

In re: CURTIS G. FOLEY AND ERTIS JERRY FOLEY, d/b/a MID-STATES EXOTICS, A PARTNERSHIP OR UNINCORPORATED ASSOCIATION, AND AS WELDING SERVICE, A CORPORATION.

AWA Docket No. 98-0018.

Decision and Order filed August 16, 2000.

Failure to file timely answer – Default decision – Exhibitor – Refusing to allow inspection – Adequate veterinary care – Housing – Sanitation – Civil penalty – License revocation.

The Judicial Officer affirmed, with minor modifications, the Default Decision issued by Administrative Law Judge Edwin S. Bemstein (ALJ) assessing Respondents, jointly and severally, a civil penalty and revoking Respondents' Animal Welfare Act license. The Respondents' failure to file a timely answer to the Amended Complaint is deemed an admission of the allegations in the Amended Complaint (7 C.F.R. § 1.136(c)) and a waiver of hearing (7 C.F.R. § 1.139). However, the Judicial Officer found that, as a matter of law, the Respondents did not violate 9 C.F.R. § 3.127(d) because it was not effective on the date the Respondents were alleged to have violated it. Based on the Judicial Officer's conclusion that the Respondents did not violate 9 C.F.R. § 3.127(d), the Judicial Officer reduced the civil penalty assessed by the ALJ from \$7,500 to \$6,667.

Colleen A. Carroll, for Complainant.

Respondents, Pro se.

Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.

The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-151) [hereinafter the Rules of Practice] by filing a Complaint on April 6, 1998. On June 17, 1999, Complainant filed a Motion to Amend Complaint and an Amended Complaint. On July 16, 1999, Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] granted Complainant's Motion to Amend Complaint (Order Amending Complaint).

The Amended Complaint alleges that on March 20, 1997, March 31, 1997, May 12, 1997, July 30, 1997, February 24, 1998, April 7, 1998, April 20, 1998, May 21, 1998, November 6, 1998, and December 1, 1998, Curtis G. Foley, Ertis Jerry Foley, Mid-States Exotics, C and C Computers, and Welding Service, a corporation [hereinafter Respondents], willfully violated the Animal Welfare Act and the Regulations and Standards (Amended Compl. ¶¶ 4-12).

The Hearing Clerk served Respondents with a copy of the Amended Complaint

on January 13, 2000.¹ Respondents failed to answer the Amended Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On February 18, 2000, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Motion for Adoption of Proposed Decision and Order [hereinafter Motion for Default Decision] and a Proposed Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondents with a copy of Complainant's Motion for Default Decision and a copy of Complainant's Proposed Default Decision on March 22, 2000.² Respondents did not file objections to Complainant's Motion for Default Decision or Complainant's Proposed Default Decision within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On April 14, 2000, the ALJ issued a Decision and Order Upon Admission of Facts by Reason of Default [hereinafter Default Decision]: (1) finding that, at all times material to this proceeding, Respondents operated as exhibitors, as defined in the Animal Welfare Act and the Regulations; (2) concluding that Respondents willfully violated the Animal Welfare Act and the Regulations and Standards, as alleged in the Amended Complaint; (3) assessing Respondents, jointly and severally, a \$7,500 civil penalty; and (4) revoking Respondents' Animal Welfare Act license.

On July 18, 2000, Respondents appealed to the Judicial Officer. Complainant failed to file a timely response to Respondents' appeal petition, and on August 11, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision.

Based upon a careful consideration of the record and pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt, with only minor modifications, the ALJ's Default Decision as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's Findings of Fact and Conclusions of Law, as restated.

APPLICABLE STATUTORY PROVISIONS AND REGULATIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

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¹See Domestic Return Receipt for Article Number P 368 427 161.

²See memorandum of TMFisher dated March 22, 2000.

**CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING
OF CERTAIN ANIMALS**

§ 2131. Congressional statement of policy

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

§ 2132. Definitions

When used in this chapter—

• • • •

(h) The term “exhibitor” means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary[.]

....

