

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 01-0004
)
Steven Bourk, Carmella Bourk,)
and Donya Bourk,)
) **Decision and Order as to**
Respondents) **Steven Bourk and Carmella Bourk**

PROCEDURAL HISTORY

William R. DeHaven, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on October 17, 2000. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that: (1) from July 28, 1992, through December 11, 1998, Respondent Steven Bourk operated as a dealer as defined in the Animal Welfare Act and

the Regulations without being licensed, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and subsection 2.1 of the Regulations (9 C.F.R. § 2.1); (2) Respondent Steven Bourk sold, in commerce, approximately 98 dogs for resale, for use as pets or for exhibition; (3) from January 23, 1995, through September 2, 1998, Respondent Carmella Bourk operated as a dealer as defined in the Animal Welfare Act and the Regulations without being licensed, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and subsection 2.1 of the Regulations (9 C.F.R. § 2.1); (4) Respondent Carmella Bourk sold, in commerce, approximately 31 dogs for resale, for use as pets or for exhibition; (5) from September 6, 1997, through March 5, 1999, Respondent Donya Bourk operated as a dealer as defined in the Animal Welfare Act and the Regulations without being licensed, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and subsection 2.1 of the Regulations (9 C.F.R. § 2.1); and (6) Respondent Donya Bourk sold, in commerce, approximately 72 dogs for resale, for use as pets or for exhibition (Compl. ¶¶ II-IV).¹

The Hearing Clerk served Respondents Steven Bourk, Carmella Bourk, and Donya Bourk with the Complaint, the Rules of Practice, and a service letter.² Respondents

¹Complainant erroneously refers to section 2.1 of the Regulations (9 C.F.R. § 2.1) as subsection 2.1 of the Regulations (9 C.F.R. § 2.1) (Compl. ¶¶ II-IV). I find Complainant's incorrect references to subsection 2.1 of the Regulations (9 C.F.R. § 2.1), do not affect the adequacy of the Complaint.

²United States Postal Service Domestic Return Receipts for Article Number P 368 327 621, Article Number P 368 327 622, and Article Number P 368 327 623.

Steven Bourk, Carmella Bourk, and Donya Bourk failed to answer the Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). On November 22, 2000, the Hearing Clerk sent a letter to Respondents Steven Bourk, Carmella Bourk, and Donya Bourk informing them that their answer to the Complaint had not been received within the time required in the Rules of Practice.³

On March 15, 2001, Complainant filed Notice of Withdrawal of Complaint Without Prejudice as to Donya Bourk giving notice of Complainant's withdrawal of the Complaint as to Respondent Donya Bourk. On March 20, 2001, Chief Administrative Law Judge James W. Hunt [hereinafter the Chief ALJ] issued an Order Withdrawing Complaint as to Donya Bourk.

On March 15, 2001, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Decision and Order [hereinafter Motion for Default Decision] and a Proposed Decision and Order Upon Admission of Facts By Reason of Default [hereinafter Proposed Default Decision]. On April 6, 2001, Respondent Carmella Bourk filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. Respondent Steven Bourk failed to file objections to Complainant's Motion for

³Letter dated November 22, 2000, from Joyce A. Dawson, Hearing Clerk, to Respondents Steven Bourk, Carmella Bourk, and Donya Bourk.

Default Decision and Complainant's Proposed Default Decision within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On June 15, 2001, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the Chief ALJ issued a Decision and Order Upon Admission of Facts By Reason of Default [hereinafter Initial Decision and Order]: (1) concluding that from July 28, 1992, through December 11, 1998, Respondent Steven Bourk operated as a dealer as defined in the Animal Welfare Act and the Regulations without being licensed, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 134) and subsection 2.1 of the Regulations (9 C.F.R. § 2.1); (2) finding that Respondent Steven Bourk sold, in commerce, approximately 98 dogs for resale, for use as pets or for exhibition;

(3) concluding that from January 23, 1995, through September 2, 1998, Respondent Carmella Bourk operated as a dealer as defined in the Animal Welfare Act and the Regulations without being licensed, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 134) and subsection 2.1 of the Regulations (9 C.F.R. § 2.1);

(4) finding that Respondent Carmella Bourk sold, in commerce, approximately 31 dogs for resale, for use as pets or for exhibition; (5) concluding that from September 6, 1997, through March 5, 1999, Respondent Donya Bourk operated as a dealer as defined in the Animal Welfare Act and the Regulations without being licensed, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 134) and subsection 2.1 of the Regulations (9 C.F.R. § 2.1); (6) finding that Respondent Donya Bourk sold, in

commerce, approximately 72 dogs for resale, for use as pets or for exhibition;

(7) directing Respondents Steven Bourk, Carmella Bourk, and Donya Bourk to cease and desist from violating the Animal Welfare Act and the Regulations and the standards issued thereunder; (8) assessing Respondents Steven Bourk, Carmella Bourk, and Donya Bourk, jointly and severally, a \$7,500 civil penalty; and (9) disqualifying Respondents Steven Bourk, Carmella Bourk, and Donya Bourk from obtaining an Animal Welfare Act license for 30 days (Initial Decision and Order at 2-4).⁴

On July 6, 2001, Respondent Carmella Bourk appealed to the Judicial Officer. On August 8, 2001, Complainant filed a Motion in Opposition of Respondent's Motion to Appeal [hereinafter Response to Carmella Bourk's Appeal Petition]. On August 22, 2001, Respondent Carmella Bourk filed a response to Complainant's Response to Carmella Bourk's Appeal Petition.⁵ On September 10, 2001, Respondent Steven Bourk

⁴The Chief ALJ erroneously indicates that section 4 of the Animal Welfare Act is codified in the United States Code at 7 U.S.C. § 134 (Initial Decision and Order at 2-3). Section 4 of the Animal Welfare Act is codified in the United States Code at 7 U.S.C. § 2134. I find the Chief ALJ's incorrect references to 7 U.S.C. § 134 harmless error. The Chief ALJ erroneously refers to section 2.1 of the Regulations (9 C.F.R. § 2.1) as subsection 2.1 of the Regulations (9 C.F.R. § 2.1) (Initial Decision and Order at 2-3). I find the Chief ALJ's erroneous references to subsection 2.1 of the Regulations (9 C.F.R. § 2.1) harmless error. The Chief ALJ's reference to the standards issued thereunder (Initial Decision and Order at 3) is a reference to the standards issued under the Animal Welfare Act (9 C.F.R. §§ 3.1-.142) [hereinafter the Standards].

