

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 04-0023
)
Mary Jean Williams, an)
individual; John Bryan Williams,)
an individual; and Deborah Ann)
Milette, an individual,)
) **Order Denying Petition to Reconsider**
Respondents) **as to Deborah Ann Milette**

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 Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; 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 Mary Jean Williams, John Bryan Williams, and Deborah Ann Milette willfully violated the Regulations (Compl. ¶¶ 5-11). The Hearing Clerk

served Respondent Deborah Ann Milette with the Complaint, the Rules of Practice, and a service letter on February 18, 2005.¹ Respondent Deborah Ann Milette failed to file an answer to the 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 March 18, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Decision and Order as to Respondent Deborah Ann Milette [hereinafter Motion for Default Decision] and a proposed Decision and Order as to Respondent Deborah Ann Milette [hereinafter Proposed Default Decision]. On April 14, 2005, Respondent Deborah Ann Milette filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.

On April 28, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order [hereinafter Initial Decision]: (1) concluding Respondent Deborah Ann Milette willfully violated sections 2.40(a) and 2.131(a)(1) of the Regulations (9 C.F.R. §§ 2.40(a), .131(a)(1)); (2) ordering Respondent Deborah Ann Milette to cease and desist from violating the Animal Welfare Act, the Regulations, and the standards issued under the Animal Welfare Act (9 C.F.R. §§ 3.1-.142) [hereinafter the

¹United States Postal Service Track and Confirm for Article Number 7003 2260 0005 5721 3953.

Standards]; and (3) revoking Respondent Deborah Ann Milette's Animal Welfare Act license (Animal Welfare Act license number 21-C-0218) (Initial Decision at 4-6).

On May 17, 2005, Respondent Deborah Ann Milette appealed the ALJ's Initial Decision to the Judicial Officer. On June 6, 2005, Complainant filed Complainant's Response to Respondent Deborah Ann Milette's Appeal Petition. On June 13, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision as to Respondent Deborah Ann Milette. On June 29, 2005, I issued a Decision and Order as to Deborah Ann Milette: (1) concluding Respondent Deborah Ann Milette willfully violated sections 2.40(a), 2.40(b)(1), and 2.131(a)(1) of the Regulations (9 C.F.R. §§ 2.40(a), (b)(1); .131(a)(1) (2004)); (2) ordering Respondent Deborah Ann Milette to cease and desist from violating the Animal Welfare Act and the Regulations; and (3) assessing Respondent Deborah Ann Milette a \$2,500 civil penalty.²

On July 18, 2005, Respondent Deborah Ann Milette filed a petition to reconsider *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. ____ (June 29, 2005), and a request to supplement her petition to reconsider. On July 27, 2005, I granted Respondent Deborah Ann Milette's request to supplement her petition to reconsider. On August 18, 2005, Respondent Deborah Ann Milette supplemented her petition to reconsider. On August 25, 2005, Complainant filed Complainant's Response

²*In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. ____, slip op. at 14-15, 32-33 (June 29, 2005).

to Respondent Deborah Ann Milette's Petition for Reconsideration of Decision of the Judicial Officer [hereinafter Complainant's Response to Petition to Reconsider]. On August 31, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent Deborah Ann Milette's petition to reconsider.³

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondent Deborah Ann Milette raises three issues in her petition to reconsider and the supplement to the petition to reconsider. First, Respondent Deborah Ann Milette contends *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. ____ (June 29, 2005), should be set aside because physical and mental incapacity during the period January 2005 through July 8, 2005, affected her ability to file a timely response to the Complaint (Respondent Deborah Ann Milette's Pet. to Recons. at 1).

Respondent Deborah Ann Milette's assertion that physical and mental incapacity during the period January 2005 through July 8, 2005, affected her ability to file a timely response to the Complaint, is belied by Respondent Deborah Ann Milette's numerous filings during this period. On April 14, 2005, Respondent Deborah Ann Milette filed

³On September 8, 2005, Respondent Deborah Ann Milette filed a rebuttal to Complainant's Response to Petition to Reconsider. The Rules of Practice do not provide for filing a rebuttal to a response to a petition to reconsider and Respondent Deborah Ann Milette did not request an opportunity to rebut Complainant's Response to Petition to Reconsider. Therefore, I have not considered Respondent Deborah Ann Milette's rebuttal of Complainant's Response to Petition to Reconsider and Respondent Deborah Ann Milette's rebuttal of Complainant's Response to Petition to Reconsider forms no part of the record in this proceeding.

timely objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. On May 17, 2005, Respondent Deborah Ann Milette filed a timely appeal of the ALJ's Initial Decision. On May 25, 2005, Respondent Deborah Ann Milette filed a letter, dated May 16, 2005, addressed to the ALJ, stating she did not violate the Regulations as alleged in the Complaint. On July 6, 2005, Respondent Deborah Ann Milette filed a letter, dated June 28, 2005, addressed to the Hearing Clerk, stating she did not violate the Regulations as alleged in the Complaint.

