

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 03-0013
)
Wanda McQuary, Randall)
Jones, and Gary Jackson,)
) **Decision and Order as to**
) **Wanda McQuary and Randall Jones**
Respondents)

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 13, 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].

Complainant alleges Wanda McQuary, Randall Jones, and Gary Jackson [hereinafter Respondents] committed willful violations of the Animal Welfare Act and the Regulations

and Standards on September 13, 2001, October 2, 2001, March 26, 2002, and September 26, 2002 (Compl. ¶¶ II-V).

The Hearing Clerk served Respondent Wanda McQuary and Respondent Randall Jones with the Complaint, the Rules of Practice, and a service letter on February 15, 2003.¹

The Hearing Clerk served Respondent Gary Jackson with the Complaint, the Rules of Practice, and a service letter on February 22, 2003.² Respondents 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)). The Hearing Clerk sent Respondents a letter dated April 30, 2003, informing them that an answer to the Complaint had not been received within the time required in the Rules of Practice.

On May 6, 2003, 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 Upon Admission of Facts by Reason of Default” [hereinafter Motion for Default Decision] and a “Proposed Decision and Order” [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondent Wanda McQuary and Respondent Gary Jackson with Complainant’s Motion for Default Decision, Complainant’s Proposed Default Decision,

¹United States Postal Service Domestic Return Receipts for Article Number 7000 1670 0011 8982 7401 and Article Number 7000 1670 0011 8982 7425.

²United States Postal Service Track/Confirm - Intranet Item Inquiry for Item Number: 7000 1670 0011 8982 7418.

and a service letter on May 15, 2003.³ The Hearing Clerk served Respondent Randall Jones with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter on May 17, 2003.⁴ Respondents failed to file objections to Complainant's Motion for 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 July 21, 2003, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Marc R. Hillson [hereinafter the ALJ] issued a "Decision and Order Upon Admission of Facts by Reason of Default" [hereinafter Initial Decision and Order]: (1) concluding that Respondents willfully violated the Animal Welfare Act and the Regulations and Standards as alleged in the Complaint; (2) directing Respondents to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondents an \$8,800 civil penalty; (4) revoking Respondents' Animal Welfare Act license; and (5) disqualifying Respondents from becoming licensed under the Animal Welfare Act and the Regulations.

³United States Postal Service Domestic Return Receipts for Article Number 7001 0360 0000 0304 5357 and Article Number 7001 0360 0000 0304 5364.

⁴United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0304 5340.

Respondent Gary Jackson did not appeal the Initial Decision and Order which the Hearing Clerk served on him on August 4, 2003.⁵ In accordance with the terms of the Initial Decision and Order (Initial Decision and Order at 8) and section 1.142 of the Rules of Practice (7 C.F.R. § 1.142), the Initial Decision and Order became final and effective as to Respondent Gary Jackson on September 8, 2003.

On August 20, 2003, Respondent Randall Jones appealed to the Judicial Officer. On August 29, 2003, Complainant filed “Opposition to Motion by Respondent Randal [sic] Jones to Set Aside Default.” On September 4, 2003, Respondent Wanda McQuary appealed to the Judicial Officer. On September 17, 2003, Complainant filed “Opposition to Respondent Wanda McQuary’s Appeal.” On September 24, 2003, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ’s Initial Decision and Order; therefore, I adopt, with minor modifications, the Initial Decision and Order as the final Decision and Order as it relates both to Respondent Wanda McQuary and Respondent Randall Jones. Additional conclusions by the Judicial Officer follow the ALJ’s conclusions of law, as restated.

⁵United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0310 3378.

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—

- (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[.]

§ 2141. Marking and identification of animals

All animals delivered for transportation, transported, purchased, or sold, in commerce, by a dealer or exhibitor shall be marked or identified at such time and in such humane manner as the Secretary may prescribe: *Provided*, That only live dogs and cats need be so marked or identified by a research facility.

§ 2146. Administration and enforcement by Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, 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 regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale. The Secretary shall inspect each research facility at least once each year and, in the case of deficiencies or deviations from the standards promulgated

under this chapter, shall conduct such follow-up inspections as may be necessary until all deficiencies or deviations from such standards are corrected. The Secretary shall promulgate such rules and regulations as he deems necessary to permit inspectors to confiscate or destroy in a humane manner any animal found to be suffering as a result of a failure to comply with any provision of this chapter or any regulation or standard issued thereunder if (1) such animal is held by a dealer, (2) such animal is held by an exhibitor, (3) such animal is held by a research facility and is no longer required by such research facility to carry out the research, test, or experiment for which such animal has been utilized, (4) such animal is held by an operator of an auction sale, or (5) such animal is held by an intermediate handler or a carrier.

§ 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), 2141, 2146(a), 2149(a)-(c), 2151.

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

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PART VI—PARTICULAR PROCEEDINGS

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CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

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FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the “Federal Civil Penalties Inflation Adjustment Act of 1990”.

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.—The Congress finds that—

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE—The purpose of this Act is to establish a mechanism that shall—

(1) allow for regular adjustment for inflation of civil monetary penalties;

- (2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and
- (3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term—

- (1) “agency” means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;
- (2) “civil monetary penalty” means any penalty, fine, or other sanction that—
 - (A)(i) is for a specific monetary amount as provided by Federal law; or
 - (ii) has a maximum amount provided for by Federal law; and
 - (B) is assessed or enforced by an agency pursuant to Federal law; and
 - (C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and
- (3) “Consumer Price Index” means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter—

- (1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 et seq.], the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 et seq.], or the Social Security Act [42 U.S.C. 301 et seq.], by the inflation adjustment described under section 5 of this Act; and
- (2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL
MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.—The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest—

- (1) multiple of \$10 in the case of penalties less than or equal to \$100;
- (2) multiple of \$100 in the case of penalties greater than \$100 but less than or equal to \$1,000;
- (3) multiple of \$1,000 in the case of penalties greater than \$1,000 but less than or equal to \$10,000;
- (4) multiple of \$5,000 in the case of penalties greater than \$10,000 but less than or equal to \$100,000;
- (5) multiple of \$10,000 in the case of penalties greater than \$100,000 but less than or equal to \$200,000; and
- (6) multiple of \$25,000 in the case of penalties greater than \$200,000.

