UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

| | | |
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| In re: | ) | HPA Docket No. 03-0005 |
| | ) | |
| Chad Way, an individual, | ) | |
| and Chad Way Stables, Inc., | ) | |
| a Tennessee corporation, | ) | |
| | ) | |
| Respondents | ) | **Decision and Order** |

## PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on January 10, 2003. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; the regulations issued under the Horse Protection Act (9 C.F.R. pt. 11) [hereinafter the Horse Protection Regulations]; 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]. On May 9, 2003, Complainant filed an Amended Complaint.

Complainant alleges: (1) on August 25, 2001, Chad Way and Chad Way Stables, Inc. [hereinafter Respondents], failed and refused to permit the Secretary of Agriculture

to inspect a horse known as "Jose Jose," in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)) and section 11.4(b) of the Horse Protection Regulations (9 C.F.R. § 11.4(b)); and (2) on August 25, 2001, Respondents entered Jose Jose, as entry number 1499 in class number 70B, in the 63rd Annual Tennessee Walking Horse Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting Jose Jose in the horse show while Jose Jose was wearing a substance prohibited by the Secretary of Agriculture under section 11.2(c) of the Horse Protection Regulations (9 C.F.R. § 11.2(c)), in violation of section 5(7) of the Horse Protection Act (15 U.S.C. § 1824(7)) (Amended Compl. ¶¶ II(1)-(2)).

The Hearing Clerk served Respondents with the Amended Complaint and a service letter by certified mail no later than May 28, 2003,[1] and also served Respondents with the Amended Complaint and the service letter by regular mail on July 29, 2003.[2] Respondents failed to file an answer to 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 9, 2004, the Hearing Clerk sent a letter to Respondents informing them that their answer to the Amended Complaint had not been filed within the time required in the Rules of Practice.[3]

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[1]Domestic Return Receipt for Article Number 7001 2510 0002 0111 5095.

[2]Memorandum to the File by Lolita Ellis, Assistant Hearing Clerk, dated July 29, 2003.

[3]Letter dated February 9, 2004, from Joyce A. Dawson, Hearing Clerk, Office of

(continued...)

On May 21, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a "Motion for Adoption of Proposed Decision and Order as to Respondents Chad Way and Chad Way Stables, Inc." [hereinafter Motion for Default Decision] and a proposed "Decision and Order as to Respondents Chad Way and Chad Way Stables, Inc. Upon Admission of Facts by Reason of Default" [hereinafter Proposed Default Decision]. On June 8, 2004, the Hearing Clerk served Respondents with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.[4] On June 28, 2004, Respondents filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision, a motion to file an answer to the Amended Complaint,[5] and "Answer of Chad Way and Chad Way Stables, Inc. to Complainant's Amended Complaint" [hereinafter Answer to Amended Complaint].

On January 19, 2005, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued an Order: (1) denying Complainant's Motion for Default Decision; (2) finding good cause for the late filing of Respondents' Answer to Amended Complaint; and (3) deeming

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[3](...continued)
Administrative Law Judges, United States Department of Agriculture, to Respondents.

[4]Domestic Return Receipt for Article Number 7099 3400 0014 4581 6584.

[5]Respondents' Response and Objection to Complainant's Motion for Adoption of Proposed Decision and Order and Respondents' Motion to File Their Answer to Amended Complainant and Proceed on the Merits.

Respondents' Answer to Amended Complaint timely filed (January 19, 2005, Order at 2-3).

On January 28, 2005, Complainant appealed the ALJ's January 19, 2005, Order to the Judicial Officer. On March 1, 2005, Respondents filed Respondents' Response to Complainant's Appeal Petition. On March 18, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I disagree with the ALJ's denial of Complainant's Motion for Default Decision. Therefore, I: (1) reverse the ALJ's January 19, 2005, denial of Complainant's Motion for Default Decision; and (2) issue this Decision and Order based upon Respondents' failure to file a timely answer to the Amended Complaint.

## APPLICABLE STATUTORY AND REGULATORY PROVISIONS

15 U.S.C.:

### TITLE 15—COMMERCE AND TRADE

. . . .