Moreover, Respondent Deborah Ann Milette's April 14, 2005, May 17, 2005, and May 25, 2005, filings do not refer to any physical or mental incapacity as a basis for her failure to file a timely response to the Complaint.⁴ Respondent Deborah Ann Milette's July 6, 2005, filing is the first filing in which she mentions a physical ailment in connection with her failure to file a timely response to the Complaint: "due to the fact I had 3 heart attacks, I more than answered in an extremely timely fashion" (Respondent Deborah Ann Milette's letter to the Hearing Clerk, dated June 28, 2005, and filed July 6, 2005, at 1). However, Respondent Deborah Ann Milette provides no detail regarding

⁴Attached to Respondent Deborah Ann Milette's May 25, 2005, filing is a letter from Dr. Jerry G. Greene, dated March 17, 2005, which states removal of Respondent Deborah Ann Milette's pets from her care and supervision would cause Respondent Deborah Ann Milette significant mental stress. However, Dr. Greene's March 17, 2005, letter does not indicate Respondent Deborah Ann Milette was physically or mentally incapacitated between the time the Hearing Clerk served Respondent Deborah Ann Milette with the Complaint, February 18, 2005, and the time Respondent Deborah Ann Milette was required to file a response to the Complaint, March 10, 2005.

dates or seriousness of these three heart attacks. Moreover, Respondent Deborah Ann Milette's assertion that she did not file a timely answer because she suffered three heart attacks is not consistent with her petition to reconsider in which she states she did not file a timely response to the Complaint because she sustained physical injuries in an automobile accident and had an adverse reaction to a combination of medications, as follows:

Although I acknowledge that it is not a common practice to reconsider a default decision, I hope that consideration would be given to the circumstances surrounding my inability to respond. Specifically, that I had sustained physical injuries resulting from an automobile accident compounded by being further incapacitated both physically and mentally, resulting from an adverse reaction to a combination of pain and neurological medications from the middle of January, 2005 through July 8, 2005. The reactions to these medications have impaired my daily functions and continued to increase in severity resulting in periods of serious drops in blood pressure and even unconsciousness and further emergency hospitalization. The situation has continued until only recently when it was concluded by my physicians that I was having an adverse reaction to the combination of medications and these were stopped.

Respondent Deborah Ann Milette's Pet. to Recons. at 1.

Further still, Respondent Deborah Ann Milette's supplement to her petition to reconsider does not support her assertion that physical and mental incapacity during the period January 2005 through July 8, 2005, affected her ability to file a timely response to the Complaint. Dr. Jerry G. Greene states Respondent Deborah Ann Milette was in a car accident in the late fall of 2004 and visited the emergency department and office on seven occasions between December 15, 2004, and February 1, 2005 (Respondent Deborah Ann

Milette's Supplement to Pet. to Recons., Attach. 1). Jeffrey Berns states Respondent Deborah Ann Milette was in an automobile accident in June 2004 and he believes, because of her physical and mental condition following the accident, Respondent Deborah Ann Milette should not be held responsible for failing to file a timely response to the Complaint (Respondent Deborah Ann Milette's Supplement to Pet. to Recons., Attach. 2). Neither Dr. Greene nor Mr. Berns addresses Respondent Deborah Ann Milette's physical or mental condition between the time the Hearing Clerk served Respondent Deborah Ann Milette with the Complaint, February 18, 2005, and the time Respondent Deborah Ann Milette was required to file a response to the Complaint, March 10, 2005.

While each case must be examined on the merits, generally, physical and mental incapacity are not bases for setting aside a default decision.⁵ I reject Respondent Deborah Ann Milette's contention that *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. ____ (June 29, 2005), should be set aside because physical and mental incapacity affected her ability to file a timely response to the Complaint based upon: (1) Respondent Deborah Ann Milette's failure to indicate physical or mental

⁵See *In re Jim Aron*, 58 Agric. Dec. 451, 462 (1999) (stating the respondent's automobile accident and loss of memory are not bases for setting aside the default decision); *In re Anna Mae Noell*, 58 Agric Dec. 130, 146 (1999) (stating age, ill health, and hospitalization of one of the respondents are not bases for setting aside the default decision), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000).

incapacity affected her ability to file a timely response to the Complaint in her objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision; (2) Respondent Deborah Ann Milette's numerous filings during the period she alleges she was incapacitated; (3) Respondent Deborah Ann Milette's failure to support her assertion that she was incapacitated between the time the Hearing Clerk served her with the Complaint, February 18, 2005, and the time she was required to file a response to the Complaint, March 10, 2005; and (4) Respondent Deborah Ann Milette's inconsistent assertions regarding the cause and nature of her incapacity.

Second, Respondent Deborah Ann Milette asserts she did not violate the Regulations as alleged in the Complaint (Respondent Deborah Ann Milette's Pet. to Recons. at 1-2).

