

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 03-0010
)
Erica Nicole Mashburn and)
James Mashburn, d/b/a)
Living Legend Kennel,) **Order Dismissing Interlocutory**
) **Appeal as to James Mashburn and**
Respondents) **Remanding the Proceeding to the ALJ**

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a “Complaint” on January 10, 2003. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice]. On March 18, 2003, Complainant filed an “Amended Complaint.”

Complainant alleges Erica Nicole Mashburn, d/b/a Living Legend Kennel, and James Mashburn, d/b/a Living Legend Kennel [hereinafter Respondents], committed willful

violations of the Animal Welfare Act and the Regulations and Standards (Amended Compl. ¶¶ II-IV).

The Hearing Clerk served Respondent James Mashburn, d/b/a Living Legend Kennel [hereinafter Respondent James Mashburn], with the Amended Complaint on March 22, 2003.¹ The Rules of Practice require that, within 20 days after the service of an amended complaint, an answer must be filed with the Hearing Clerk.² Chief Administrative Law Judge James W. Hunt extended Respondents' time to file an answer to the Amended Complaint to May 2, 2003.³ Respondent James Mashburn failed to file an answer to the Amended Complaint within the time prescribed by Chief Administrative Law Judge James W. Hunt.

On September 3, 2003, Complainant filed a "Motion for Adoption of Decision and Order as to James Mashburn Upon Admission of Facts by Reason of Default" [hereinafter Motion for Default Decision] and a proposed "Decision and Order as to James Mashburn Upon Admission of Facts by Reason of Default" [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondent James Mashburn with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on September 11, 2003.⁴

¹United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8982 7241.

²See 7 C.F.R. § 1.136(a).

³Order Extending Time to File Answer filed April 17, 2003.

⁴United States Postal Service Domestic Return Receipt for Article Number 7001

Respondent James Mashburn 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 the Rules of Practice.⁵

On October 14, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued an "Order Denying APHIS' Motion re: James Mashburn" denying Complainant's Motion for Default Decision. On November 13, 2003, Complainant filed "Complainant's Appeal of Order Denying APHIS' Motion Re: James Mashburn" [hereinafter Appeal Petition]. The Hearing Clerk served Respondent James Mashburn with Complainant's Appeal Petition on November 26, 2003.⁶ Respondent James Mashburn failed to file a response to Complainant's Appeal Petition within 20 days after service as required by the Rules of Practice.⁷ On January 12, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

CONCLUSIONS BY THE JUDICIAL OFFICER

Section 1.145(a) of the Rules of Practice provides that a party may appeal after receiving service of an administrative law judge's written decision, as follows:

§ 1.145 Appeal to Judicial Officer.

⁴(...continued)
0360 0000 0310 3491.

⁵See 7 C.F.R. § 1.139.

⁶United States Postal Service Domestic Return Receipt for Article Number 7001
0360 0000 0310 3897.

⁷See 7 C.F.R. § 1.145(b).

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

7 C.F.R. § 1.145(a).

Section 1.132 of the Rules of Practice defines the word *decision*, as follows:

1.132 Definitions.

As used in this subpart, the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:

. . . .

Decision means: (1) The Judge's initial decision made in accordance with the provisions of 5 U.S.C. 556 and 557, and includes the Judge's (i) findings and conclusions and the reasons or basis therefor on all material issues of fact, law or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and orders submitted by the parties; and

(2) The decision and order by the Judicial Officer upon appeal of the Judge's decision.

7 C.F.R. § 1.132.

The ALJ has not issued an initial decision in the instant proceeding in accordance with 5 U.S.C. §§ 556 and 557. Moreover, the Rules of Practice do not permit interlocutory appeals.⁸ Therefore, Complainant's Appeal Petition must be rejected as premature.

⁸*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 Ori S. LeaVell*, 40 Agric. Dec. 783 (1980) (Order Dismissing Appeal by Respondent Spencer Livestock, Inc.).

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

ORDER

Complainant's interlocutory appeal filed November 13, 2003, is dismissed.

The proceeding is remanded to the ALJ to conduct the proceeding in accordance with the Rules of Practice.

Done at Washington, DC

January 15, 2004

William G. Jenson
Judicial Officer