### CHAPTER 44—PROTECTION OF HORSES

**§ 1821. Definitions**

As used in this chapter unless the context otherwise requires:

. . . .

(3) The term "sore" when used to describe a horse means that—

(A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,

(B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

**§ 1823. Horse shows and exhibitions**

. . . .

**(e) Inspection by Secretary or duly appointed representative**

For purposes of enforcement of this chapter (including any regulation promulgated under this chapter) the Secretary, or any representative of the Secretary duly designated by the Secretary, may inspect any horse show, horse exhibition, or horse sale or auction or any horse at any such show, exhibition, sale, or auction. Such an inspection may only be made upon presenting appropriate credentials. Each such inspection shall be commenced and completed with reasonable promptness and shall be conducted within reasonable limits and in a reasonable manner. An inspection under this subsection shall extend to all things (including records) bearing on whether the requirements of this chapter have been complied with.

**§ 1824. Unlawful acts**

The following conduct is prohibited:

. . . .

(7) The showing or exhibiting at a horse show or horse exhibition; the selling or auctioning at a horse sale or auction; the allowing to be shown, exhibited, or sold at a horse show, horse exhibition, or horse sale or auction; the entering for the purpose of showing or exhibiting in any horse show or horse exhibition; or offering for sale at a horse sale or auction, any horse which is wearing or bearing any equipment, device, paraphernalia, or substance which the Secretary by regulation under section 1828 if this title prohibits to prevent the soring of horses.

. . . .

(9) The failure or refusal to permit access to or copying of records, or the failure or refusal to permit entry or inspection, as required by section 1823 of this title.

**§ 1825. Violations and penalties**

. . . .

**(b) Civil penalties; review and enforcement**

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing a notice of appeal in such

court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of title 28. The findings of the Secretary shall be set aside if unsupported by substantial evidence.

. . . .

**(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures**

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation.

**§ 1828. Rules and regulations**

The Secretary is authorized to issue such rules and regulations as he deems necessary to carry out the provisions of this chapter.

15 U.S.C. §§ 1821(3), 1823(e), 1824(7), (9), 1825(b)(1)-(2), (c), 1828.

28 U.S.C.:

## TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

. . . .

## PART VI—PARTICULAR PROCEEDINGS

. . . .

## CHAPTER 163—FINES, PENALTIES AND FORFEITURES

### § 2461. Mode of recovery

. . . .

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the "Federal Civil Penalties Inflation Adjustment Act of 1990"

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.–The Congress finds that–

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE–The purpose of this Act is to establish a mechanism that shall–

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term–

(1) "agency" means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) "civil monetary penalty" means any penalty, fine, or other sanction that–

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) "Consumer Price Index" means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter–

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 et seq.], the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], the Occupational Safety and Health Act of 1970 [20 U.S.C. 651 et seq.], or the Social Security Act [42 U.S.C. 301 et seq.], by the inflation adjustment described under section 5 of this Act [bracketed material in original]; and

(2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.–The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest–

(1) multiple of $10 in the case of penalties less than or equal to $100;

(2) multiple of $100 in the case of penalties greater than $100 but less than or equal to $1,000;

(3) multiple of $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000;

(4) multiple of $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000;

(5) multiple of $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and

(6) multiple of $25,000 in the case of penalties greater than $200,000.

(b) DEFINITION.–For purposes of subsection (a), the term "cost-of-living adjustment" means the percentage (if any) for each civil monetary penalty by which–

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.–The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 note.

7 C.F.R.:

# TITLE 7—AGRICULTURE

## SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

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## PART 3—DEBT MANAGEMENT

. . . .

### SUBPART E—ADJUSTED CIVIL MONETARY PENALTIES

**§ 3.91 Adjusted civil monetary penalties.**

(a) *In general*. The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties*– . . . .

. . . .

(2) *Animal and Plant Health Inspection Service*. . . .

. . . .

(vii) Civil penalty for a violation of Horse Protection Act, codified at 15 U.S.C. 1825(b)(1), has a maximum of $2,200.

7 C.F.R. § 3.91(a), (b)(2)(vii).

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 11—HORSE PROTECTION REGULATIONS

. . . .

