UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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In re:	)	
	)	
Jeffrey L. Green, an individual,	)	HPA Docket No. 17-0205
	)	
Respondent.	)	

DECISION AND ORDER SETTING ASIDE DEFAULT AND REMANDING FOR FURTHER PROCEEDINGS

Appearances:

Robin L. Webb, Esq., 102 South Hord Street, Grayson, Kentucky 41143, for Respondent, Jeffrey L. Green; and
John V. Rodriguez, Esq., with the Office of the General Counsel, United States Department of Agriculture, 1400 Independence Ave. SW, Washington D.C. 20250, for the Petitioner, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture ("the Agency" or "APHIS").

Decision and Order issued by Judge Bobbie J. McCartney, Judicial Officer.

PRELIMINARY STATEMENT

This is a proceeding under the Horse Protection Act, as amended (15 U.S.C. §§ 1821 *et seq.*) ("HPA" or "Act"); the regulations promulgated thereunder (9 C.F.R. §§ 11.1 through 11.4) ("Regulations"); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 through 1.151) ("Rules of Practice"). The matter initiated with a complaint filed on February 3, 2017 by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture

("APHIS" or " Complainant"), against Jeffrey L. Green ("Respondent") and others.[1] The Complaint alleged, *inter alia*, that Respondent committed multiple violations of the Act[2] and requested that any "order or orders with respect to sanctions issued be as are authorized by the Act (15 U.S.C. § 1825) and warranted under the circumstances."[3]

Service of the Complaint was made by both regular and certified mail to Respondent, Jeffrey Green, at (b) (6) [redacted], in accordance with the Rules of Practice at 7 C.F.R.§ 1.147(c)(1).[4] It is undisputed that Respondent filed a timely answer to the Complaint.[5]

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[1] In addition to Mr. Green, the following respondents were named in the February 3, 2017 Complaint: Christopher Alexander, an individual (HPA Docket No. 17-0195); Alias Family Investments, LLC, a Mississippi limited liability company (HPA Docket No. 17-0196); Margaret Anne Alias, an individual (HPA Docket No. 17-0197); Kelsey Andrews, an individual (HPA Docket No. 17-0198); Tammy Barclay, an individual (HPA Docket No. 17-0199); Ray Beech, an individual (HPA Docket No. 17-0200); Noel Botsch, an individual (HPA Docket No. 17-0201); Lynsey Denney, an individual (HPA Docket No. 17-0202); Mikki Eldridge, an individual (HPA Docket No. 17-0203); Formac Stables, Inc., a Tennessee corporation (HPA Docket No. 17-0204); William Ty Irby, an individual (HPA Docket No. 17-0206); James Dale McConnell, an individual (HPA Docket No. 17-0207); Joyce Meadows, an individual (HPA Docket No. 17-0208); Joyce H. Myers, an individual (HPA Docket No. 17-0209); Libby Stephens, an individual (HPA Docket No. 17-0210); and Taylor Walters, an individual (HPA Docket No. 17-0211). On June 13, 2017, then-Chief Administrative Law Judge Bobbie J. McCartney issued an order reassigning the dockets wherein timely answers were filed – including Mr. Green's docket (HPA Docket No. 17-0205) – to now Chief Administrative Law Judge Channing Strother. The case caption was amended several times thereafter to reflect the entry of consent decisions in various dockets, which resolved the case as to those respondents. Following a May 13, 2019 telephone conference with counsel for the parties, Judge Strother issued an order severing Mr. Green's proceeding (HPA Docket No. 17-0205) from the remaining two respondents: Tammy Barclay (HPA Docket No. 17-0199) and Noel Botsch (HPA Docket No. 17-0201).

[2] *See* Complaint at 16-18.

[3] *Id.* at 19.

