

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 03-0010
)
Erica Nicole Mashburn and)
James Mashburn, d/b/a)
Living Legend Kennel,) **Order Vacating Order**
) **Dismissing Interlocutory**
Respondents) **Appeal as to James Mashburn**

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a “Complaint” on January 10, 2003. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; 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]. On March 18, 2003, Complainant filed an “Amended Complaint.”

Complainant alleges Erica Nicole Mashburn, d/b/a Living Legend Kennel, and James Mashburn, d/b/a Living Legend Kennel [hereinafter Respondents], violated the Animal Welfare Act and the Regulations and Standards (Amended Compl. ¶¶ II-IV).

The Hearing Clerk served Respondent James Mashburn, d/b/a Living Legend Kennel [hereinafter Respondent James Mashburn], with the Amended Complaint on March 22, 2003.¹ The Rules of Practice require that, within 20 days after the service of an amended complaint, an answer must be filed with the Hearing Clerk.² Chief Administrative Law Judge James W. Hunt extended Respondents' time to file an answer to the Amended Complaint to May 2, 2003.³ Respondent James Mashburn failed to file an answer to the Amended Complaint within the time prescribed by Chief Administrative Law Judge James W. Hunt.

On September 3, 2003, Complainant filed a "Motion for Adoption of Decision and Order as to James Mashburn Upon Admission of Facts by Reason of Default" [hereinafter Motion for Default Decision] and a proposed "Decision and Order as to James Mashburn Upon Admission of Facts by Reason of Default" [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondent James Mashburn with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on September 11, 2003.⁴ Respondent James Mashburn failed to file objections to Complainant's Motion for Default

¹United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8982 7241.

²See 7 C.F.R. § 1.136(a).

³Order Extending Time to File Answer filed April 17, 2003.

⁴United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0310 3491.

Decision and Complainant's Proposed Default Decision within 20 days after service as required by the Rules of Practice.⁵

On October 14, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued an "Order Denying APHIS' Motion re: James Mashburn" denying Complainant's Motion for Default Decision. On November 13, 2003, Complainant filed "Complainant's Appeal of Order Denying APHIS' Motion Re: James Mashburn" [hereinafter Appeal Petition]. The Hearing Clerk served Respondent James Mashburn with Complainant's Appeal Petition on November 26, 2003.⁶ Respondent James Mashburn failed to file a response to Complainant's Appeal Petition within 20 days after service as required by the Rules of Practice.⁷ On January 12, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

On January 15, 2004, I issued an "Order Dismissing Interlocutory Appeal as to James Mashburn and Remanding the Proceeding to the ALJ" erroneously concluding that Complainant's Appeal Petition must be rejected as premature. Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) provides that an administrative law judge's denial of a motion for a default decision may be appealed to the Judicial Officer pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

⁵See 7 C.F.R. § 1.139.

⁶United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0310 3897.

⁷See 7 C.F.R. § 1.145(b).

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

ORDER

The Judicial Officer's Order Dismissing Interlocutory Appeal as to James Mashburn and Remanding the Proceeding to the ALJ filed January 15, 2004, is vacated.

Done at Washington, DC

January 21, 2004

William G. Jenson
Judicial Officer