

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	
)	
Billy E. Rowan,)	A.Q. Docket No. 06-0006
)	
Respondent)	Decision and Order

Decision Summary

1. I decide that Billy E. Rowan, Respondent, an owner/shipper of horses (9 C.F.R. § 88.1), failed to comply with the Commercial Transportation of Equines for Slaughter Act (7 U.S.C. § 1901 note) and the regulations promulgated thereunder (9 C.F.R. § 88 *et seq.*) when he commercially transported horses for slaughter to Dallas Crown, Inc. in Kaufman, Texas in November 2003 and in May 2004. For Billy E. Rowan’s failures to comply, \$12,650 in civil penalties (9 C.F.R. § 88.6) for remedial purposes is reasonable, appropriate, justified, necessary, proportionate, and not excessive.

Complaint and Hearing

2. The Complaint, filed on December 16, 2005, alleged that during each of two slaughter horse shipments (one on or about November 12, 2003; the other on or about May 16, 2004), Respondent Billy E. Rowan (frequently herein “Respondent Rowan” or the “Respondent”) violated the Commercial Transportation of Equines for Slaughter Act, 7 U.S.C. § 1901 note (frequently herein “the Act”), and the regulations promulgated thereunder (9 C.F.R. § 88 *et seq.*) (frequently herein the “Regulations”).

3. The hearing was held on July 10, 2008, before U.S. Administrative Law Judge Jill S. Clifton, by audio-visual telecommunication¹ between the Oxford, Mississippi site and the Washington, D.C. site. The 342-page transcript (Tr.) was prepared by Neal R. Gross & Co., Inc., Court Reporters. This Decision and Order is issued in accordance with section 1.142(c) of the Rules of Practice (7 C.F.R. § 1.142(c)), except that the decision was not issued orally from the bench, so that some of Respondent Rowan's photographs (RX 2), which needed to be transported from Mississippi to Washington, D.C., could be considered.

Introduction

4. The two most serious allegations involve a black mare that Respondent Rowen commercially transported for slaughter on or about November 12, 2003. One allegation regarding the black mare is that she was unable to bear weight on all four limbs and thus suffered unnecessary discomfort, stress, physical harm, or trauma during the commercial transportation, in violation of 9 C.F.R. § 88.4(c). The other allegation regarding the black mare is that, due to the black mare's inability to bear weight on all four limbs, she was in obvious physical distress at the time she was loaded onto a conveyance and commercially transported to slaughter; yet Respondent Rowan failed to obtain veterinary assistance for the black mare from an equine veterinarian as soon as possible, in violation of 9 C.F.R. § 88.4(b)(2). For each of these two alleged violations involving the black mare, the Slaughter Horse Transport Program recommended a \$5,000 civil penalty (Tr. 259-61) [the maximum

¹ See section 1.141 of the Rules of Practice (7 C.F.R. § 1.141) regarding using **audio-visual** telecommunication.

civil penalty allowable under 9 C.F.R. § 88.6(a) for a single violation], for a total of \$10,000.

5. Respondent Rowan's Answer, filed on January 11, 2006, asserted that the horse (the black mare) with the crooked left hind leg had been that way since birth, that he had bought her in that condition, and that the horse was able to bear weight on all four limbs.

Respondent Rowan denied that the commercial transportation of the black mare in November 2003 caused the horse undue stress, discomfort, or physical harm.

6. The next most serious allegation is that on or about May 16, 2004, Respondent Rowan commercially transported for slaughter three (3) stallions that were not segregated from each other and from other horses in the shipment, in violation of 9 C.F.R. § 88.3(a)(2). For each of the three unsegregated stallions, because there was no evidence of actual harm to any of the horses in that shipment, the Slaughter Horse Transport Program recommended an \$800 civil penalty (Tr. 261-64), for a total of \$2,400.