[4] The record reflects that on February 8, 2017, the original Complaint was served by both regular and certified mail to Respondent, Jeffrey Green, at (b) (6) [redacted]. *See* United States Postal Service Domestic Return Receipt for Article Number [redacted] 4696. The receipt is unsigned and undated, and the envelope containing the Complaint is marked "Return To Sender, Unable to Forward" for both the certified mail copy and the regular mail copy which followed. The Rules of Practice at 7 C.F.R.§ 1.147(c)(1) provide that service of a complaint is to be made to the last known residence of an individual party and, further, if it is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.

[5] Respondent, through his attorney of record, Robin L. Webb, timely filed an Answer on February 28, 2017. Attorney Webb provided her street address on both the Answer itself and on the Certificate of Service, as follows: 102 South Hord Street, Grayson, Kentucky 41143. However, she served the Answer to Complainant's attorney at the Office of General Counsel, as well as to the Hearing Clerk's Office, by electronic mail. The Hearing Clerk's

On July 31, 2019, more than two years after the original complaint filed on February 3, 2017, Complainant filed an Amended Complaint[6] asserting that "APHIS ha[d] identified evidence of additional alleged violations by the respondent."[7] In addition to nine (9) allegations from the original Complaint, the Amended Complaint raised numerous new material allegations of violations of the Act,[8] and requested:

> that, in accordance with the Act, 15 U.S.C. §§ 1825(b)(1), 1825(c), respondent Jeffrey L. Green (1) be assessed a civil penalties [sic] of not more than $2,2000 for each violation, and (2) be disqualified from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction, directly or indirectly through any agent, employee, or other device, for a period of not less than one year for each violation.

Amended Complaint at 3-4. Furthermore, the Amended Complaint specified: "Failure to file a timely answer shall constitute the admission of all the material allegations of this amended complaint."[9] The Hearing Clerk's records reflect that the Amended Complaint was not served by certified or registered mail in accordance with the Rules of Practice at 7 C.F.R.§ 1.147(c)(1) but was sent to Respondent's counsel via email ([redacted] on August 2, 2019. [10]

Office then served the Answer to all parties utilizing only electronic mail, apparently obtaining Respondent's attorney's email address, [redacted], from her submission.

[6] *See* 7 C.F.R. § 1.137 ("Any time prior to the filing of a motion for hearing, the complaint . . . may be amended."); *Meacham*, 47 Agric. Dec. at 1709. In his Answer, the Respondent requested "[t]hat this proceeding be set for oral hearing in conformity with the provisions of the Rules of Practice applicable to the Horse Protection Act[.]" Answer at p. 3. A request for hearing set forth in an answer "is not the same as a motion for hearing, referred to in §§ 1.137 and I.14 l(b)" of the Rules of Practice. *In re Meacham,* 47 Agric. Dec. 1708, 1709 (1988). Accordingly, as Complainant correctly notes, "[n]o motion for hearing has been filed in this case." Amended Complaint at 1.

[7] Amended Complaint at 1.

[8] The original nine (9) allegations from the Complaint were incorporated into the Amended Complaint #92/29, #93/30, #94/31, #95/32, #96/33, #97/34, #98/35, #99/36. #98/35 is a double allegation.

[9] *Id.* at 9.

[10] The Hearing Clerk's records reflect that the Amended Complaint was sent to Respondent's counsel via email on August 2, 2019. Respondent's answer was due on or before August 22, 2019. Respondent has not filed an answer to the Amended Complaint.

On August 28, 2019, Complainant filed a Proposed Decision and Order by Reason of Default ("Proposed Default Decision") and Motion for Adoption the Proposed Decision ("Motion for Default") which was served by certified mail in accordance with the Rules of Practice at 7 C.F.R.§ 1.147(c)(1) to Attorney Webb's street address of 102 South Hord Street, Grayson, Kentucky 41143, as well as by electronic mail address to [redacted] (*see* Complainant's Response at 2-3). Respondent did not file any objections within the twenty (20) day period in accordance with the Rules of Practice (7 C.F.R. § 1.139).[11]