⁵The Rules of Practice do not provide for a response to a response to an appeal petition. Further, Respondent Carmella Bourk did not request the opportunity to file a response to Complainant's Response to Carmella Bourk's Appeal Petition. Therefore, I do not address or consider Respondent Carmella Bourk's response to Complainant's

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appealed to the Judicial Officer. Complainant failed to file a timely response to Respondent Steven Bourk's appeal petition, and on December 26, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I disagree with the Chief ALJ's Initial Decision and Order. Therefore, while I use much of the Chief ALJ's Initial Decision and Order in this Decision and Order as to Steven Bourk and Carmella Bourk, I do not adopt the Chief ALJ's Initial Decision and Order as the final Decision and Order as to Steven Bourk and Carmella Bourk.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7 AGRICULTURE

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CHAPTER 54 TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

§ 2131. Congressional statement of policy

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order

⁵(...continued)

Response to Carmella Bourk's Appeal Petition.

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

§ 2132. Definitions

When used in this chapter

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(f) The term *dealer* means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than \$500 gross income from the sale of other animals during any calendar year[.]

§ 2134. Valid license for dealers and exhibitors required

No dealer or exhibitor shall sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animals, unless and until such dealer or exhibitor

shall have obtained a license from the Secretary and such license shall not have been suspended or revoked.

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than \$2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

(c) Appeal of final order by aggrieved person; limitations; exclusive jurisdiction of United States Courts of Appeals

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, aggrieved by a final order of the Secretary issued pursuant to this section may, within 60 days after entry of such an order, seek review of such order in the appropriate United States Court of Appeals in accordance with the provisions of sections 2341, 2343 through 2350 of title 28, and such court shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of the Secretary's order.

§ 2151. Rules and regulations

The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.

7 U.S.C. §§ 2131, 2132(f), 2134, 2149(a)-(c), 2151.

9 C.F.R.:

TITLE 9 ANIMALS AND ANIMAL PRODUCTS

**CHAPTER I ANIMAL AND PLANT HEALTH INSPECTION SERVICE,
DEPARTMENT OF AGRICULTURE**

SUBCHAPTER A ANIMAL WELFARE

PART 1 DEFINITION OF TERMS

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

....

Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animals to a research facility, an exhibitor, or a dealer (wholesale); or any person who does not sell, or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than \$500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats, during any calendar year.

PART 2 REGULATIONS

SUBPART A LICENSING

§ 2.1 Requirements and application.

(a)(1) Any person operating or desiring to operate as a dealer, exhibitor, or operator of an auction sale, except persons who are exempted from the licensing requirements under paragraph (a)(3) of this section, must have a valid license. A person must be 18 years of age or older to obtain a license. A person seeking a license shall apply on a form which will be furnished by the APHIS, REAC Sector Supervisor in the State in which that person operates or intends to operate. The applicant shall provide the information requested on the application form, including a valid mailing address through which the licensee or applicant can be reached at all times, and a valid premises address where the animals, animal facilities, equipment, and records may be inspected for compliance. The applicant shall file the completed application form with the APHIS, REAC Sector Supervisor.

9 C.F.R. §§ 1.1, 2.1(a)(1) (1998).⁶

⁶During the period material to this proceeding, section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (1998)) was amended by removing the term APHIS, REAC Sector Supervisor both times it appears and adding in its place the term AC Regional Director

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STATEMENT OF THE CASE

Introduction

Respondents Steven Bourk and Carmella Bourk failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as Findings of Fact. This Decision and Order as to Steven Bourk and Carmella Bourk is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Steven Bourk is an individual whose mailing address is 1904 Verendrye Drive, Ft. Pierre, South Dakota 57532.
2. Respondent Carmella Bourk is an individual whose mailing address is 1904 Verendrye Drive, Ft. Pierre, South Dakota 57532.

⁶(...continued)
(63 Fed. Reg. 62,925-27 (Nov. 10, 1998)). This November 10, 1998, amendment of section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (1998)) has no bearing on the disposition of this proceeding.

3. From July 28, 1992, through December 11, 1998, Respondent Steven Bourk operated as a dealer as defined in the Animal Welfare Act and the Regulations without being licensed. Respondent Steven Bourk sold, in commerce, approximately 98 dogs for resale, for use as pets or for exhibition.

4. From January 23, 1995, through September 2, 1998, Respondent Carmella Bourk operated as a dealer as defined in the Animal Welfare Act and the Regulations without being licensed. Respondent Carmella Bourk sold, in commerce, approximately 31 dogs for resale, for use as pets or for exhibition.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. From July 28, 1992, through December 11, 1998, Respondent Steven Bourk willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1).
3. From January 23, 1995, through September 2, 1998, Respondent Carmella Bourk willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1).

Respondents Steven Bourk s and Carmella Bourk s Appeal Petitions

Respondents Steven Bourk and Carmella Bourk raise six issues in Respondent Carmella Bourk s letter filed July 6, 2001 [hereinafter Carmella Bourk s Appeal Petition], and Respondent Steven Bourk s letter filed September 10, 2001 [hereinafter Steven

Bourk s Appeal Petition]. First, Respondent Carmella Bourk asks: Why does my daughter s name still appear on these forms when she received a letter stating that the charges against her have been dropped? (Carmella Bourk s Appeal Pet. at first unnumbered page.)