§ 2146. Administration and enforcement by Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale. . . . The Secretary shall promulgate such rules and regulations as he deems necessary to permit inspectors to confiscate or destroy in a humane manner any animal found to be suffering as a result of a failure to comply with any provision of this chapter or any regulation or standard issued thereunder if (1) such animal is held by a dealer, (2) such animal is held by an exhibitor, (3) such animal is held by a research facility and is no longer required by such research facility to carry out the research, test, or experiment for which such animal has been utilized, (4) such animal is held by an operator of an auction sale, or (5) such animal is held by an intermediate handler or a carrier.

....

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

- (b) **Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order**

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than \$2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. 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. . . .

. . . .

§ 2151. Rules and regulations

The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.

7 U.S.C. §§ 2131, 2132(h), 2146(a), 2149(a), (b), 2151.

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

**CHAPTER I—ANIMAL AND PLANT HEALTH
INSPECTION SERVICE,
DEPARTMENT OF AGRICULTURE**

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

....

Exhibitor means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts, zoos, and educational exhibits, exhibiting such animals whether operated for profit or not. This term excludes retail pet stores, horse and dog races, organizations sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, field trials, coursing events, purebred dog and cat shows and any other fairs or exhibitions intended to advance agricultural arts and sciences as may be determined by the Secretary.

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PART 2—REGULATIONS

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SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

§ 2.40 Attending veterinarian and adequate veterinarian care (dealers and exhibitors).

(a) Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section.

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor; and

(2) Each dealer and exhibitor shall assure that the attending veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

(b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:

(1) The availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of this subchapter;

(2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care;

(3) Daily observation of all animals to assess their health and well-being; *Provided, however,* That daily observation of animals may be accomplished by someone other than the attending veterinarian; and *Provided, further,* That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian;

(4) Adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia; and

(5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.

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SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

(a) Each dealer, exhibitor, operator of an auction sale, and intermediate handler shall comply in all respects with the regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals.

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SUBPART I—MISCELLANEOUS

....

§ 2.126 Access and inspection of records and property.

(a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:

- (1) To enter its place of business;
- (2) To examine records required to be kept by the Act and the regulations in this part;
- (3) To make copies of the records;
- (4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and
- (5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.

(b) The use of a room, table, or other facilities necessary for the proper examination of the records and inspection of the property or animals shall be extended to APHIS officials by the dealer, exhibitor, intermediate handler or carrier.

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PART 3—STANDARDS

....

SUBPART F—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF WARMBLOODED ANIMALS OTHER THAN DOGS, CATS, RABBITS, HAMSTERS, GUINEA PIGS, NONHUMAN PRIMATES, AND MARINE MAMMALS

FACILITIES AND OPERATING STANDARDS

§ 3.125 Facilities, general.

(a) *Structural strength.* The facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.

....

(c) *Storage.* Supplies of food and bedding shall be stored in facilities which adequately protect such supplies against deterioration, molding, or contamination by vermin. Refrigeration shall be provided for supplies of perishable food.

....

ANIMAL HEALTH AND HUSBANDRY STANDARDS

§ 3.129 Feeding.

(a) The food shall be wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health. The diet shall be prepared with consideration for the age, species, condition, size, and type of the animal. Animals shall be fed at least once a day except as dictated by hibernation, veterinary treatment, normal fasts, or other professionally accepted practices.

(b) Food, and food receptacles, if used, shall be sufficient in quantity and located so as to be accessible to all animals in the enclosure and shall be placed so as to minimize contamination. Food receptacles shall be kept clean and sanitary at all times. If self-feeders are used, adequate measures shall be taken to prevent molding, contamination, and deterioration or caking of food.

§ 3.130 Watering.

If potable water is not accessible to the animals at all times, it must be provided as often as necessary for the health and comfort of the animal. Frequency of watering shall consider age, species, condition, size, and type of the animal. All water receptacles shall be kept clean and sanitary.

§ 3.131 Sanitation.

(a) *Cleaning of enclosures.* Excreta shall be removed from primary enclosures as often as necessary to prevent contamination of the animals contained therein and to minimize disease hazards and to reduce odors. When enclosures are cleaned by hosing or flushing, adequate measures shall be taken to protect the animals confined in such enclosures from being directly sprayed with the stream of water or wetted involuntarily.

