

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	AWA Docket No. 05-0006
)	
RICHARD MIELKE, an individual;)	
KAYE MIELKE, an individual; and)	
MIELKE’S PEKE PATCH,)	DECISION AND ORDER
an unincorporated association,)	AS TO RICHARD MIELKE
)	AND KAYE MIELKE BY
Respondents)	REASON OF DEFAULT

[1] This proceeding was instituted under the Animal Welfare Act (“Act”), as amended (7 U.S.C. § 2131 et seq.), by a complaint filed on December 2, 2004, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (hereinafter frequently “APHIS”), alleging that the respondents willfully violated the Act and the regulations and standards issued thereunder (“Regulations” and “Standards”, 9 C.F.R. § 1.1 et seq.).

[2] On December 3, 2004, the Hearing Clerk sent to respondents, by certified mail, return receipt requested, copies of the complaint, Rules of Practice and a service letter. Respondents were informed in the accompanying letter of service that an answer to the complaint should be filed pursuant to the Rules of Practice and that failure to answer any allegation in the complaint would constitute an admission of that allegation.

[3] Respondent Richard Mielke received the complaint on December 11, 2004,¹ and respondent Kaye Mielke received the complaint on December 10, 2004.² Respondents Richard Mielke and Kaye Mielke failed to file answers. Thus, the material facts alleged in the complaint, which are admitted by said respondents' default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139.

[4] APHIS filed a Motion for Adoption of Proposed Decision and Order as to Richard Mielke and Kaye Mielke on January 14, 2005, identifying APHIS's request for "the maximum possible civil penalty, \$30,800." The Motion was served on Richard Mielke and on Kaye Mielke on January 24, 2005. Respondents Richard Mielke and Kaye Mielke failed to respond to APHIS's Motion.

[5] APHIS's Motion addresses the Act's guidance for appropriateness of the civil penalty amount. 7 U.S.C. § 2149(b). APHIS states that the size of the business of the person involved is small. APHIS states that the gravity of the violation is serious, because respondents have continued to operate as dealers after their Animal Welfare Act license was revoked. APHIS does not specifically address the good faith of respondents. APHIS shows the history of previous violations to have been those identified in the Consent Decision in *In re Richard Mielke, an individual; Kaye Mielke, an individual; and Mielke's Peke Patch, an unincorporated association*, 62 Agric. Dec. 726 (Dec. 3, 2003) (AWA Docket No. 03-0019) (finding at least 21 violations of the Act and Regulations, revoking respondents' Animal Welfare Act license, and assessing a civil penalty of \$6,875, of which \$5,875 was held in abeyance).

¹See Domestic Return Receipt for Article Number 7003 2260 0005 5721 3472.

[6] Respondent Kaye Mielke filed a letter, postmarked March 14, 2005 and received by the Hearing Clerk on March 22, 2005, which was too late to be an answer and too late to be a response to APHIS's Motion for a default decision. APHIS filed a Motion to Strike the letter, on March 30, 2005. The Motion is denied. Perhaps APHIS will respond to the questions respondent Kaye Mielke asks.

Findings of Fact

[7] Respondent Richard Mielke is an individual whose mailing address is 4799 Tyrone Road, Houston, Missouri 65483.

[8] Respondent Kaye Mielke is an individual whose mailing address is 4799 Tyrone Road, Houston, Missouri 65483.

[9] On June 5, 2004, respondent Richard Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, and specifically, respondent Richard Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Phyllis Fish (Animal Welfare Act license number 73-A-1594) of Duncan, Oklahoma. The sale of each dog constitutes a separate violation.

[10] On June 5, 2004, respondent Kaye Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, and specifically, respondent Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Hazel Gilpin (Animal Welfare Act license number 73-A-1979) of Big Cabin, Oklahoma. The sale of each dog constitutes a separate violation.

[11] On June 5, 2004, respondent Kaye Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, and specifically, respondent Kaye Mielke sold one male

²See Domestic Return Receipt for Article Number 7003 2260 0005 5721 3489.

Pekingese, in commerce, through Southwest Auction Service to Michel Lasiter (Animal Welfare Act license number 43-A-4044) of Pierce City, Missouri. The sale of each dog constitutes a separate violation.

[12] On June 5, 2004, respondent Kaye Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, and specifically, respondent Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Glenn Manning (Animal Welfare Act license number 42-A-0775) of Waukon, Iowa. The sale of each dog constitutes a separate violation.

[13] On June 5, 2004, respondent Kaye Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, and specifically, respondent Kaye Mielke sold three female Pekingese, in commerce, through Southwest Auction Service to Steve Lewis (Animal Welfare Act license number 31-B-0113) of Newark. The sale of each dog constitutes a separate violation.

[14] Respondents Richard Mielke and Kaye Mielke were respondents in *In re Richard Mielke, an individual; Kaye Mielke, an individual; and Mielke's Peke Patch, an unincorporated association*, 62 Agric. Dec. 726 (Dec. 3, 2003) (AWA Docket No. 03-0019) (Consent Decision) (finding at least 21 violations of the Act and Regulations, revoking respondents' Animal Welfare Act license, assessing civil penalty of \$6,875, of which \$5,875 was held in abeyance provided that respondents complied with the provisions of the Act and the Regulations during an 18 month "probation period," and ordering respondents to cease and desist from future violations of the Act and Regulations and Standards).