(b) DEFINITION.—For purposes of subsection (a), the term “cost-of-living adjustment” means the percentage (if any) for each civil monetary penalty by which—

- (1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds
- (2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.—The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 (note).
7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

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PART 3—DEBT MANAGEMENT

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SUBPART E—ADJUSTED CIVIL MONETARY PENALTIES

§ 3.91 Adjusted civil monetary penalties.

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties*—.....

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(2) *Animal and Plant Health Inspection Service*. . . .

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(v) Civil penalty for a violation of Animal Welfare Act, codified at 7 U.S.C. 2149(b), has a maximum of \$2,750; and knowing failure to obey a cease and desist order has a civil penalty of \$1,650.

7 C.F.R. § 3.91(a), (b)(2)(v).

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

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SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

§ 2.40 Attending veterinarian and adequate veterinary care (dealers and exhibitors).

(a) Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section.

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor; and

(2) Each dealer and exhibitor shall assure that the attending veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

(b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:

(1) The availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of this subchapter;

(2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care;

(3) Daily observation of all animals to assess their health and well-being; *Provided, however,* That daily observation of animals may be accomplished by someone other than the attending veterinarian; and *Provided, further,* That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian;

(4) Adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia; and

(5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

SUBPART E—IDENTIFICATION OF ANIMALS

§ 2.50 Time and method of identification.

(a) A class “A” dealer (breeder) shall identify all live dogs and cats on the premises as follows:

(1) All live dogs and cats held on the premises, purchased, or otherwise acquired, sold or otherwise disposed of, or removed from the premises for delivery to a research facility or exhibitor or to another dealer, or for sale, through an auction sale or to any person for use as a pet, shall be identified by an official tag of the type described in § 2.51 affixed to the animal’s neck by means of a collar made of material generally considered acceptable to pet owners as a means of identifying their pet dogs or cats, or shall be identified by a distinctive and legible tattoo marking acceptable to and approved by the Administrator.

(2) Live puppies or kittens, less than 16 weeks of age, shall be identified by:

(i) An official tag as described in § 2.51;

(ii) A distinctive and legible tattoo marking approved by the Administrator; or

(iii) A plastic-type collar acceptable to the Administrator which has legibly placed thereon the information required for an official tag pursuant to § 2.51.

(b) A class “B” dealer shall identify all live dogs and cats under his or her control or on his or her premises as follows:

(1) When live dogs or cats are held, purchased, or otherwise acquired, they shall be immediately identified:

(i) By affixing to the animal’s neck an official tag as set forth in § 2.51 by means of a collar made of material generally acceptable to pet owners as a means of identifying their pet dogs or cats; or

(ii) By a distinctive and legible tattoo marking approved by the Administrator.

(2) If any live dog or cat is already identified by an official tag or tattoo which has been applied by another dealer or exhibitor, the dealer or exhibitor who purchases or otherwise acquires the animal may continue identifying the dog or cat by the previous identification number, or may replace the previous tag with his own official tag or approved tattoo. In either case, the class B dealer or class C exhibitor shall correctly list all old and new official tag numbers or tattoos in his or her records of purchase which shall be maintained in accordance with §§ 2.75 and 2.77. Any new official

tag or tattoo number shall be used on all records of any subsequent sales by the dealer or exhibitor, of any dog or cat.

(3) Live puppies or kittens less than 16 weeks of age, shall be identified by:

(i) An official tag as described in § 2.51;

(ii) A distinctive and legible tattoo marking approved by the Administrator; or

(iii) A plastic-type collar acceptable to the Administrator which has legibly placed thereon the information required for an official tag pursuant to § 2.51.

(4) When any dealer has made a reasonable effort to affix an official tag to a cat, as set forth in paragraphs (a) and (b) of this section, and has been unable to do so, or when the cat exhibits serious distress from the attachment of a collar and tag, the dealer shall attach the collar and tag to the door of the primary enclosure containing the cat and take measures adequate to maintain the identity of the cat in relation to the tag. Each primary enclosure shall contain no more than one weaned cat without an affixed collar and official tag, unless the cats are identified by a distinctive and legible tattoo or plastic-type collar approved by the Administrator.

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SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

(a) Each dealer, exhibitor, operator of an auction sale, and intermediate handler shall comply in all respects with the regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals.

SUBPART I—MISCELLANEOUS

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§ 2.126 Access and inspection of records and property.

(a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:

(1) To enter its place of business;

(2) To examine records required to be kept by the Act and the regulations in this part;

- (3) To make copies of the records;
 - (4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and
 - (5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.
- (b) The use of a room, table, or other facilities necessary for the proper examination of the records and inspection of the property or animals shall be extended to APHIS officials by the dealer, exhibitor, intermediate handler or carrier.

PART 3—STANDARDS

SUBPART A—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF DOGS AND CATS

FACILITIES AND OPERATING STANDARDS

§ 3.1 Housing facilities, general.

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(f) *Drainage and waste disposal.* Housing facility operators must provide for regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks. Housing facilities must be equipped with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and animals stay dry. Disposal and drainage systems must minimize vermin and pest infestation, insects, odors, and disease hazards. All drains must be properly constructed, installed, and maintained. If closed drainage systems are used, they must be equipped with traps and prevent the backflow of gases and the backup of sewage onto the floor. If the facility uses sump or settlement ponds, or other similar systems for drainage and animal waste disposal, the system must be located far enough away from the animal area of the housing facility to prevent odors, diseases, pests, and vermin infestation. Standing puddles of water in animal enclosures must be drained or mopped up so that the animals stay dry. Trash containers in housing facilities and in food storage and food preparation areas must be leakproof and must have tightly fitted lids on them at all times. Dead animals, animal parts, and animal waste must not be kept in food storage or food preparation areas, food freezers, food refrigerators, or animal areas.

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§ 3.2 Indoor housing facilities.