Respondent Carmella Bourk does not identify the person who she asserts is her daughter, does not identify the forms on which her daughter s name appears, and does not identify the letter stating that the charges against her [daughter] have been dropped[.] However, based on the limited record before me, I infer the person who Respondent Carmella Bourk asserts is her daughter is Respondent Donya Bourk; I infer the letter stating that the charges against [Respondent Donya Bourk] have been dropped referenced by Respondent Carmella Bourk is either Complainant s Notice of Withdrawal of Complaint Without Prejudice as to Donya Bourk or the Chief ALJ s Order Withdrawing Complaint as to Donya Bourk; and I infer Respondent Carmella Bourk asserts the Chief ALJ erroneously concluded that Respondent Donya Bourk willfully violated the Animal Welfare Act and the Regulations and imposed sanctions against Respondent Donya Bourk.

On March 15, 2001, Complainant filed a Notice of Withdrawal of Complaint Without Prejudice as to Donya Bourk giving notice of Complainant s withdrawal of the Complaint as to Respondent Donya Bourk. On March 20, 2001, the Chief ALJ filed an Order Withdrawing Complaint as to Donya Bourk stating:

On March 15, 2001, Complainant filed a Notice of Withdrawal of Complaint Without Prejudice as to Donya Bourk. The complaint against Respondent Donya Bourk, filed herein on October 17, 2000, is withdrawn without prejudice.

Notwithstanding Complainant's March 15, 2001, Notice of Withdrawal of Complaint Without Prejudice as to Donya Bourk and the Chief ALJ's March 20, 2001, Order Withdrawing Complaint as to Donya Bourk, the Chief ALJ issued an Initial Decision and Order on June 15, 2001, in which he: (1) found that from September 6, 1997, through March 5, 1999, Respondent Donya Bourk operated as a dealer as defined in the Animal Welfare Act and the Regulations without an Animal Welfare Act license; (2) found that Respondent Donya Bourk sold, in commerce, approximately 72 dogs for resale, for use as pets or for exhibition; (3) concluded that Respondent Donya Bourk willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 134) and subsection 2.1 of the Regulations (9 C.F.R. § 2.1);⁷ (4) ordered Respondent Donya Bourk to cease and desist from violating the Animal Welfare Act, the Regulations, and the Standards; (5) assessed Respondent Donya Bourk a \$7,500 civil penalty; and (6)

⁷The Chief ALJ erroneously indicates that section 4 of the Animal Welfare Act is codified in the United States Code at 7 U.S.C. § 134 (Initial Decision and Order at 2-3). Section 4 of the Animal Welfare Act is codified in the United States Code at 7 U.S.C. § 2134. I find the Chief ALJ's incorrect references to 7 U.S.C. § 134 harmless error. The Chief ALJ erroneously refers to section 2.1 of the Regulations (9 C.F.R. § 2.1) as subsection 2.1 of the Regulations (9 C.F.R. § 2.1) (Initial Decision and Order at 2-3). I find the Chief ALJ's erroneous references to subsection 2.1 of the Regulations (9 C.F.R. § 2.1) harmless error.

disqualified Respondent Donya Bourk from obtaining an Animal Welfare Act license for 30 days (Initial Decision and Order at 3-4).

In light of Complainant's March 15, 2001, Notice of Withdrawal of Complaint Without Prejudice as to Donya Bourk and the Chief ALJ's March 20, 2001, Order Withdrawing Complaint as to Donya Bourk, I am perplexed by the Chief ALJ's June 15, 2001, Initial Decision and Order in which the Chief ALJ concluded that Respondent Donya Bourk violated the Animal Welfare Act and the Regulations and imposed sanctions against Respondent Donya Bourk. Moreover, I am perplexed by Complainant's failure to appeal the Chief ALJ's Initial Decision and Order as it relates to Respondent Donya Bourk.

The Chief ALJ does not explain, and I can find nothing in the record which explains, how Respondent Donya Bourk became a party to this proceeding after the Complaint against her had been withdrawn. Based on the limited record before me, I find that no later than March 20, 2001, Respondent Donya Bourk ceased being a party to this proceeding, and I conclude that the Chief ALJ's June 15, 2001, Initial Decision and Order as it relates to Respondent Donya Bourk, is error. Therefore, in this Decision and Order as to Steven Bourk and Carmella Bourk, I make no findings or conclusions as to Respondent Donya Bourk and I impose no sanction against Respondent Donya Bourk.

Second, Respondent Carmella Bourk states Respondent Steven Bourk no longer resides at 1904 Verendrye Drive, Ft. Pierre, South Dakota 57532, but, instead, resides at

324 Spruce Avenue, Pierre, South Dakota 57501. Respondent Carmella Bourk states that she finds meeting with Respondent Steven Bourk painful and requests that all mail for Respondent Steven Bourk be sent directly to him. (Carmella Bourk s Appeal Pet. at first unnumbered page.)

Respondent Steven Bourk failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Therefore, Respondent Steven Bourk is deemed to have admitted that his mailing address is 1904 Verendrye Drive, Ft. Pierre, South Dakota 57532, as alleged in paragraph I(A) of the Complaint, and I find in this Decision and Order as to Steven Bourk and Carmella Bourk that Respondent Steven Bourk s mailing address is 1904 Verendrye Drive, Ft. Pierre, South Dakota 57532.

Third, Respondent Carmella Bourk asks whether the Chief ALJ reviewed her last letter . . . about this case and what [the Chief ALJ s] ruling was (Carmella Bourk s Appeal Pet. at first unnumbered page).

I infer Respondent Carmella Bourk s reference to her last letter . . . about this case is a reference to Respondent Carmella Bourk s filing that immediately preceded Carmella Bourk s Appeal Petition: viz., Respondent Carmella Bourk s objections to

Complainant's Motion for Default Decision and Complainant's Proposed Default

Decision, which she filed on April 6, 2001. In the absence of clear evidence to the

contrary, public officers are presumed to have properly discharged their official duties.⁸