7. Respondent Rowan acknowledged in his Answer that he had transported three (3) stallions in the May 2004 shipment but asserted that the "3 stallions [were] hauled in 3 different compartments."

8. The last allegations are that Respondent Rowan omitted certain required information from the owner-shipper certificates, Veterinary Services (VS) Forms 10-13, that accompanied both shipments of horses being commercially transported for slaughter, in violation of 9 C.F.R. § 88.4(a)(3). For these paperwork violations, the Slaughter Horse Transport Program recommended (Tr. 264-65) a \$50 civil penalty for failure to list the

prefix and number of one horse (November 2003 shipment), and a \$200 civil penalty for failure to check off the boxes indicating the fitness of the horses to travel at the time of loading (May 2004 shipment), for a total of \$250.

9. Respondent Rowan acknowledged in his Answer that certain required information was missing from the VS 10-13 that accompanied his November 2003 shipment and asserted that the form was otherwise complete and correct. Respondent Rowan likewise acknowledged the omission of certain required information from the VS 10-13 that accompanied his May 2004 shipment.

Parties, Counsel, Witnesses, and Exhibits

10. The Complainant is the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (frequently herein “APHIS” or “Complainant”). APHIS is represented by Thomas Neil Bolick, Esq., Office of the General Counsel, Regulatory Division, United States Department of Agriculture, South Building, 1400 Independence Ave. SW, Washington, D.C. 20250.

11. The Respondent, Billy E. Rowan, appeared *pro se* at the hearing and testified. Also testifying on behalf of Respondent Rowan was Arylon R. Burney. Four APHIS employees testified: Joseph Thomas (“Joey”) Astling, Compliance Specialist,² USDA APHIS Veterinary Services (VS); David B. Green, Sr. Investigator, USDA APHIS Investigative and Enforcement Services; Dr. Timothy (“Tim”) Cordes (D.V.M.), the National Coordinator of Equine Programs within USDA APHIS Veterinary Services (VS); and Kevin A. Conner.

² formerly Animal Health Technician

12. The following APHIS exhibits (Complainant's exhibits) were admitted into evidence: CX 1 through CX 24. Tr. 250-51.

13. The following Respondent Rowan exhibits (Respondent's exhibits) were admitted into evidence: RX 1 (sent to Mr. Bolick in the prehearing "Exchange" of exhibits, Tr. 288-290) and RX 2 (six photographs, given to Mr. Green during the hearing: four of the livestock trailer; and two of black mare and foal). Tr. 288, 290, 292-94.

Discussion

14. Respondent Billy Rowan testified that he has been in the horse business longer than 40 years, since he was 14 or 15 years old; that he loves and takes care of his animals.

Respondent Rowan testified that he was doing Mr. Arylon Burney a favor, when he bought the black mare from him. [The black mare, approximately six years old, is shown in CX 11, bearing back tag no. USAU 0280.] Respondent Rowan testified that when he transported the black mare to slaughter, she could walk unassisted, and he regarded the black mare as weight-bearing on all four legs, despite her crooked left hind leg.

15. Respondent Rowan suggested that if the black mare was not weight-bearing at Dallas Crown on November 13, 2003, then standing on the concrete in the Dallas Crown pens had caused that; or she had been injured in some other way at Dallas Crown. Respondent Rowan pointed out that during the six years of the black mare's life with Arylon Burney, the black mare had coped with living in a pasture with other horses and had even given birth to a foal.

16. I have considered carefully the testimony of Arylon Burney, but I agree with Dr.

Timothy Cordes (D.V.M.), that the black mare was *not* weight-bearing on all four legs, not when she was photographed and videotaped at Dallas Crown; not when Respondent Rowan loaded her for transport the day before; and not during the year or two or more, prior to that. Tr. 165-66. Dr. Cordes is a Doctor of Veterinary Medicine with post-graduate work in bone developmental disorders and orthopedics and ophthalmology. Tr. 146. Dr. Cordes' veterinary experience treating horses, after his residency, during 18 years of veterinary surgical referral practice, included a heavy emphasis working with lameness in horses and with orthopedic surgery on horses. Tr. 147-48, 158. He has been the veterinarian for the United States Equestrian Team. Tr. 148.