Based on Complainant's representation in the Motion For Default that Respondent failed to file a timely answer to the "duly served" Amended Complaint, on October 17, 2019, Chief Administrative Law Judge ("CALJ") Channing D. Strother granted Complainant's Motion for Decision Without Hearing by Reason of Default and issued a issued a Default Decision and Order ("Default Decision" or "DD") without further procedure or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).[12] The Rules of Practice at 7 C.F.R. § 1.136(c) provide that failure to file a timely answer within 20 days after the service of the complaint as required in 7 C.F.R. § 1.136(a) "...shall be deemed, for purposes of this proceeding, an

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[11] United States Postal Service records reflect that the Proposed Decision and Motion for Default were sent to Respondent's counsel via certified mail to Attorney Webb's street address of 102 South Hord Street, Grayson, Kentucky 41143, and delivered on September 3, 2019. Additionally, service was made by electronic mail, and the address used was [redacted] Respondent had twenty days from the date of service to file objections thereto. 7 C.F.R. § 1.139. Weekends and federal holidays shall not be included in the count; however, if the due date falls on a Saturday, Sunday, or federal holiday, the last day for timely filing shall be the following work day. 7 C.F.R. § 1.147(h). In this case, Respondent's objections were due by September 23, 2019. Respondent has not filed any objections.

[12] That the instant Motion for Default is based on Respondent's failure to answer the Amended Complaint – rather than the original Complaint, which Respondent timely answered – is of no consequence. The operative pleading in this case is the Amended Complaint. *See Walker*, 65 Agric. Dec. 932, 966 (U.S.D.A. 2006) ("Thus, the record clearly establishes that the operative pleading in this proceeding is the Amended Complaint, not the Complaint, and Respondent's response to the Complaint does not operate as a response to the Amended Complaint."); *Foley*, 59 Agric. Dec. 581, 599 (U.S.D.A. 2000).

admission of the allegations in the Complaint." [13] Accordingly, the Default Decision "deemed admitted" the material facts alleged in the Amended Complaint and adopted the findings of fact and conclusions of law contained therein. Based on these "deemed admitted" findings of fact and conclusions of law, the Default Decision disqualified Respondent Jeffrey L. Green for a period of thirty-four years from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or other device, or from judging, managing, or otherwise participating in any horse show, horse exhibition, or horse sale or auction, directly or indirectly through any agency, employee, or other device and assessing Respondent a civil penalty of $74,800. [14]

On November 11, 2019, Respondent filed an Appeal to the Judicial Officer and /or Motion to Reconsider to Vacate and Set Aside; along with a Motion to Strike the Amended Complaint, or in the Alternative Accept Late Answer of Respondent; as well as an Answer of Respondent to Amended Complaint. The Respondent's Appeal argues, generally, that the Default Decision and Order should be vacated and dismissed for the following reasons: 1. The Amended Complaint does not comply with the Federal Rules of Civil Procedure and is prejudicial; 2. The Rules of Practice deny due process as there is no procedure for the filing of a late answer; 3. An allegation based on the "scar rule" is void of due process and an arbitrary ultra vires action; and 4. The ALJ is not lawfully appointed.

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[13] 7 C.F.R. § 1.136(c).

[14] The Default Decision and Order were served by the Hearing Clerk's Office to [redacted], as well as by certified mail to Respondent's counsel, Robin L. Webb, at 102 South Hord Street, Grayson, Kentucky 41143. *See* United States Postal Service Domestic Return Receipt for Article Number 7015 3010 0001 5187 6836.

THE AMENDED COMPLAINT MUST BE SERVED BY CERTIFIED MAIL

The subject Default Decision has been timely appealed to the Judicial Officer as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 1.145) raising several issues, including the dispositive issue of the sufficiency of service of the Amended Complaint. For the reasons discussed more fully below, it is the determination of the Judicial Officer that the Amended Complaint was not served by certified mail in accordance with the requirements of the Rules of Practice at 7 C.F.R.§ 1.147(c)(1).[15]

Because this matter will be remanded back to the Chief Administrative Law Judge for further proceedings, the other issues raised in Respondent's appeal are premature and will not be addressed.

