

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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In re:)	
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GERHARD FELTS, a/k/a GARY FELTS,)	AWA Docket No. 17-0187
d/b/a BLACK DIAMOND KENNEL,)	
)	
Respondent)	

DEFAULT DECISION AND ORDER

Appearances:

Matthew S. Weiner, Esq., with the Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue, SW, Washington D.C. 20250, for the Complainant, Animal and Plant Health Inspection Service [APHIS]; and

Respondent Gerhard Felts, a/k/a Gary Felts, d/b/a Black Diamond Kennel, pro se.

Preliminary Statement

This is a disciplinary proceeding under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) [AWA or Act], instituted by the Administrator of the Animal and Plant Health Inspection Service [APHIS], United States Department of Agriculture [USDA or Complainant], directing Gerhard Felts, a/k/a Gary Felts, d/b/a Black Diamond Kennel [Respondent], to show cause why his AWA license should not be terminated.

Procedural and Factual History

On January 18, 2017, Complainant filed with the Hearing Clerk, Office of Administrative Law Judges [Hearing Clerk], an “Order to Show Cause Why Animal Welfare Act License 42-A-0757 Should Not Be Terminated” [Show Cause Order].

On February 8, 2017, the Hearing Clerk sent the Show Cause Order and accompanying letter of service via certified mail to the Respondent’s mailing address. According to U.S. Postal Service records, the documents were “delivered” on February 22, 2017, at 11:34 a.m. These

documents informed Respondent that an answer should be filed pursuant to the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. § 1.130 *et seq.*) [Rules of Practice].¹ Respondent did not file an answer.²

On March 15, 2017, Complainant filed a “Motion for Adoption of Proposed Default Decision and Order” [Motion for Default] and “Proposed Default Decision and Order” [Proposed Decision]. As of this date, Respondent has not filed any objections thereto.³

Regulatory Authority

Pursuant to the Rules of Practice, a respondent is required to file an answer within twenty (20) days after service of a Show Cause Order. 7 C.F.R. § 1.136(a). The Rules of Practice provide that an answer “shall . . . [c]learly admit, deny, or explain each of the allegations of the Complaint

¹ See Show Cause Order at 3-4 (“ . . . [T]his Order to Show Cause shall be served upon the respondent, who 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 Order to Show Cause.”); Hearing Clerk’s Letter at 1 (“**The rules specify that you have 20 days from the receipt of this letter to file with the Hearing Clerk your written Answer to the Order to Show signed by you or your attorney of record. . . . Failure to file a timely answer or filing an answer which does not deny the allegations of the Order to Show Cause may constitute an admission of those allegations and waive your right to an oral hearing.**”).

² United States Postal Service records reflect that Respondent received the Show Cause Order on February 22, 2017. Respondent had twenty (20) days from the date of service to file a response. 7 C.F.R. § 1.136(a). Weekends and federal holidays shall 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(g), (h). In this case, Respondent’s answer was due by March 14, 2017. Failure to file a timely answer or failure to deny or otherwise respond to allegations in the Complaint shall be deemed, for purposes of this proceeding, an admission of the allegations in the Complaint, unless the parties have agreed to a consent decision. 7 C.F.R. § 1.136(c). Regrettably, other than a consent decision, the Rules of Practice do not provide for exceptions to the regulatory consequences of an untimely filed answer.

³ The Hearing Clerk’s records reflect that the Motion for Default and Proposed Decision were sent to Respondent on March 15, 2017. Respondent had twenty (20) days from the date of service to file objections to Complainant’s Motion. 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(g), (h). In this case, Respondent’s objections were due by April 4, 2017. Respondent did not file any objections by that date.

and shall clearly set forth any defense asserted by the respondent.” 7 C.F.R. § 1.136(b)(1). Failure to timely file an answer or failure to deny or otherwise respond to an allegation proffered in the Show Cause Order shall be deemed an admission of all material allegations in the Show Cause Order; in such situation, default shall be appropriate. *See* 7 C.F.R. § 1.136(c).

Additionally, failure to timely file an answer shall constitute a waiver of hearing. Upon such failure, “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.” 7 C.F.R. § 1.139. The respondent will then have twenty (20) days to file an objection with the Hearing Clerk. *See id.*

Discussion

The Hearing Clerk’s records reflect that the Show Cause Order was sent by certified mail to Respondent’s known address on February 8, 2017 and was delivered on February 22, 2017. No answer was filed by March 14, 2017, which was twenty (20) days after service of the Show Cause Order. As Respondent failed to file an answer within the time period prescribed in section 1.136 of the Rules of Practice (7 C.F.R. § 1.136), no hearing shall be necessary in this matter, and the material allegations of the Show Cause Order are adopted as findings of fact. 7 C.F.R. § 1.139.

