

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	AWA Docket No. 03-0010
)	
Erica Nicole Mashburn and)	
James Mashburn,)	AMENDED
d/b/a Living Legend Kennel,)	Decision and Order as to
)	James Mashburn by
Respondents)	Reason of Default

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 et seq.), by the Complaint filed on January 10, 2003, and the Amended Complaint filed on March 18, 2003, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (“APHIS”), alleging that the respondents willfully violated the Act and the regulations and standards issued thereunder (9 C.F.R. § 1.1 et seq.)

The Hearing Clerk sent to Respondent James Mashburn, on January 10, 2003, by certified mail, return receipt requested, a copy of the Complaint and the Rules of Practice governing proceedings under the Act (7 C.F.R. §§ 1.130-1.151), and an accompanying letter of service that advised respondents of many things, including: “You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.”

Respondent James Mashburn was served with the Complaint and accompanying documents on January 22, 2003. Pursuant to a request for extension of time, an Answer was filed on February 20, 2003. I construe that Answer to have been filed on behalf of all

respondents. The Answer included all three respondents in its caption. Respondent James Mashburn's statement dated February 18, 2003, and notarized on February 19, 2003, is included in the Answer.

On March 18, 2003, APHIS filed the Amended Complaint, and the Hearing Clerk sent a copy of the Amended Complaint to Respondent James Mashburn at his last known address, by certified mail, return receipt requested. Respondent James Mashburn was served with the Amended Complaint at his last known address on March 22, 2003, when his co-respondent, Nicole Mashburn, now known as Nicole deHaan (full name Erica Nicole deHaan), signed to receive the certified mailing addressed to Mr. James Mashburn. The letter of service that accompanied the Amended Complaint stated he would have twenty (20) days from service in which to file an answer to the Amended Complaint.

On April 17, 2003, Chief Administrative Law Judge James W. Hunt issued an Order granting an extension of time to May 2, 2003, for respondents to respond to the Amended Complaint. Respondent James Mashburn failed to file an answer to the Amended Complaint by May 2, 2003, as required, and to this day he still has not filed an answer to the Amended Complaint.

On July 1, 2003, this case was reassigned, to me. On September 3, 2003, APHIS moved for a default decision and order against Respondent James Mashburn. By Order issued February 3, 2004, the Judicial Officer of the United States Department of Agriculture remanded this proceeding to me to issue a decision as to Respondent James Mashburn in accordance with the Rules of Practice. The Judicial Officer vacated my Order Denying APHIS' Motion re: James Mashburn, received by the Hearing Clerk October 14, 2003.

Respondent James Mashburn was served at his last known address with APHIS's motion for a default decision and order against him, together with the proposed default decision and

order, on September 11, 2003, when Rick deHaan, a relative of his co-respondent Nicole Mashburn, now known as Nicole deHaan (full name Erica Nicole deHaan), signed to receive the certified mailing addressed to Mr. James Mashburn.

Respondent James Mashburn failed to file objections to the proposed default decision and order within 20 days after service, as required, and to this day he still has not responded to the proposed default decision and order.

The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the Complaint. 7 C.F.R. §1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139. Accordingly, the material allegations in the Amended Complaint are adopted and set forth in this Decision as the Findings of Fact, and this Decision is issued pursuant to the Rules of Practice. 7 C.F.R. § 1.139. *See* 7 C.F.R. §1.130 et seq.

Findings of Fact

1. Respondent James Mashburn, hereinafter referred to as respondent, is an individual who operated as a dealer as defined by the Animal Welfare Act, whose last known address is Rt. 3 Box 209-A, Ava, Missouri 65608.
2. Respondent has failed to notify the Hearing Clerk of his address changes.
3. On June 12, 2001, APHIS officials found that respondent failed to individually identify dogs.
4. On June 12, 2001, APHIS officials found that respondent failed to maintain primary enclosures for dogs that were structurally sound and in good repair so that they protected the animals from injury and had no sharp points or edges that could injure the animals.
5. On June 12, 2001, APHIS officials found that respondent failed to construct

primary enclosures for dogs so that they provided sufficient space.

