

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 04-0012
)
Dennis Hill, an individual, d/b/a)
White Tiger Foundation; and)
Willow Hill Center for Rare &)
Endangered Species, LLC, an)
Indiana domestic limited liability)
company, d/b/a Hill's Exotics,)
) **Order Denying Petition**
Respondents) **for Reconsideration**

PROCEDURAL HISTORY

Kevin Shea, 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 March 4, 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 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 Dennis Hill, d/b/a White Tiger Foundation, and Willow Hill Center for Rare & Endangered Species, LLC, d/b/a Hill's Exotics [hereinafter Respondents], willfully violated the Animal Welfare Act and the Regulations and Standards.¹

The Hearing Clerk served Respondents with the Complaint, the Rules of Practice, and a service letter on March 15, 2004.² Respondents were required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) to answer the Complaint within 20 days after service. On March 26, 2004, Respondents requested an additional 30 days within which to file an answer.³ On March 30, 2004, Chief Administrative Law Judge Marc R. Hillson extended the time for filing Respondents' answer to May 5, 2004.⁴

On April 23, 2004, Complainant filed an "Amended Complaint." On April 27, 2004, Respondents filed an "Answer" in which Respondents deny the material allegations of the Complaint. The Hearing Clerk sent Respondents a letter dated April 27, 2004, stating "Respondents' Amended Answer To Amended Complaint, has been received and filed in the above-captioned proceeding." On April 30, 2004, the Hearing Clerk served

¹Complaint.

²United States Postal Service Domestic Return Receipts for Article Number 7003 0500 0000 1056 0083 and Article Number 7003 0500 0000 1056 0090.

³Request for Extension of Time to Respond to Complaint.

⁴Extension of Time.

Respondents with the Amended Complaint.⁵ Respondents failed to file a response to the Amended 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 June 3, 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 Dennis Hill and Willow Hill Center for Rare & Endangered Species, LLC, By Reason of Admission of Facts” [hereinafter Proposed Default Decision]. On June 7, 2004, the Hearing Clerk served Respondents with Complainant’s Motion for Default Decision and Complainant’s Proposed Default Decision.⁶ On June 15, 2004, and June 23, 2004, Respondents filed objections to Complainant’s Motion for Default Decision and Complainant’s Proposed Default Decision.⁷

On July 13, 2004, during a teleconference with counsel for Respondents and counsel for Complainant, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] denied Complainant’s Motion for Default Decision and provided Respondents until

⁵United States Postal Service Domestic Return Receipt for Article Number 7003 0500 0000 1056 0458.

⁶United States Postal Service Domestic Return Receipt for Article Number 7003 0500 0000 1056 0656.

⁷Objection to Motion for Adoption of Proposed Decision and Order, filed June 15, 2004, and Supplemental Objection to Motion for Adoption of Proposed Decision and Order, filed June 23, 2004.

August 2, 2004, to file a response to the Amended Complaint.⁸ On August 3, 2004, Respondents filed “Answer to Amended Complaint.”

On August 27, 2004, Complainant appealed the ALJ’s denial of Complainant’s Motion for Default Decision to the Judicial Officer.⁹ On September 15, 2004, Respondents filed “Response in Opposition to Complainant’s Appeal Petition.” On September 22, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

On October 8, 2004, I issued a Decision and Order reversing the ALJ’s July 13, 2004, denial of Complainant’s Motion for Default Decision and concluding Respondents violated the Animal Welfare Act and the Regulations and Standards as alleged in the Amended Complaint.¹⁰

On October 27, 2004, Respondents filed “Respondents’ Motion to Reconsider” the October 8, 2004, Decision and Order and a request for oral argument before the Judicial Officer. On November 16, 2004, Complainant filed “Complainant’s Response to Respondents’ Motion to Reconsider” and “Complainant’s Response to Respondents’ Request for Oral Argument.” On November 19, 2004, the Hearing Clerk transmitted the

⁸Notice of Hearing and Exchange Deadlines at 1, filed by the ALJ on July 14, 2004.

⁹Complainant’s Appeal Petition.

¹⁰*In re Dennis Hill*, 63 Agric. Dec. ____ (Oct. 8, 2004).

record to the Judicial Officer for rulings on Respondents' Motion to Reconsider and Respondents' request for oral argument before the Judicial Officer.

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondents' Request for Oral Argument

Respondents' request for oral argument before the Judicial Officer, which, pursuant to section 1.145(d) of the Rules of Practice (7 C.F.R. § 1.145(d)), the Judicial Officer may grant, refuse, or limit, is refused because Complainant and Respondents have thoroughly addressed the issues and the issues are not complex. Thus, oral argument would appear to serve no useful purpose.