### § 11.2 Prohibitions concerning exhibitors.

. . . .

(c) *Substances*. All substances are prohibited on the extremities above the hoof of any Tennessee Walking Horse or racking horse while being shown, exhibited, or offered for sale at any horse show, horse exhibition, or horse sale or auction, except lubricants such as glycerine, petrolatum, and mineral oil, or mixtures thereof: *Provided*, That:

(1) The horse show, horse exhibition, or horse sale or auction management agrees to furnish all such lubricants and to maintain control over them when used at the horse show, horse exhibition, or horse sale or auction.

(2) Any such lubricants shall be applied only after the horse has been inspected by management or by a DQP and shall only be applied under the supervision of the horse show, horse exhibition, or horse sale or auction management.

(3) Horse show, horse exhibition, or horse sale or auction management makes such lubricants available to Department personnel for inspection and sampling as they deem necessary.

### § 11.4 Inspection and detention of horses.

For the purpose of effective enforcement of the Act:

. . . .

(b) When any APHIS representative notifies the owner, exhibitor, trainer, or other person having custody of or responsibility for a horse at any

> horse show, horse exhibition, or horse sale or auction that APHIS desires to inspect such horse, it shall not be moved from the horse show, horse exhibition, or horse sale or auction until such inspection has been completed and the horse has been released by an APHIS representative.

9 C.F.R. §§ 11.2(c), .4(b).

## DECISION

### Statement of the Case

Respondents failed to file an answer to the Amended Complaint 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 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, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file a timely answer constitutes a waiver of hearing. Accordingly, the material allegations of the 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).

### Findings of Fact

1. Respondent Chad Way is an individual whose mailing address is 728 Sir Winston Place, Franklin, Tennessee 37064.

2. Respondent Chad Way Stables, Inc., is a corporation whose business mailing address is 2692 Midland Road, Shelbyville, Tennessee 37160.

3. On August 25, 2001, Respondents entered Jose Jose as entry number 1499 in class number 70B, in the 63rd Annual Tennessee Walking Horse Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting the horse.

**Conclusions of Law**

1. On August 25, 2001, Respondents failed and refused to permit the Secretary of Agriculture to inspect Jose Jose, in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)) and section 11.4(b) of the Horse Protection Regulations (9 C.F.R. § 11.4(b)).

2. On August 25, 2001, Respondents entered Jose Jose as entry number 1499 in class number 70B, in the 63rd Annual Tennessee Walking Horse Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting the horse in that show, while the horse was wearing a substance prohibited by the Secretary of Agriculture under section 11.2(c) of the Horse Protection Regulations (9 C.F.R. § 11.2(c)), in violation of section 5(7) of the Horse Protection Act (15 U.S.C. § 1824(7)).

**COMPLAINANT'S APPEAL PETITION**

Complainant raises two issues in Complainant's Appeal Petition. First, Complainant asserts Respondents' objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision were not timely filed; therefore, the ALJ erroneously considered Respondents' objections (Complainant's Appeal Pet. at 3-5).

On June 8, 2004, the Hearing Clerk served Respondents with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.[6] Respondents objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision were due no later than June 28, 2004. Complainant concedes the Hearing Clerk received one faxed copy of Respondents' objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision at 5:14 p.m., on June 28, 2004; however, Complainant argues the effective date of filing Respondents' objections is June 29, 2004, because the Hearing Clerk's Office is only open to receive documents until 4:30 p.m. and section 1.147(a) of the Rules of Practice (7 C.F.R. § 1.147(a)) requires that all documents required or authorized to be filed with the Hearing Clerk shall be filed in quadruplicate (Complainant's Appeal Pet. at 4).

Section 1.147(g) of the Rules of Practice provides that the effective date of filing a document is the date the document reaches the Hearing Clerk, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (g) *Effective date of filing.* Any document or paper required or authorized under the rules in this part to be filed shall be deemed to be filed at the time when it reaches the Hearing Clerk; or, if authorized to be filed with another officer or employee of the Department it shall be deemed to be filed at the time when it reaches such officer or employee.