⁸See *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) (stating the fact that there is potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing plea negotiation; the great majority of prosecutors are faithful to their duties and absent clear evidence to the contrary, courts presume that public officers properly discharge their duties); *INS v. Miranda*, 459 U.S. 14, 18 (1982) (per curiam) (stating although the length of time to process the application is long, absent evidence to the contrary, the court cannot find that the delay was unwarranted); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (stating a presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume they have properly discharged their official duties); *Sunday Lake Iron Co. v. Wakefield TP*, 247 U.S. 350, 353 (1918) (stating the good faith of taxing officers and the validity of their actions are presumed; when assailed, the burden of proof is on the complaining party); *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001) (stating the presumption of regularity supports official acts of public officers; in the absence of clear evidence to the contrary, the doctrine presumes that public officers have properly discharged their official duties and the doctrine allows courts to presume that what appears regular is regular, the burden shifting to the attacker to show to the contrary); *United States v. Studevent*, 116 F.3d 1559, 1563 (D.C. Cir. 1997) (stating in the absence of clear evidence to the contrary, courts presume that public officers have properly discharged their official duties); *United States v. Allen*, 106 F.3d 695, 700 (6th Cir.) (stating where there is no evidence indicating that tampering with exhibits occurred, courts presume public officers have discharged their duties properly), *cert. denied*, 520 U.S. 1281 (1997); *Felzcerek v. INS*, 75 F.3d 112, 116 (2d Cir. 1996) (stating records made by public officials in the ordinary course of their duties have a strong indicia of reliability, since public officials are presumed to perform their duties properly and generally lack motive to falsify information); *Chaney v. United States*, 406 F.2d 809, 813 (5th Cir.) (stating the presumption that the local selective service board considered the appellant's request for reopening in accordance with 32 C.F.R. § 1625.2 is a strong presumption that is only overcome by clear and convincing evidence), *cert. denied*, 396 U.S. 867 (1969); *Lawson Milk Co. v. Freeman*, 358 F.2d 647, 649 (6th Cir. 1966) (stating without a showing that the action of the Secretary of Agriculture was arbitrary, his action is presumed to be valid); *Donaldson v. United States*, 264 F.2d 804, 807 (6th Cir. 1959)

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⁸(...continued)

(stating the presumption of regularity supports official acts of public officers and in the absence of clear evidence to the contrary, courts presume they have properly discharged their duties); *Panno v. United States*, 203 F.2d 504, 509 (9th Cir. 1953) (stating a presumption of regularity attaches to official acts of the Secretary of Agriculture in the exercise of his congressionally delegated duties); *Reines v. Woods*, 192 F.2d 83, 85 (Emer. Ct. App. 1951) (stating the presumption of regularity which attaches to official acts can be overcome only by clear evidence to the contrary); *NLRB v. Bibb Mfg. Co.*, 188 F.2d 825, 827 (5th Cir. 1951) (holding duly appointed police officers are presumed to discharge their duties lawfully and that presumption may only be overcome by clear and convincing evidence); *Woods v. Tate*, 171 F.2d 511, 513 (5th Cir. 1948) (concluding an order of the Acting Rent Director, Office of Price Administration, is presumably valid and genuine in the absence of proof or testimony to the contrary); *Pasadena Research Laboratories, Inc. v. United States*, 169 F.2d 375, 381-82 (9th Cir.) (stating the presumption of regularity applies to methods used by government chemists and analysts and to the care and absence of tampering on the part of postal employees), *cert. denied*, 335 U.S. 853 (1948); *Laughlin v. Cummings*, 105 F.2d 71, 73 (D.C. Cir. 1939) (stating there is a strong presumption that public officers exercise their duties in accordance with law); *In re PMD Produce Brokerage Corp.*, 60 Agric. Dec. ___, slip op. at 16-19 (Nov. 26, 2001) (Decision and Order on Remand) (stating, in the absence of clear evidence to the contrary, an administrative law judge is presumed to have considered the evidence in a proceeding prior to the issuance of a decision the proceeding); *In re Lamers Dairy, Inc.*, 60 Agric. Dec. ___, slip op. at 37-40 (Aug. 21, 2001) (stating, in the absence of clear evidence to the contrary, an administrative law judge is presumed to have adequately reviewed the record in a proceeding prior to the issuance of a decision in the proceeding), *appeal docketed*, No. 01C0890 (E.D. Wis. Sept. 5, 2001); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 220-22 (2000) (stating that, in the absence of evidence to the contrary, Food Safety and Inspection Service inspectors are presumed to have properly issued process deficiency records), *aff'd in part & transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001); *In re Dwight L. Lane*, 59 Agric. Dec. 148, 177-78 (2000) (stating that a United States Department of Agriculture hearing officer is presumed to have adequately reviewed the record and no inference is drawn from an erroneous decision that the hearing officer failed to properly discharge his official duty to review the record), *aff'd*, A2-00-84 (D.N.D. July 18, 2001), *appeal docketed*, No. 01-3257 (8th Cir. Sept. 17, 2001); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 280-82 (1998) (stating that, in the absence of clear evidence to the contrary, United States Department of Agriculture inspectors and investigators are presumed to have properly

(continued...)

Under the Rules of Practice, an administrative law judge must read and consider a respondent's timely-filed objections to a complainant's motion for a default decision and proposed default decision in order to determine the proper disposition of the

⁸(...continued)

discharged their duty to document violations of the Animal Welfare Act); *In re Auvil Fruit Co.*, 56 Agric. Dec. 1045, 1079 (1997) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Kim Bennett*, 55 Agric. Dec. 176, 210-11 (1996) (stating that instead of presuming United States Department of Agriculture attorneys and investigators warped the viewpoint of United States Department of Agriculture veterinary medical officers, the court should have presumed that training of United States Department of Agriculture veterinary medical officers was proper because there is a presumption of regularity with respect to official acts of public officers); *In re C.I. Ferrie*, 54 Agric. Dec. 1033, 1053 (1995) (stating use of United States Department of Agriculture employees in connection with a referendum on the continuance of the Dairy Promotion and Research Order does not taint the referendum process, even if petitioners show some United States Department of Agriculture employees would lose their jobs upon defeat of the Dairy Promotion and Research Order, because a presumption of regularity exists with respect to official acts of public officers); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 55 (1995) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 55 (1994) (stating without a showing that the official acts of the Secretary are arbitrary, his actions are presumed to be valid), *aff d*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1494 (1981) (stating there is a presumption of regularity with respect to the issuance of instructions as to grading methods and procedures by the Chief of the Meat Grading Branch, Food Safety and Quality Service, United States Department of Agriculture), *aff d*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff d*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff d*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1361 (1978) (rejecting respondent's theory that United States Department of Agriculture shell egg graders switched cases of eggs to discredit respondent, in view of the presumption of regularity supporting acts of public officials), *aff d*, No. 78-3134 (D.N.J. May 25, 1979), *aff d mem.*, 614 F.2d 770 (3d Cir. 1980).

complainant's motion for a default decision and proposed default decision.⁹ The record contains no indication that the Chief ALJ failed to read and consider Respondent Carmella Bourk's objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. Therefore, I presume the Chief ALJ properly discharged his duty to read and consider Respondent Carmella Bourk's objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.