(b) *Sanitation of enclosures.* Subsequent to the presence of an animal with an infectious or transmissible disease, cages, rooms, and hard-surfaced pens or runs shall be sanitized either by washing them with hot water (180

F. at source) and soap or detergent, as in a mechanical washer, or by washing all soiled surfaces with a detergent solution followed by a safe and effective disinfectant, or by cleaning all soiled surfaces with saturated live steam under pressure. Pens or runs using gravel, sand, or dirt, shall be sanitized when necessary as directed by the attending veterinarian.

(c) *Housekeeping*. Premises (buildings and grounds) shall be kept clean and in good repair in order to protect the animals from injury and to facilitate the prescribed husbandry practices set forth in this subpart. Accumulations of trash shall be placed in designated areas and cleared as necessary to protect the health of the animals.

(d) *Pest control*. A safe and effective program for the control of insects, ectoparasites, and avian and mammalian pests shall be established and maintained.

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§ 3.133 Separation.

Animals housed in the same primary enclosure must be compatible. Animals shall not be housed near animals that interfere with their health or cause them discomfort.

9 C.F.R. §§ 1.1; 2.40, .100(a), .126; 3.125(a), (c), .129, .130, .131, .133.

**ADMINISTRATIVE LAW JUDGE'S
DEFAULT DECISION
(AS RESTATED)**

The Hearing Clerk served Respondents with a copy of the Amended Complaint on January 13, 2000.³ Respondents failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides 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. Further, the failure to file a timely answer constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the allegations of the Amended Complaint are adopted as findings of fact, and this Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

³See note 1.

Findings of Fact and Conclusions of Law

1. Respondent Curtis G. Foley is an individual whose mailing address is 6774 N. U.S. 31, Whiteland, Indiana 46184, and is an owner of or principal in Respondents Welding Service, a corporation, C and C Computers, and Mid-States Exotics, located at the same mailing address.

2. Respondent Ertis Jerry Foley is an individual whose mailing address is 6774 N. U.S. 31, Whiteland, Indiana 46184, and is an owner of or principal in Respondents Welding Service, a corporation, C and C Computers, and Mid-States Exotics.

3. At all times material to this proceeding, Respondents operated as exhibitors, as that term is defined in the Animal Welfare Act and the Regulations. Respondents maintain animals at two different locations: (1) 6774 N. U.S. 31, Whiteland, Indiana 46184; and (2) 945 E. Worthsville Road, Greenwood, Indiana 46143.

4. On May 12, 1997, February 24, 1998, April 7, 1998, April 20, 1998, November 6, 1998, and December 1, 1998, Respondents willfully violated section 16 of the Animal Welfare Act (7 U.S.C. § 2146) and section 2.126 of the Regulations (9 C.F.R. § 2.126) by failing and refusing to make their facilities, animals, and records available for inspection by Animal and Plant Health Inspection Service inspectors during normal business hours.

5. On March 20, 1997, March 31, 1997, May 12, 1997, February 24, 1998, and May 21, 1998, the Animal and Plant Health Inspection Service inspected Respondents' facilities and found that Respondents had willfully violated section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to maintain a program of adequate veterinary care. Specifically, the Animal and Plant Health Inspection Service found that Respondents, on March 20, 1997, March 31, 1997, and May 12, 1997, failed to provide veterinary care to a wounded male lion; on March 20, 1997, failed to provide veterinary care to an ailing female lion; and on February 24, 1998, failed to provide veterinary care to a wounded skunk.

6. On March 20 1997, March 31, 1997, and February 24, 1998, the Animal and Plant Health Inspection Service inspected Respondents' facilities and found that Respondents had willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.129 of the Standards (9 C.F.R. § 3.129) by failing to provide animals with an adequate supply of uncontaminated, wholesome, and palatable food and/or vitamin supplements.