Failure to file a timely answer or failure to deny or otherwise respond to allegations in the Show Cause Order shall be deemed, for purposes of this proceeding, an admission of the allegations in the Show Cause Order, unless the parties have agreed to a consent decision. 7 C.F.R. § 1.136(c). I find that the Show Cause Order was served upon Respondent, and Respondent failed to file an answer. Consequently, Respondent is hereby deemed to have admitted the allegations set forth in the Show Cause Order, and an entry of default is appropriate. “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."⁴

Moreover, for purposes of determining reasonable sanctions against Respondent, I turn to the Department's sanction policy as set forth in *S.S. Farms Linn County, Inc.*, 50 Agric. Dec. 476 (U.S.D.A. 1991) (Decision as to James Joseph Hickey & Shannon Hansen), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3), which provides that appropriate weight should be given to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose of the act. *S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497. "In assessing penalties, the Secretary is required to give due consideration to the size of the business involved, the gravity of the violation, the person's good faith, and the history of previous violations." *Roach*, 51 Agric. Dec. 252, 264 (U.S.D.A. 1992); 7 U.S.C. 213(b). The purpose of assessing sanctions is not to punish violators but to deter future similar behavior by the violator and others. *Zimmerman*, 57 Agric. Dec. 1038, 1998 WL 799196 at *16 (U.S.D.A. 1998). Here, Respondent admitted the allegations of the Show Cause Order by failing to answer the Show Cause Order and failing to object to Complainant's Motion for Default. Thus, I find that Complainant's proposed sanctions in this case are warranted and appropriate.

Furthermore, Complainant's Motion for Default shall be GRANTED, and the following decision is issued against Respondent without further proceeding or hearing pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Gerhard Felts [Respondent] is an individual with a mailing address in the State of Iowa.

⁴ Knapp, 64 Agric. Dec. 253, 295 (U.S.D.A. 2005).

2. At all times material herein, Respondent was a dealer, as that term is defined in the Act and the Regulations, and holds AWA license number 42-A-0757.
3. On January 17, 2012, a civil judgement in the sum of \$18,938 was issued against Respondent in Civil Case No. 11-CV-4031 for violations committed under the AWA.⁵
4. In connection with Civil Case No. 11-CV-4031, Respondent was required to complete and tender yearly Financial Disclosure Statements to the United States Attorney's Office in the Northern District of Iowa [USAO].
5. The Financial Disclosure Statements in connection to Civil Case No. 11-CV-4031 were signed by Respondent under penalty of perjury and informed Respondent of the maximum penalties for false statements under Title 18 U.S.C. § 1001. The Financial Disclosure Statements further informed Respondent that his statements were being submitted to the United States Department of Justice and that Respondent was certifying that all responses were true and correct.
6. On May 25, 2016, Respondent was indicted in *United States v. Gerhard Felts*, Case No. 16-CR-49 (N.D. Iowa), and charged with knowingly and willfully making false and fraudulent material statements, representations, and omissions in his Financial Disclosure Statements to the USAO, in violation of 18 U.S.C. § 1001(a).
7. On July 13, 2016, Respondent pled guilty to Count 2 of the Indictment in *United States v. Gerhard Felts*, admitting the following:
 - a. In his 2013 Financial Disclosure Statement Defendant GARY FELTS:

⁵ Civil Case No. 11-CV-4031 arose in connection with the federal government's attempt to collect unpaid civil penalties assessed to respondent in *Felts*, 69 Agric. Dec. 669 (U.S.D.A. 2010) (Default Decision and Order), available at <https://www.oaljdecisions.dm.usda.gov/sites/default/files/100603AWA10-0068DD.pdf> (last visited May 25, 2017).

- i. failed to disclose under question 34, all banks, credit unions, and other financial institutions where he had an account by failing to disclose that he maintained a checking account at F&M bank . . . which was opened on April 7, 2011 and a savings account at F&M bank . . . which was opened April 22, 2013.
- ii. failed to disclose under question 61 that he received a workers compensation settlement of \$25,000 on April 16, 2013.

Conclusions of Law

1. The Secretary has jurisdiction in this matter.
2. Respondent made false or fraudulent statements to a governmental agency, as defined in 9 C.F.R. § 2.11(a)(6), in that Respondent provided false or fraudulent information on his Financial Disclosure Statements in connection to Civil Case No. 11-CV-4031.
3. The Secretary has authority under 9 C.F.R. § 2.11(a)(6) to terminate AWA license number 42-A-0757, held by Respondent.
4. Respondent's false statements and subsequent guilty plea in *United States v. Gerhard Felts*, Case No. 16-CR-49 (N.D. Iowa) render him unfit to continue operating as a dealer under the AWA.

ORDER

1. AWA license number 42-A-0757 is hereby TERMINATED.
2. Respondent Gerhard Felts, his agents, and employees, directly or indirectly, in connection with operations subject to the Animal Welfare Act, shall cease and desist from engaging in activities under the Animal Welfare Act that require a valid AWA license until such time

that Respondent is eligible to request a new AWA license and does, in fact, obtain a new AWA license.

3. This order shall have the same effect as if entered after a full hearing.

This Decision and Order shall be final and effective without further proceedings thirty-five (35) days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties, with courtesy copies provided via email where available.

Done at Washington, D.C.,
this 30 day of May, 2017


Bobbie J. McCartney
Chief Administrative Law Judge

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