

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 02-0010
)
David McCauley,)
) **Order Denying Petition**
) **for Reconsideration**
Respondent)

PROCEDURAL HISTORY

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 February 4, 2002. 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 David McCauley [hereinafter Respondent] operated as a dealer as defined in the Animal Welfare Act and the Regulations without an Animal Welfare Act license, in willful 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) (Compl. ¶ II). On March 15, 2002, Respondent filed an answer denying the material allegations of the Complaint.

Administrative Law Judge Marc R. Hillson [hereinafter the ALJ] scheduled a hearing to commence in San Antonio, Texas, on October 23, 2003. Respondent failed to appear at the hearing. Section 1.141(e)(1) of the Rules of Practice (7 C.F.R. § 1.141(e)(1)) provides, if a respondent fails to appear at the hearing, the complainant may follow the procedure set forth in section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) or present evidence, in whole or in part, in the form of affidavits or by oral testimony before the administrative law judge. Complainant chose to proceed by presenting oral testimony before the ALJ, and on October 23, 2003, the ALJ conducted a hearing in San Antonio, Texas.

Following the hearing, Complainant filed a “Proposed Decision and Order Upon Admission of Facts By Reason of Default and Motion for Adoption.” On January 30, 2004, the ALJ filed a “Decision,” which the Hearing Clerk served on Respondent, on February 11, 2004.¹ On May 13, 2004, Respondent appealed to the Judicial Officer. On June 1, 2004, Complainant filed “Memorandum in Response to Late Appeal,” and on July 12, 2004, I issued an Order Denying Late Appeal in which I denied Respondent’s late-filed appeal petition and stated the ALJ’s Decision, filed January 30, 2004, is the

¹United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0310 4078.

final decision in this proceeding. *In re David McCauley*, 63 Agric. Dec. ____ (July 12, 2004) (Order Denying Late Appeal).

On July 15, 2004, the Hearing Clerk served Respondent with the Order Denying Late Appeal.² On August 17, 2004, Respondent filed a petition for reconsideration.³ On August 31, 2004, Complainant filed “Memorandum in Response to Late Petition for Reconsideration.” On September 1, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for reconsideration of the July 12, 2004, Order Denying Late Appeal.

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Section 1.146(a)(3) of the Rules of Practice provides that a petition for reconsideration of the Judicial Officer’s decision must be filed within 10 days after service of the decision, as follows:

²United States Postal Service Domestic Return Receipt for Article Number 7003 0500 0000 1056 0762.

³Respondent entitles his August 17, 2004, filing “Appeal.” However, Respondent previously filed an appeal petition on May 13, 2004. The Rules of Practice do not provide that a party may file multiple appeal petitions, and Respondent did not request the opportunity to supplement his May 13, 2004, appeal petition. Moreover, section 1.145(a) of the Rules of Practice (7 C.F.R. § 1.145(a)) provides that, within 30 days after receiving service of the administrative law judge’s written decision, a party who disagrees with that decision may appeal to the Judicial Officer by filing an appeal petition with the Hearing Clerk. Thus, Respondent’s August 17, 2004, filing is not a timely-filed appeal petition. Based on Respondent’s having previously filed an appeal petition and the contents of Respondent’s August 17, 2004, filing, I infer the August 17, 2004, filing is Respondent’s petition for reconsideration.

§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.

(a) *Petition requisite. . . .*

. . . .

(3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

Respondent filed his petition for reconsideration 1 month 2 days after the date the Hearing Clerk served Respondent with the Order Denying Late Appeal. Accordingly, Respondent's petition for reconsideration is late and must be denied.⁴

⁴See *In re Heartland Kennels, Inc.*, 61 Agric. Dec. 562 (2002) (Order Denying Second Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 50 days after the date the Hearing Clerk served the respondents with the decision and order); *In re David Finch*, 61 Agric. Dec. 593 (2002) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 15 days after the date the Hearing Clerk served the respondent with the decision and order); *In re JSG Trading Corp.*, 61 Agric. Dec. 409 (2002) (Rulings as to JSG Trading Corp. Denying: (1) Motion to Vacate; (2) Motion to Reopen; (3) Motion for Stay; and (4) Request for Pardon or Lesser Sanction) (denying, as late-filed, a petition for reconsideration filed 2 years 2 months 26 days after the date the Hearing Clerk served the respondent with the decision and order on remand); *In re Jerry Goetz*, 61 Agric. Dec. 282 (2002) (Order Lifting Stay) (denying, as late-filed, a petition for reconsideration filed 4 years 2 months 4 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Beth Lutz*, 60 Agric. Dec. 68 (2001) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 2 months 2 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Mary Meyers*, 58 Agric. Dec. 861 (1999) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for

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⁴(...continued)

reconsideration filed 2 years 5 months 20 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Anna Mae Noell*, 58 Agric. Dec. 855 (1999) (Order Denying the Chimp Farm Inc.'s Motion to Vacate) (denying, as late-filed, a petition for reconsideration filed 6 months 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Paul W. Thomas*, 58 Agric. Dec. 875 (1999) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 19 days after the date the Hearing Clerk served the applicants with the decision and order); *In re Nkiambi Jean Lema*, 58 Agric. Dec. 302 (1999) (Order Denying Pet. for Recons. and Mot. to Transfer Venue) (denying, as late-filed, a petition for reconsideration filed 35 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Kevin Ackerman*, 58 Agric. Dec. 349 (1999) (Order Denying Pet. for Recons. as to Kevin Ackerman) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the order denying late appeal as to Kevin Ackerman); *In re Marilyn Shepherd*, 57 Agric. Dec. 1280 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 11 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jack Stepp*, 57 Agric. Dec. 323 (1998) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 16 days after the date the Hearing Clerk served the respondents with the decision and order); *In re Billy Jacobs, Sr.*, 55 Agric. Dec. 1057 (1996) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 13 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Jim Fobber*, 55 Agric. Dec. 74 (1996) (Order Denying Respondent Jim Fobber's Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 12 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Robert L. Heywood*, 53 Agric. Dec. 541 (1994) (Order Dismissing Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed approximately 2 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Christian King*, 52 Agric. Dec. 1348 (1993) (Order Denying Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration, since it was not filed within 10 days after the date the Hearing Clerk served the respondent with the decision and order); *In re Charles Crook Wholesale Produce & Grocery Co.*, 48 Agric. Dec. 1123 (1989) (Order Dismissing Untimely Pet. for Recons.) (dismissing, as late-filed, a petition for reconsideration filed more than 4 months after the date the Hearing Clerk served the respondent with the decision and order); *In re Toscony Provision Co.*, 45 Agric. Dec. 583 (1986) (Order Denying Pet. for Recons. and Extension of Time) (dismissing a petition for reconsideration because it was not filed within 10 days after the date the Hearing Clerk served the respondent with the

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

ORDER

Respondent's petition for reconsideration, filed August 17, 2004, is denied.

Done at Washington, DC

September 2, 2004

William G. Jenson
Judicial Officer

⁴(...continued)
decision and order); *In re Charles Brink*, 41 Agric. Dec. 2147 (1982) (Order Denying Pet. for Recons.) (denying, as late-filed, a petition for reconsideration filed 17 days after the date the Hearing Clerk served the respondent with the decision and order).