7. On March 20, 1997, July 30, 1997, February 24, 1998, and May 21, 1998, an inspection of Respondents' facilities revealed that Respondents had willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.125(c) of the Standards (9 C.F.R. § 3.125(c)) by failing to store supplies of food in a manner that protects them from deterioration, molding, and contamination by vermin and by failing to provide refrigeration for perishable food

supplies.

8. On March 31, 1997, and May 21, 1998, an inspection of Respondents' facilities revealed that Respondents had willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.130 of the Standards (9 C.F.R. § 3.130) by failing to keep water receptacles clean and sanitized.

9. On March 20, 1997, and May 21, 1998, the Animal and Plant Health Inspection Service inspected Respondents' facilities and found that Respondents had willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) by failing to construct and maintain animal housing facilities so that they are structurally sound, are in good repair, protect the animals from injury, and contain the animals securely.

10. On February 24, 1998, an inspection of Respondents' facilities revealed that Respondents had willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.131 of the Standards (9 C.F.R. § 3.131) by failing to clean and sanitize pens, runs, and outdoor housing areas and by failing to maintain the premises clean and in good repair.

11. On February 24, 1998, an inspection of Respondents' facilities revealed that Respondents had willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.133 of the Standards (9 C.F.R. § 3.133) by housing incompatible animals in the same primary enclosure.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondents' Appeal Petition denies the material allegations of the Amended Complaint. Respondents' denial of the material allegations of the Amended Complaint is too late to be considered. Respondents are deemed, for the purposes of this proceeding, to have admitted the allegations in the Amended Complaint because Respondents failed to file an answer within 20 days after the Hearing Clerk served Respondents with the Amended Complaint.⁴

⁴Among other allegations, the Amended Complaint alleges that on March 20, 1997, March 31, 1997, and May 12, 1997, Respondents willfully violated section 2.100(a) of the Regulations (9 C.F.R. § 2.100(a)) and section 3.127(d) of the Standards (9 C.F.R. § 3.127(d)) by failing to establish a method for the regular elimination of animal waste and other liquid from animal housing areas (Amended Compl. ¶ 6). The ALJ concluded that Respondents are deemed by their failure to file a timely answer to have admitted the violations of section 3.127(d) of the Standards (9 C.F.R. § 3.127(d)) alleged in the Amended Complaint (Default Decision at 2-3). Section 3.127(d) of the Standards (9 C.F.R. § 3.127(d)) was not effective until November 17, 1999, and compliance with section 3.127(d) of the Standards (9 C.F.R. § 3.127(d)) was not required until May 17, 2000. Moreover, section 3.127(d) of the Standards (9 C.F.R. § 3.127(d)) does not require the establishment of a method for the regular elimination of animal waste and other liquid from animal housing areas. (64 Fed. Reg. 56,142 (1999).) Therefore, as a matter of law, I conclude that Respondents did not violate section 3.127(d) of the

The Hearing Clerk served a copy of the Amended Complaint and a service letter on Respondents on January 13, 2000.⁵ Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice clearly state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint . . . , the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

§ 1.139 Procedure upon failure 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. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts

Standards (9 C.F.R. § 3.127(d)) on March 20, 1997, March 31, 1997, and May 12, 1997, as alleged in the Amended Complaint.

Based on my conclusion that Respondents did not violate section 3.127(d) of the Standards (9 C.F.R. § 3.127(d)), as alleged in the Amended Complaint, I reduce the \$7,500 civil penalty assessed against Respondents by the ALJ to \$6,667.

⁵See note 1.

by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Amended Complaint served on Respondents on January 13, 2000, clearly informs Respondents of the consequences of failing to file a timely answer, as follows:

The respondents shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 et seq.). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Amended Compl. at 4.

