

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:

Carrie Leo, an individual, doing business
as Caring for Cottontails Wildlife Rescue
& Rehabilitation, Inc., a New York State
Corporation,

) AWA Docket No. 20-J-0118
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)
)

Respondent.

ORDER DENYING LATE APPEAL

Appearances:

John V. Rodriguez, Esq., with the Office of the General Counsel, United States Department of Agriculture, Washington, D.C., for the Complainant, the Administrator of the Animal and Plant Health Inspection Service

Carrie Leo, pro se Respondent

Order Issued by John Walk, Judicial Officer

Summary of Procedural History

This is a proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131 *et seq.*) (“AWA”); the regulations promulgated thereunder (9 C.F.R. §§ 1.1 *et seq.*) (“Regulations”); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 *et seq.*) (“Rules of Practice”). The Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (“APHIS” or “Complainant”) initiated this matter on April 21, 2020 by filing an Order to Show Cause Why Animal Welfare Act License 21-C-0435 Should Not Be

Terminated (“Order to Show Cause”). The Respondent filed an Answer to the Order to Show Cause on June 2, 2020. On June 19, 2020, the Complainant filed a Motion for Summary Judgment against Respondent. On July 30, 2020, the Respondent filed an answer to Complainant’s Motion for Summary Judgment, wherein the Respondent raised affirmative defenses and set forth counter-motions for dismissal of the Order to Show Cause and summary judgment. The Complainant filed a response on August 3, 2020.

On September 8, 2020, Chief Administrative Law Judge Channing D. Strother (“CALJ Strother”) issued the Decision and Order Granting Complainant’s Motion for Summary Judgment and Denying Respondent’s Cross-Motions for Dismissal of Order to Show Cause and Summary Judgment (“Decision and Order”). On September 9, 2020, the Office of the Hearing Clerk (“OHC” or “Hearing Clerk”) served the Respondent with a copy of the Decision and Order by email and on September 12, 2020, OHC served the Respondent with a copy of the Decision and Order by certified mail.¹ On October 8, 2020, the Respondent requested an extension of time to file an appeal petition and the Judicial Officer granted an extension to, and including, November 8, 2020. On November 9, 2020, at 5:02 p.m., the Respondent submitted a Petition for Review of Decision Made by Administrative Law Judge & Complaint of Deprivation of Rights (“Appeal Petition”) by email to OHC. The Appeal Petition is date and time-stamped 8:30 a.m., November 10, 2020 by OHC. Complainant filed a response to the Appeal Petition on November 25, 2020 (“Complainant’s Response to Petition for Review”). On December 1, 2020, Respondent filed a request by email for “an additional submission of a supplement to my appeal” (“Request to Supplement”).

¹See OHC Letter dated September 9, 2020; United States Postal Service Domestic Return Receipt for Article Number 7018 2290 0000 8607 1621.

Discussion

The Rules of Practice provide that an appeal of an administrative law judge's written decision must be filed within 30 days after service, as follows:

Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a).

CALJ Strother's Decision and Order of September 8, 2020 in the above-captioned proceeding was served upon Respondent on September 9, 2020. The deadline to file an appeal to the Judicial Officer was 30 days from that date, October 9, 2020, pursuant to the Rules of Practice.²

However, Respondent made a request for extension of time. In her Notice of Request for Extension of Time to File Appeal, dated October 8, 2020, Respondent requested "only a 3-4 day extension ideally until 4:30 PM on Monday, October 12, 2020."³ The former Judicial Officer generously granted a 30-day extension of time to November 8, 2020.⁴

² See 7 C.F.R. § 1.145(a).

³ Notice of Request for Extension of Time to File Appeal.

⁴ Order Granting Respondent's Request to Extend the Time to File an Appeal to the Judicial Officer.

On Saturday, November 7, 2020, Respondent sent an email to Complainant's counsel and OHC staff. She wrote:

Since the Judge granted my request to have until the end of the 7th to submit my appeal, he probably wouldn't get it until Monday. May I have until Monday 8:00 AM to send the appeal in?

See Attachment 2 to Complainant's Response to Petition for Review.

Where, as here, a filing deadline falls on a Sunday, the Rules of Practice provide that the time allowed for filing "shall be extended to include the next following business day."⁵

Therefore, Respondent already had until 4:30 p.m. (before the time of closing of OHC) ⁶ on Monday, November 9, 2020, to submit her appeal.⁷ However, Respondent did not submit her Appeal Petition until 5:02 p.m. on Monday, November 9, 2020, which is 32 minutes past the

⁵ 7 C.F.R. § 1.147(h).