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(b) *Ventilation.* Indoor housing facilities for dogs and cats must be sufficiently ventilated at all times when dogs or cats are present to provide for their health and well-being, and to minimize odors, drafts, ammonia levels, and moisture condensation. Ventilation must be provided by windows, vents, fans, or air conditioning. Auxiliary ventilation, such as fans, blowers, or air conditioning must be provided when the ambient temperature is 85 °F (29.5 °C) or higher. The relative humidity must be maintained at a level that ensures the health and well-being of the dogs or cats housed therein, in accordance with the directions of the attending veterinarian and generally accepted professional and husbandry practices.

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3.4 Outdoor housing facilities.

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(b) *Shelter from the elements.* Outdoor facilities for dogs or cats must include one or more shelter structures that are accessible to each animal in each outdoor facility, and that are large enough to allow each animal in the shelter structure to sit, stand, and lie in a normal manner, and to turn about freely. In addition to the shelter structures, one or more separate outside areas of shade must be provided, large enough to contain all the animals at one time and protect them from the direct rays of the sun. Shelters in outdoor facilities for dogs or cats must contain a roof, four sides, and a floor, and must:

- (1) Provide the dogs and cats with adequate protection and shelter from the cold and heat;
- (2) Provide the dogs and cats with protection from the direct rays of the sun and the direct effect of wind, rain, or snow;
- (3) Be provided with a wind break and rain break at the entrance; and
- (4) Contain clean, dry, bedding material if the ambient temperature is below 50 °F (10 °C). Additional clean, dry bedding is required when the temperature is 35 °F (1.7 °C) or lower.

(c) *Construction.* Building surfaces in contact with animals in outdoor housing facilities must be impervious to moisture. Metal barrels, cans, refrigerators or freezers, and the like must not be used as shelter structures. The floors of outdoor housing facilities may be of compacted

earth, absorbent bedding, sand, gravel, or grass, and must be replaced if there are any prevalent odors, diseases, insects, pests, or vermin. All surfaces must be maintained on a regular basis. Surfaces of outdoor housing facilities—including houses, dens, etc.—that cannot be readily cleaned and sanitized, must be replaced when worn or soiled.

§ 3.6 Primary enclosures.

Primary enclosures for dogs and cats must meet the following minimum requirements:

(a) *General requirements.*

(1) Primary enclosures must be designed and constructed of suitable materials so that they are structurally sound. The primary enclosures must be kept in good repair.

(2) Primary enclosures must be constructed and maintained so that they:

- (i) Have no sharp points or edges that could injure the dogs and cats;
- (ii) Protect the dogs and cats from injury;
- (iii) Contain the dogs and cats securely;
- (iv) Keep other animals from entering the enclosure;
- (v) Enable the dogs and cats to remain dry and clean;
- (vi) Provide shelter and protection from extreme temperature and weather conditions that may be uncomfortable or hazardous to all dogs and cats;

(vii) Provide sufficient shade to shelter all dogs and cats housed in the primary enclosure at one time;

(viii) Provide all dogs and cats with easy and convenient access to clean food and water;

(ix) Enable all surfaces in contact with the dogs and cats to be readily cleaned and sanitized in accordance with §3.11(b) of this subpart, or be replaced when worn or soiled;

(x) Have floors that are constructed in a manner that protects the dogs' and cats' feet and legs from injury, and that, if of mesh or slatted construction, do not allow the dogs' or cats' feet to pass through any openings in the floor;

(xi) Provide sufficient space to allow each dog and cat to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner; and

(xii) Primary enclosures constructed on or after February 20, 1998 and floors replaced on or after that date, must comply with the requirements in this paragraph (a)(2). On or after January 21, 2000, all primary enclosures must be in compliance with the requirements in this paragraph (a)(2). If the

suspended floor of a primary enclosure is constructed of metal strands, the strands must either be greater than C of an inch in diameter (9 gauge) or coated with a material such as plastic or fiberglass. The suspended floor of any primary enclosure must be strong enough so that the floor does not sag or bend between the structural supports.

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ANIMAL HEALTH AND HUSBANDRY STANDARDS

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§ 3.11 Cleaning, sanitization, housekeeping, and pest control.

(a) *Cleaning of primary enclosures.* Excreta and food waste must be removed from primary enclosures daily, and from under primary enclosures as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent soiling of the dogs or cats contained in the primary enclosures, and to reduce disease hazards, insects, pests and odors. When steam or water is used to clean the primary enclosure, whether by hosing, flushing, or other methods, dogs and cats must be removed, unless the enclosure is large enough to ensure the animals would not be harmed, wetted, or distressed in the process. Standing water must be removed from the primary enclosure and animals in other primary enclosures must be protected from being contaminated with water and other wastes during the cleaning. The pans under primary enclosures with grill-type floors and the ground areas under raised runs with mesh or slatted floors must be cleaned as often as necessary to prevent accumulation of feces and food waste and to reduce disease hazards pests, insects and odors.

(b) *Sanitization of primary enclosures and food and water receptacles.* (1) Used primary enclosures and food and water receptacles must be cleaned and sanitized in accordance with this section before they can be used to house, feed, or water another dog or cat, or social grouping of dogs or cats.

(2) Used primary enclosures and food and water receptacles for dogs and cats must be sanitized at least once every 2 weeks using one of the methods prescribed in paragraph (b)(3) of this section, and more often if necessary to prevent an accumulation of dirt, debris, food waste, excreta, and other disease hazards.

