UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

AWA Docket No. 04-0016
AWA Docket No. 05-0013

In re:

DAVID HAMILTON, and individual, doing business as
MID-SOUTH DISTRIBUTORS OF ARKANSAS, LLC,
an Arkansas domestic limited liability company; and
WILLIAM HAMILTON, an individual doing business as
MID-SOUTH DISTRIBUTORS,

Respondents

MEMORANDUM OPINIONAND ORDER

This matter is before the Administrative Law Judge upon a number of pending Motions filed by the parties in both actions.

PROCEDURAL HISTORY

AWA Docket No. 04-0016 was initiated by the filing of a complaint by the Administrator of the Animal and Plant Health Inspection Service on May 13, 2004 alleging that the Respondent David Hamilton had violated the Animal Welfare Act and the regulations and standards issued implementing the Act. On June 8, 2004, the Respondent David Hamilton filed a Motion to Dismiss, or in the alternative, Answer to the Complaint.

On November 5, 2004, the Complainant filed a Motion to Set Date for Oral Hearing and following a telephonic Pre-Hearing Conference on February 3, 2005, the matter was set for hearing on May 17, 2005 in Little Rock, Arkansas.[1]

On February 15, 2005, Complainant filed a Motion to Amend Complaint, Extend Exchange Deadlines, Lengthen Hearing, and Request to Shorten Respondent's Response Time and Expedited Decision.[2] The same day, after consulting with the undersigned, Judge Jill S. Clifton entered an Order granting the Motion to Amend the Complaint, Extending the Complainant's Exchange Deadline to March 9, 2005, vacating the Respondent's Exchange Deadline to a date to be set by further order and confirming the hearing date of May 17, 2005. On March 9, 2005, consistent with the Order of February 15, 2005, the Complainant filed its List of Exhibits and Witnesses.

On March 15, 2005, the Respondents David Hamilton and Mid-South Distributors, LLC filed a Motion to Extend Time in which to Respond to the Amended Complaint, indicating that counsel for the Complainant had been contacted and had no opposition to the Motion.[3] On March 16, 2005, I entered an Order granting the Respondents until April 14, 2005 in which to file their Answer to the Amended Complaint.

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[1] A Notice of Hearing and Exchange Dates was entered on February 3, 2005.

[2] In the Motion, Complainant's counsel, apparently without checking the record, incorrectly stated that no order summarizing the teleconference had been entered inferring a violation of Rule 1.140(d). The Amended Complaint added William Hamilton as a party respondent and alleged a number of additional violations.

[3] In their Motion for the Extension of Time, respondents' counsel indicated that they had been in the process of drafting an answer to the Amended Complaint and had been advised that Complainant's counsel planned to file a Second Amended Complaint. The Motion continued that Respondents would not consent at that time to the filing of a Second Amended Complaint. In their prayer for relief, they requested thirty additional days in which to respond to the First Amended Complaint and if "USDA" in fact moved to amend its Complaint a second time, Respondents would respond to that Motion within the time set by the Rules and if so required, file a response to the Second Amended Complaint.

On March 29, 2005, Complainant filed its List of Witnesses and Supplemental Exhibits and a Motion to Amend Complaint and Request to Shorten Respondents' Response Time and To Expedite Decision.[4] On April 4, 2005, the Motion to Shorten the Response Time was denied.

On April 12, 2005, the Complainant moved to withdraw its Motion to Amend the Complaint and filed the complaint in AWA Docket No. 05-0013. A week later, on April 19, 2005, the Complainant filed its Motion for Adoption of Proposed Decision and Order, citing the failure of the Respondents to file an Answer to the Amended Complaint by April 14, 2005, the date specified in the March 16, 2005 Order. On April 27, 2005, unaware that a new action had been filed involving the same parties, I entered an Order granting the Complainant's Motion to Withdraw its Second Amended Complaint and canceling the hearing scheduled to commence on May 17, 2005.