⁶ As stated on OHC's website, "Hours for filing: 8:30 am to 4:30 pm (Eastern)". *See* <https://oalj.oha.usda.gov/hearing-clerks-office>. Further, OHC served Respondent with a letter that informed her in bold typeface that OHC's office hours are 8:30 a.m. to 4:30 p.m. and that submissions received after 4:30 p.m. would not be stamped until the following business day. *See* OHC's letter dated April 22, 2020; United States Postal Service Domestic Return Receipt for Article Number 7015 3010 0001 5187 9905.

⁷ The Judicial Officer has consistently held that filings are due on the day of the deadline before OHC closes for purpose of receiving filings. *See Peter A. Lang*, 57 Agric. Dec. 59, 61 n.2 (U.S.D.A. 1998) (denying as late a request for extension of time to respond to respondent's appeal petition made on the day of the filing deadline thirteen (13) minutes after OHC closed for the purpose of filing documents); *Lion Raisins, Inc.*, 68 Agric. Dec. 244, 286-87, and n.35 (U.S.D.A. 2009), 2009 WL 1064498, at *26, and n.35 (finding that respondents were required to file an appeal petition no later than 4:30 p.m. on the day of the deadline when OHC receives documents from 8:30 a.m. to 4:30 p.m.); *Derwood Stewart*, 60 Agric. Dec. 570, 607 (U.S.D.A. 2001) (finding that request for an extension of time made on the day of the deadline to file an appeal petition was timely when request was submitted prior to OHC closing at 4:30 p.m. for purpose of filing documents), *aff'd* 64 F. App'x. 941, 944 (6th Cir. 2003) (unpublished); *Susan Biery Sergiojan*, 2010 WL 3191858, at *2-3 (Aug. 3, 2010) (finding appeal petition submitted after 4:30 p.m. on the day of the deadline was untimely).

closing time of OHC.⁸ Further, the Appeal Petition is date and time-stamped received at 8:30 a.m., November 10, 2020, which is the time the Appeal Petition was actually received by OHC. The Rules of Practice provide that “[a]ny document or paper required or authorized . . . to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk”.⁹ The Judicial Officer has held that “[t]he Hearing Clerk’s date and time stamp establishes the date and time a document reaches the Hearing Clerk.”¹⁰ Accordingly, Respondent’s Appeal Petition is deemed filed at 8:30 a.m. on November 10, 2020, the time it was received by OHC. However, even assuming *arguendo* that Respondent’s Appeal Petition is deemed filed at 5:02 p.m. on November 9, 2020, that would still be after the filing deadline had passed. Therefore, I find Respondent’s Appeal Petition is late.

It has continuously and consistently been held under the Rules of Practice that the Judicial Officer has no jurisdiction to hear an appeal that is filed after an administrative law judge’s decision becomes final.¹¹ The Rules of Practice make the administrative law judge’s

⁸ See Attachment 3 to Complainant’s Response to Petition for Review.

⁹ 7 C.F.R. § 1.147(g).

¹⁰ *Susan Biery Sergiojan*, 2010 WL 3191858, at *3 (U.S.D.A. Aug. 3, 2010); see also *Lion Raisins, Inc.*, 68 Agric. Dec. 244, 287 (U.S.D.A. 2009), 2009 WL 1064498, at *26 (“The most reliable evidence of the date and time a document reaches the Hearing Clerk is the date and time stamped by the Office of the Hearing Clerk on that document.”).

¹¹ See *Hubert Dennis Edwards*, 75 Agric. Dec. 280, 281-83 (U.S.D.A. 2016) (concluding that Judicial Officer had no jurisdiction to hear appeal of ALJ’s decision granting summary judgment filed after the decision became final); *Vega Nunez*, 63 Agric. Dec. 766, 769-71 (U.S.D.A. 2004), 2004 WL 2031430, at *2 (concluding that the Judicial Officer had no jurisdiction to hear an appeal filed on the day the ALJ decision and order became final); *Mary Fran Hamilton and M.F. Hamilton, Inc.*, 45 Agric. Dec. 2395, 2395 (U.S.D.A. 1986) (dismissing appeal filed on the day the initial decision became final); *Samuel Simon Petro*, 42 Agric. Dec. 921, 921 (U.S.D.A. 1983) (stating that the Judicial Officer lacks jurisdiction to hear an appeal after the administrative law judge’s initial decision has become final and effective); *Veg-Pro Distrib.*, 42 Agric. Dec. 1173, 1174 (U.S.D.A. 1983) (denying appeal of ALJ’s decision and order filed after it became final);

written decision final 35 days after the date of service thereof unless an appeal is filed pursuant to § 1.145.¹² CALJ Strother's Decision and Order also contained the following notice:

This Decision and Order shall be final and effective without further proceedings thirty-five (35) days after service upon Respondent unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, as provided in section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Decision and Order at 25.

