

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 04-0023
)
Mary Jean Williams, an)
individual; John Bryan Williams,)
an individual; and Deborah Ann)
Milette, an individual,)
) **Decision and Order as to**
Respondents) **Mary Jean Williams**

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on August 19, 2004. 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 Mary Jean Williams, John Bryan Williams, and Deborah Ann Milette willfully violated the Regulations (Compl. ¶¶ 5-11). The Hearing Clerk

served Respondent Mary Jean Williams with the Complaint and a service letter on November 19, 2004.¹ Respondent Mary Jean Williams failed to file an answer to the Complaint within 20 days after service as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On January 19, 2005, 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 as to Respondents Mary Jean Williams and John Bryan Williams [hereinafter Motion for Default Decision] and a proposed Decision and Order as to Respondents Mary Jean Williams and John Bryan Williams [hereinafter Proposed Default Decision]. Respondent Mary Jean Williams 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 April 28, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order [hereinafter Initial Decision]: (1) concluding Respondent Mary Jean Williams willfully violated sections 2.1(a)(1), 2.40(a)-(b), and 2.131(a)(1) of the Regulations (9 C.F.R. §§ 2.1(a)(1), .40(a)-(b), .131(a)(1)); (2) ordering Respondent Mary Jean Williams to cease and desist from violating the Animal Welfare Act, the Regulations, and the standards issued under the Animal Welfare Act (9 C.F.R. §§

¹Memorandum of Tonya Fisher, dated November 19, 2004.

3.1-.142) [hereinafter the Standards]; and (3) assessing Respondent Mary Jean Williams a \$5,500 civil penalty (Initial Decision at 4-6).

On August 8, 2005, Respondent Mary Jean Williams appealed the ALJ's Initial Decision to the Judicial Officer. On September 6, 2005, Complainant filed a response to Respondent Mary Jean Williams' appeal petition. On September 13, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision as to Respondent Mary Jean Williams.

Based upon a careful review of the record, I agree with the ALJ's Initial Decision as it relates to Respondent Mary Jean Williams. Therefore, except for minor modifications, I adopt the ALJ's Initial Decision as it relates to Respondent Mary Jean Williams as the final Decision and Order as to Mary Jean Williams. Additional conclusions by the Judicial Officer follow the ALJ's conclusions of law, as restated.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

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—

....

(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[.]

§ 2149. Violations by licensees

.....

- (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. Any such civil penalty may be compromised by the Secretary. Upon any failure to pay the penalty assessed by a final order under this section, the Secretary shall request the Attorney General to institute a civil action in a district court of the United States or other United States court for any district in which such person is found or resides or transacts business, to collect the penalty, and such court shall have jurisdiction to hear and decide any such action. Any person who knowingly fails to obey a cease and desist order made by the Secretary under this section shall be subject to a civil penalty of \$1,500 for each offense, and each day during which such failure continues shall be deemed a separate offense.

(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), 2149(b)-(c), 2151.

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

....

PART VI—PARTICULAR PROCEEDINGS

....

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

....

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.

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

....

PART 3—DEBT MANAGEMENT

....

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—*

....

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

....

(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 at the wholesale level 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 animal to a research facility, an exhibitor, or a dealer (wholesale); any retail outlet where dogs are sold for hunting, breeding, or security purposes; or any person who does not sell or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than \$500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats during any calendar year.

PART 2—REGULATIONS

SUBPART A—LICENSING

§ 2.1 Requirements and application.

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

....

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

SUBPART I—MISCELLANEOUS

.....

§ 2.131 Handling of animals.

(a)(1) Handling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.

9 C.F.R. §§ 1.1; 2.1(a)(1), .40(a), (b)(1)-(2), (4), .131(a)(1) (2004).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS RESTATED)

Statement of the Case

Respondent Mary Jean Williams failed to file an answer to the Complaint 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 the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice

(7 C.F.R. § 1.139), the failure to file an answer or the admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint that relate to Respondent Mary Jean Williams are adopted as findings of fact. This Decision and Order as to Mary Jean Williams is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Mary Jean Williams is an individual whose business mailing address is Route 1, Box 67, Ivanhoe, Texas 75447. At all times material to this proceeding, Respondent Mary Jean Williams was a *dealer* as that term is defined in the Animal Welfare Act and the Regulations.
2. Respondent Mary Jean Williams has a small business. The gravity of Respondent Mary Jean Williams' violations of the Regulations is great and resulted in the death of a young tiger. Respondent Mary Jean Williams has no record of previous violations of the Animal Welfare Act, the Regulations, or the Standards.
3. On or about September 27, 2002, and September 28, 2002, Respondent Mary Jean Williams operated as a *dealer*, as that term is defined in the Animal Welfare Act and the Regulations, without obtaining an Animal Welfare Act license from the Secretary of Agriculture. Specifically, Respondent Mary Jean Williams, while unlicensed, transported a young tiger for use in exhibition from Hennepin, Illinois, to Bloomington, Illinois. (9 C.F.R. § 2.1(a)(1) (2004).)