17. Mr. Burney testified: "I decided to sell her (the black mare), because no one would buy her in that condition with back legs like that. And so I decided to get rid of her, so I . . . sold her as a killer horse. I only got \$65 for her. Probably was a good price." Tr. 116-17. Mr. Burney testified that the black mare was born with hind legs that were deformed at birth. Tr. 128. Mr. Burney testified that the right hind leg straightened up better than the left hind, and that the left hind straightened up somewhat so that she was able to walk without carrying the leg. Tr. 125. Mr. Burney testified that he decided to sell the black mare as a killing horse, though, because no one wanted to buy her. Mr. Burney testified that potential buyers thought they couldn't ride the black mare, and they were afraid she was carrying a deficiency in her genes so her colts might be bad. Tr. 126.

18. The evidence persuades me that the black mare's condition when Joey Astling photographed her (CX 11) and videotaped her (CX 24) at Dallas Crown on November 13,

2003, was essentially the same as it had been the day before, when Respondent Rowan loaded her on November 12, 2003 (CX 1) to be transported to slaughter. There is no evidence that the black mare was injured during transport or at Dallas Crown. Dr. Cordes testified that standing on the concrete in the Dallas Crown pens did not affect the black mare. Tr. 166. Dr. Cordes was asked, "Could this horse's condition have occurred either during transportation, or after transportation on the morning of November 13th?" Dr. Cordes replied, "Absolutely not." Tr. 156.

19. The videotape of the black mare on November 13, 2003 is painful to watch. The black mare's left hind leg was turned inward at the ankle at an angle so sharp (about 60 degrees) that I describe it as grotesque. The left hind leg did not reach the ground, because the length of it from the ankle down did not reach down toward the ground, but rather reached across, toward the horse's right hind leg. If the black mare's left hind leg *were* to have reached the ground, it would have been the *ankle* touching the ground, not the hoof. Tr. 162, 155.

20. Dr. Cordes used the term "varus" to describe the deformity of the horse's left hind leg whereby the limb turned inward. Dr. Cordes described the left hind leg deformity after we watched the videotape. Dr. Cordes explained that the left hind "leg is shorter by three bones because the bones come down, make a sharp right-hand turn, the hoof wall continues to grow because it's not opposed to (the) ground, it doesn't wear the way a hoof wall does. A hoof wall is just like your fingernail on your fingers. And so you have this limb that comes down, it's short by three bones because it makes a right-hand turn and

moves inward. And I believe the radiographs and the photographs clearly demonstrate that right-hand turn, which has been fused over many years of time.” Tr. 162-63.

21. The black mare’s condition as observed November 13, 2003 was long-standing, having begun at birth and having worsened over time, as evidenced in the radiographs (x-rays, CX 12) of the left hind leg (severed after the horse was killed), showing the periosteal new bone growth at the ankle, the periosteum’s attempt to bridge the ankle joint and to stabilize or to fuse the joint. Tr. 157. Dr. Cordes testified, “This is severe, severe periosteal new bone growth. This much bone doesn’t grow overnight. It doesn’t grow in months. It takes years for it to build up this size of a callus, or this size of a bone formation to fuse the ankle over the joint.” Tr. 157-58.

22. I asked Dr. Cordes about the “hop” in the black mare’s movement we watched in the videotape (made into a DVD, CX 24, Tr. 136). Tr. 158-160.

Judge Clifton: Now, as you watch the horse move, there are times that the horse appears to be putting the left rear leg on the ground and using it momentarily while it hops. Is that - - first of all, is what I have described something accurate about what we saw? No?