(3) Hard surfaces of primary enclosures and food and water receptacles must be sanitized using one of the following methods:

- (i) Live steam under pressure;
 - (ii) Washing with hot water (at least 180 °F (82.2 °C)) and soap or detergent, as with a mechanical cage washer; or
 - (iii) Washing all soiled surfaces with appropriate detergent solutions and disinfectants, or by using a combination detergent/disinfectant product that accomplishes the same purpose, with a thorough cleaning of the surfaces to remove organic material, so as to remove all organic material and mineral buildup, and to provide sanitization followed by a clean water rinse.
- (4) Pens, runs, and outdoor housing areas using material that cannot be sanitized using the methods provided in paragraph (b)(3) of this section, such as gravel, sand, grass, earth, or absorbent bedding, must be sanitized by removing the contaminated material as necessary to prevent odors, diseases, pests, insects, and vermin infestation.
- (c) *Housekeeping for premises.* Premises where housing facilities are located, including buildings and surrounding grounds, must be kept clean and in good repair to protect the animals from injury, to facilitate the husbandry practices required in this subpart, and to reduce or eliminate breeding and living areas for rodents and other pests and vermin. Premises must be kept free of accumulations of trash, junk, waste products, and discarded matter. Weeds, grasses, and bushes must be controlled so as to facilitate cleaning of the premises and pest control, and to protect the health and well-being of the animals.
- (d) *Pest control.* An effective program for the control of insects, external parasites affecting dogs and cats, and birds and mammals that are pests, must be established and maintained so as to promote the health and well-being of the animals and reduce contamination by pests in animal areas.

9 C.F.R. §§ 1.1; 2.40, .50(a)-(b), .100(a), .126; 3.1(f), .2(b), .4(b)-(c), .6(a)(1)-(2), .11

(footnotes omitted).

**ADMINISTRATIVE LAW JUDGE'S
INITIAL DECISION AND ORDER
(AS RESTATED)**

Statement of the Case

Respondent Wanda McQuary and Respondent Randall Jones failed to file answers 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)) and the failure to deny or otherwise respond to an allegation of the Complaint 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 Wanda McQuary and Randall Jones is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Wanda McQuary and Respondent Randall Jones are individuals with a business mailing address of 565 County Road 131, Black Rock, Arkansas 72455.

2. Respondent Wanda McQuary and Respondent Randall Jones are, and at all times material to this proceeding were, operating as dealers as defined in the Animal Welfare Act and the Regulations.

3. On September 13, 2001, Respondent Wanda McQuary and Respondent Randall Jones willfully violated section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to provide veterinary care to animals in need of care.

4. On September 13, 2001, Respondent Wanda McQuary and Respondent Randall Jones willfully violated section 11 of the Animal Welfare Act (7 U.S.C. § 2141)

and section 2.50 of the Regulations (9 C.F.R. § 2.50) by failing to individually identify dogs.

5. On September 13, 2001, Respondent Wanda McQuary and Respondent Randall Jones willfully violated section 16 of the Animal Welfare Act (7 U.S.C. § 2146) and section 2.126 of the Regulations (9 C.F.R. § 2.126) by failing to have the records of animals on hand, a program of veterinary care, and sales records located at Respondents' premises.

6. On September 13, 2001, Respondent Wanda McQuary and Randall Jones willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified in Findings of Fact 6(a)-6(e):

(a) Housing facilities were not equipped with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and animals stay dry (9 C.F.R. § 3.1(f));

(b) Surfaces of outdoor housing facilities for dogs were not maintained on a regular basis (9 C.F.R. § 3.4(c));

(c) Primary enclosures for dogs were not structurally sound and maintained in good repair (9 C.F.R. § 3.6(a)(1));

(d) Primary enclosures for dogs were not structurally sound and maintained in good repair so that they protect the animals from injury and have no sharp points or edges that could injure the animals (9 C.F.R. § 3.6(a)(1), (a)(2)); and

(e) Excreta was not removed from primary enclosures daily to prevent soiling of the dogs and to reduce disease hazards, insects, pests, and odors (9 C.F.R. § 3.11(a)).

7. On October 2, 2001, Respondent Wanda McQuary and Respondent Randall Jones willfully violated section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to provide veterinary care to animals in need of care.

8. On October 2, 2001, Respondent Wanda McQuary and Respondent Randall Jones willfully violated section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50) by failing to individually identify dogs.

9. On October 2, 2001, Respondent Wanda McQuary and Respondent Randall Jones willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified in Findings of Fact 9(a)-9(b):

(a) Primary enclosures for dogs were not structurally sound and maintained in good repair (9 C.F.R. § 3.6(a)(1)); and

(b) Primary enclosures for dogs were not structurally sound and maintained in good repair so that they protect the animals from injury and have no sharp points or edges that could injure the animals (9 C.F.R. § 3.6(a)(1), (a)(2)).

10. On March 26, 2002, Respondent Wanda McQuary and Respondent Randall Jones willfully violated section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50) by failing to individually identify dogs.

11. On March 26, 2002, Respondent Wanda McQuary and Respondent Randall Jones willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified in Findings of Fact 11(a)-11(c):

(a) Indoor housing facilities for dogs were not adequately ventilated and cooled so as to provide for the health and comfort of the animals at all times (9 C.F.R. § 3.2(b));

(b) Dogs in outdoor housing facilities were not provided with adequate protection from the elements (9 C.F.R. § 3.4(b)); and

(c) The premises, including buildings and surrounding grounds, were not kept in good repair, clean, and free of trash (9 C.F.R. § 3.11).

12. On September 26, 2002, Respondent Wanda McQuary and Respondent Randall Jones willfully violated section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to provide veterinary care to animals in need of care.

13. On September 26, 2002, Respondent Wanda McQuary and Respondent Randall Jones willfully violated section 11 of the Animal Welfare Act (7 U.S.C. § 2141) and section 2.50 of the Regulations (9 C.F.R. § 2.50) by failing to individually identify dogs.

14. On September 26, 2002, Respondent Wanda McQuary and Respondent Randall Jones willfully violated section 16 of the Animal Welfare Act (7 U.S.C. § 2146) and section 2.126 of the Regulations (9 C.F.R. § 2.126) by failing to have the records of

animals on hand, a program of veterinary care, and sales records located at Respondents' premises.

