

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	
)	AWA Docket No. 07-0008
J. Kirk McKinnell,)	
)	Decision and Order
Respondent)	by Reason of Default

Procedural History

1. This administrative proceeding was initiated under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) (herein frequently the “Act”), by a complaint filed on October 16, 2006. The complainant, the Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture (herein frequently “APHIS” or “Complainant”), is represented by Heather M. Pichelman, Esq., with the Marketing Division, Office of the General Counsel, United States Department of Agriculture.
2. The complaint alleged that J. Kirk McKinnell, the respondent (herein frequently “Respondent McKinnell”) willfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 *et seq.*) (herein frequently the “Regulations”), specifically 7 U.S.C. § 2134 and 9 C.F.R. § 2.1, which prohibit operating as a dealer without having an Animal Welfare Act license.
3. A copy of the complaint was sent to Respondent McKinnell at Route 1, Box 3473, Ava, Missouri 65608, by certified mail on October 16, 2006. The complaint (together with the Hearing Clerk’s notice letter dated October 16, 2006 and a copy of the Rules of Practice) was

delivered and signed for by Respondent McKinnell on October 21, 2006. No answer to the complaint has been received. The time for filing an answer expired on November 13, 2006.

4. The Complainant's motion for the issuance of a decision by reason of default is before me. The Rules of Practice provide that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. 7 C.F.R. §1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139.

5. Accordingly, the material allegations in the complaint, which are admitted by Respondent McKinnell's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139. *See* 7 C.F.R. §1.130 *et seq.*

Findings of Fact and Conclusions

6. The Secretary of Agriculture has jurisdiction.

7. Respondent McKinnell is an individual whose address is Route 1, Box 3473, Ava, Missouri 65608.

8. From about September 29, 2004 through about June 14, 2005, Respondent McKinnell operated as a dealer without having obtained an Animal Welfare Act license and sold at least 81 dogs in commerce as specified in the complaint, in violation of 7 U.S.C. §§ 2131-2134 and the Regulations, particularly 9 C.F.R. § 2.1.

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

10. The size of Respondent McKinnell's business that sold at least 81 dogs during about 8-1/2 months appears to be small to medium. The gravity of the violations appears to be medium (repeated violations through an 8-1/2 month period). There are no allegations regarding

Respondent McKinnell's good faith or lack thereof. There are no allegations of a history of previous violations.

11. Under these circumstances, \$18,975 is a reasonable and appropriate civil penalty for these 81 violations of the Animal Welfare Act, in accordance with the statutory factors to be considered. 7 U.S.C. § 2149.

Order

12. Respondent McKinnell, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued thereunder, 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.

13. Respondent McKinnell is assessed an \$18,975 civil penalty, which he shall pay by certified check(s) or cashier's check(s) or money order(s), 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.: Heather M. Pichelmann, Esq.
Room 2343 South Building, Stop 1417
1400 Independence Avenue SW
Washington, D.C. 20250-1417.

Respondent McKinnell shall include **AWA Docket No. 07-0008** on the certified check(s) or cashier's check(s) or money order(s).

Finality

14. This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final and effective without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 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 Decision and Order shall be served by the Hearing Clerk upon each of the parties.

Done at Washington, D.C.
this 23rd day of April 2007

Jill S. Clifton
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
South Bldg Room 1031
1400 Independence Avenue, SW
Washington, DC 20250-9203
202-720-4443
Fax: 202-720-9776

APPENDIX A

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—ADMINISTRATIVE REGULATIONS

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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