4. On September 27, 2002, Respondent Mary Jean Williams failed to have an attending veterinarian provide adequate veterinary care to a young tiger. Specifically, Respondent Mary Jean Williams, who was not a veterinarian, approved of and acquiesced in the administration of a sedative solution to a young tiger by a person who was not a veterinarian. (9 C.F.R. § 2.40(a) (2004).)

5. On September 27, 2002, Respondent Mary Jean Williams failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel. Specifically, Respondent Mary Jean Williams failed to provide personnel capable of handling a tiger safely. (9 C.F.R. § 2.40(b)(1) (2004).)

6. On September 28, 2002, Respondent Mary Jean Williams failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent and control injuries. Specifically, Respondent Mary Jean Williams lacked any plan to ensure that a young tiger could not escape from its travel enclosure or to provide for the animal's safe recapture. (9 C.F.R. § 2.40(b)(2) (2004).)

7. On September 28, 2002, Respondent Mary Jean Williams failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling. Specifically, Respondent Mary Jean Williams lacked the ability to adequately care for and handle a young tiger and failed to employ personnel capable of adequately caring for and handling a young tiger. (9 C.F.R. § 2.40(b)(4) (2004).)

8. On September 27, 2002, Respondent Mary Jean Williams failed to handle animals as expeditiously and carefully as possible in a manner that would not cause unnecessary discomfort, behavioral stress, or physical harm. Specifically, Respondent Mary Jean Williams, who was not a veterinarian, administered or attempted to administer sedatives to a young tiger. (9 C.F.R. § 2.131(a)(1) (2004) [9 C.F.R. § 2.131(b)(1) (2005)].)

9. On September 28, 2002, Respondent Mary Jean Williams failed to handle animals as expeditiously and carefully as possible in a manner that would not cause unnecessary discomfort, behavioral stress, or physical harm. Specifically, Respondent Mary Jean Williams allowed a young tiger to exit its travel enclosure and escape into a parking lot of a restaurant, which resulted in local authorities shooting and killing the animal. (9 C.F.R. § 2.131(a)(1) (2004) [9 C.F.R. § 2.131(b)(1) (2005)].)

Conclusions of Law

1. On or about September 27, 2002, and September 28, 2002, Respondent Mary Jean Williams operated as a *dealer*, as that term is defined in the Animal Welfare Act and the Regulations, without obtaining an Animal Welfare Act license from the Secretary of Agriculture. Specifically, Respondent Mary Jean Williams, while unlicensed, transported a young tiger for use in exhibition from Hennepin, Illinois, to Bloomington, Illinois, in willful violation of section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (2004)).

2. On September 27, 2002, Respondent Mary Jean Williams failed to have an attending veterinarian provide adequate veterinary care to a young tiger. Specifically, Respondent Mary Jean Williams, who was not a veterinarian, approved of and acquiesced in the administration of a sedative solution to a young tiger by a person who was not a veterinarian, in willful violation of section 2.40(a) of the Regulations (9 C.F.R. § 2.40(a) (2004)).

3. On September 27, 2002, Respondent Mary Jean Williams failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel. Specifically, Respondent Mary Jean Williams failed to provide personnel capable of handling a tiger safely, in willful violation of section 2.40(b)(1) of the Regulations (9 C.F.R. § 2.40(b)(1) (2004)).

4. On September 28, 2002, Respondent Mary Jean Williams failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent and control injuries. Specifically, Respondent Mary Jean Williams lacked any plan to ensure that a young tiger could not escape from its travel enclosure or to provide for the animal's safe recapture, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2) (2004)).

5. On September 28, 2002, Respondent Mary Jean Williams failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling. Specifically, Respondent Mary Jean Williams lacked the ability to adequately care for and handle a

young tiger and failed to employ personnel capable of adequately caring for and handling a young tiger, in willful violation of section 2.40(b)(4) of the Regulations (9 C.F.R. § 2.40(b)(4) (2004)).

6. On September 27, 2002, Respondent Mary Jean Williams failed to handle animals as expeditiously and carefully as possible in a manner that would not cause unnecessary discomfort, behavioral stress, or physical harm. Specifically, Respondent Mary Jean Williams, who was not a veterinarian, administered or attempted to administer sedatives to a young tiger, in willful violation of section 2.131(a) of the Regulations (9 C.F.R. § 2.131(a) (2004) [9 C.F.R. § 2.131(b)(1) (2005)]).

