UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	Docket No. 11-0147
	)	
Carolyn & Julie Arends, a general partnership d/b/a Julie's Jewels; Julie Arends, an individual; and Carolyn Arends, an individual,	)	
	)	
Respondents	)	**Decision and Order**

PROCEDURAL HISTORY

Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this disciplinary administrative proceeding on February 24, 2011, by filing an Order To Show Cause Why Animal Welfare Act License 42-B-0168 Should Not Be Terminated [hereinafter Order to Show Cause]. The Administrator instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the 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].

The Administrator alleges Carolyn & Julie Arends, a general partnership [hereinafter C&JA],[1] through its agents Carolyn Arends and Julie Arends, interfered with, threatened, verbally abused, and/or harassed United States Department of Agriculture, Animal and Plant Health Inspection Service [hereinafter APHIS], employees in the course of their performing duties under the Animal Welfare Act.[2] The Administrator seeks an order (1) terminating Animal Welfare Act license number 42-B-0168 issued to C&JA and (2) disqualifying the following from obtaining an Animal Welfare Act license: (a) C&JA, (b) C&JA's agents and assigns, and (c) any business entity in which Carolyn Arends or Julie Arends is an officer, agent, or representative, or holds a substantial business interest.[3]

The Hearing Clerk served Respondents with the Order to Show Cause, the Rules of Practice, and the Hearing Clerk's service letter on February 28, 2011.[4] Respondents failed to file a response to the Order to Show Cause with the Hearing Clerk within 20 days after service, as required by 7 C.F.R. § 1.136(a). Instead, on March 23, 2011,

---

[1]C&JA consists of two partners, Carolyn Arends and Julie Arends. References in this Decision and Order to "Respondents" are references to all three respondents, C&JA, Carolyn Arends, and Julie Arends.

[2]Order to Show Cause at 3-6 ¶¶ 6-9.

[3]Order to Show Cause at 7.

[4]United States Postal Service Domestic Return Receipt for article number 7009 1680 0001 9852 2268 and United States Postal Service Domestic Return Receipt for article number 7009 1680 0001 9852 2237.

Colleen A. Carroll, counsel for the Administrator, received Respondents' response to the Order to Show Cause. Ms. Carroll did not file Respondents' response to the Order to Show Cause with the Hearing Clerk, and the Hearing Clerk sent Respondents a letter dated March 28, 2011, informing Respondents that they failed to file a timely response to the Order to Show Cause.

On April 4, 2011, in accordance with 7 C.F.R. § 1.139, the Administrator filed a Motion For Adoption Of Decision And Order By Reason Of Default [hereinafter Motion for Default Decision] and a proposed Decision And Order [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondents with the Administrator's Motion for Default Decision, the Administrator's Proposed Default Decision, and the Hearing Clerk's service letter on April 22, 2011.[5] On April 26, 2011, and May 2, 2011, Respondents filed objections to the Administrator's Motion for Default Decision and the Administrator's Proposed Default Decision with the Hearing Clerk, stating they had responded to the Order to Show Cause, but they had sent their response to counsel for the Administrator, rather than to the Hearing Clerk.

On June 9, 2011, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] issued a Decision And Order Denying Motion For Default Judgment [hereinafter

---

[5]United States Postal Service Domestic Return Receipt for article number 7009 1680 0001 9852 1759 and United States Postal Service Domestic Return Receipt for article number 7009 1680 0001 9852 1742.

ALJ's Decision]: (1) tolling the time for filing Respondents' response to the Order to Show Cause; and (2) denying the Administrator's Motion for Default Decision.

On July 7, 2011, the Administrator filed Complainant's Petition For Appeal [hereinafter Appeal Petition] seeking: (1) reversal of the ALJ's Decision, or (2) an order vacating the ALJ's Decision and remanding the proceeding to the ALJ for further proceedings in accordance with the Rules of Practice. On August 1, 2011, Respondents filed a response to the Administrator's Appeal Petition. On August 4, 2011, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful review of the record, I reverse the ALJ's Decision and adopt, with minor changes, the proposed findings of fact, the proposed conclusions of law, and the proposed order in the Administrator's Proposed Default Decision.