Similarly, the Hearing Clerk informed Respondents in the service letter, which accompanied the Amended Complaint, that a timely answer must be filed pursuant to the Rules of Practice and that failure to file a timely answer to any allegation in the Amended Complaint would constitute an admission of that allegation, as follows:

January 3, 2000

Mr. Curtis G. Foley
Mr. Ertis Jerry Foley d/b/a
Mid-States Exotics a partnership
or unincorporated association, and
as Welding Service, a corporation
6774 N. U.S. 31
Whitland, [sic] IN 46184

Mr. Curtis G. Foley
Mr. Ertis Jerry Foley d/b/a
Mid-States Exotics a partnership
or unincorporated association, and
as Welding Service, a corporation
945 E. Worthsville Road
Greenwood, IN 46143

Dear Sir:

Subject: In re: Curtis G. Foley and Ertis Jerry Foley d/b/a Mid-States Exotics a partnership or unincorporated association, and as Welding Service, a corporation - Respondents
AWA Docket No. 98-0018

Enclosed is a copy of the Complainant's Amended Complaint which has been filed with this office in the above-captioned proceeding.

Inasmuch as Complainant has filed the Amended Complaint prior to the filing of a motion of hearing, the amendment is effective upon filing.

You will have 20 days from the service of this letter in which to file an answer to the Amended Complaint. Failure to file a timely Answer to or plead specifically to any allegation of the Amended Complaint shall constitute an admission of such allegation.

Your answer, as well as any motions or requests that you wish to file hereafter in this proceeding, should be submitted to the Hearing Clerk, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250. An original and three copies are required for each document.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

On February 9, 2000, the Hearing Clerk sent a letter to Respondents informing them that their answer to the Amended Complaint had not been received within the time required in the Rules of Practice (Letter dated February 9, 2000, from Joyce A.

Dawson, Hearing Clerk, to Messrs. Curtis G. Foley and Ertis Jerry Foley). Respondents did not respond to this letter.

On February 18, 2000, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Default Decision and a Proposed Default Decision based on Respondents' failure to file a timely answer. On March 22, 2000, the Hearing Clerk served Respondents with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.⁶ Respondents failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service, as provided in 7 C.F.R. § 1.139.

Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant states that the complainant does not object to setting aside the default decision,⁷ generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.⁸

⁶See note 2.

⁷See *In re H. Schnell & Co.*, 57 Agric. Dec. 1722 (1998) (Remand Order) (setting aside the default decision, which was based upon the respondent's statements during two telephone conference calls with the administrative law judge and the complainant's counsel, because the respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding that the default decision deprived the respondent of its right to due process under the Fifth Amendment to the United States Constitution); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (Remand Order) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and the respondent's license under the PACA had lapsed before service was attempted), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (Order Vacating Default Decision and Remanding Proceeding) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (Remand Order) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because the complainant had no objection to the respondent's motion for remand), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (Order Reopening After Default) (setting aside a default decision and accepting a late-filed answer because the complainant did not object to the respondent's motion to reopen after default).

⁸See generally *In re Nancy M. Kutz* (Decision as to Nancy M. Kutz), 58 Agric. Dec. ____ (July 12, 1999) (holding that the default filing was properly issued where the respondent's first filing in the proceeding was 28 days after service of the complaint on the respondent and the filing did not respond to the allegations of the complaint and that the respondent is deemed, by her failure to file a timely answer and by her failure to deny the allegations of the complaint, to have admitted the violations of