Dr. Cordes: If that were the case, Your Honor, if a thousand pounds, this is a 450 kilogram at least, it’s a small mare. She’s about a thousand pounds. If she was regularly bearing weight on that left hind, which is the back of the ankle, that skin would have been completely worn away. We would have had exposed bone. It appears that she grazes the ground with the left hind by virtue of the fact that the right hind has become so stretched and has lowered itself so much to the ground that she will scrape - - she will scrape that left

hind. But if she were in a moving conveyance, and she were to sway to the left and be asked to bear full weight on that, that mare would go down. She would fall down.

Tr. 158-160.

23. Dr. Cordes explained further. Tr. 160-61.

Judge Clifton: When a horse is weight bearing on all four limbs, does that mean roughly equally weight bearing on all four?

Dr. Cordes: There's never a time when they're bearing 100 percent weight on all four legs. As the horse shifts, there are varying percentages. It's like a four wheel drive vehicle. Horses don't think about that. This is something that happens automatically, whether they're jumping a fence or whether they're walking or whether they're even sleeping, or even if they're standing in a conveyance that's swaying, those legs are constantly compensating. And what you're seeing in this picture is a mare that's going through an incredible compensatory mechanism. She's pulling her front legs back to try to swing her weight forward. She's putting all of her weight as well on the right hind, and so, it's a compensatory process, which causes compensatory problems, the reason this mare could never be ridden.

Judge Clifton: Right hind doesn't look too good either.

Dr. Cordes: The point I was making was, that because she takes all the weight off the left and puts it on the right, those tendons and ligaments have stretched to the point that that ankle now is dropping to the ground. It's difficult for me to watch, Your Honor.

Tr. 160-61.

24. Dr. Cordes testified: “If Mr. Rowan tells us that this horse did well on pasture with other familiar horses, I would agree with that. If she could hobble around three legged, as a herd animal, that relates to other horses, in an environment that she was familiar with, with her friends, I would say that for that intended use, she could survive. I would not, under any circumstances say that her intended use, with her current condition would be to stand on a moving conveyance that was swaying and bumping and starting and stopping, let alone asking her to move up and down off of a ramp or onto a loading dock. And there, an equine practitioner, a veterinarian who specializes in equine medicine and surgery would assess the situation and say, under no circumstances should this horse be shipped. She is not only a danger to herself, if she falls down, she may injure other horses as she struggles. And therefore, the recommendation would either be euthanasia or send her back to the farm, but certainly not to get on a swinging, swaying, breaking, stopping conveyance.” Tr. 163-64.

25. Dr. Cordes summarized: “I trust, Your Honor that the witness and medical testimony including radiographic, photographic and videographic evidence presented at this hearing today, prove that this mare was not transported to slaughter in the most humane way because of the varus or the deformity of the left hind ankle, and compensatory damage to the right hind ankle. Again, Your Honor, the intent was to avoid even the potential for harm. It’s the Program’s position, therefore, by definition of the CFR, this mare was unfit for commercial transportation to slaughter, and it was not possible to commercially transport her as carefully and expeditiously as possible in a manner that does not - - from the CFR, “does not cause horses unnecessary discomfort, stress, physical harm or trauma.” Therefore

Mr. Rowan did not meet the standards of the Code of Federal Regulations. It is also our position, Your Honor that this horse was in obvious physical distress prior to being loaded and I would submit that she needed the assistance of an equine veterinarian at that time, and yet, Mr. Rowan did not seek such assistance. For these reasons, the Program believes that these violations warrant the maximum civil penalty of \$5,000 for each, for a total of \$10,000. Tr. 259-61.

26. From Joey Astling's testimony, and from Joey Astling's videotape and still photographs of the black mare on November 13, 2003, and from Dr. Cordes' testimony including his observations from watching the videotape and evaluating the radiographs (x-rays), I find that the black mare was not weight-bearing on all four legs on November 13, 2003, and she was not weight-bearing on all four legs the day before, when she was loaded and transported. Consequently, I find that Respondent Rowan is mistaken when he described the black mare as weight-bearing on all four legs. Further, although Mr. Burney testified he had observed improvement in the black mare's condition initially, I find that the black mare's condition had been worsening over the years prior to November 12, 2003, when she was shipped.