15. On September 26, 2002, Respondent Wanda McQuary and Respondent Randall Jones willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and the Standards specified in Findings of Fact 15(a)-15(e):

(a) Indoor housing facilities for dogs were not sufficiently ventilated to provide for the health and well-being of the animals and to minimize odors, drafts, ammonia levels, and moisture condensation (9 C.F.R. § 3.2(b));

(b) The building surfaces in contact with the animals in outdoor housing facilities for dogs were not impervious to moisture (9 C.F.R. § 3.4(c));

(c) Primary enclosures for dogs were not structurally sound and maintained in good repair (9 C.F.R. § 3.6(a)(1));

(d) Primary enclosures for dogs were not kept clean and sanitized, as required (9 C.F.R. § 3.11(b)(2)); and

(e) The premises, including buildings and surrounding grounds, were not kept in good repair, clean, and free of trash (9 C.F.R. § 3.11).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. By reason of the facts set forth in the Findings of Fact, Respondent Wanda McQuary and Respondent Randall Jones have willfully violated the Animal Welfare Act and the Regulations and Standards.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent Wanda McQuary's Appeal Petition

The Hearing Clerk served Respondent Wanda McQuary with the Initial Decision and Order on August 4, 2003.⁶ On September 4, 2003, 31 days after service, Respondent Wanda McQuary filed a letter dated August 22, 2003 [hereinafter McQuary's Appeal Petition]. Section 1.145(a) of the Rules of Practice provides that an appeal must be filed within 30 days after service of an administrative law judge's decision, as follows:

§ 1.145 Appeal to Judicial Officer.

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

7 C.F.R. § 1.145(a).

Respondent Wanda McQuary's late-filed appeal could be denied. However, section 1.139 of the Rules of Practice provides that an administrative law judge's default decision becomes final 35 days after service of the default decision, as follows:

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

. . . Where the decision as proposed by complainant is entered, such decision shall become final and effective without further proceedings 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145.

⁶United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0310 3330.

7 C.F.R. § 1.139.

Thus, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), a default decision does not become final and effective until 5 days after the 30-day appeal time has elapsed. This provision was placed in the Rules of Practice so that if an appeal is inadvertently filed up to 4 days late, *e.g.*, because of a delay in the mail system, an extension of time could be granted by the Judicial Officer for the filing of a late appeal.⁷ The Judicial Officer has jurisdiction to hear an appeal petition filed after the 30-day appeal time has elapsed but before the administrative law judge's decision becomes final.

The ALJ's Initial Decision and Order had not become final on September 4, 2003, when Respondent Wanda McQuary filed her appeal petition. The postmark on the

⁷*In re David Finch*, 61 Agric. Dec. 567, 582-84 (2002); *In re Scamcorp, Inc.*, 55 Agric. Dec. 1395, 1405-06 (1996) (Ruling on Respondent's Motion to Reconsider Ruling Denying Motion to Dismiss Appeal); *In re Sandra L. Reid*, 55 Agric. Dec. 996, 999-1000 (1996); *In re Rinella's Wholesale, Inc.*, 44 Agric. Dec. 1234, 1236 (1985) (Order Denying Pet. for Recons.); *In re William T. Powell*, 44 Agric. Dec. 1220, 1222 (1985) (Order Denying Late Appeal); *In re Palmer G. Hulings*, 44 Agric. Dec. 298, 300-01 (1985) (Order Denying Late Appeal), *appeal dismissed*, No. 85-1220 (10th Cir. Aug. 16, 1985); *In re Toscony Provision Co.*, 43 Agric. Dec. 1106, 1108 (1984) (Order Denying Late Appeal), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished); *In re Henry S. Shatkin*, 34 Agric. Dec. 296, 315 (1975) (Order Granting Motion to Withdraw Appeal).

envelope containing Respondent Wanda McQuary's appeal petition establishes that Respondent Wanda McQuary mailed her appeal petition from Pocahontas, Arkansas, on August 27, 2003. Under these circumstances, I grant Respondent Wanda McQuary a 1-day

extension of time for filing her appeal petition.⁸ Thus, I deem Respondent Wanda

⁸Had the ALJ's Initial Decision and Order become final prior to Respondent Wanda McQuary's filing an appeal, the Judicial Officer would not have had jurisdiction to consider Respondent Wanda McQuary's appeal petition. *See In re Samuel K. Angel*, 61 Agric. Dec. 275 (2002) (dismissing the respondent's appeal petition filed 3 days after the initial decision and order became final); *In re Paul Eugenio*, 60 Agric. Dec. 676 (2001) (dismissing the respondent's appeal petition filed 1 day after the initial decision and order became final); *In re Harold P. Kafka*, 58 Agric. Dec. 357 (1999) (dismissing the respondent's appeal petition filed 15 days after the initial decision and order became final), *aff'd per curiam*, 259 F.3d 716 (3d Cir. 2001) (Table); *In re Kevin Ackerman*, 58 Agric. Dec. 340 (1999) (dismissing Kevin Ackerman's appeal petition filed 1 day after the initial decision and order became final); *In re Severin Peterson*, 57 Agric. Dec. 1304 (1998) (dismissing the applicants' appeal petition filed 23 days after the initial decision and order became final); *In re Queen City Farms, Inc.*, 57 Agric. Dec. 813 (1998) (dismissing the respondent's appeal petition filed 58 days after the initial decision and order became final); *In re Gail Davis*, 56 Agric. Dec. 373 (1997) (dismissing the respondent's appeal petition filed 41 days after the initial decision and order became final); *In re Field Market Produce, Inc.*, 55 Agric. Dec. 1418 (1996) (dismissing the respondent's appeal petition filed 8 days after the initial decision and order became effective); *In re Ow Duk Kwon*, 55 Agric. Dec. 78 (1996) (dismissing the respondent's appeal petition filed 35 days after the initial decision and order became effective); *In re New York Primate Center, Inc.*, 53 Agric. Dec. 529 (1994) (dismissing the respondents' appeal petition filed 2 days after the initial decision and order became final); *In re K. Lester*, 52 Agric. Dec. 332 (1993) (dismissing the respondent's appeal petition filed 14 days after the initial decision and order became final and effective); *In re Amril L. Carrington*, 52 Agric. Dec. 331 (1993) (dismissing the respondent's appeal petition filed 7 days after the initial decision and order became final and effective); *In re Teofilo Benicta*, 52 Agric. Dec. 321 (1993) (dismissing the respondent's appeal petition filed 6 days after the initial decision and order became final and effective); *In re Newark Produce Distributors, Inc.*, 51 Agric. Dec. 955 (1992) (dismissing the respondent's appeal petition filed after the initial decision and order became final and effective); *In re Laura May Kurjan*, 51 Agric. Dec. 438 (1992) (dismissing the respondent's appeal petition filed after the initial decision and order became final); *In re Kermit Breed*, 50 Agric. Dec. 675 (1991) (dismissing the respondent's late-filed appeal petition); *In re Bihari Lall*, 49 Agric. Dec. 896 (1990) (stating the respondent's appeal petition, filed after the initial decision became final, must be dismissed because it was not timely filed); *In re Dale Haley*, 48 Agric. Dec. 1072 (1989) (stating the respondents' appeal petition, filed after the initial decision became final and effective, must be dismissed because it was not timely filed); *In re Mary Fran Hamilton*, 45 Agric. Dec.