The Default Decision granting the Complainant's Motion for Default is based on Complainant's representation that Respondent failed to file a timely answer to the "duly served" Amended Complaint. Complainant goes on to explain that Respondent's timely filed Answer to the original Complaint is considered to be "...of no consequence..." under applicable jurisprudence because the "operative pleading" is the Amended Complaint. *See Walker*, 65 Agric. Dec. 932, 966 (U.S.D.A. 2006) ("Thus, the record clearly establishes that the operative pleading in this proceeding is the Amended Complaint, not the Complaint, and Respondent's response to the Complaint does not operate as a response to the Amended Complaint."); *Foley*, 59 Agric. Dec. 581, 599 (U.S.D.A. 2000).

Of course, such a holding contemplates that the Amended Complaint has been properly

[15] It is well settled the Federal Rules of Civil Procedure do not apply to these proceedings. *In re Karl Mitchell*, 60 Agric. Dec. 91 (2001).

served in accordance with the Rules of Practice. With regard to service, the applicable Rules of Practice at 7 C.F.R.§ 1.147(c)(1) provide in pertinent part as follows:

> Filing; service; extensions of time; and computation of time. (c) Service on party other than the Secretary. (1) Any complaint or other document initially served on a person to make that person a party respondent in a proceeding, proposed decision and motion for adoption thereof upon failure to file an answer or other admission of all material allegations of fact contained in a complaint, initial decision, final decision, appeal petition filed by the Department, or other document specifically ordered by the Judge to be served by certified or registered mail, shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, *Provided that*, if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.

In the instant proceeding, the Amended Complaint was "served" by the Hearing Clerk's Office on August 2, 2019, by electronic mail only, to Respondent's counsel, Robin L. Webb, at [redacted] (*see* Complainant's Response at 2). Electronic mail is not sufficient to comply with the service requirements of the Rules of Practice at 7 C.F.R.§ 1.147. While the use of electronic mail has developed as an expedient means of communication with the parties, unless a party has elected to waive the service requirements under 7 C.F.R.§ 1.147 and has affirmatively requested that service be effected only by electronic mail, service on a party other than the Secretary must comply with the provisions of 7 C.F.R.§ 1.147. This is particularly important where failure to file an answer within twenty days from the date of service of the complaint is asserted in support of a Default Decision. 7 C.F.R. § 1.136(a) and (c). Here, however, there is no indication that the attorney of record for Respondent, Robin Webb, affirmatively waived the service

requirements of 7 C.F.R. § 1.147.

Complainant argues that an amended complaint need not be considered one of the six documents required to be served by certified mail under the Rules of Practice based on the language in *Arbuckle Adventures, LLC*, 76 Agric. Dec. 38, 43 (U.S.D.A. 2017)[16] to the effect that, unlike an original complaint, an amended complaint is not one of the documents initially served on a person to make that person a party respondent in a proceeding. (7 C.F.R. § 1.137(c))

For the reasons discussed below, it is the determination of this Judicial Officer that the Rules of Practice require the same manner of service for an amended complaint as is required for an original complaint. The protections of service by certified mail of an amended complaint are consistent with the Rules of Practice when read as a whole. For example, Complainant may file an amended complaint at any time without the consent of the parties prior to the filing of a motion for hearing under the Rules of Practice at 7 C.F.R. § 1.137(a). In his timely filed Answer to the original Complaint, the Respondent requested "[t]hat this proceeding be set for oral hearing in conformity with the provisions of the Rules of Practice applicable to the Horse Protection Act[.]" Answer at p. 3. However, as Complainant has correctly pointed out, a request for hearing set forth in an answer is not the same as a motion for hearing, referred to in §§ 1.137 and 1.14 l(b) of the Rules of Practice. In this case, Complainant filed an Amended Complaint on July 31, 2019, more than two years after the original complaint was filed on February 3, 2017. [17]

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[16] The dispositive issue was one of the timeliness of the Answer given USDA's failure to track the receipt of the Answer upon delivery. The Default Decision was set aside and the matter remanded to the Chief Judge for further proceedings.