27. Regarding the three stallions that were not segregated when they arrived at Dallas Crown on May 16, 2004, there was evidence that the horses were part of a split load of cows and horses, the cows having gone to a kill plant in Waco before the conveyance went to Dallas Crown. Tr. 224-25, 229. Thus, it is possible that the three stallions began the journey properly segregated, and that when the cows (all but one downer cow) were off-

loaded in Waco, the horses were rearranged to the positions Joey Astling observed them in upon arrival - - not properly segregated.

28. As a businessman, as an owner/shipper, Respondent Rowan is responsible to control the work being done in connection with transporting horses to slaughter. So, even if the three stallions were properly segregated when they left Mississippi, and even if Respondent Rowan had instructed his driver properly to keep the stallions segregated, Respondent Rowan is responsible for noncompliance that may have begun en route when others, while working on behalf of Respondent Rowan, failed to keep the stallions segregated. Respondent Rowan is responsible for the noncompliance of agents acting on his behalf.

Findings of Fact and Conclusions

29. Paragraphs 30 through 36 contain intertwined Findings of Fact and Conclusions.

30. The Secretary of Agriculture has jurisdiction over Respondent Billy E. Rowan and the subject matter involved herein.

31. Respondent Billy E. Rowan is an individual with a mailing address of P.O. Box 1242, New Albany, Mississippi 38652. Respondent Rowan is now and was at all times material herein a commercial buyer and seller of slaughter horses who commercially transported horses for slaughter. He was and is an owner/shipper of horses within the meaning of 9 C.F.R. § 88.1.

32. Respondent Rowan is responsible not only for what he himself did or failed to do in violation of the Commercial Transportation of Equine for Slaughter Act and Regulations, but also for what others did or failed to do on his behalf in the commercial transportation of

horses for slaughter, as his agents, in violation of the Act and Regulations. Respondent Rowan is responsible for errors and omissions of those who acted as agents on his behalf in the commercial transportation of horses for slaughter, such as truck drivers.

33. Respondent Rowan shipped in commercial transportation two (2) shipments of horses for slaughter, one on or about November 12, 2003, and the other on or about May 16, 2004, and committed violations of 9 C.F.R. § 88 during both shipments.

34. On or about November 12, 2003, Respondent Rowan shipped 18 horses in commercial transportation to Dallas Crown, Inc., in Kaufman, Texas, for slaughter.

(a) One of the horses in the shipment, a black mare with back tag # USAU 0280, could not bear weight on all four legs. By transporting the black mare in this manner, Respondent Rowan failed to handle this horse as expeditiously and carefully as possible in a manner that did not cause the black mare unnecessary discomfort, stress, physical harm or trauma, in violation of 9 C.F.R. § 88.4(c).

(b) One of the horses in the shipment, a black mare with back tag # USAU 0280, could not bear weight on all four legs and was in obvious physical distress, but Respondent Rowan failed to obtain veterinary assistance as soon as possible from an equine veterinarian, in violation of 9 C.F.R. § 88.4(b)(2).

(c) Respondent Rowan did not properly complete the required owner-shipper certificate, VS Form 10-13, which had the following deficiencies: the prefix and number of one horse's USDA back tag were not properly recorded, in violation of 9 C.F.R. § 88.4(a)(3)(vi).

35. On or about May 16, 2004, Respondent Rowan shipped 10 horses in commercial transportation to Dallas Crown for slaughter.

(a) The shipment included three (3) stallions and Respondent Rowan did not transport the horses on the conveyance so that each stallion was completely segregated from the other horses to prevent it from coming into contact with any other horse on the conveyance, in violation of 9 C.F.R. § 88.4(a)(4)(ii).