(continued...)

McQuary's appeal petition filed September 4, 2003, to have been timely filed.

⁸(...continued)

2395 (1986) (dismissing the respondent's appeal petition filed with the Hearing Clerk on the day the initial decision and order had become final and effective); *In re Bushelle Cattle Co.*, 45 Agric. Dec. 1131 (1986) (dismissing the respondent's appeal petition filed 2 days after the initial decision and order became final and effective); *In re William T. Powell*, 44 Agric. Dec. 1220 (1985) (stating it has consistently been held that, under the Rules of Practice, the Judicial Officer has no jurisdiction to hear an appeal after the initial decision and order becomes final); *In re Toscony Provision Co., Inc.*, 43 Agric. Dec. 1106 (1984) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial decision becomes final), *aff'd*, No. 81-1729 (D.N.J. Mar. 11, 1985) (court reviewed merits notwithstanding late administrative appeal), *aff'd*, 782 F.2d 1031 (3d Cir. 1986) (unpublished); *In re Dock Case Brokerage Co.*, 42 Agric. Dec. 1950 (1983) (dismissing the respondents' appeal petition filed 5 days after the initial decision and order became final); *In re Veg-Pro Distributors*, 42 Agric. Dec. 1173 (1983) (denying the respondent's appeal petition filed 1 day after the default decision and order became final); *In re Samuel Simon Petro*, 42 Agric. Dec. 921 (1983) (stating the Judicial Officer has no jurisdiction to hear an appeal that is filed after the initial decision and order becomes final and effective); *In re Yankee Brokerage, Inc.*, 42 Agric. Dec. 427 (1983) (dismissing the respondent's appeal petition filed on the day the initial decision became effective); *In re Charles Brink*, 41 Agric. Dec. 2146 (1982) (stating the Judicial Officer has no jurisdiction to consider the respondent's appeal dated before the initial decision and order became final, but not filed until 4 days after the initial decision and order became final and effective), *reconsideration denied*, 41 Agric. Dec. 2147 (1982); *In re Mel's Produce, Inc.*, 40 Agric. Dec. 792 (1981) (stating since the respondent's petition for reconsideration was not filed within 35 days after service of the default decision, the default decision became final and neither the administrative law judge nor the Judicial Officer has jurisdiction to consider the respondent's petition); *In re Animal Research Center of Massachusetts, Inc.*, 38 Agric. Dec. 379 (1978) (stating failure to file an appeal petition before the effective date of the initial decision is jurisdictional); *In re Willie Cook*, 39 Agric. Dec. 116 (1978) (stating it is the consistent policy of the United States Department of Agriculture not to consider appeals filed more than 35 days after service of the initial decision).

Respondent Wanda McQuary's raises one issue related to the instant proceeding in her appeal petition.⁹ Respondent Wanda McQuary states she "would like to have the opportunity [t]o continue raising dogs" (Respondent McQuary's Appeal Pet.).

The ALJ revoked Respondent Wanda McQuary's Animal Welfare Act license and disqualified Respondent Wanda McQuary from becoming licensed under the Animal Welfare Act and the Regulations (Initial Decision and Order at 8). However, the ALJ's Initial Decision and Order does not prohibit Respondent Wanda McQuary's raising dogs. Individuals who merely raise dogs are not required by the Animal Welfare Act or the Regulations to obtain an Animal Welfare Act license. Therefore, I reject Respondent Wanda McQuary's request that I modify the sanction imposed against her to allow her to raise dogs because nothing in the ALJ's Initial Decision and Order, which I adopt as the final Decision and Order as to Wanda McQuary and Randall Jones, prohibits Respondent Wanda McQuary from raising dogs.

Respondent Randall Jones' Appeal Petition

On August 20, 2003, Respondent Randall Jones filed a letter [hereinafter Jones' Appeal Petition], in which he raises four issues. First, Respondent Randall Jones requests a

⁹Respondent Wanda McQuary also addresses a July 22, 2003, United States Department of Agriculture inspection report, a copy of which she attached to her appeal petition (Respondent McQuary's Appeal Pet.). The July 22, 2003, United States Department of Agriculture inspection report is not relevant to this proceeding which relates to September 13, 2001, October 2, 2001, March 26, 2002, and September 26, 2002, violations of the Animal Welfare Act and the Regulations and Standards.

reduction of the civil penalty assessed against him and the removal of the disqualification from obtaining an Animal Welfare Act license (Respondent Jones' Appeal Pet. at 1-2).

Respondent Randall Jones, by his failure to file an answer within 20 days after the Hearing Clerk served him with the Complaint, is deemed to have admitted the allegations in the Complaint.¹⁰ Thus, Respondent Randall Jones is deemed to have admitted that he willfully violated the Animal Welfare Act and the Regulations and Standards 24 times during the period from September 13, 2001, through September 26, 2002.

With respect to the civil monetary penalty, the Secretary of Agriculture is required to give due consideration 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.¹¹

The limited record before me does not provide any indication of the size of Respondent Randall Jones' business; therefore, for the purposes of determining the amount of the civil penalty, I give Respondent Randall Jones the benefit of the lack of a record and assume for purposes of this Decision and Order as to Wanda McQuary and Randall Jones that Respondent Randall Jones' business is a small business.