7. On September 28, 2002, Respondent Mary Jean Williams failed to handle animals as expeditiously and carefully as possible in a manner that would not cause unnecessary discomfort, behavioral stress, or physical harm. Specifically, Respondent Mary Jean Williams allowed a young tiger to exit its travel enclosure and escape into a parking lot of a restaurant, which resulted in local authorities shooting and killing the animal, in willful violation of section 2.131(a) of the Regulations (9 C.F.R. § 2.131(a) (2004) [9 C.F.R. § 2.131(b)(1) (2005)]).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent Mary Jean Williams raises two relevant issues in her appeal petition. First, Respondent Mary Jean Williams denies the material allegations of the Complaint.

Respondent Mary Jean Williams' denial of the allegations in the Complaint comes far too late to be considered. Respondent Mary Jean Williams is deemed, for purposes of

this proceeding, to have admitted the allegations in the Complaint because she failed to file an answer to the Complaint within 20 days after the Hearing Clerk served her with the Complaint. The Hearing Clerk served Respondent Mary Jean Williams with the Complaint and the Hearing Clerk's service letter on November 19, 2004.² Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

§ 1.136 Answer.

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

. . . .

(c) *Default.* Failure to file an answer within the time provided under 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

²See note 1.

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 informs Respondent Mary Jean Williams of the consequences of failing to file a timely answer, as follows:

[T]his complaint shall be served upon the respondents, who 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 4.

Similarly, the Hearing Clerk informed Respondent Mary Jean Williams in the August 20, 2004, 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:

CERTIFIED RECEIPT REQUESTED

August 20, 2004

Ms. Mary Jean Williams
Mr. John Bryan Williams
Route 1, Box 67
Ivanhoe, Texas 75447

Ms. Deborah Ann Milette
30-8 Needle Park Circle
Queensbury, New York 12804

Dear Sir/Madame:

Subject: In re: Mary Jean Williams, an individual; John B. Williams, an individual; and Deborah Ann Milette, an individual, Respondents -
AWA Docket No. 04-0023

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 three 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.

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 on the last page of the complaint.

Sincerely,

/s/

Joyce A. Dawson
Hearing Clerk

Respondent Mary Jean Williams' answer was due no later than December 9, 2004.

Respondent Mary Jean Williams' first filing in this proceeding is her appeal petition, which she filed August 8, 2005, almost 8 months after Respondent Mary Jean Williams' answer was due. Respondent Mary Jean Williams' failure to file a timely answer is deemed an admission of the allegations of the Complaint (7 C.F.R. § 1.136(a), (c)) and constitutes a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)).

On January 19, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. Respondent Mary Jean Williams 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 April 28, 2005, the ALJ issued an Initial Decision: (1) concluding Respondent Mary Jean Williams willfully violated sections 2.1(a)(1), 2.40(a)-(b) and 2.131(a)(1) of the Regulations (9 C.F.R. §§ 2.1(a)(1), .40(a)-(b), .131(a)(1)); (2) ordering Respondent Mary Jean Williams to cease and desist from violating the Animal Welfare Act, the Regulations, and the Standards; and (3) assessing Respondent Mary Jean Williams a \$5,500 civil penalty (Initial Decision at 4-6).

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

the default decision,³ generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.⁴

³See *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 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 Perishable Agricultural Commodities Act 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).

⁴See generally *In re Mary Jean Williams* (Decision as to Deborah Ann Milette) 64 Agric. Dec. ____ (June 29, 2005) (holding the default decision was properly issued where the respondent filed her answer 1 month 4 days after her 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 Bodie S. Knapp*,

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64 Agric. Dec. ____ (May 31, 2005) (holding the default decision was properly issued where the respondent filed his answer 1 month 15 days after his answer was due and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re Wanda McQuary* (Decision as to Wanda McQuary and Randall Jones), 62 Agric. Dec. 452 (2003) (holding the default decision was properly issued where respondent Wanda McQuary filed her answer 6 months 20 days after she was served with the complaint and respondent Randall Jones filed his answer 6 months 5 days after he was served with the complaint and holding the respondents are deemed, by their failures to file timely answers, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *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 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 failures to file timely answers, 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 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

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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 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

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⁴(...continued)

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 in the complaint); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994) (holding the default decision was properly issued where the respondent was given an extension of time until March 22, 1994, to file an answer, but the answer was not received until March 25, 1994, and holding the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995), *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 Mary Jean Williams' first filing in this proceeding was filed with the Hearing Clerk almost 8 months after Respondent Mary Jean Williams' answer was due. Respondent Mary Jean Williams' failure to file a timely answer is deemed, for purposes of this proceeding, an admission of the allegations of the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)). Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding, and the ALJ properly deemed Respondent Mary Jean Williams to have admitted the allegations of the Complaint.