7 C.F.R. § 1.147(g).

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[6]See note 4.

The former Acting Chief Administrative Law Judge set the hours during which the Hearing Clerk's Office is open for the purpose of receiving documents, as follows:

> January 28, 1999
>
> TO: OALJ Staff
>
> FROM: Edwin S. Bernstein
> Acting Chief Administrative Law Judge
>
> SUBJECT: New Hours of Operation
>
> Effective February 1, 1999, the hours that the Hearing Clerk's Office will be open to receive documents will be 8:30 a.m. to 4:30 p.m., Monday through Friday, except for holidays.[7]

However, as Respondents correctly point out, the Rules of Practice do not set forth the hours during which the Hearing Clerk's Office is open to receive documents. Moreover, I find no indication in the record that the Hearing Clerk provided Respondents with the Acting Chief Administrative Law Judge's January 28, 1999, memorandum. Therefore, since Complainant concedes the Hearing Clerk received Respondents' objections on June 28, 2004,[8] and Respondents did not have notice of the hours during which the Hearing Clerk's Office was open to receive documents, I find the effective date of filing Respondents' objections is June 28, 2004, and I find Respondents' objections

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[7]*See also In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. 570, 607 (2001), *aff'd*, 64 Fed. Appx. 941, 2003 WL 21147808 (6th Cir. May 15, 2003).

[8]Generally, the Hearing Clerk's time and date stamp establishes the time and date a document reaches the Hearing Clerk. Here, however, the parties agree that the Hearing Clerk received Respondents' objections at 5:14 p.m., on June 28, 2004, rather than at 9:04 a.m., June 29, 2004, as indicated by the Hearing Clerk's time and date stamp.

timely filed. Moreover, Respondents' failure to fax Respondents' objections in quadruplicate does not change the effective date of filing. Parties have long been allowed to establish the effective date of filing by faxing a single copy of a document to the Hearing Clerk's Office, which then must be followed by filing the original and appropriate number of copies of the document.

Second, Complainant contends the ALJ's denial of Complainant's Motion for Default Decision is error. Complainant requests that I reverse the ALJ's January 19, 2005, Order denying Complainant's Motion for Default Decision or vacate the ALJ's January 19, 2005, Order denying Complainant's Motion for Default Decision and remand the proceeding to the ALJ for issuance of a decision and order in accordance with the Rules of Practice. (Complainant's Appeal Pet. at 5-12.)

The ALJ denied Complainant's Motion for Default Decision on the ground that decisions on the merits have traditionally been preferred over default procedures particularly when, as in the instant proceeding, a pro se respondent files a timely answer to the complaint and mistakenly believes the answer to the complaint operates as an answer to an amended complaint (January 19, 2005, Order at 2).

The Rules of Practice makes no distinction between persons who appear pro se and persons represented by counsel. The Rules of Practice requires that a respondent, whether appearing pro se or through counsel, file a response to a complaint within 20 days after service of the complaint and provides that failure to file a timely answer

shall be deemed an admission of the allegations of the complaint and a waiver of hearing.[9] Respondents' decision to proceed pro se does not excuse them from failing to file a timely answer to the Amended Complaint and is not a meritorious basis for denying Complainant's Motion for Default Decision.[10] Moreover, I find no basis for Respondents' mistaken belief that a timely answer to the Complaint operates as an answer to the Amended Complaint. The Amended Complaint, served on Respondents no later than May 28, 2003, informs Respondents of the consequences of failing to file a timely answer to the Amended Complaint, 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 second unnumbered page.

Similarly, the Hearing Clerk informed Respondents in the service letter, which accompanied the Amended Complaint, that they had 20 days in which to file a response to the Amended Complaint, as follows:

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[9]7 C.F.R. §§ 1.136(a), (c), .139.

[10]*See In re Dean Byard* (Decision as to Dean Byard), 56 Agric. Dec. 1543, 1559 (1997) (stating the respondent's decision to proceed pro se prior to May 1997 does not operate as an excuse for the respondent's failure to file an answer).