Many of the violations of the Animal Welfare Act and the Regulations and Standards, which Respondent Randall Jones is deemed to have admitted, are grave. For example, Respondent Randall Jones' September 13, 2001, October 2, 2001, and September 26, 2002, failures to provide veterinary care for animals in need of care are

¹⁰See 7 C.F.R. § 1.136(c).

¹¹See 7 U.S.C. § 2149(b).

serious violations of the Regulations which affect the health and well-being of Respondents' animals.

Respondent Randall Jones' conduct over a period of 1 year reveals a consistent disregard for, and unwillingness to abide by, the requirements of the Animal Welfare Act and the Regulations and Standards. 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)) and a lack of good faith.

The United States Department of Agriculture's current 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 seeks: (1) revocation of Respondent Randall Jones' Animal Welfare Act license; (2) Respondent Randall Jones' disqualification from becoming licensed under

the Animal Welfare Act and the Regulations; (3) the assessment of an \$8,800 civil penalty against Respondents; and (4) a cease and desist order (Complainant's Proposed Decision and Order; Complainant's Opposition to Motion by Respondent Randal [sic] Jones to Set Aside Default).

Respondent Randall Jones could be assessed a maximum civil penalty of \$66,000 for his 24 violations of the Animal Welfare Act and the Regulations and Standards.¹² After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the requirements of 7 U.S.C. § 2149(b), the remedial purposes of the Animal Welfare Act, and the recommendations of the administrative officials, I conclude that a cease and desist order, revocation of Respondent Randall Jones' Animal Welfare Act license, disqualification of Respondent Randall Jones from obtaining an Animal Welfare Act license, and assessment of an \$8,800 civil penalty are appropriate and necessary to ensure Respondent Randall Jones' compliance with the Animal Welfare Act and the Regulations and Standards in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to thereby fulfill the remedial purposes of the Animal Welfare Act.

¹²Section 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 and the Regulations and Standards. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil 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 and the Regulations and Standards by increasing the maximum civil penalty from \$2,500 to \$2,750 (7 C.F.R. § 3.91(b)(2)(v)).

Second, Respondent Randall Jones states all of the violations alleged in the Complaint occurred at “9470 Hwy[,] 251[,] [P]ocahontas, AR 72455[,]” and his “site” is located at “565 Lawerance Rd. 131[,] Black Rock, AR 72415[,]” a site that “has always been in good standing except for small write ups” which “are always fixed” (Respondent Jones’ Appeal Pet. at 1).

Respondent Randall Jones’ denial that the violations alleged in the Complaint occurred on a premises in which he had an interest comes far too late. Respondent Randall Jones is deemed to have admitted the allegations in the Complaint by his failure to file a timely answer. Complainant alleged the violations occurred on “respondents’ premises” (Compl. ¶¶ II-V). Therefore, Respondent Randall Jones is deemed to have admitted that the violations occurred on a premises in which he had an interest.

Third, Respondent Randall Jones contends he recently bought a whelping building which he is currently fixing (Respondent Jones’ Appeal Pet. at 1).

Respondent Randall Jones’ recent purchase of a whelping building and his efforts to fix that building are not relevant to his violations of the Animal Welfare Act and the Regulations and Standards that occurred during the period from September 13, 2001, through September 26, 2002.

Fourth, Respondent Randall Jones states he is “in the process now of getting [his] own license.” (Respondent Jones’ Appeal Pet. at 2.)

This Decision and Order as to Wanda McQuary and Randall Jones disqualifies Respondent Randall Jones from obtaining an Animal Welfare Act license. Respondent

Randall Jones' initiation of the process to obtain an Animal Welfare Act license does not alter the sanction imposed against Respondent Randall Jones. If Complainant intends to issue Respondent Randall Jones an Animal Welfare Act license and no longer believes disqualification of Respondent Randall Jones from obtaining an Animal Welfare Act license is necessary to accomplish the remedial purposes of the Animal Welfare Act, Complainant is instructed to file a petition for reconsideration requesting modification of the sanction imposed in this Decision and Order as to Wanda McQuary and Randall Jones and setting forth the reasons for any requested modification.

Basis for Adopting the ALJ's Initial Decision and Order

Respondent Wanda McQuary and Respondent Randall Jones 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 Respondent Wanda McQuary and Respondent Randall Jones with the Complaint, the Rules of Practice, and the Hearing Clerk's February 14, 2003, service letter on February 15, 2003.¹³ 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.

¹³See note 1.

(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 paragraph (a) of this section 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.

§ 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 Respondent Wanda McQuary and Respondent Randall Jones 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 6.

Similarly, the Hearing Clerk informed Respondent Wanda McQuary and Respondent Randall Jones in the February 14, 2003, 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:

February 14, 2003

Ms. Wanda McQuary
Mr. Randall Jones and
Mr. Gary Jackson
565 Country [sic] Road 131
Black Rock, Arkansas 72455

Dear Sir/Madam:

Subject: In re: Wanda McQuary, Randall Jones, and Gary Jackson - Respondents
AWA Docket No. 03-0013

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

The Hearing Clerk sent Respondent Wanda McQuary and Respondent Randall Jones a letter dated April 30, 2003, informing them that their answers to the Complaint had not been received within the time required in the Rules of Practice. On May 6, 2003, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant

filed a Motion for Default Decision and a Proposed Default Decision. The Hearing Clerk served Respondent Wanda McQuary with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and a service letter on May 15, 2003.¹⁴ The Hearing Clerk served Respondent Randall Jones with Complainant's Motion for Default Decision, Complainant's Proposed Default Decision, and the Hearing Clerk's May 6, 2003, service letter on May 17, 2003.¹⁵

The Hearing Clerk informed Respondent Wanda McQuary and Respondent Randall Jones in the May 6, 2003, service letter that they had 20 days in which to file objections to Complainant's Proposed Default Decision, as follows:

May 6, 2003

Ms. Wanda McQuary
Mr. Randall Jones
Mr. Gary Jackson
565 Country [sic] Road 131
Black Rock, Arkansas 72455

Dear Sir/Madam:

Subject: In re: Wanda McQuary, Randall Jones, and Gary Jackson
Respondents
AWA Docket No. 03-0013

Enclosed is a copy of Complainant's Motion for Adoption of Proposed Decision and Order Upon Admission of Facts by Reason of Default, together with a copy of the Proposed Decision and Order Upon Admission of Facts by

¹⁴United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0304 5357.