6. On June 12, 2001, APHIS officials found that respondent failed to keep the premises, including buildings and surrounding grounds, in good repair, and clean and free of debris, and to control weeds, grasses and bushes, in order to protect the animals from injury and facilitate the required husbandry practices.

7. On August 8, 2001, APHIS officials found that respondent failed to individually identify dogs.

8. On August 8, 2001, APHIS officials found that respondent failed to maintain primary enclosures for dogs that were structurally sound and in good repair so that they protected the animals from injury and had no sharp points or edges that could injure the animals.

9. On August 8, 2001, APHIS officials found that respondent failed to maintain primary enclosures for dogs that were structurally sound and in good repair so that they contained the animals securely.

10. On August 8, 2001, APHIS officials found that respondent failed to sanitize water receptacles for dogs.

11. On August 8, 2001, APHIS officials found that respondent failed to keep the premises, including buildings and surrounding grounds, in good repair, and clean and free of debris, and to control weeds, grasses and bushes, in order to protect the animals from injury and facilitate the required husbandry practices.

12. On August 17, 2001, APHIS officials found that respondent failed to individually identify dogs.

13. On August 17, 2001, APHIS officials found that respondent failed to store supplies of food in a manner that protected them from spoilage, contamination, and vermin

infestation.

14. On August 17, 2001, APHIS officials found that respondent failed to maintain housing facilities that were equipped with disposal facilities and drainage systems that were constructed and operated so that animal waste and water are removed rapidly.

15. On August 17, 2001, APHIS officials found that respondent failed to provide adequate protection from the elements to dogs in outdoor housing facilities.

16. On August 17, 2001, APHIS officials found that respondent failed to maintain on a regular basis the surfaces of outdoor housing facilities for dogs.

17. On August 17, 2001, APHIS officials found that respondent failed to maintain primary enclosures for dogs that were structurally sound and in good repair so that they protected the animals from injury and had no sharp points or edges that could injure the animals.

18. On August 17, 2001, APHIS officials found that respondent failed to maintain primary enclosures for dogs that were structurally sound and in good repair so that they contained the animals securely.

19. On August 17, 2001, APHIS officials found that respondent failed to construct primary enclosures for dogs so that they provided sufficient space.

20. On August 17, 2001, APHIS officials found that respondent failed to clean and sanitize water receptacles for dogs.

21. On August 17, 2001, APHIS officials found that respondent failed to keep the premises, including buildings and surrounding grounds, in good repair, and clean and free of debris, and to control weeds, grasses and bushes, in order to protect the animals from injury and facilitate the required husbandry practices.

Conclusion

By reason of the foregoing Findings of Fact, respondent has violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159), and the regulations and standards issued thereunder, 9 C.F.R. §§ 1.1 - 3.142. Consequently, the following Order is issued.

Order

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the regulations and standards issued thereunder.

2. Respondent is assessed a civil penalty of \$1,575.00, which he shall pay by cashier's check or money order, made payable to the order of "**Treasurer of the United States**", and forwarded within thirty (30) days from the effective date of this Order by a commercial delivery service, such as FedEx or UPS, to

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

Respondent shall indicate that payment is in reference to **AWA Docket No. 03-0010**.

This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service upon respondent, unless an appeal to the Judicial Officer is filed within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

The Hearing Clerk shall continue to serve Respondent James Mashburn at his last known address, which is **Rt. 3 Box 209-A, Ava, Missouri 65608**, in a **separate envelope** from that prepared for other respondents. Respondent James Mashburn's envelope should be marked,

“Please Forward.”

Copies of this Decision and Order as to James Mashburn by Reason of Default shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.
this 9th day of March, 2004

Jill S. Clifton
Administrative Law Judge

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, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such 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 petition, and the arguments thereon, shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations of the record, statutes, regulations or authorities being relied upon in support thereof. A brief may be filed in support of the appeal simultaneously with the 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]

7 C.F.R. § 1.145