Moreover, application of the default provisions of the Rules of Practice does not deprive Respondent Mary Jean Williams of her rights under the due process clause of the Fifth Amendment to the Constitution of the United States.⁵

Second, Respondent Mary Jean Williams states she is unable to pay the \$5,500 civil penalty assessed by the ALJ.

⁵See *United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding 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 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).

Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations, and a respondent's ability to pay the civil penalty is not one of those factors. Therefore, Respondent Mary Jean Williams' inability to pay the \$5,500 civil penalty is not a basis for reducing the \$5,500 civil penalty.⁶

⁶The Judicial Officer did give consideration to ability to pay when determining the amount of the civil penalty to assess under the Animal Welfare Act in *In re Gus White, III*, 49 Agric. Dec. 123, 152 (1990). The Judicial Officer subsequently held that consideration of ability to pay in *In re Gus White, III*, was inadvertent error and that ability to pay would not be considered in determining the amount of civil penalties assessed under the Animal Welfare Act in the future. See *In re Mary Jean Williams* (Order Denying Petition to Reconsider as to Deborah Ann Milette), 64 Agric. Dec. ____, slip op. at 9 (Sept. 9, 2005) (stating 7 U.S.C. § 2149(b) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and a respondent's ability to pay the civil penalty is not one of those factors); *In re J. Wayne Shaffer*, 60 Agric. Dec. 444, 475-76 (2001) (stating 7 U.S.C. § 2149(b) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and a respondent's ability to pay the civil penalty is not one of those factors); *In re Nancy M. Kutz* (Decision and Order as to Nancy M. Kutz), 58 Agric. Dec. 744, 757 (1999) (stating 7 U.S.C. § 2149(b) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act, the Regulations, and the Standards, and a respondent's ability to pay the civil penalty is not one of those factors); *In re James E. Stephens*, 58 Agric. Dec. 149, 199 (1999) (stating the respondents' financial state is not relevant to the amount of the civil penalty assessed against the respondents for violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1143 (1998) (stating a respondent's ability to pay a civil penalty is not considered in determining the amount of the civil penalty to be assessed), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1050 n.1 (1998) (stating the Judicial Officer has

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

ORDER

1. Respondent Mary Jean Williams, her 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.

Paragraph 1 of this Order shall become effective on the day after service of this Order on Respondent Mary Jean Williams.

2. Respondent Mary Jean Williams is assessed a \$5,500 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:

⁶(...continued)

pointed out that when determining the amount of a civil penalty to be assessed under the Animal Welfare Act, consideration need not be given to a respondent's ability to pay the civil penalty); *In re James J. Everhart*, 56 Agric. Dec. 1401, 1416 (1997) (stating a respondent's inability to pay the civil penalty is not a consideration in determining civil penalties assessed under the Animal Welfare Act); *In re Mr. & Mrs. Stan Kopunec*, 52 Agric. Dec. 1016, 1023 (1993) (stating the ability to pay a civil penalty is not a relevant consideration in Animal Welfare Act cases); *In re Micheal McCall*, 52 Agric. Dec. 986, 1008 (1993) (stating the ability or inability to pay is not a criterion in Animal Welfare Act cases); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1071 (1992) (stating the Judicial Officer once gave consideration to the ability of respondents to pay a civil penalty, but that the Judicial Officer has removed the ability to pay as a criterion, since the Animal Welfare Act does not require it), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Jerome A. Johnson*, 51 Agric. Dec. 209, 216 (1992) (stating the holding in *In re Gus White, III*, 49 Agric. Dec. 123 (1990), as to consideration of ability to pay, was an inadvertent error; ability to pay is not a factor specified in the Animal Welfare Act and it will not be considered in determining future civil penalties under the Animal Welfare Act).

Colleen A. Carroll
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, Colleen A. Carroll within 60 days after service of this Order on Respondent Mary Jean Williams.

Respondent Mary Jean Williams shall state on the certified check or money order that payment is in reference to AWA Docket No. 04-0023.

RIGHT TO JUDICIAL REVIEW

Respondent Mary Jean Williams has 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 Mary Jean Williams must seek judicial review within 60 days after entry of this Order.⁷ The date of entry of this Order is September 14, 2005.

Done at Washington, DC

September 14, 2005

William G. Jenson
Judicial Officer

⁷7 U.S.C. § 2149(c).