Respondents' Motion to Reconsider

Respondents raise five issues in Respondents' Motion to Reconsider the October 8, 2004, Decision and Order. First, Respondents contend only an administrative law judge has authority under section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) to determine whether a respondent has filed meritorious objections to a complainant's motion for adoption of a proposed default decision; therefore, the October 8, 2004, Decision and Order reversing the ALJ's July 13, 2004, denial of Complainant's Motion for Default Decision,¹¹ is error (Respondents' Motion to Reconsider at 2-4).

I disagree with Respondents' contention that only an administrative law judge has authority under section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) to determine

¹¹*In re Dennis Hill*, 63 Agric. Dec. ___, slip op. at 4, 64 (Oct. 8, 2004).

whether a respondent has filed meritorious objections to a complainant's motion for adoption of a proposed default decision. Pursuant to the Act of April 4, 1940, as amended (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953 (5 U.S.C. app. at 126 (2000)), the Secretary of Agriculture delegated authority to the Judicial Officer to act as final deciding officer in adjudicatory proceedings instituted pursuant to the Rules of Practice.¹² Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) explicitly provides that a party may appeal an administrative law judge's ruling denying a complainant's motion for a default decision to the Judicial Officer in accordance with section 1.145 of the Rules of Practice (7 C.F.R. § 1.145), and section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)) requires the Judicial Officer to rule on any such appeal.

Second, Respondents contend the Judicial Officer erroneously inferred "that Respondents received the Amended Complaint after receiving the Hearing Clerk's April 27, 2004, correspondence." Respondents assert they received the Hearing Clerk's letter dated April 27, 2004, after the Hearing Clerk served them with the Amended Complaint justifying their reliance on the Hearing Clerk's letter which states Respondents' Answer to the Amended Complaint "has been received and filed." (Respondents' Motion to Reconsider at 2, 4-6.)

¹²See 7 C.F.R. § 2.35(a)(2).

Respondents do not cite, and I cannot locate, any part of the October 8, 2004, Decision and Order, in which I infer the Hearing Clerk served Respondents with the Amended Complaint after Respondents received the Hearing Clerk's April 27, 2004, correspondence. The Hearing Clerk served Respondents with the Amended Complaint on April 30, 2004.¹³ The Hearing Clerk sent Respondents the April 27, 2004, correspondence and Respondents assert they received the April 27, 2004, correspondence; however, the record does not establish the date on which Respondents received the Hearing Clerk's correspondence. I have no reason to doubt Respondents' assertion that Amended Complaint" (Respondents' Motion to Reconsider at 5). However, the timing of Respondents' receipt of the Hearing Clerk's letter mischaracterizing Respondents' April 27, 2004, filing as an "Amended Answer To Amended Complaint" is not relevant to this proceeding. My reasons for finding Respondents' reliance on the Hearing Clerk's April 27, 2004, correspondence misplaced, are fully explicated in *In re Dennis Hill*, 63 Agric. Dec. ___, slip op. at 65-70 (Oct. 8, 2004), and addressed in this Order Denying Petition for Reconsideration, *infra*.

Third, Respondents contend the Judicial Officer erroneously defaulted Respondents when Respondents' Answer clearly placed Complainant, the ALJ, and the Judicial Officer on notice that Respondents disputed or denied the majority of the allegations in the Complaint (Respondents' Motion to Reconsider at 2, 6-7).

¹³See note 5.

Respondents' April 27, 2004, filing denies the material allegations of the Complaint. However, Complainant's operative pleading is the Amended Complaint. Respondents are deemed, for purposes of this proceeding, to have admitted the allegations in the Amended Complaint because they failed to file an answer to the Amended Complaint within 20 days after the Hearing Clerk served them with the Amended Complaint. The Hearing Clerk served Respondents with the Amended Complaint and the Hearing Clerk's April 23, 2004, service letter on April 30, 2004.¹⁴ 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

¹⁴See note 5.

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 Amended Complaint informs Respondents 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 amended complaint.

Amended Compl. at 29.

Similarly, the Hearing Clerk informed Respondents in the April 23, 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 Amended Complaint would constitute an admission of that allegation, as follows:

April 23, 2004

Mr. Michael Stephenson, Esq.
McNeely, Stephenson, Thopy & Harrold
30 East Washington Street, Suite 400
Shelbyville, Indiana 46176

Dear Mr. Stephenson:

**Subject: In re: Dennis Hill, an individual d/b/a White Tiger
Foundation and Willow Hill Center for Rare &
Endangered Species, LLC, an Indiana domestic limited
liability company d/b/a Hill's Exotics
AWA Docket No. 04-0012**

Enclosed is a copy of Complainant's Amended Complaint, which has been filed with this office in the above-captioned proceeding.

