

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: ) AWA Docket No. 09-0128  
)  
Brian Karl Turner, an individual, )  
)  
Respondent ) **Second Remand Order**

**PROCEDURAL HISTORY**

Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding on June 4, 2009, by filing an “Order to Show Cause Why Animal Welfare License 88-C-0158 Should Not Be Terminated” [hereinafter Order to Show Cause]. On December 22, 2009, after Brian Karl Turner filed a response to the Order to Show Cause, the Administrator filed a motion for summary judgment.

On March 1, 2010, Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] issued a Decision and Order in which he found Mr. Turner had not filed a response to the Administrator’s motion for summary judgment and granted the Administrator’s motion for summary judgment. Mr. Turner appealed the ALJ’s Decision and Order stating he had filed a timely response to the Administrator’s motion for summary judgment. On April 7, 2010, the Hearing Clerk located Mr. Turner’s timely-filed

response to the Administrator's motion for summary judgment. As the ALJ did not consider Mr. Turner's response to the Administrator's motion for summary judgment, I vacated the ALJ's March 1, 2010, Decision and Order and remanded the instant proceeding to the ALJ for consideration of Mr. Turner's response.<sup>1</sup>

On October 6, 2010, the ALJ scheduled a hearing to be conducted by audio-visual telecommunication on November 9-10, 2010, in Washington, DC, and Las Vegas, Nevada. The hearing commenced November 9, 2010. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Mr. Turner of Pahrump, Nevada, appeared pro se.

Mr. Turner did not attend the second day of the hearing, and the Administrator moved for entry of a decision based upon Mr. Turner's failure to appear at the hearing without good cause. The ALJ granted the Administrator's motion and, on November 10, 2010, issued a Decision and Order in which the ALJ concluded Mr. Turner "is deemed to have waived the right to an oral hearing and to have admitted all of the material allegations of fact contained in the amended complaint" based upon his failure to appear at the hearing without good cause (ALJ's Decision and Order at 1).<sup>2</sup> The ALJ found that Mr. Turner violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159)

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<sup>1</sup>*In re Brian Karl Turner* (Remand Order), \_\_\_ Agric. Dec. \_\_\_ (Apr. 7, 2010).

<sup>2</sup>I find the ALJ's reference to the "amended complaint" perplexing as the record does not contain an amended complaint or any other amended pleading filed by the Administrator.

[hereinafter the Animal Welfare Act], and the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142), and terminated Mr. Turner's Animal Welfare Act license (Animal Welfare Act license number 88-C-0158) (ALJ's Decision and Order).

On December 20, 2010, Mr. Turner appealed the ALJ's Decision and Order to the Judicial Officer. On February 24, 2011, the Administrator filed a response to Mr. Turner's appeal petition, and on February 25, 2011, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

#### **CONCLUSION BY THE JUDICIAL OFFICER**

The ALJ's Decision and Order is based upon the ALJ's finding that Mr. Turner failed to appear at the hearing without good cause. Mr. Turner asserts he appeared at the hearing and had good cause for failing to attend on the second day of the hearing, November 10, 2010 (Mr. Turner's appeal petition). The rules of practice applicable to the instant proceeding<sup>3</sup> provide for the issuance of a decision based upon a failure to appear at the hearing, as follows:

#### **§ 1.141 Procedure for hearing.**

....

(e) *Failure to appear.* (1) A respondent who, after being duly notified, fails to appear at the hearing without good cause, shall be deemed to have waived the right to an oral hearing in the proceeding and to have admitted any facts which may be presented at the hearing. Such failure by

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<sup>3</sup>The rules of practice applicable to the instant proceeding are 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].

the respondent shall also constitute an admission of all the material allegations of fact contained in the complaint. Complainant shall have an election whether to follow the procedure set forth in § 1.139 or whether to present evidence, in whole or in part, in the form of affidavits or by oral testimony before the Judge. Failure to appear at a hearing shall not be deemed to be a waiver of the right to be served with a copy of the Judge's decision and to appeal and request oral argument before the Judicial Officer with respect thereto in the manner provided in § 1.145.

7 C.F.R. § 1.141(e)(1). The record establishes that Mr. Turner entered an appearance at the hearing and participated in the first day of the two-day hearing (Transcript of the November 9, 2010, segment of the hearing). Therefore, I conclude Mr. Turner appeared at the hearing. Based upon this conclusion, I vacate the ALJ's November 10, 2010, Decision and Order and remand the instant proceeding to the ALJ.

For the foregoing reasons, the following Remand Order is issued.

#### **REMAND ORDER**

1. The ALJ's November 10, 2010, Decision and Order is vacated.
2. The instant matter is remanded to the ALJ for further proceedings in accordance with the Rules of Practice.

Done at Washington, DC

March 1, 2011

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William G. Jenson  
Judicial Officer