The Respondents, apparently prior to receiving the April 27, 2005 Order, filed their Motion to Strike Complainant's Motion for Adoption of Proposed Decision and Order and Opposition to Complainant's Request to Withdraw Motion to Amend Complaint on April 29, 2005. Their motion claimed surprise and advanced the position that the tendered but not filed (second) amended complaint had "mooted" the April 14, 2005 deadline. In their Motion, the Respondents bitterly characterized the Motion for Adoption of Proposed Decision as "bewildering" and "gamesmanship" and without knowledge of the April 27, 2005 order noted that the motion to amend the complaint a second time had been filed and was still pending.

On May 6, 2005, the Complainant responded to the Motion to Strike, pointing out that the Federal Rules of Civil Procedure are not applicable to proceedings brought

[4] On March 29, 2005, the undersigned was out of the office hearing a case in Tennessee.

before the Secretary of Agriculture and indicating that the filing of a Motion to Amend Complaint in no way mooted or tolled the deadline to file an answer to the Amended Complaint which had been set as April 14, 2005.

On May 6, 2005, the Respondents filed their Motion to Consolidate and Dismiss, or in the Alternative, Answer to the Complaint filed in AWA Docket No. 05-0013. On May 9, 2005, the Respondents filed a Motion for Reconsideration of the Order Granting Complainant's Request to Withdraw the Motion to Amend Complaint, and at the same time also asked that the Order of April 27, 2005 be reconsidered. On May 11, 2005, Respondents filed a Notice of Filing and Request for Hearing on the Motion for Reconsideration.

On June 1, 2005, the Respondents filed "Respondent's Motion to Dismiss and in the Alternative, Answer to the Amended Complaint" in AWA Docket No. 04-0016. On June 10, 2005, the Complainant moved to strike Respondents' Answer to the Amended Complaint and on June 14, 2005, filed a Response to the Respondent's Motion to Dismiss Amended Complaint. The Respondents responded to the Motion to Strike the Respondents' Answer by filing Respondents' Opposition to Complainant's Motion to Strike Respondents' Answer to the Amended Complaint on June 15, 2005.

On June 16, 2005, a hearing was held on all pending motions in both cases. Bernadette R. Juarez, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, D.C. appeared for the Complainant and David M. Tafuri, Esquire, Patton Boggs, LLP, Washington, D.C. appeared for the Respondents.

DISCUSSION

It is well established that the Rules of Practice, 7 C.F.R. § 1.130 *et seq.*, rather than the Federal Rules of Civil Procedure apply to adjudicatory proceedings under the regulations promulgated under the Animal Welfare Act.[5] The Rules of Practice differ from the Federal Rules of Civil Procedure in that an answer must be filed within 20 days after service of the complaint. Rule 1.136. That rule specifies the content of an answer, requiring that an answer shall "clearly admit, deny, or explain each of the allegations" and set forth any defenses. *Id.* It further provides that "failure to file an answer within the time provided in paragraph (a) of this section shall be deemed, for the purposes of the proceeding, an admission of the allegations in the Complaint...." *Id.*

Rule 1.139 sets forth the procedure upon failure of a party to file an answer or admission of facts:

> The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. . . . . 7 C.F.R. §1.139

Extensions may be permitted, as Rule 1.147 provides that the "time for the filing of any document or paper required or authorized under the rules in this part to be filed may be extended by the Judge or the Judicial Officer...if...there is good reason for the extension." 7 C.F.R. §1.147(f).

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[5] *In re Anna Mae Noell,* 58 Agric. Dec. 130, 147 (1999) *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Department of Agriculture,* No. 00-10608-A (11th Circ. 2000) and the list of cases cited in Footnote 7 of the Complainant's Response to Respondents' Motion to Strike Complainant's Motion for Adoption of Proposed Decision and Order filed on May 6, 2005.

Given the unusual procedural history and circumstances of this case, with amendments being made after a hearing date being set, the tendering of a second amended complaint and then the withdrawal of that complaint accompanied by the initiation of a new action, I find the respondents' counsels' failure to answer, while in error, to be understandable. The pleadings in the file make it abundantly clear that the Respondents intended to vigorously defend this case and did not intentionally "default,"[6] particularly in view of the significant civil penalties sought as well as the potential loss of the Respondents' Animal Welfare Act licenses. Accordingly, I can easily understand and accept their statement that Complainant's Motion for Adoption of Proposed Decision did indeed take them by surprise.