Moreover, I find no basis for Respondent Carmella Bourk's apparent confusion regarding the Chief ALJ's ruling on Complainant's Motion for Default Decision. Section 1.139 of the Rules of Practice provides for the disposition of a complainant's motion for a default decision, as follows:

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

7 C.F.R. § 1.139.

⁹7 C.F.R. § 1.139.

After Respondent Carmella Bourk filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision, the Chief ALJ issued the Initial Decision and Order without further procedure or hearing. While the Chief ALJ did not adopt Complainant's Proposed Default Decision in its entirety, the Chief ALJ's issuance of the Initial Decision and Order establishes that he found Respondent Carmella Bourk's objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision lacked merit.

Fourth, Respondent Carmella Bourk states Respondent Steven Bourk emotionally and mentally abused her and controlled her. Moreover, Respondent Carmella Bourk states Respondent Steven Bourk forced her to sell dogs, dogs were sold under her name against her wish, and she had no say over what was done with the dogs. Respondent Carmella Bourk requests that these charges be dropped against [her]. (Carmella Bourk's Appeal Pet. at first and second unnumbered pages.)

I infer Respondent Carmella Bourk's statements regarding her relationship with Respondent Steven Bourk and her lack of control over the sale of dogs constitute Respondent Carmella Bourk's general denial of the material allegations in the Complaint that relate to her sale of dogs and operation as a dealer as defined in the Animal Welfare Act and the Regulations without an Animal Welfare Act license. Respondent Steven Bourk denies all the allegations in the Complaint against [himself] and [his] family (Steven Bourk's Appeal Pet.).

Respondents Steven Bourk s and Carmella Bourk s denials come too late to be considered. Respondents Steven Bourk and Carmella Bourk are deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint because they failed to answer the Complaint within 20 days after the Hearing Clerk served them with the Complaint.

The Hearing Clerk served Respondents Steven Bourk and Carmella Bourk with the Complaint, the Rules of Practice, and the Hearing Clerk s October 18, 2000, service letter no later than October 31, 2000.¹⁰ Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice clearly state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint . . . , the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding

. . . .

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

¹⁰United States Postal Service Domestic Return Receipts for Article Number P 368 327 621 and Article Number P 368 327 622.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint clearly informs Respondents Steven Bourk and Carmella Bourk of the consequences of failing to file a timely answer, as follows:

The respondents shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 et seq.). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Compl. at 2-3.

Similarly, the Hearing Clerk informed Respondents Steven Bourk and Carmella Bourk in the October 18, 2001, service letter that a timely answer must be filed pursuant

to the Rules of Practice and that failure to file a timely answer to any allegation in the Complaint would constitute an admission of that allegation, as follows:

October 18, 2000

Mr. Steven Bourk
Ms. Carmella Bourk
Ms. Donya Bourk
1904 Verendrye Drive
Ft. Pierre, South Dakota 57532

Dear Sir/Madam:

Subject: In re: Steven Bourk, Carmella Bourk, Donya Bourk
Respondents
AWA Docket No. 01-0004

Enclosed is a copy of a Complaint, which has been filed with this office under the Animal Welfare Act, as amended.

Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and four copies of your written and signed answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law

Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number [sic].

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case should be directed to the attorney whose name and telephone number appears [sic] on the last page of the complaint.

Sincerely,

/s/

Joyce A. Dawson
Hearing Clerk

On November 22, 2000, the Hearing Clerk sent a letter to Respondents Steven Bourk and Carmella Bourk informing them that their answer to the Complaint had not been received within the time required in the Rules of Practice.¹¹ Neither Respondent Steven Bourk nor Respondent Carmella Bourk responded to the Hearing Clerk's November 22, 2000, letter.

Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant states that the complainant does not object to setting

¹¹See note 3.

aside the default decision,¹² generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.¹³

¹²See *Dale Goodale*, 60 Agric. Dec. ____ (Dec. 11, 2001) (Remand Order) (setting aside the default decision because the administrative law judge adopted apparently inconsistent findings of a dispositive fact in the default decision, and the order in the default decision was not clear); *In re Deora Sewnanan*, 60 Agric. Dec. ____ (Nov. 9, 2001) (setting aside the default decision because the respondent was not served with the complaint); *In re H. Schnell & Co.*, 57 Agric. Dec. 1722 (1998) (Remand Order) (setting aside the default decision, which was based upon the respondent's statements during two telephone conference calls with the administrative law judge and the complainant's counsel, because the respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding that the default decision deprived the respondent of its right to due process under the Fifth Amendment to the Constitution of the United States); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (Remand Order) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and the respondent's license under the PACA had lapsed before service was attempted), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (Order Vacating Default Decision and Remanding Proceeding) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (Remand Order) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because the complainant had no objection to the respondent's motion for remand), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (Order Reopening After Default) (setting aside a default decision and accepting a late-filed answer because the complainant did not object to the respondent's motion to reopen after default).

¹³See generally *In re Beth Lutz*, 60 Agric. Dec. ____ (Jan. 24, 2001) (holding the default decision was properly issued where the respondent filed her answer 23 days after she was served with the complaint and 3 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations alleged in the complaint); *In re Curtis G. Foley*,

(continued...)