**CERTIFIED RECEIPT REQUESTED**

May 13, 2003

Aubrey B. Harwell, Jr., Esq.
Neal & Harwell, PLC
2000 One Nashville Place
150 Fourth Avenue North
Nashville, Tennessee 37219

Chad Way
Chad Way Stables, Inc.
2692 Midland Road
Shelbyville, Tennessee 37160

Dear Gentlemen:

Subject: In re: Chad Way, Chad Way Stables, Inc., William B. Johnson and Sandra Johnson; Respondents - HPA Docket No. 03-0005

*Amended Complaint* was received and filed with this office on May 9, 2003 in the above-entitled proceeding.

In accordance with the applicable Rules of Practice, Respondents will have 20 days from receipt of this letter in which to file a response with this office.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

On February 9, 2004, the Hearing Clerk informed Respondents that their answer to the Amended Complaint had not been received within the allotted time, as follows:

February 9, 2004

Chad Way
Chad Way Stables
2692 Midland Road
Shelbyville, Tennessee 37160

Dear Mr. Way:

Subject: In re: Chad Way and Chad Way Stables; Respondents - HPA Docket No. 03-0005

A copy of the *Amended Complaint* was mailed to you via certified return receipt on May 13, 2003, which was signed for by Brooke Way, and resent through regular mail on July 29, 2003. You have failed to file an Answer to the *Amended Complaint* within the time prescribed in accordance with Section 1.136 of the Rules of Practice.

You will be informed of any future action taken in this matter.

Sincerely,
/s/
Joyce A. Dawson
Hearing Clerk

Respondents failed to respond to the Hearing Clerk's February 9, 2004, letter.

Respondents' answer to the Amended Complaint was due no later than June 17, 2003. Respondents filed a response to the Amended Complaint on June 28, 2004, 1 year 11 days after Respondents' answer was due. Respondents' failure to file a timely answer is deemed an admission of the allegations of the Amended Complaint (7 C.F.R. § 1.136(a), (c)) and constitutes a waiver of hearing (7 C.F.R. § 1.139). Therefore, Respondents are deemed, for purposes of this proceeding, to have admitted the allegations of the Amended Complaint. Respondents' mistaken belief that their timely answer to the

Complaint operated as an answer to the Amended Complaint is not a meritorious basis upon which to deny Complainant's Motion for Default Decision.[11]

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

## ORDER

1. Respondents are jointly and severally assessed a $4,400 civil penalty. The civil penalty shall be paid by certified check or money order, made payable to the "Treasurer of the United States" and sent to:

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

Respondents' payment of the civil penalty shall be forwarded to, and received by, Ms. Juarez within 60 days after service of this Order on Respondents. Respondents shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 03-0005.

2. Respondents are each disqualified for 2 years from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, corporation,

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[11] *In re Dennis Hill*, 63 Agric. Dec. ___, slip op. at 69 (Oct. 8, 2004) (finding the respondent's answer to the complaint is not an answer to the amended complaint); *In re Erica Nicole Mashburn*, 63 Agric. Dec. 254, 257-58 (2004) (Order Vacating the ALJ's Denial of Complainant's Motion for Default Decision and Remand Order as to James Mashburn) (stating the respondent's timely answer to the complaint does not operate as an answer to the amended complaint).

partnership, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (1) transporting, or arranging for the transportation of, horses to or from equine events; (2) personally giving instructions to exhibitors; (3) being present in the warm-up or inspection areas or in any area where spectators are not allowed; and (4) financing the participation of others in equine events. This disqualification shall continue until the civil penalty assessed in paragraph 1 of this Order and any costs associated with collecting the civil penalty are paid in full.

The disqualification of Respondents shall become effective on the 60th day after service of this Order on Respondents.

**RIGHT TO JUDICIAL REVIEW**

Respondents have the right to obtain review of this Order in the court of appeals of the United States for the circuit in which they reside or have their place of business or in the United States Court of Appeals for the District of Columbia Circuit. Respondents

must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send a copy of the notice of appeal by certified mail to the Secretary of Agriculture.[12] The date of this Order is April 11, 2005.

Done at Washington, DC

April 11, 2005

_____

William G. Jenson
Judicial Officer

[12]15 U.S.C. § 1825(b)(2), (c).