Here, because an extension was requested and granted, the Decision and Order of CALJ Strother became final at 4:31 p.m. on November 9, 2020, after the filing deadline, as extended, expired.¹³ After that time, the Judicial Officer had no jurisdiction to hear Respondent's appeal.

David L. Noble, 68 Agric. Dec. 1060, 1061-62 (U.S.D.A. 2009) (concluding that the Judicial Officer had no jurisdiction to hear an appeal filed November 24, 2009 after the ALJ's decision became final on November 23, 2009); *Paul Rosberg and Nebraska's Finest Meats, L.L.C.*, 73 Agric. Dec. 551, 554 (U.S.D.A. 2014) (concluding that the Judicial Officer had no jurisdiction to hear an appeal filed on July 29, 2014 after the ALJ's decision became final on July 28, 2014); *Phyllis J. Britz*, 76 Agric. Dec. 26, 29 (U.S.D.A. 2017) (concluding that Judicial Officer had no jurisdiction to hear appeal petition filed one day after ALJ's decision and order became final).

¹² 7 C.F.R. § 1.142(c)(4).

¹³ See *Everflora, Inc.*, 57 Agric. Dec. 1314, 1314-15, and n.3 (U.S.D.A. 1998) (finding that after Judicial Officer extended filing deadline to August 3, 1998 and OHC closed at 4:00 p.m., the ALJ's decision became final at 4:01 p.m. on August 3, 1998 and motion for extension of time filed at 10:15 a.m. on August 4, 1998 was denied as late); *Tim Gray*, 64 Agric. Dec. 1699, 1702-05 (U.S.D.A. 2005) (concluding the Judicial Officer had no jurisdiction to hear an appeal after an extension of time to file was granted to May 26, 2005 and the appeal was filed May 27, 2005, one day after the ALJ's decision became final); *David Gilbert*, 63 Agric. Dec. 807, 811-14 (U.S.D.A. 2004) (finding that ALJ's decision became final on the day of the deadline, as extended by the Judicial Officer, and concluding that Judicial Officer lacked jurisdiction to hear appeal filed the day after the extended deadline).

As the Judicial Officer has explained:

The Rules of Practice do not provide for an extension of time (for good cause or excusable neglect) for filing an appeal petition after an administrative law judge's decision has become final. The absence of such a provision in the Rules of Practice emphasizes that jurisdiction has not been granted to the Judicial Officer to extend the time for filing an appeal after an administrative law judge's decision has become final.

Phyllis J. Britz, 76 Agric. Dec 26, 29 (U.S.D.A. 2017); *See also Anglen Produce, Inc.*, 46 Agric. Dec. 1239, 1239 (U.S.D.A. 1987) (denying request for extension to file an appeal because ALJ's decision became final before the request was made and Judicial Officer no longer had jurisdiction); *Palmer G. Hulings*, 44 Agric. Dec. 298, 299 (U.S.D.A. 1985) ("[S]ince the Decision and Order had already become final, the Judicial Officer lacked jurisdiction to grant an extension of time for filing an appeal."); *Houston Livestock Co., Inc.*, 63 Agric. Dec. 896, 897-99 (U.S.D.A. 2002), 2002 WL 31396962, at *1 ("[T]he Judicial Officer cannot grant a request for an extension of time to file an appeal petition if the request is filed on or after the date the administrative law judge's initial decision becomes final."). Therefore, under the Rules of Practice, I cannot extend the time for Respondent's filing an appeal petition after CALJ Strother's Decision and Order became final.

For the foregoing reasons, the following Order is issued.

ORDER

1. Respondent's Appeal Petition, filed November 10, 2020, is denied.
2. Respondent's Request to Supplement filed December 1, 2020, is denied as moot.
3. CALJ Strother's Decision and Order as to Respondent Carrie Leo, doing business as Caring for Cottontails Wildlife Rescue & Rehabilitation, Inc., filed September 8, 2020, is the final decision in this proceeding.

Done at Washington, D.C.,

this 26th day of February 2021

**JOHN
WALK**

Digitally signed
by JOHN WALK
Date: 2021.02.26
14:54:50 -05'00'

John Walk
Judicial Officer

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