

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)	Order Vacating the ALJ's Denial of
Living Legend Kennel,)	Complainant's Motion for Default
)	Decision and Remand Order as to
Respondents)	James Mashburn

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].

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

Kennel [hereinafter Respondent James Mashburn], violated the Animal Welfare Act and the Regulations and Standards (Compl. ¶¶ II-IV).

The Hearing Clerk served Respondent Erica Mashburn and Respondent James Mashburn with the Complaint on January 22, 2003.¹ An answer in response to the Complaint was filed on February 20, 2003.

On March 18, 2003, Complainant filed an “Amended Complaint” which the Hearing Clerk served on Respondent James Mashburn on March 22, 2003,² and served on Respondent Erica Mashburn on April 16, 2003.³ Respondent Erica Mashburn requested an extension of time within which to file an answer in response to the Amended Complaint.⁴ Chief Administrative Law Judge James W. Hunt extended both Respondent Erica Mashburn’s and Respondent James Mashburn’s time to file answers to the Amended Complaint to May 2, 2003.⁵ Respondent James Mashburn failed to file an answer to the Amended Complaint within the time prescribed by Chief Administrative Law Judge James W. Hunt.

¹United States Postal Service Domestic Return Receipts for Article Number 7000 1670 0011 8982 7814 and Article Number 7000 1670 0011 8982 7685.

²United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0011 8982 7241.

³Memorandum of Tonya Fisher, Office of the Hearing Clerk, dated April 16, 2003.

⁴“Request for Extension on Time” filed April 17, 2003.

⁵“Order Extending Time to File Answer” filed April 17, 2003.

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, 2003.⁶ 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.⁷

On October 14, 2003, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] filed an “Order Denying APHIS’ Motion re: James Mashburn” denying Complainant’s Motion for Default Decision based on the ALJ’s conclusions that Respondent James Mashburn had filed a timely answer to the Complaint and that Respondent James Mashburn’s timely answer to the Complaint operates as an answer to Complainant’s Amended Complaint.

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,

⁶United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0310 3491.

⁷See 7 C.F.R. § 1.139.

2003.⁸ 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.⁹ On January 12, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

On January 15, 2004, I issued an Order dismissing Complainant's Appeal Petition and remanding the proceeding to the ALJ based upon my conclusion that Complainant's Appeal Petition was premature.¹⁰ On January 21, 2004, I vacated the January 15, 2004, Order concluding that section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) provides that an administrative law judge's denial of a motion for a default decision may be appealed to the Judicial Officer pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145);¹¹ therefore, Complainant's Appeal Petition was not premature.

Complainant contends the ALJ's denial of Complainant's Motion for Default Decision is error (Complainant's Appeal Pet.). I agree with Complainant's contention. Complainant's operative pleading is the Amended Complaint filed on March 18, 2003, and

⁸United States Postal Service Domestic Return Receipt for Article Number 7001 0360 0000 0310 3897.

⁹See 7 C.F.R. § 1.145(b).

¹⁰*In re Erica Nicole Mashburn*, 63 Agric. Dec. ____ (Jan. 15, 2004) (Order Dismissing Interlocutory Appeal as to James Mashburn and Remanding the Proceeding to the ALJ).

¹¹*In re Erica Nicole Mashburn*, 63 Agric. Dec. ____ (Jan. 21, 2004) (Order Vacating Order Dismissing Interlocutory Appeal as to James Mashburn).

served on Respondent James Mashburn on March 22, 2003.¹² Pursuant to the Rules of Practice, Respondent James Mashburn was required to file his answer to the Amended Complaint no later than April 11, 2003;¹³ however, Chief Administrative Law Judge James W. Hunt extended Respondent James Mashburn's time to file an answer to the Amended Complaint to May 2, 2003.¹⁴ Respondent James Mashburn failed to file an answer to the Amended Complaint within the time prescribed by Chief Administrative Law Judge James W. Hunt. Even if I were to find that Respondent James Mashburn filed a timely answer to the Complaint, Respondent James Mashburn's timely answer to the Complaint does not operate as an answer to the Amended Complaint.

The Rules of Practice provide that the failure to file an answer to a complaint shall be deemed an admission of the allegations in the complaint and a waiver of hearing.¹⁵ Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) provides that, upon a failure to file an answer, the complainant shall file a proposed decision, along with a motion for the adoption of the proposed decision, both of which shall be served upon the respondent by the Hearing Clerk. Unless a respondent files timely meritorious objections to the complainant's motion and proposed decision, the administrative law judge is required to issue a decision without further procedure or hearing. The Hearing Clerk served

¹²See note 2.

¹³See 7 C.F.R. § 1.136(a).

¹⁴See note 5.

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

Respondent James Mashburn with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on September 11, 2003.¹⁶ Respondent James Mashburn failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision, meritorious or otherwise, within 20 days after service as required by the Rules of Practice.¹⁷ Therefore, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the ALJ is required to issue a decision as to Respondent James Mashburn without further procedure or hearing.

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

ORDER

The ALJ's "Order Denying APHIS' Motion re: James Mashburn," filed October 14, 2003, is vacated. This proceeding is remanded to the ALJ to issue a decision as to Respondent James Mashburn in accordance with the Rules of Practice.

Done at Washington, DC

February 3, 2004

William G. Jenson
Judicial Officer

¹⁶See note 6.

¹⁷See 7 C.F.R. § 1.139.