DECISION

Statement of the Case

Respondents failed to file, with the Hearing Clerk, a response to the Order to Show Cause within the time prescribed in 7 C.F.R. § 1.136(a). Moreover, Respondents' response to the Order to Show Cause, which they sent to counsel for the Administrator, rather than to the Hearing Clerk, does not deny, or otherwise respond to, the allegations in the Order to Show Cause. The Rules of Practice (7 C.F.R. § 1.136(c)) provide the failure to file an answer with the Hearing Clerk within the time provided in 7 C.F.R. § 1.136(a) shall be deemed, for purposes of the proceeding, an admission of the allegations in a

complaint. The Rules of Practice (7 C.F.R. § 1.136(c)) also provide the failure to deny, or otherwise respond to, an allegation in a complaint shall be deemed, for purposes of the proceeding, an admission of that allegation. Further, pursuant to 7 C.F.R. § 1.139, the failure to file an answer, or the admission by the answer of all the material allegations of fact contained in a complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Order to Show Cause are adopted as findings of fact. I issue this Decision and Order pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. C&JA is a general partnership doing business variously as "Julie's Jewels," "Julie's Jewels Puppies," and "Julie's Jewels Precious Puppies." C&JA's business mailing address is 3434 Little Wall Lake Road, Jewell, Iowa 50130. At all times material to this proceeding, C&JA operated as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, and held Animal Welfare Act license number 42-B-0168 as a partnership.[6]

2. Julie Arends is an individual whose mailing address is 3434 Little Wall Lake Road, Jewell, Iowa 50130. At all times material to this proceeding, Julie Arends operated as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, and was a partner and principal of C&JA.

---

[6]Copies of C&JA's most recent Animal Welfare Act license renewal application and C&JA's most recent Animal Welfare Act license are attached to the Order to Show Cause as Complainant's Exhibit 1.

3. Carolyn Arends is an individual whose mailing address is 3434 Little Wall Lake Road, Jewell, Iowa 50130. At all times material to this proceeding, Carolyn Arends operated as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations, and was a partner and principal of C&JA.

4. The Animal Welfare Act is a remedial statute enacted "to insure that animals . . . are provided humane care and treatment" (7 U.S.C. § 2131). The Regulations provide that the Secretary of Agriculture may terminate an Animal Welfare Act license, as follows:

> **§ 2.11 Denial of initial license application.**
>
> (a) A license will not be issued to any applicant who:
>
> . . . .
>
> (6) Has made any false or fraudulent statements or provided any false or fraudulent records to the Department or other government agencies, or has pled *nolo contendere* (no contest) or has been found to have violated any Federal, State, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals, or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act.
>
> . . . .
>
> **§ 2.12 Termination of a license.**
>
> A license may be terminated during the license renewal process or at any other time for any reason that an initial license application may be denied pursuant to § 2.11 after a hearing in accordance with the applicable rules of practice.

9 C.F.R. §§ 2.11(a)(6), .12.

The final version of 9 C.F.R. §§ 2.11 and 2.12 was published in the Federal Register on July 14, 2004, and became effective August 13, 2004 (69 Fed. Reg. 42,089 (July 14, 2004)).

5. The Animal Welfare Act authorizes the Secretary of Agriculture to conduct inspections and investigations of dealers and requires dealers to allow access for those purposes:

> **§ 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 inspect each research facility at least once a year and, in the case of deficiencies or deviations from the standards promulgated under this chapter, shall conduct such follow-up inspections as may be necessary until all deficiencies or deviations from such standards are corrected.

7 U.S.C. § 2146(a).[7]

The Regulations require all dealers to allow APHIS officials to conduct inspections, as follows:

---

[7]The term "Secretary" means the Secretary of Agriculture of the United States or the Secretary's representative who shall be an employee of the United States Department of Agriculture (7 U.S.C. § 2132(b); 9 C.F.R. § 1.1 (definition of "Secretary")).