¹³(...continued)

59 Agric. Dec. 581 (2000) (holding the default decision was properly issued where the respondents filed their answer 6 months and 5 days after they were served with the complaint and 5 months and 16 days after the respondents answer was due and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Nancy M. Kutz* (Decision as to Nancy M. Kutz), 58 Agric. Dec. 744 (1999) (holding the default decision was properly issued where the respondent s first filing in the proceeding was 28 days after service of the complaint on the respondent and the filing did not respond to the allegations of the complaint and holding the respondent is deemed, by her failure to file a timely answer and by her failure to deny the allegations of the complaint, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Anna Mae Noell*, 58 Agric. Dec. 130 (1999) (holding the default decision was properly issued where the respondents filed an answer 49 days after service of the complaint on the respondents and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep t of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re Jack D. Stowers*, 57 Agric. Dec. 944 (1998) (holding the default decision was properly issued where the respondent filed his answer 1 year and 12 days after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding the default decision was properly issued where the respondent s first filing was more than 8 months after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re John Walker*, 56 Agric. Dec. 350 (1997) (holding the default decision was properly issued where the respondent s first filing was 126 days after service of the complaint on the respondent and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding the default decision was properly issued where the respondent s first filing was 117 days after the respondent s answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Dora Hampton*, 56 Agric. Dec. (continued...)

¹³(...continued)

301 (1997) (holding the default decision was properly issued where the respondent's first filing was 135 days after the respondent's answer was due and holding the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (holding the default decision was properly issued where the respondent's first filing was 70 days after the respondent's answer was due and holding the respondent is deemed, by its failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged the complaint); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994) (holding the default decision was properly issued where the respondent was given an extension of time until March 22, 1994, to file an answer, but the answer was not received until March 25, 1994, and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding the default decision was properly issued where the respondent failed to file a timely answer and, in his late answer, did not deny the material allegations of the complaint and holding the respondent is deemed, by his failure to file a timely answer and by his failure to deny the allegations in the complaint in his late answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding the default decision was properly issued where the respondents failed to file a timely answer and holding the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Standards alleged in the complaint); *In re Willard Lambert*, 43 Agric. Dec. 46 (1984) (holding the default decision was properly issued where the respondent failed to file an answer and holding the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding the default decision was properly issued where the respondents failed to file an

(continued...)

The Rules of Practice provide that an answer must be filed within 20 days after service of the complaint (7 C.F.R. § 1.136(a)). Neither Respondent Steven Bourk nor Respondent Carmella Bourk filed a timely answer. Respondent Steven Bourk's first and only filing in this proceeding was September 10, 2001, 10 months and 9 days after the Hearing Clerk served Respondent Steven Bourk with the Complaint. Respondent Carmella Bourk's first filing in this proceeding was April 6, 2001, 5 months and 5 days after the Hearing Clerk served Respondent Carmella Bourk with the Complaint. Respondent Steven Bourk's failure to file a timely answer is deemed, for purposes of this proceeding, an admission of the allegations in the Complaint and constitutes a waiver of hearing (7 C.F.R. §§ 1.136(c), .139, .141(a)). Respondent Carmella Bourk's failure to file a timely answer is deemed, for purposes of this proceeding, an admission of the allegations in the Complaint and constitutes a waiver of hearing (7 C.F.R. §§ 1.136(c), .139, .141(a)).

Accordingly, there are no issues of fact on which a meaningful hearing could be held in this proceeding, and the Chief ALJ properly issued the Initial Decision and Order. Application of the default provisions of the Rules of Practice does not deprive

¹³(...continued)

answer and holding the respondents are deemed, by their failure to file an answer, to have admitted the violations of the Standards alleged in the complaint).

Respondent Steven Bourk of his rights or Respondent Carmella Bourk of her rights under the due process clause of the Fifth Amendment to the Constitution of the United States.¹⁴

Fifth, Respondent Steven Bourk states that the civil penalty assessed by the Chief ALJ is astronomical (Steven Bourk's Appeal Pet.).

The Chief ALJ assessed Respondents Steven Bourk, Carmella Bourk, and Donya Bourk, jointly and severally, a \$7,500 civil penalty for their violations of the Animal Welfare Act and the Regulations (Initial Decision and Order at 3).¹⁵ Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than \$2,500 for each violation of the Animal Welfare Act, the Regulations, and the Standards.¹⁶ Each violation and each day during which a

¹⁴*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding that a hearing was not required under the Fifth Amendment to the United States Constitution where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating that due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

¹⁵My reasons for concluding the Chief ALJ's assessment of a civil penalty against Respondent Donya Bourk is error are discussed in this Decision and Order as to Steven Bourk and Carmella Bourk, *supra*.

¹⁶The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note (Supp. V 1999)) provides that the head of each agency shall, by
(continued...)

violation continues is a separate offense. Therefore, based on the approximately 98 dogs which Respondent Steven Bourk sold in commerce for resale for use as pets or for exhibition and the approximately 2,323 days during which Respondent Steven Bourk operated as a dealer as defined in the Animal Welfare Act and the Regulations in violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1), the Chief ALJ could have assessed Respondent Steven Bourk a maximum civil penalty of approximately \$6,052,500. Moreover, based on the approximately 31 dogs which Respondent Carmella Bourk sold in commerce for resale for use as pets or for exhibition and the approximately 1,315 days during which Respondent Carmella Bourk operated as a dealer as defined in the Animal Welfare Act and the Regulations in violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134)

¹⁶(...continued)

regulation, adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, by increasing the maximum civil monetary penalty for each civil monetary penalty by the cost-of-living adjustment. Effective September 2, 1997, the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act, the Regulations, and the Standards by increasing the maximum civil penalty from \$2,500 to \$2,750 (62 Fed. Reg. 40,924-28 (July 31, 1997); 7 C.F.R. § 3.91(b)(2)(v)). However, based on the limited record before me, I cannot determine the number of Respondent Steven Bourk's violations of the Animal Welfare Act and the Regulations or the number of Respondent Carmella Bourk's violations of the Animal Welfare Act and the Regulations that occurred after September 1, 1997. Therefore, for the purposes of this Decision and Order as to Steven Bourk and Carmella Bourk, I use \$2,500 as the maximum civil penalty that can be assessed against Respondents Steven Bourk and Carmella Bourk for each violation of the Animal Welfare Act and the Regulations.

and section 2.1 of the Regulations (9 C.F.R. § 2.1), the Chief ALJ could have assessed Respondent Carmella Bourk a maximum civil penalty of approximately \$3,365,000.

Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that four factors must be considered when determining the civil penalty to be assessed for violations of the Animal Welfare Act, the Regulations, and the Standards: (1) the size of the business of the person involved; (2) the gravity of the violations; (3) the person's good faith; and (4) the history of previous violations.

Based on the number of dogs Respondents Steven Bourk and Carmella Bourk sold in commerce during the period from July 28, 1992, through December 11, 1998, I find Respondents Steven Bourk and Carmella Bourk operated a medium-sized business. I find that the failure to obtain an Animal Welfare Act license before operating as a dealer is a serious violation because enforcement of the Animal Welfare Act, the Regulations, and the Standards depends upon the identification of persons operating as dealers as defined by the Animal Welfare Act and the Regulations. During a period of more than 6 years and 4 months, Respondent Steven Bourk operated as a dealer as defined by the Animal Welfare Act and the Regulations without obtaining the required Animal Welfare Act license. During a period of more than 3 years and 7 months, Respondent Carmella Bourk operated as a dealer as defined by the Animal Welfare Act and the Regulations without obtaining the required Animal Welfare Act license. Respondents Steven Bourk's and Carmella Bourk's failure to obtain the required Animal Welfare Act license thwarted the

Secretary of Agriculture's ability to carry out the purposes of the Animal Welfare Act. Respondents Steven Bourk's and Carmella Bourk's conduct reveals a consistent disregard for, and unwillingness to abide by, the requirements of the Animal Welfare Act and the Regulations. Thus, I conclude Respondents Steven Bourk and Carmella Bourk lacked good faith. Finally, an ongoing pattern of violations establishes a history of previous violations for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)). In light of the number of Respondents Steven Bourk's and Carmella Bourk's violations, the maximum civil penalty that could have been assessed against Respondents Steven Bourk and Carmella Bourk, the seriousness and history of Respondents Steven Bourk's and Carmella Bourk's violations, and the lack of good faith exhibited by Respondents Steven Bourk and Carmella Bourk, I disagree with Respondent Steven Bourk's characterization of the amount of the civil penalty assessed by the Chief ALJ.

However, I find the Chief ALJ's assessment of a \$7,500 civil penalty against Respondents Steven Bourk and Carmella Bourk puzzling. The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate

weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497.

Complainant, one of the officials charged with administering the Animal Welfare Act, requests that Respondents Steven Bourk and Carmella Bourk be ordered to cease and desist from violating the Animal Welfare Act, the Regulations, and the Standards; that Respondents Steven Bourk and Carmella Bourk be jointly and severally assessed a \$5,000 civil penalty; and that Respondents Steven Bourk and Carmella Bourk be disqualified from obtaining an Animal Welfare Act license for 2 years (Complainant's Proposed Default Decision at fourth unnumbered page).

The Chief ALJ ordered Respondents Steven Bourk and Carmella Bourk to cease and desist from violating the Animal Welfare Act, the Regulations, and the Standards as recommended by Complainant. However, without explanation, the Chief ALJ assessed Respondents Steven Bourk and Carmella Bourk, jointly and severally, a \$7,500 civil penalty rather than the \$5,000 civil penalty recommended by Complainant, and disqualified Respondents Steven Bourk and Carmella Bourk from obtaining an Animal Welfare Act license for 30 days rather than 2 years as recommended by Complainant.

The recommendation of administrative officials as to the sanction is not controlling, and in appropriate circumstances, the sanction imposed may be less, or different, than that recommended by administrative officials.¹⁷ Thus, the Chief ALJ may choose not to adopt the sanction recommended by an administrative official and may impose any sanction warranted in law and justified by the facts. My puzzlement over the Chief ALJ's sanction derives not from the differences between the sanction recommended by Complainant and the sanction imposed by the Chief ALJ, but rather from the Chief ALJ's lack of explanation for the differences.

¹⁷*In re H.C. MacClaren, Inc.*, 60 Agric. Dec. ____, slip op. at 47-48 (Nov. 8, 2001); *In re Karl Mitchell*, 60 Agric. Dec. ____, slip op. at 57 (June 13, 2001), *appeal docketed*, No. 01-71486 (9th Cir. Sept. 10, 2001); *In re American Raisin Packers, Inc.*, 60 Agric. Dec. ____, slip op. at 39 n.8 (May 1, 2001), *appeal docketed*, No. CIV F 015606 AWI SMS (E.D. Cal. May 18, 2001); *In re Fred Hodgins*, 60 Agric. Dec. ____, slip op. at 24 (Apr. 4, 2001) (Decision and Order on Remand), *appeal docketed*, No. 01-3508 (6th Cir. May 12, 2001); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 626 (2000), *aff d per curiam*, No. 00-60844 (5th Cir. Sept. 5, 2001); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 226-27 (2000), *aff d in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001); *In re James E. Stephens*, 58 Agric. Dec. 149, 182 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1604 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. 1498, 1514 (1998); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1141 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (*per curiam*); *In re Richard Lawson*, 57 Agric. Dec. 980, 1031-32 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *aff d*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

Complainant did not appeal the Chief ALJ's failure to adopt the sanction recommended by Complainant. In light of the sanction recommended by Complainant in Complainant's Proposed Default Decision, the sanction imposed by the Chief ALJ in the Initial Decision and Order, and Complainant's failure to appeal the sanction imposed by the Chief ALJ, I impose a sanction which gives Respondents Steven Bourk and Carmella Bourk the benefit of the lower civil penalty recommended by Complainant and the shorter period of disqualification from obtaining an Animal Welfare Act license imposed by the Chief ALJ. I also do not order Respondents Steven Bourk and Carmella Bourk to cease and desist from violating the Standards because I do not find that either Respondent Steven Bourk or Respondent Carmella Bourk violated the Standards.

Sixth, Respondent Steven Bourk requests legal counsel so this matter can be resolved in a timely manner (Steven Bourk's Appeal Pet.).