the Animal Welfare Act and the Regulations alleged in the complaint); *In re Anna Mae Noell*, 58 Agric. Dec. 130 (1999) (holding that the default decision was properly issued where the respondents filed an answer 49 days after service of the complaint on the respondents and that the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re Jack D. Stowers*, 57 Agric. Dec. 944 (1998) (holding that the default decision was properly issued where the respondent filed his answer 1 year and 12 days after service of the complaint on the respondent and that the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James J. Everhart*, 56 Agric. Dec. 1400 (1997) (holding that the default decision was properly issued where the respondent's first filing was more than 8 months after service of the complaint on the respondent and that the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re John Walker*, 56 Agric. Dec. 350 (1997) (holding that the default decision was properly issued where the respondent's first filing was 126 days after service of the complaint on the respondent and that the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards); *In re Mary Meyers*, 56 Agric. Dec. 322 (1997) (holding that the default decision was properly issued where the respondent's first filing was 117 days after the respondent's answer was due and that the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Dora Hampton*, 56 Agric. Dec. 301 (1997) (holding that the default decision was properly issued where the respondent's first filing was 135 days after the respondent's answer was due and that the respondent is deemed, by her failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re City of Orange*, 55 Agric. Dec. 1081 (1996) (holding that the default decision was properly issued where the respondent's first filing was 70 days after the respondent's answer was due and that the respondent is deemed, by its failure to file a timely answer, to have admitted the violations of the Regulations and Standards alleged in the complaint); *In re Ronald DeBruin*, 54 Agric. Dec. 876 (1995) (holding that the default decision was properly issued where the respondent failed to file an answer and that the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087 (1994) (holding that the default decision was properly issued where the respondent failed to file an answer and that the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint); *In re Ron Morrow*, 53 Agric. Dec. 144 (1994) (holding that the default decision was properly issued where the respondent was given an extension of time until March 22, 1994, to file an answer, but it was not received until March 25, 1994, and that the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Animal Welfare Act and the Regulations and Standards alleged in the complaint), *aff'd per curiam*, 65 F.3d 168 (Table), 1995 WL 523336 (6th Cir. 1995); *In re Dean Daul*, 45 Agric. Dec. 556 (1986) (holding that the default decision was properly issued where the respondent failed to file a timely answer and, in his late answer, did not deny the material allegations of the

Respondents were given notice of the proceeding and an opportunity for a hearing. The Rules of Practice provide that an answer must be filed within 20 days after service of the complaint (7 C.F.R. § 1.136(a)). Respondents' answer was filed 6 months and 5 days after Respondents were served with the Amended Complaint and 5 months and 16 days after Respondents' answer was due. Respondents' failure to file a timely answer is deemed, for the purposes of this proceeding, an admission of the allegations in the Amended Complaint⁹ and constitutes a waiver of hearing (7 C.F.R. §§ 1.136(c), .139, .141(a)). Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding.

Moreover, the Rules of Practice require that any objections to a motion for a default decision and proposed default decision must be filed within 20 days after service of the motion and proposed default decision (7 C.F.R. § 1.139). Respondents failed to file timely objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.

Accordingly, the Default Decision was properly issued.¹⁰ Application of the default provisions of the Rules of Practice does not deprive Respondents of their rights under the due process clause of the Fifth Amendment to the United States Constitution.¹¹

complaint and that the respondent is deemed, by his failure to file a timely answer and by his failure to deny the allegations in the complaint in his late answer, to have admitted the violations of the Animal Welfare Act and the Regulations alleged in the complaint); *In re Ronald Jacobson*, 43 Agric. Dec. 780 (1984) (holding that the default decision was properly issued where the respondents failed to file timely answer and that the respondents are deemed, by their failure to file a timely answer, to have admitted the violations of the Standards alleged in the complaint); *In re Willard Lambert*, 43 Agric. Dec. 46 (1984) (holding that the default decision was properly issued where the respondent failed to file an answer and that the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Animal Welfare Act and the Regulations and standards alleged in the complaint); *In re Randy & Mary Berhow*, 42 Agric. Dec. 764 (1983) (holding that the default decision was properly issued where the respondents failed to file an answer and that the respondents are deemed, by their failure to file an answer, to have admitted the violations of the Standards alleged in the complaint).

⁹See note 4.

¹⁰See note 4.

¹¹See *United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding that a hearing was not required under the Fifth Amendment to the United States Constitution where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). See also *Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating that due process generally does not entitle parties to an evidentiary hearing where the

For the foregoing reasons, the following Order should be issued.

Order

1. Respondents are jointly and severally assessed a civil penalty of \$6,667. Respondents shall pay the civil penalty by a certified check or money order, made payable to the Treasurer of the United States. Respondents shall send the certified check or money order to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

The certified check or money order shall be sent to, and received by, Ms. Carroll within 60 days after service of this Order on Respondents. Respondents shall state on the certified check or money order that payment is in reference to AWA Docket No. 98-0018.

2. Respondents' Animal Welfare Act license (Animal Welfare Act license number 32-C-0009) is revoked. The Animal Welfare Act license revocation provisions of this Order shall become effective on the 60th day after service of this Order on Respondents.

National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).