¹⁵See note 4.

Reason [of] Default, which have been filed with this office in the above-captioned proceeding.

In accordance with the applicable Rules of Practice, you will have 20 days from the receipt of this letter in which to file with this office an original and three copies of objections to the Proposed Decision.

Sincerely,

/s/

Joyce A. Dawson
Hearing Clerk

Respondent Wanda McQuary and Respondent Randall Jones failed to file objections to Complainant's Motion for Default Decision or 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).

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 aside

the default decision,¹⁶ generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.¹⁷

¹⁶See *In re Dale Goodale*, 60 Agric. Dec. 670 (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. 688 (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).

¹⁷See generally *In re David Finch*, 61 Agric. Dec. 567 (2002) (holding the default decision was properly issued where the respondent filed his answer 3 months 18 days after he was served with the complaint 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 Heartland Kennels, Inc.*, 61 Agric. Dec. 492 (2002) (holding the default decision was properly issued where the respondents filed their answer 3 months 9 days after they were served with the complaint

(continued...)

¹⁷(...continued)

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 Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25 (2002) (holding the default decision was properly issued where Respondent Steven Bourk's first and only filing was 10 months 9 days after he was served with the complaint and Respondent Carmella Bourk's first filing was 5 months 5 days after she was served with the complaint; stating both respondents are deemed, by their 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 J. Wayne Shaffer*, 60 Agric. Dec. 444 (2001) (holding the default decision was properly issued where the respondents' first filing in the proceeding was 5 months 13 days after they were served with the complaint and 4 months 24 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 alleged in the complaint); *In re Beth Lutz*, 60 Agric. Dec. 53 (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*, 59 Agric. Dec. 581 (2000) (holding the default decision was properly issued where the respondents filed their answer 6 months 5 days after they were served with the complaint and 5 months 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

(continued...)

¹⁷(...continued)

1 year 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. 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),

(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)). Respondent Wanda McQuary and Respondent Randall Jones failed to file timely answers. Respondent Wanda McQuary's first and only filing in this proceeding is Respondent McQuary's Appeal Petition, which she filed 6 months 20 days after being served with the Complaint. Respondent Randall Jones' first and only filing in this proceeding is Respondent Jones' Appeal Petition, which he filed 6 months 5 days after being served with the Complaint.

¹⁷(...continued)

1995 WL 523336 (6th Cir. 1995), *printed in* 54 Agric. Dec. 870 (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 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 Wanda McQuary's and Respondent Randall Jones' failures to file timely answers are deemed, for purposes of this proceeding, admissions of the allegations in the Complaint and constitute waivers 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 ALJ properly issued the Initial Decision and Order. Application of the default provisions of the Rules of Practice does not deprive Respondent Wanda McQuary or Respondent Randall Jones of rights under the due process clause of the Fifth Amendment to the Constitution of the United States.¹⁸

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

¹⁸*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 Constitution of the United States 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).

ORDER

1. Respondent Wanda McQuary and Respondent Randall Jones, their agents and 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 Standards, and in particular, shall cease and desist from:

(a) Failing to provide veterinary care to animals in need of care;

(b) Failing to establish and maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine;

(c) Failing to individually identify animals, as required;

(d) Failing to maintain records of the acquisition, disposition, description, and identification of animals, as required;

(e) Failing to maintain housing facilities for animals so that they are structurally sound and in good repair in order to protect the animals from injury, contain the animals securely, and restrict other animals from entering;

(f) Failing to provide for the regular and frequent collection, removal, and disposal of animal and food wastes and dead animals, in a manner that minimizes contamination and disease risks;

(g) Failing to construct and maintain indoor and sheltered housing facilities for animals so that they are adequately ventilated;

(h) Failing to provide animals with adequate shelter from the elements;

and

(i) Failing to provide a suitable method for the rapid elimination of

excess water and wastes from housing facilities for animals.

The cease and desist provisions of this Order shall become effective as to Respondent Wanda McQuary on the day after service of this Order on Respondent Wanda McQuary. The cease and desist provisions of this Order shall become effective as to Respondent Randall Jones on the day after service of this Order on Respondent Randall Jones.

2. Respondent Wanda McQuary and Respondent Randall Jones are jointly and severally assessed an \$8,800 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:

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

Payment of the civil penalty shall be sent to, and received by, Frank Martin, Jr., within 60 days after service of this Order on Respondent Wanda McQuary and Respondent Randall Jones. Respondent Wanda McQuary and Respondent Randall Jones shall state on the certified check or money order that payment is in reference to AWA Docket No. 03-0013.

3. Respondent Wanda McQuary's and Respondent Randall Jones' Animal Welfare Act license is revoked. Respondent Wanda McQuary and Respondent Randall Jones are permanently disqualified from becoming licensed under the Animal Welfare Act and the Regulations.

The Animal Welfare Act license revocation provisions of this Order shall become effective as to Respondent Wanda McQuary on the 60th day after service of this Order on Respondent Wanda McQuary. The Animal Welfare Act license revocation provisions of this Order shall become effective as to Respondent Randall Jones on the 60th day after service of this Order on Respondent Randall Jones. The Animal Welfare Act license disqualification provisions of this Order shall become effective as to Respondent Wanda McQuary upon service of this Order on Respondent Wanda McQuary. The Animal Welfare Act license disqualification provisions of this Order shall become effective as to Respondent Randall Jones upon service of this Order on Respondent Randall Jones.

RIGHT TO JUDICIAL REVIEW

Respondent Wanda McQuary and Respondent Randall Jones 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. Respondent Wanda McQuary and Respondent Randall Jones 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 October 1, 2003.

Done at Washington, DC

October 1, 2003

William G. Jenson
Judicial Officer