

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	
)	AWA Docket No. 04-0004
Erica Nicole deHaan, formerly)	
known as Erica Nicole Mashburn,)	Second Decision and Order by
formerly known as Erica Nicole)	Reason of Admission of Facts, as to
Avery, an individual, doing)	Erica Nicole deHaan, formerly known
business as Bundle of Joy Kennel;)	as Erica Nicole Mashburn, formerly
and Ricky deHaan, an individual,)	known as Erica Nicole Avery, an
)	individual, doing business as
Respondents)	Bundle of Joy Kennel

Procedural History

[1] The parties participated in a teleconference with me on April 5, 2004. The Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, was represented by Bernadette R. Juarez, Esq. Respondent Erica Nicole deHaan (formerly known as Erica Nicole Mashburn, formerly known as Erica Nicole Avery), doing business as Bundle of Joy Kennel, represented herself. Respondent Erica Nicole deHaan, doing business as Bundle of Joy Kennel, took responsibility for the alleged violations that were not addressed in my Decision and Order issued on March 25, 2004.

[2] This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 et seq.), by the Complaint filed on December 5, 2003, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the Animal Welfare Act and the Regulations and Standards issued thereunder (9 C.F.R. § 1.1 et seq.).

[3] The Hearing Clerk sent to respondent Erica Nicole deHaan (formerly known as Erica Nicole Mashburn, formerly known as Erica Nicole Avery), doing business as Bundle of Joy Kennel, on December 9, 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). The accompanying letter of service advised respondents that they would have 20 days from receipt in which to file an answer to the Complaint.

[4] Respondent Erica Nicole deHaan, also known as Nicole deHaan, was served with the Complaint and accompanying documents on December 13, 2003, when she signed to receive the certified mailing addressed to her.

[5] For this type of case, the only response to a Complaint authorized by the Rules of Practice is an *answer*. Respondent Erica Nicole deHaan failed to file an *answer* to the Complaint as required; to this day, she still has not filed an *answer* to the Complaint.

[6] On December 22, 2003, according to respondent Erica Nicole deHaan, she sent a Motion to Dismiss to the Hearing Clerk. No such Motion was filed in the record until January 26, 2004, when respondent Erica Nicole deHaan filed a Motion to Dismiss, enclosing a copy of the Motion to Dismiss which she states she had already filed, together with color copies of United States Postal Service documents showing deliveries to the Hearing Clerk on December 29, 2003 and on December 31, 2003. She states that she sent 3 items for the 2 cases, "for this case and another case that I am forced to deal with." The other case may be AWA Docket No. 03-0010. The record file of AWA Docket No. 03-0010 also does not contain the Motion to Dismiss which she states she had already filed.

[7] Assuming respondent Erica Nicole deHaan did send a Motion to Dismiss to the Hearing

Clerk on December 22, 2003, her timely response avails nothing, because she does not deny the allegations of the Complaint. Further, both of her Motions to Dismiss must be and hereby are denied. Under the Rules of Practice, any motion will be entertained *other than a motion to dismiss* on the pleading. *See* 7 C.F.R. § 1.143(b)(1).

[8] On January 8, 2004, the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (APHIS), moved for adoption of a decision and order by reason of admission of facts against Respondent Erica Nicole deHaan.

[9] The Hearing Clerk sent to Respondent Erica Nicole deHaan, on January 9, 2004, by certified mail, return receipt requested, a copy of APHIS's motion, together with a copy of the proposed decision and order by reason of admission of facts against respondent Erica Nicole deHaan, and an accompanying letter of service that advised her that she would have 20 days from receipt in which to file objections.

[10] Respondent Erica Nicole deHaan was served with APHIS's motion for a decision and order against her, together with the proposed decision and order by reason of admission of facts, on January 21, 2004, when she signed to receive the certified mailing addressed to her.

[11] Respondent Erica Nicole deHaan failed to file *objections* to the proposed decision and order within 20 days after service, as required; to this day, she still has not filed *objections* to the proposed decision and order. *See* 7 C.F.R. §1.139. Her Motion to Dismiss filed January 26, 2004, does not constitute meritorious *objections*; furthermore, both of her Motions to Dismiss have been denied. *See* paragraph [6].

[12] On February 6, 2004, this case was reassigned, to me.

[13] The Rules of Practice provide that the failure to file an answer within 20 days after

service (*see* 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 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

[14] Respondent Erica Nicole deHann, formerly known as Erica Nicole Mashburn, formerly known as Erica Nicole Avery, doing business as Bundle of Joy Kennel, hereinafter referred to as respondent Erica Nicole deHann, is an individual.

[15] Respondent Erica Nicole deHaan's address is Rt. 3 Box 209-A, Ava, Missouri 65608.

[16] APHIS officials have determined that, at all material times mentioned herein, respondent Erica Nicole deHaan was operating as a dealer, as defined in the Animal Welfare Act, as amended (7 U.S.C. § 2131 et seq.) (Act), and the Regulations (9 C.F.R. § 1.1 et seq.) (Regulations).

[17] On April 1, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 3 Labradors, 4 Pugs, and 3 Eskimos, to Puppy Love of Virginia, Inc.

[18] On April 8, 2003, respondent Erica Nicole deHaan operated as a dealer as defined in the Act and the Regulations, without being licensed, and sold dogs in commerce, for resale for use as pets, specifically, 1 Pug, and 1 Golden Retriever, to Puppy Love of Virginia, Inc.

[19] Ricky deHaan, an individual, is the minor child of respondent Erica Nicole deHaan.

Conclusions

[20] The Secretary of Agriculture has jurisdiction.

[21] During the approximately 1-week period from April 1-8, 2003, as shown in the Findings of Fact, respondent Erica Nicole deHaan was operating as a dealer without being licensed, in willful violation of the Animal Welfare Act, as amended, particularly 7 U.S.C. §§ 2131-2134, and the Regulations, particularly 9 C.F.R. § 2.1(a)(1).

[22] During that time, as shown in the Findings of Fact, respondent Erica Nicole deHaan sold 12 dogs in commerce, for resale for use as pets, while operating as a dealer without being licensed.

[23] The sale of each dog constitutes a separate violation. 7 U.S.C. § 2149.

[24] Under these circumstances, \$360.00 is a reasonable and appropriate civil penalty for these 12 violations of the Animal Welfare Act, in accordance with the statutory factors to be considered. 7 U.S.C. § 2149.

[25] All allegations against Ricky deHaan, an individual, the minor child of respondent Erica Nicole deHaan, should be dismissed.

Order

[26] Respondent Erica Nicole deHaan, her 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, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Act and Regulations without being licensed as required.

[27] Respondent Erica Nicole deHaan is assessed a civil penalty of \$360.00, which she 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. 04-0004**.

[28] All allegations against Ricky deHaan, an individual, the minor child of respondent Erica Nicole deHaan, are hereby dismissed.

[29] This Second 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).

Copies of this Second Decision and Order as to respondent Erica Nicole deHaan by reason of admission of facts shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.
this 5th day of April 2004

Jill S. Clifton
Administrative Law Judge

A

Hearing Clerk's Office
U.S. Department of Agriculture
1400 Independence Avenue, SW
Room 1081, South Building
Washington, D.C. 20250-9200
202-720-4443
Fax: 202-720-9776

PPENDIX 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