Inasmuch as Complainant has filed the Amended Complaint prior to the filing of a motion for hearing, the amendment is effective upon filing.

You will have 20 days from service of this letter in which to file an answer to the amended complaint. Failure to file a timely Answer to or plead specifically to any allegation of the Amended Complaint shall constitute an admission of such allegation.

Your answer, as well as any motion or requests that you may wish to file hereafter in this proceeding, should be submitted to the Hearing Clerk, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250. An original and 3 copies are required for each document submitted.

Sincerely,

/s/

Joyce A. Dawson
Hearing Clerk

Respondents' answer to the Amended Complaint was required to be filed no later than May 20, 2004. Respondents filed an Answer to Amended Complaint on August 3,

2004, 3 months 4 days after the Hearing Clerk served Respondents with the Amended Complaint. Respondents' failure to file a timely answer to the Amended Complaint is deemed, for purposes of this proceeding, an admission of the allegations in the Amended Complaint and constitutes a waiver of hearing.

Fourth, Respondents contend the Judicial Officer erroneously held Respondents' reliance on the Hearing Clerk's April 27, 2004, letter was misplaced. Respondents point out that I state the Hearing Clerk's April 23, 2004, letter clearly informs Respondents of the requirement for a timely response to the Amended Complaint, but that I dismiss the Hearing Clerk's April 27, 2004, letter, which mischaracterizes Respondents' April 27, 2004, filing, claiming Respondents should not have relied on the Hearing Clerk's mischaracterization. (Respondents' Motion to Reconsider at 2, 7-8.)

I disagree with Respondents' contention that I erroneously held that Respondents' reliance on the Hearing Clerk's April 27, 2004, letter was misplaced. The Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer,¹⁵ the Amended Complaint informs Respondents of the consequences of failing to file a timely answer,¹⁶ and the Hearing Clerk's April 23, 2004, letter, which accompanied the Amended Complaint, states the time within which an answer must be filed and the consequences of failing to file a timely answer. Juxtaposed

¹⁵See 7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

¹⁶See Amended Complaint at 29.

to all these warnings, Respondents rely on the Hearing Clerk's letter dated April 27, 2004, wherein the Hearing Clerk erroneously mischaracterizes Respondents' April 27, 2004, filing as an "Amended Answer To Amended Complaint" and erroneously states Respondents' Amended Answer has been received and filed.

Notwithstanding the Hearing Clerk's April 27, 2004, letter, the record establishes that Respondents' April 27, 2004, filing was neither an amended answer nor a response to the Amended Complaint. As an initial matter, the Hearing Clerk did not serve Respondents with the Amended Complaint until April 30, 2004,¹⁷ 3 days after Respondents filed their April 27, 2004, filing. Moreover, Respondents entitle their April 27, 2004, filing "Answer." Further still, Respondents state in the April 27, 2004, filing that the filing is a response to the "Complaint" and pray that the ALJ deny the "Complaint." In addition, Respondents' letter transmitting the April 27, 2004, filing is dated April 22, 2004, the April 27, 2004, filing contains a certificate of service stating counsel for Respondents placed the filing "in the United States Mail, first class, postage prepaid, this 22nd day of April, 2004[,]"¹⁸ and the envelope containing the April 27, 2004, filing is postmarked April 22, 2004, 1 day prior to the date Complainant filed the Amended Complaint and 8 days prior to the date the Hearing Clerk served Respondents with the Amended Complaint. Based on the record before me, I find Respondents'

¹⁷See note 5.

¹⁸Answer at second unnumbered page.

April 27, 2004, filing is an answer filed in response to the Complaint and Complainant's operative pleading is the Amended Complaint. Therefore, I find Respondents' reliance on the Hearing Clerk's April 27, 2004, mischaracterization of Respondents' April 27, 2004, filing, misplaced.

Fifth, Respondents, relying on *Kreider Dairy Farms, Inc. v. Glickman*, 1998 WL 481926 (E.D. Pa. Aug. 10, 1998), *printed in* 57 Agric. Dec. 857; *In re Karl Mitchell*, 60 Agric. Dec. 91 (2001); *In re Spring Valley Meats, Inc.* (Decision as to Charles Contris), 56 Agric. Dec. 1731 (1997); and *In re Jerald Brown*, 54 Agric. Dec. 537 (1995), contend the Judicial Officer erroneously used formalities and clerical errors to default Respondents, which practice is contrary to United States Department of Agriculture "case law" (Respondents' Motion to Reconsider at 2, 8-9).