[15] On or about June 5, 2004, respondents Richard Mielke and Kaye Mielke knowingly failed to obey the cease and desist order contained in the Consent Decision described above in

paragraph [14].

Conclusions

[16] The Secretary has jurisdiction in this matter.

[17] On June 5, 2004, respondent Richard Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations, and specifically, respondent Richard Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Phyllis Fish (Animal Welfare Act license number 73-A-1594) of Duncan, Oklahoma. The sale of each dog constitutes a separate violation. 7 U.S.C. §§ 2134, 2149, 9 C.F.R. § 2.1(a)(1).

[18] On June 5, 2004, respondent Kaye Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations, and specifically, respondent Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Hazel Gilpin (Animal Welfare Act license number 73-A-1979) of Big Cabin, Oklahoma. The sale of each dog constitutes a separate violation. 7 U.S.C. §§ 2134, 2149, 9 C.F.R. § 2.1(a)(1).

[19] On June 5, 2004, respondent Kaye Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations, and specifically, respondent Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Michel Lasiter (Animal Welfare Act license number 43-A-4044) of Pierce City, Missouri. The sale of each dog constitutes a separate violation. 7 U.S.C. §§ 2134, 2149, 9 C.F.R. § 2.1(a)(1).

[20] On June 5, 2004, respondent Kaye Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, in willful violation of section 2134 of the Act and

section 2.1(a)(1) of the Regulations, and specifically, respondent Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Glenn Manning (Animal Welfare Act license number 42-A-0775) of Waukon, Iowa. The sale of each dog constitutes a separate violation. 7 U.S.C. §§ 2134, 2149, 9 C.F.R. § 2.1(a)(1).

[21] On June 5, 2004, respondent Kaye Mielke operated as a dealer as defined in the Act and the Regulations, without being licensed, in willful violation of section 2134 of the Act and section 2.1(a)(1) of the Regulations, and specifically, respondent Kaye Mielke sold three female Pekingese, in commerce, through Southwest Auction Service to Steve Lewis (Animal Welfare Act license number 31-B-0113) of Newark. The sale of each dog constitutes a separate violation. 7 U.S.C. §§ 2134, 2149, 9 C.F.R. § 2.1(a)(1).

[22] On or about June 5, 2004, respondents Richard Mielke and Kaye Mielke knowingly failed to obey the cease and desist order made by the Secretary under section 2149(b) of the Act (7 U.S.C. § 2149(b)), in *In re Richard Mielke, and individual, Kaye Mielke, and individual; and Mielke's Peke Patch, an unincorporated association*, 62 Agric. Dec. 726 (Dec. 3, 2003) (AWA Docket No. 03-0019) (Consent Decision).

[23] The cease and desist order is paragraph one of the “Order” found on pages 10-11 of the Consent Decision and states: “Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations and Standards issued thereunder.”

[24] The maximum civil penalty per offense for knowing failure to obey a cease and desist order is \$1,650. 7 U.S.C. § 2149(b), 7 C.F.R. § 3.91(a), (b)(2)(v).

[25] The maximum civil penalty per violation of the Act is \$2,750. 7 U.S.C. § 2149(b), 7 C.F.R. § 3.91(a), (b)(2)(v).

[26] The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. 7 U.S.C. § 2149(b).

[27] Maximum civil penalties are not warranted by the circumstances here. 7 U.S.C. § 2149(b).

[28] Adding the maximum civil penalty for each violation of the Act to the maximum civil penalty for failure to obey a cease and desist order for the very same violation is not warranted by the circumstances here. 7 U.S.C. § 2149(b).

Order

[29] Respondents Richard Mielke and Kaye Mielke, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations and Standards, and, in particular, shall cease and desist from engaged in activity for which an Animal Welfare Act license is required.

[30] Respondents Richard Mielke and Kaye Mielke are jointly and severally assessed the **\$5,875** civil penalty that was held in abeyance in AWA Docket No. 03-0019 (see paragraph [14]), to be paid as described below in paragraph [33].

[31] Respondent Richard Mielke is assessed an **additional \$500** civil penalty, for his sale of one dog on June 5, 2004, a male Pekingese, to be paid as described below in paragraph [33].

[32] Respondent Kaye Mielke is assessed an **additional \$3,000** civil penalty, for her sale of six dogs on June 5, 2004, three male Pekingese and three female Pekingese, to be paid as described below in paragraph [33].

[33] The **\$9,375 total** in civil penalty shall be paid by cashier's check(s) or certified check(s) or money order(s) made payable to order of the **Treasurer of the United States** and forwarded

within 30 days from the effective date of this Order by a commercial carrier such as FedEx or

UPS to: Bernadette R. Juarez, Esq.
 United States Department of Agriculture
 Office of the General Counsel, Marketing Division
 Room 2343-South Building
 1400 Independence Avenue, SW
 Washington, DC 20250-1417

Respondents shall state on their cashier's checks, certified checks or money orders that the payment is in reference to **AWA Docket No. 05-0006**.

[34] This Order shall be effective on the first day after this Decision and Order becomes final.

This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.
this 10th day of May 2005

Jill S. Clifton
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
1400 Independence Avenue, SW
Room 1031, South Building
Washington, D.C. 20250-9203
202-720-4443
Fax: 202-720-9776

APPENDIX A

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—ADMINISTRATIVE REGULATIONS

....

SUBPART H—RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

...

§ 1.145 Appeal to Judicial Officer.

(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. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the

time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145