§ 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 must be extended to APHIS officials by the dealer, exhibitor, intermediate handler or carrier, and a responsible adult shall be made available to accompany APHIS officials during the inspection process.

9 C.F.R. § 2.126.

6. On September 15, 2010, C&JA, through its agents Carolyn Arends and Julie Arends, interfered with, threatened, verbally abused, and/or harassed APHIS employees, specifically Animal Care Inspector Cynthia Neis and Supervisory Animal Care Specialist Dr. Richard Watkins, in the course of their performing duties under the Animal Welfare Act, to such an extent that the Administrator is unable to conduct normal routine inspections of Respondents' facilities, animals, and records, without having APHIS employees accompanied by armed law enforcement officers. Specifically, during the course of the inspection, Julie Arends became irate, yelled at Animal Care Inspector Cynthia Neis and Supervisory Animal Care Specialist Dr. Richard Watkins, threw a chain at the bench in front of a shed, and made numerous threats to kill herself.

7. On September 15, 2010, C&JA, through its agent Julie Arends, interfered with, threatened, verbally abused, and/or harassed APHIS employees, specifically Animal Care Inspector Cynthia Neis and Supervisory Animal Care Specialist Dr. Richard Watkins, in the course of their performing duties under the Animal Welfare Act, to such an extent that the Administrator is unable to conduct normal routine inspections of Respondents' facilities, animals, and records, without having APHIS employees accompanied by armed law enforcement officers:

a. During the exit interview, Animal Care Inspector Cynthia Neis and Supervisory Animal Care Specialist Dr. Richard Watkins attempted to review the September 13, 2010, inspection report[8] with Carolyn Arends and Julie Arends. Julie Arends yelled at Carolyn Arends not to sign the inspection report and yelled at Animal Care Inspector Cynthia Neis and Supervisory Animal Care Specialist Dr. Richard Watkins regarding microchipped dogs.

b. During the exit interview, Animal Care Inspector Cynthia Neis and Supervisory Animal Care Specialist Dr. Richard Watkins showed Respondents photographs taken during the inspection on September 13, 2010, to illustrate the deficiencies described in the inspection report. C&JA, through Carolyn Arends and her husband Eldon Arends, took possession of the photographs, wrote on the photographs,

[8]A copy of the September 13, 2010, inspection report is attached to the Order to Show Cause as Complainant's Exhibit 2. The previous inspection of C&JA was conducted on July 16, 2009, and a copy of the July 16, 2009, inspection report is attached to the Order to Show Cause as Complainant's Exhibit 3.

and refused to return the photographs to Animal Care Inspector Cynthia Neis and Supervisory Animal Care Specialist Dr. Richard Watkins, despite repeated requests for return of the photographs. Julie Arends became upset and loud and warned Animal Care Inspector Cynthia Neis and Supervisory Animal Care Specialist Dr. Richard Watkins that perhaps she would "start packing heat like Randy" (another dog dealer) apparently does.

c. During the exit interview, Julie Arends called the APHIS regional office in Fort Collins, Colorado, yelled at the person who answered the telephone in that office, and reported to Animal Care Inspector Cynthia Neis and Supervisory Animal Care Specialist Dr. Richard Watkins that that person had ordered them to identify the locations of the photographed deficiencies so that Respondents could take their own photographs.

d. Following Julie Arends' telephone call to the APHIS regional office, Julie Arends advised Animal Care Inspector Cynthia Neis and Supervisory Animal Care Specialist Dr. Richard Watkins, among other things, that the dogs were "her dogs," that she could do what she wanted with them, and that she was going to have the veterinarian kill 50 of them.

e. After Respondents determined that they were unable to locate a camera with which to take their own photographs, Julie Arends quickly got into a red pickup truck that was parked at the house, started the engine, "spun out" of the driveway, losing control of the vehicle, and then turned right onto Highway 69 at high speed.