[17] *See* 7 C.F.R. § 1.137 ("Any time prior to the filing of a motion for hearing, the complaint . . . may be amended."); *Meacham*, 47 Agric. Dec. at 1709. A request for hearing set forth in an answer "is not the same as a motion for hearing, referred to in §§ 1.137 and 1.14 l(b)" of the Rules of Practice. *In re Meacham*, 47 Agric. Dec. 1708, 1709 (1988). Accordingly, as Complainant correctly notes, "[n]o motion for hearing has been filed in this case." Amended Complaint at 1.

Further, with regard to newly raised material allegations of violations, an amended complaint *is* "[a]ny complaint or other document initially served on a person to make that person a party respondent in a proceeding," within the meaning of 7 C.F.R. § 1.147(c)(1), because it supplants any preceding complaints and becomes the "*operative pleading*" in the proceeding for all purposes,[18] including newly raised material allegations, to which a party respondent must file an answer within twenty (20) days of the date of service or suffer the severe regulatory ramifications of failure to file a timely answer.[19]

This result is supported by the very cases Complainant references in response to Respondent's appeal of the Default Decision. In *In re Marjorie Walker, d/b/a Linn Creek Kennel*, 2006 WL 2439003, at *22 (Aug. 10, 2006), the Amended Complaint was served by certified mail, with the return receipt information provided in FN1 (*see also* FN11) (*Id.* at *1). Further, in *In re Erica Nicole Mashburn*, 63 Agric. Dec. 254, 257-58 (2004)[20] the respondent was granted an extension to file an Answer to the Amended Complaint, which was also served by certified mail, with proof of service (Id. at *2; FN1).

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[18] The operative pleading in this case is the Amended Complaint. *See Walker*, 65 Agric. Dec. 932, 966 (U.S.D.A. 2006) ("Thus, the record clearly establishes that the operative pleading in this proceeding is the Amended Complaint, not the Complaint, and Respondent's response to the Complaint does not operate as a response to the Amended Complaint."); *Foley*, 59 Agric. Dec. 581, 599 (U.S.D.A. 2000).

[19] *In re Bodie S. Knapp*, 64 Agric. Dec. 253, 295 (2005), "Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant does not object to setting aside the default decision, generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer."

[20] 2004 WL 193569.

Consistency of application of the Rules of Practice, which do not draw a distinction between an original and an amended complaint with regard to service, require that service of an amended complaint be made in the same manner as required for an original Complaint (7 C.F.R. § 1.147(c)(1), "… by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual[.]" (7 C.F.R. § 1.147(c)(1)). In the instant proceeding, Respondent's Attorney, Robin Webb, provided her mailing address as 102 South Hord Street, Grayson, Kentucky 41143, and this is the address that should have been utilized by the Hearing Clerk's Office for service of the Amended Complaint. For this reason, remand is required for further proceedings.

DECISION AND ORDER

For the foregoing reasons, it is the determination of the Judicial Officer that service of an amended complaint must be made by certified in the same manner as required for service of an original complaint. The subject Amended Complaint was not served upon Respondent by certified in accordance with the requirements of the Rules of Practice at 7 C.F.R. § 1.147(c)(1). Accordingly, the October 17, 2019 Default Decision granting Complainant's Motion for Decision Without Hearing by Reason of Default is set aside and this matter is hereby remanded to the Chief Administrative Law Judge for referral to the Hearing Clerk's Office for service of the Amended Complaint by certified mail.

Copies of this Order shall be served, by certified mail, by the Hearing Clerk upon each of the parties identified herein above.

Done at Washington, D.C.
This 25th day of February 2020

Judge Bobbie J. McCartney
Judicial Officer

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