Respondent Deborah Ann Milette's denial of the allegations in the Complaint comes far too late to be considered. As fully explained in *In re Mary Jean Williams* (Decision and Order as to Deborah Ann Milette), 64 Agric. Dec. ____, slip op. at 13, 15-25 (June 29, 2005), Respondent Deborah Ann Milette is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint because she failed to file an answer to the Complaint within 20 days after the Hearing Clerk served her with the Complaint.

Third, Respondent Deborah Ann Milette states the \$2,500 civil penalty assessed against her in *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric.

Dec. ____ (June 29, 2005), should be reduced because she cannot pay the civil penalty (Respondent Deborah Ann Milette's Pet. to Recons. at 2).

Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations, and a respondent's ability to pay the civil penalty is not one of those factors. Therefore, Respondent Deborah Ann Milette's inability to pay the \$2,500 civil penalty is not a basis for reducing the \$2,500 civil penalty.⁶

⁶The Judicial Officer did give consideration to ability to pay when determining the amount of the civil penalty to assess under the Animal Welfare Act in *In re Gus White, III*, 49 Agric. Dec. 123, 152 (1990). The Judicial Officer subsequently held that consideration of ability to pay in *In re Gus White, III*, was inadvertent error and that ability to pay would not be considered in determining the amount of civil penalties assessed under the Animal Welfare Act in the future. See *In re J. Wayne Shaffer*, 60 Agric. Dec. 444, 475-76 (2001) (stating section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act and the Regulations and a respondent's ability to pay the civil penalty is not one of those factors); *In re Nancy M. Kutz* (Decision and Order as to Nancy M. Kutz), 58 Agric. Dec. 744, 757 (1999) (stating section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act, the Regulations, and the Standards, and a respondent's ability to pay the civil penalty is not one of those factors); *In re James E. Stephens*, 58 Agric. Dec. 149, 199 (1999) (stating the respondents' financial state is not relevant to the amount of the civil penalty assessed against the respondents for violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1143 (1998) (stating a respondent's ability to pay a civil penalty is not considered in determining the amount of the civil penalty to be assessed), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1050 n.1 (1998) (stating the Judicial Officer

(continued...)

For the foregoing reasons and the reasons set forth in *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. ____ (June 29, 2005), Respondent Deborah Ann Milette's petition 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 to reconsider. Respondent Deborah Ann Milette's petition to reconsider was timely filed and automatically stayed *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. ____ (June 29, 2005). Therefore, since Respondent Deborah Ann Milette's petition to reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. ____ (June 29, 2005), is reinstated; except that the effective date

⁶(...continued)

has pointed out that when determining the amount of a civil penalty to be assessed under the Animal Welfare Act, consideration need not be given to a respondent's ability to pay the civil penalty); *In re James J. Everhart*, 56 Agric. Dec. 1401, 1416 (1997) (stating a respondent's inability to pay the civil penalty is not a consideration in determining civil penalties assessed under the Animal Welfare Act); *In re Mr. & Mrs. Stan Kopunec*, 52 Agric. Dec. 1016, 1023 (1993) (stating the ability to pay a civil penalty is not a relevant consideration in Animal Welfare Act cases); *In re Micheal McCall*, 52 Agric. Dec. 986, 1008 (1993) (stating the ability or inability to pay is not a criterion in Animal Welfare Act cases); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1071 (1992) (stating the Judicial Officer once gave consideration to the ability of respondents to pay a civil penalty, but that the Judicial Officer has removed the ability to pay as a criterion, since the Animal Welfare Act does not require it), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Jerome A. Johnson*, 51 Agric. Dec. 209, 216 (1992) (stating the holding in *In re Gus White, III*, 49 Agric. Dec. 123 (1990), as to consideration of ability to pay, was an inadvertent error; ability to pay is not a factor specified in the Animal Welfare Act and it will not be considered in determining future civil penalties under the Animal Welfare Act).

of the Order is the date indicated in the Order in this Order Denying Petition to Reconsider as to Deborah Ann Milette.

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

ORDER

1. Respondent Deborah Ann Milette, her 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.

Paragraph 1 of this Order shall become effective on the day after service of this Order on Respondent Deborah Ann Milette.

2. Respondent Deborah Ann Milette is assessed a \$2,500 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:

Colleen A. Carroll
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, Colleen A. Carroll within 60 days after service of this Order on Respondent Deborah Ann Milette.

Respondent Deborah Ann Milette shall state on the certified check or money order that payment is in reference to AWA Docket No. 04-0023.

RIGHT TO JUDICIAL REVIEW

Respondent Deborah Ann Milette has 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. Respondent Deborah Ann Milette must seek judicial review within 60 days after entry of this Order.⁷ The date of entry of this Order is September 9, 2005.

Done at Washington, DC

September 9, 2005

William G. Jenson
Judicial Officer

⁷U.S.C. § 2149(c).