While noting that the Rules of Practice would authorize, but not require the entry of the Proposed Decision and further noting that counsel for the Complainant is under no obligation to instruct opposing counsel in the requirements of the rules, I find it lamentable and manifestly unjust, given the procedural history of this case and the significant penalties sought, including the loss of the Respondents' Animal Welfare Act licenses for the Complainant to seek to forego a hearing on the merits by capitalizing on a procedural error of the nature as was made in this case, particularly as the Complainant will not be prejudiced in any way.

The Administrative Law Judges with this agency have previously sought to afford respondents a hearing on the merits where they felt there was good cause, noting

[6] In their Motion filed on March 15, 2005, the Respondents sought an extension of time in which to file their answer in part to avoid the time and expense of responding to a complaint that might be "mooted" and commented that if USDA moved to amend its complaint a second time, that they would respond to that motion within the time allowed by the Rules, and "if so required" file its Response to the Second Amended Complaint. To the extent that my rulings precluded their response, that fault is mine.

the traditional preference for such disposition.[7] To do otherwise appears to lose sight of the basic tenet that fairness concerns should be paramount where quasi-criminal sanctions may be imposed. In *Oberstar v. FDIC,* 987 F,2d 494, 504 (8th Cir. 1993), Oberstar sought to set aside a default that had been entered against him pursuant to the FDIC rules despite the fact that he had filed a late answer. In reversing the default, the Court wrote:

> The judicial preference for adjudication on the merits goes to the fundamental fairness of the adjudicatory proceedings. Fairness concerns are especially important when a government agency proposes to assess a quasi-criminal monetary penalty on a private individual. By entering the default judgment against Oberstar because of his minor deviation from the FDIC's procedural rule, with no showing of prejudice to the agency, the Board unfairly deprived Oberstar of his right to a statutorily mandated hearing. We hold that the Board's application of the FDIC default regulation in this case was an abuse of discretion. *Id.*[8]

The Court in *Oberstar* found good cause for not filing the answer, in part, because, as in this case, FDIC had commenced a second action against Oberstar while the outcome of the first was still pending. *Id.*[9]

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[7] Not all such efforts have been approved by the Judicial Officer. *In re Chad Way, et al*,.HPA Docket No. 03-0005 (JO Decision and Order April 11, 2005). *See also: In re Diana R. McCourt, et al.,* AWA Docket No. 05-0003 (JO Decision and Order March 29, 2005; since vacated at the request of the Office of General Counsel). In that case, complainant sought a default where a counsel's father's death contributed to the filing of a late answer. Notwithstanding the circumstances of the case and the brief interval before the answer was filed, Chief Judge Hillson's acceptance of the late answer was considered error by the Judicial Officer. Similarly, Judge Clifton's denial of a motion for default was overturned by the Judicial Officer in *In re Lion Raisins, Inc., et al.,* 63 Agric. Dec. 211 (2004) In that case, rather than filing an answer, respondent's counsel filed a motion to dismiss. When the complainant's motion for default was filed for lack of a timely answer, respondent filed timely objection and which was found good cause by Judge Clifton who denied the motion for default. The Judicial Officer found the denial of the motion for default error and entered a decision and order adverse to the respondent. On appeal, the District Court for the Eastern District of California cited *Oberstar* with approval and remanded the case for further proceedings. *Lion Raisins, Inc., et al. v. United States Department of Agriculture*, CV-F-04-05844 REC DLB (May 12, 2005). All of these cases illustrate an unseemly, if not egregious rush to take procedural advantage of a litigant.

