

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	HPA Docket No. 04-0003
)	
Robert Raymond Black, II, an)	
individual; Christopher B. Warley,)	
an individual; Black Gold Farm,)	
Inc., a Texas corporation;)	
Robbie J. Warley, an individual,)	
d/b/a Black Gold Farms; and)	
Herbert Derickson and Jill)	
Derickson, individuals, d/b/a)	
Herbert Derickson Training)	
Facility, a/k/a Herbert Derickson)	
Stables, a/k/a Herbert Derickson)	
Breeding and Training Facility,)	Order Dismissing Interlocutory
)	Appeal as to Robert Raymond
)	Black, II, and Remanding the
Respondents)	Proceeding to the ALJ

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 Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; and the Rules of Practice

Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that on or about March 21, 2002, Robert Raymond Black, II [hereinafter Respondent], violated section 5(1) and (2)(B) of the Horse Protection Act (15 U.S.C. § 1824(1), (2)(B)) (Compl. ¶¶ 11-12).

On August 20, 2004, the Hearing Clerk sent Respondent, by certified mail, the Complaint, the Rules of Practice, and a service letter. On September 8, 2004, the United States Postal Service returned the August 20, 2004, certified mailing to the Hearing Clerk marked “Not Deliverable As Addressed/Unable to Forward/Return to Sender.”¹ On September 13, 2004, the Hearing Clerk sent Respondent, by regular mail, the Complaint, the Rules of Practice, and the Hearing Clerk’s August 20, 2004, service letter.² Respondent failed to answer the Complaint within 20 days after the date the Hearing Clerk mailed the Complaint to Respondent by regular mail, and, on October 19, 2004, the Hearing Clerk sent Respondent a letter informing him that he had failed to file an answer within the time prescribed by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136).³

¹Memorandum of Lolita Ellis, Assistant Hearing Clerk, dated September 13, 2004, and envelope in which the Hearing Clerk sent Respondent, by certified mail, the Complaint, the Rules of Practice, and the August 20, 2004, service letter.

²Memorandum of Lolita Ellis, Assistant Hearing Clerk, dated September 13, 2004.

³Letter dated October 19, 2003 [sic], from Joyce A. Dawson, Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, to Robert Raymond Black, II.

On October 21, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a “Motion for Adoption of Proposed Decision and Order” [hereinafter Motion for Default Decision] and a proposed “Decision and Order as to Robert Raymond Black II, by Reason of Admission of Facts” [hereinafter Proposed Default Decision]. On November 22, 2004, the Hearing Clerk served Respondent with Complainant’s Motion for Default Decision and Complainant’s Proposed Default Decision.⁴

On January 21, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued an Order: (1) directing the Hearing Clerk to provide Respondent with the Complaint and all other pleadings; (2) providing Respondent 20 days in which to file an answer; and (3) deferring consideration of Complainant’s Motion for Default Decision (ALJ’s January 21, 2005, Order at 2-3).

On March 11, 2005, Complainant appealed the ALJ’s January 21, 2005, Order to the Judicial Officer. On April 26, 2005, Respondent filed “Respondent Robert Raymond Black’s Response to Complainant’s Appeal Petition.” On April 29, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

⁴See United States Postal Service Domestic Return Receipt for Article Number 7099 3400 0014 4584 7328 establishing the Hearing Clerk served Respondent with Complainant’s Motion for Default Decision and Complainant’s Proposed Default Decision on November 22, 2004.

CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant filed Complainant's Appeal Petition and Complainant's Supplement to Appeal Petition pursuant to sections 1.139 and 1.145(a) of the Rules of Practice (7 C.F.R. §§ 1.139, .145(a)). Complainant contends the ALJ erroneously denied Complainant's Motion for Default Decision in the ALJ's January 21, 2005, Order.

Section 1.139 of the Rules of Practice provides a party may appeal an administrative law judge's denial of a complainant's motion for adoption of a proposed decision, as follows:

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

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing. Copies of the decision or denial of complainant's Motion shall be served by the Hearing Clerk upon each of the parties and may be appealed pursuant to § 1.145. 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: *Provided, however*, That no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

7 C.F.R. § 1.139.

I have reviewed the ALJ's January 21, 2005, Order, and I do not find the ALJ denied Complainant's Motion for Default Decision, as Complainant asserts. To the contrary, the ALJ explicitly states "[c]onsideration of the Complainant's Motion for Adoption of Proposed Decision and Order is deferred" (ALJ's January 21, 2005, Order at 3). Moreover, the ALJ's January 21, 2005, Order is not a decision issued under section 1.139 or section 1.142(c) of the Rules of Practice (7 C.F.R. §§ 1.139, .142(c)) that may be appealed to the Judicial Officer. Finally, the Rules of Practice do not permit interlocutory appeals.⁵ Therefore, Complainant's Appeal Petition and Complainant's Supplement to Appeal Petition must be rejected as premature.

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

⁵*In re Velasam Veal Connection*, 55 Agric. Dec. 300, 304 (1996) (Order Dismissing Appeal); *In re L. P. Feuerstein*, 48 Agric. Dec. 896 (1989) (Order Dismissing Appeal); *In re Landmark Beef Processors, Inc.*, 43 Agric. Dec. 1541 (1984) (Order Dismissing Appeal); *In re Orie S. LeaVell*, 40 Agric. Dec. 783 (1980) (Order Dismissing Appeal by Respondent Spencer Livestock, Inc.).

ORDER

1. Complainant's interlocutory appeal, filed March 11, 2005, is dismissed.
2. The proceeding is remanded to the ALJ to conduct the proceeding in accordance with the Rules of Practice.

Done at Washington, DC

May 3, 2005

William G. Jenson
Judicial Officer