The Administrative Procedure Act provides that a party in an agency proceeding may appear by or with counsel, as follows:

§ 555. Ancillary matters

....

(b) . . . A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding.

5 U.S.C. § 555(b).

However, a respondent who desires assistance of counsel in an agency proceeding bears the responsibility of obtaining counsel. Moreover, a respondent who is unable to

obtain counsel has no right under the Constitution of the United States, the Administrative Procedure Act, or the Rules of Practice to have counsel provided by the government in disciplinary administrative proceedings, such as those conducted under the Animal Welfare Act.¹⁸ Therefore, I reject Respondent Steven Bourk's request to have counsel

¹⁸*See generally Elliott v. SEC*, 36 F.3d 86, 88 (11th Cir. 1994) (per curiam) (rejecting petitioner's assertion of prejudice due to his lack of representation in an administrative proceeding before the Securities and Exchange Commission and stating there is no statutory or constitutional right to counsel in disciplinary administrative proceedings before the Securities and Exchange Commission); *Henry v. INS*, 8 F.3d 426, 440 (7th Cir. 1993) (stating it is well-settled that deportation hearings are in the nature of civil proceedings and aliens, therefore, have no constitutional right to counsel under the Sixth Amendment); *Michelson v. INS*, 897 F.2d 465, 467 (10th Cir. 1990) (stating a deportation proceeding is civil in nature; thus no Sixth Amendment right to counsel exists); *Lozada v. INS*, 857 F.2d 10, 13 (1st Cir. 1988) (stating because deportation proceedings are deemed to be civil, rather than criminal, in nature, petitioners have no constitutional right to counsel under the Sixth Amendment); *Sartain v. SEC*, 601 F.2d 1366, 1375 (9th Cir. 1979) (per curiam) (stating 5 U.S.C. § 555(b) and due process assure petitioner the right to obtain independent counsel and have counsel represent him in a civil administrative proceeding before the Securities and Exchange Commission, but the Securities and Exchange Commission is not obliged to provide petitioner with counsel); *Feeney v. SEC*, 564 F.2d 260, 262 (8th Cir. 1977) (rejecting petitioners' argument that the Securities and Exchange Commission erred in not providing appointed counsel for them and stating, assuming petitioners are indigent, the Constitution, the statutes, and prior case law do not require appointment of counsel at public expense in administrative proceedings of the type brought by the Securities and Exchange Commission), *cert. denied*, 435 U.S. 969 (1978); *Nees v. SEC*, 414 F.2d 211, 221 (9th Cir. 1969) (stating petitioner has a right under 5 U.S.C. § 555(b) to employ counsel to represent him in an administrative proceeding, but the government is not obligated to provide him with counsel); *Boruski v. SEC*, 340 F.2d 991, 992 (2d Cir.) (stating in administrative proceedings for revocation of registration of a broker-dealer, expulsion from membership in the National Association of Securities Dealers, Inc., and denial of registration as an investment advisor, there is no requirement that counsel be appointed because the administrative proceedings are not criminal), *cert. denied*, 381 U.S. 943 (1965); *Alvarez v. Bowen*, 704 F. Supp. 49, 52 (S.D.N.Y. 1989) (stating the Secretary of Health and

(continued...)

provided to him; however, I note that Respondent Steven Bourk is free to obtain counsel to assist him in this proceeding.

For the foregoing reasons, the following Order should be issued.

ORDER

1. Respondents Steven Bourk and Carmella Bourk, their agents, employees, successors, and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and, in particular, shall cease and desist from operating as dealers as defined in the Animal Welfare Act and the Regulations without an Animal Welfare Act license.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondents Steven Bourk and Carmella Bourk.

¹⁸(...continued)

Human Services is not obligated to furnish a claimant with an attorney to represent the claimant in a social security disability proceeding); *In re Garland E. Samuel*, 57 Agric. Dec. 905, 911 (1998) (stating a respondent who is unable to afford an attorney has no right under the Constitution of the United States, the Administrative Procedure Act, or the Rules of Practice to have counsel provided by the government in disciplinary proceedings, such as those conducted under the Swine Health Protection Act); *In re Steven M. Samek*, 57 Agric. Dec. 185, 188 (1998) (Ruling Denying Motion to Appoint Public Defender as to Steven M. Samek) (stating a respondent who is unable to afford an attorney has no right under the Constitution of the United States, the Administrative Procedure Act, or the Rules of Practice to have counsel provided by the government in disciplinary proceedings, such as those conducted under the Animal Welfare Act); *In re Ray H. Mayer* (Decision as to Jim Doss), 43 Agric. Dec. 439, 442 (1984) (stating a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented, is not a criminal proceeding and the respondent, even if he cannot afford counsel, has no constitutional right to have counsel provided by the government), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984).

2. Respondents Steven Bourk and Carmella Bourk are jointly and severally assessed a \$5,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Brian T. Hill
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Respondents Steven Bourk s and Carmella Bourk s payment of the \$5,000 civil penalty shall be sent to, and received by, Brian T. Hill within 60 days after service of this Order on Respondents Steven Bourk and Carmella Bourk. Respondents Steven Bourk and Carmella Bourk shall state on the certified check or money order that payment is in reference to AWA Docket No. 01-0004.

3. Respondents Steven Bourk and Carmella Bourk are disqualified from obtaining an Animal Welfare Act license for 30 days and continuing thereafter until they demonstrate to the Animal and Plant Health Inspection Service that they are in full compliance with the Animal Welfare Act, the Regulations, the Standards, and this Order, including the payment of the civil penalty assessed against them in paragraph 2 of this Order.

The disqualification provisions of this Order shall become effective on the day after service of this Order on Respondents Steven Bourk and Carmella Bourk.

4. Respondents Steven Bourk and Carmella Bourk have the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. Respondents Steven Bourk and Carmella Bourk must seek judicial review within 60 days after entry of this Order. 7 U.S.C. § 2149(c). The date of entry of this Order is January 4, 2002.

Done at Washington, DC

January 4, 2002

William G. Jenson
Judicial Officer