[8] Cited with approval in *Lion Raisins, Inc., et al v. United States Department of Agriculture,* No. CV-F-04-5844 REC DLB, (E.D. Ca. 2005)

[9] The Court in *Oberstar* characterized the filing of a second action while the first was still pending "unfair harassment". The Court in *Lion Raisins* commented that it appeared contrary to all notions of judicial and administrative economy to bring a second action rather than amending its complaint to add additional allegations. In the instant case, the complainant first sought to amend its complaint a second time and then

My perception of fairness likely has been strongly influenced by the experience of representing the United States for more than a decade as an Assistant United States Attorney in both civil and criminal cases and being mentored with the philosophy and purpose being expressed as not merely to win cases, but to see that justice is done.[10] Government attorneys at all levels are charged with a very peculiar and awesome fiduciary responsibility when they are called upon to enforce the law or regulations, yet still being mindful of the fact that they are a servant of the people. While they indeed have an obligation to advance their cases with earnestness and vigor, every action taken must be in the context of seeing that justice is done. Measured against that yardstick, I cannot but express doubt that decisions to seek victories by procedural maneuvers thereby avoiding a hearing on the merits such as were done in this case and others that have been before me and my colleagues are inconsistent with the principles and objectives of this Department, much less being inconsistent with what I have been advised by senior attorneys of the Department is agency policy.

Accordingly, the following Order is entered:

1. The Complainant's Motion for Adoption of Proposed Decision and Order by reason of default is **DENIED.**

2. Good cause having been found for the filing of the untimely Answer of the Respondents, the same is Ordered **FILED** in AWA Docket No. 04-0016, as if timely.

3. The Respondents' Motion to Consolidate the cases of AWA Docket No. 04-0016 and AWA Docket No. 05-0013 is **GRANTED** and the cases are

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moved to withdraw the amendment only to bring another action without indication of the intended action in its Motion to Withdraw Second Amended Complaint.

[10] *See: United States v. Berger,* 295 U.S. 78, 88 (1935) The decision also contains the oft quoted "he may strike hard blows, he is not at liberty to strike foul ones" language.

CONSOLIDATED for the purposes of hearing. All subsequent pleadings filed by the parties will bear both case numbers and will be filed by the Hearing Clerk in the case jacket of AWA Docket No. 04-0016.

4. The Respondents' Motion to Strike Complainant's Motion for Adoption of Proposed Decision and Order having been mooted is **DENIED.**

5. The Respondents' separate Motions to Dismiss filed in both actions are **DENIED.**

6. It previously having been ordered that the cases be consolidated, the Respondents' Motion for Reconsideration of the Order Granting Complainant's Request to Withdraw the Motion to Amend Complaint is **DENIED.**

7. Complainant's Motion to Strike Respondent's Answer to Amended Complaint is **DENIED.**

8. By **Friday, July 15, 2005**, Counsel for the Complainant will file with the Hearing Clerk a list of exhibits and a list of witnesses. Counsel will also deposit for next day business day delivery to Counsel for the Respondents, by commercial carrier such as Fed Ex, UPS or other comparable service, copies of Complainant's proposed exhibits, a list of the exhibits and a list of anticipated witnesses together with a short statement as to the nature of their testimony.

9. By **Friday, August 12, 2005**, Counsel for the Respondents will file with the Hearing Clerk a list of exhibits and a list of witnesses. Counsel will also deposit for next day business day delivery to Counsel for the Complainant, by commercial carrier such as Fed Ex, UPS or other comparable service, copies of the Respondents' proposed exhibits,

a list of exhibits and a list of anticipated witnesses together with a short statement as to the nature of their testimony.

10. Exhibits shall be pre-marked, on the lower right corner, as CX-1, CX-2 *et seq.* (for Complainant's exhibits[11]) and RX-1, RX-2 *et seq.* (for Respondents' exhibits). Multi-page exhibits shall be paginated with numbers placed at the bottom of the pages.

11. This matter will be set for oral hearing by separate order to be entered. Counsel for the respective parties will advise the Administrative Law Judge of the anticipated length of the hearing and of their available dates when the matters may be heard.

Copies of this Order shall be served upon counsel for the parties by the Hearing Clerk's Office.

Done at Washington, D.C.
June 16, 2005

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PETER M. DAVENPORT
Administrative Law Judge

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[11] Alternatively, standard Government Exhibit stickers may be used.