(b) Respondent Rowan did not properly complete the required owner-shipper certificate, VS Form 10-13, which had the following deficiencies: the boxes indicating the fitness of the horses to travel at the time of loading were not checked off, in violation of 9 C.F.R. § 88.4(a)(3)(vii).

36. The civil penalty recommendation of the Slaughter Horse Transport Program is persuasive.³ I conclude that \$12,650 (twelve thousand six hundred fifty dollars) in civil penalties for remedial purposes is reasonable, appropriate, justified, necessary, proportionate, and not excessive. 9 C.F.R. § 88.6.

Order

37. The **cease and desist** provisions of this Order (paragraph 38) shall be effective on the first day after this Decision and Order becomes final.⁴ The remaining provisions of this

³ The Slaughter Horse Transport Program recommended a \$12,650 civil penalty. The Program recommendations were presented by Dr. Timothy Cordes (D.V.M.), the National Coordinator of Equine Programs within USDA APHIS Veterinary Services.

⁴ See paragraph 43.

Order shall be effective on the tenth day after this Decision and Order becomes final.

38. Respondent Billy E. Rowan, and his agents and employees, successors and assigns, directly or indirectly, or through any corporate or other device or person, shall cease and desist from violating the Commercial Transportation of Equine for Slaughter Act, 7 U.S.C. § 1901 note, and the Regulations promulgated thereunder (9 C.F.R. § 88 *et seq.*).

39. Respondent Billy Rowan is assessed a civil penalty of **\$12,650** (twelve thousand six hundred fifty dollars), which he shall pay by certified check(s), cashier's check(s), or money order(s), made payable to the order of "**Treasurer of the United States.**"

40. Paragraph 41 offers Respondent Rowan an **opportunity to decrease by \$5,000** the civil penalty he must pay, on certain conditions.

41. Five thousand dollars (**\$5,000**) of Respondent Rowan's civil penalty is **held in abeyance** on condition that Respondent Rowan pay **\$7,650** of his civil penalty **in full, timely, as required**; and on condition that Respondent Rowan, during the **5 years** following the hearing, that is, **through July 9, 2013, commit no further violations** of the Act and the Regulations promulgated thereunder (9 C.F.R. § 88 et seq.). If Respondent Rowan fails to comply with either of these two conditions, the remaining balance of the full \$12,650 civil penalty will become due and payable 60 days following APHIS's filing of an application herein, supported by Declaration. Respondent Rowan shall file with the Hearing Clerk any change in mailing address or other contact information; otherwise, a copy of any filings will be sent to Respondent Rowan at the address in paragraph 31.

42. Respondent Rowan shall reference **A.Q. Docket No. 06-0006** on his certified

check(s), cashier's check(s), or money order(s). Payments of the civil penalties shall be sent to, and received by, APHIS, at the following address:

United States Department of Agriculture
APHIS, Accounts Receivable
P.O. Box 3334
Minneapolis, Minnesota 55403.

within sixty (60) days from the effective date of this Order. [See paragraph 37 regarding effective dates of the Order.]

Finality

43. This Decision and Order shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A). [See paragraph 37 regarding effective dates of the Order.]

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties, mailing Mr. Rowan's copy by certified mail to his post office box. [See paragraph 31.]

Done at Washington, D.C.
this 11th day of September 2008

Jill S. Clifton
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
South Bldg Room 1031
1400 Independence Ave SW
Washington DC 20250-9203
202-720-4443
Fax: 202-720-9776

APPENDIX A**7 C.F.R.:****TITLE 7—AGRICULTURE****SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE****PART 1—ADMINISTRATIVE REGULATIONS**

. . . .

SUBPART H—RULES OF PRACTICE GOVERNING FORMAL**ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER****VARIOUS STATUTES**

. . .

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* 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. As provided in

§ 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been

filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]