I disagree with Respondents' contention that filing a timely response to an amended complaint is a mere formality. The Rules of Practice state the time within which an answer must be filed and provide the failure to file a timely answer shall be deemed an admission of the allegations in the complaint and a waiver of hearing.¹⁹ Moreover, I disagree with Respondents' contention that the practice of issuing default decisions is contrary to United States Department of Agriculture "case law." 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

¹⁹See note 15.

decision,²⁰ generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.²¹

²⁰See *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).

²¹See generally *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, (continued...)

²¹(...continued)

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 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

(continued...)

²¹(...continued)

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 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
(continued...)

Further still, I find *Kreider Dairy Farms, Inc. v. Glickman* and *In re Jerald Brown* inapposite, and I find *In re Karl Mitchell* and *In re Spring Valley Meats, Inc.*, do not support Respondents' contention that filing a timely response to an amended complaint is a mere formality.

²¹(...continued)

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), 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).

Respondents, relying on *Kreider Dairy Farms, Inc. v. Glickman*, 1998 WL 481926 (E.D. Pa. Aug. 10, 1998), suggest that my conclusion that Respondents' Answer does not operate as response to Complainant's Amended Complaint elevates form over substance. In *Kreider Dairy Farms*, the United States District Court for the Eastern District of Pennsylvania found the Judicial Officer's determination that the word *postmark* does not include a Federal Express label, elevates form over substance and was erroneous. The district court reasoned: (1) the word *postmark* was not defined in the applicable United States Department of Agriculture rules of practice; (2) the purpose of the postmark is to ensure there is reliable evidence of the date a party sends a document to the Hearing Clerk; and (3) the purpose is met whether a party uses Federal Express or the United States Postal Service.

As initial matter, I note that, on appeal, the United States Court of Appeals for the Third Circuit vacated *Kreider Dairy Farms, Inc. v. Glickman*, 1998 WL 481926 (E.D. Pa. Aug. 10, 1998).²² Moreover, the requirement that a respondent file a timely answer and the consequences of failing to file a timely answer, unlike the district court found with respect to the postmark requirement in *Kreider Dairy Farms*, are clearly stated in the Rules of Practice.

Respondents, relying on *In re Karl Mitchell*, 60 Agric. Dec. 91 (2001); *In re Spring Valley Meats, Inc.* (Decision as to Charles Contris), 56 Agric. Dec. 1731 (1997);

²²See *Kreider Dairy Farms, Inc. v. Glickman*, 190 F.3d 113 (3d Cir. 1999).

and *In re Jerald Brown*, 54 Agric. Dec. 537 (1995), contend filing a timely response to an amended complaint is a mere formality. In *In re Jerald Brown*, the respondent filed a timely response to the complaint. *In re Jerald Brown* does not address a respondent's failure to file a timely response to a complaint. In *In re Karl Mitchell*, the respondents failed to file a timely answer to the complaint, but the Judicial Officer found, based on the failure to file a timely answer, the respondents were deemed to have admitted the allegations in the complaint. In *In re Spring Valley Meats, Inc.*, the Judicial Officer rejected the respondents' contention that their December 13, 1996, filing constituted a response to the complaint and stated, even if it constituted an answer, the default decision would not be set aside because the purported answer was not timely filed.

For the foregoing reasons and the reasons set forth in *In re Dennis Hill*, 63 Agric. Dec. ____ (Oct. 8, 2004), Respondents' Motion to Reconsider is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition for reconsideration. Respondents' Motion to Reconsider was timely filed and automatically stayed the October 8, 2004, Decision and Order. Therefore, since Respondents' Motion to Reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Dennis Hill*, 63 Agric. Dec. ____ (Oct. 8, 2004), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition for Reconsideration.

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

ORDER

1. Respondents, 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.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondents.

2. Respondents are jointly and severally assessed a \$20,000 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:

Bernadette R. Juarez
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, Bernadette R. Juarez within 60 days after service of this Order on Respondents. Respondents shall state on the certified check or money order that payment is in reference to AWA Docket No. 04-0012.

3. Respondent Dennis Hill's Animal Welfare Act license (Animal Welfare Act license number 32-A-0160) is revoked.

The Animal Welfare Act license revocation provisions of this Order shall become effective on the 60th day after service of this Order on Respondent Dennis Hill.

RIGHT TO JUDICIAL REVIEW

Respondents 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. Respondents 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 November 30, 2004.

Done at Washington, DC

November 30, 2004

William G. Jenson
Judicial Officer