f. Animal Care Inspector Cynthia Neis and Supervisory Animal Care Specialist Dr. Richard Watkins advised Carolyn Arends that they thought it best to leave and departed the premises in Ms. Neis' government vehicle. Ms. Neis and Dr. Watkins turned right onto Highway 69 and headed north toward Jewell, Iowa. Ms. Neis was driving. Ms. Neis and Dr. Watkins had only been on the highway a short time (about a minute) when they saw a red pickup truck approaching from the opposite direction. The truck picked up speed and veered from the southbound lane into the northbound lane heading toward the government vehicle. Ms. Neis drove the government vehicle onto the northbound shoulder and stopped. The red truck continued to gain speed and moved onto the northbound shoulder as well, heading for a direct impact with the government vehicle. Shortly before impact, the driver swerved back onto the highway, missing the government vehicle by 10 to 15 feet, stopped perpendicular to the highway, and glared at the inspectors. The driver was Julie Arends. While Julie Arends started to make a U-turn, Ms. Neis drove back onto the northbound lane and quickly headed to Jewell, Iowa, to get away from the red truck before Julie Arends could complete the U-turn. Ms. Neis and Dr. Watkins proceeded to the Hamilton County Sheriff's Department where they reported the incident. Ms. Neis and Dr. Watkins also documented the incident in affidavits.[9]

---

[9]A copy of Animal Care Inspector Cynthia Neis' affidavit is attached to the Order to Show Cause as Complainant's Exhibit 4. A copy of Supervisory Animal Care Specialist Dr. Richard Watkins' affidavit is attached to the Order to Show Cause as Complainant's Exhibit 5.

8. The need to have additional personnel, as well as local law enforcement officers, accompany APHIS employees on every occasion when APHIS has in-person dealings with Respondents is an unwarranted strain on the Administrator's and the United States Department of Agriculture's resources and diverts those resources from other enforcement activities.

Conclusions of Law

Respondents have acted to impede the Administrator from carrying out his mandate to enforce the Animal Welfare Act. Respondents' acts create obstacles to inspections. Allowing C&JA to continue to hold an Animal Welfare Act license would be contrary to the Animal Welfare Act's purpose of ensuring humane treatment of animals because C&JA and its agents have made it unsafe for APHIS employees to inspect C&JA's facilities, animals, and records. C&JA's principals, Julie Arends and Carolyn Arends, and C&JA's apparent agent, Eldon Arends, are unwilling and/or unable to comply with the requirements of the Animal Welfare Act and the Regulations. Their behavior evidences that APHIS employees cannot safely conduct inspections of Respondents' facilities, animals, and records. Respondents' actions constitute an abuse of the licensure privileges of the Animal Welfare Act and render Respondents unfit to be licensed under the Animal Welfare Act. For these reasons, the Administrator's determination that renewal of Animal Welfare Act license number 42-B-0168 would be

contrary to the purposes of the Animal Welfare Act is supported by the facts admitted here.

The Administrator's Appeal Petition

The Administrator raises six issues in his Appeal Petition. First, the Administrator contends the ALJ erroneously concluded the Order to Show Cause is not a complaint requiring Respondents to respond in order to avoid a default, as provided in 7 C.F.R. §§ 1.136(c) and 1.139 (Appeal Pet. 3-5).

The ALJ construed the Order to Show Cause as a motion or request, as follows:

> Complainant argues that default is appropriate because Respondents failed to adhere to the Rules regarding filing an Answer. However, Complainant did not file a formal complaint under the Rules, but rather issued an Order to show cause, which I construe as a motion or request within the definition of 7 C.F.R. § 1.143(d).

ALJ's Decision at 4. However, an order to show cause is, by definition, a "complaint" under the Rules of Practice:

> **§ 1.132 Definitions.**
>
> As used in this subpart, the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:
>
> . . . .
>
> *Complaint* means the formal complaint, order to show cause, or other document by virtue of which a proceeding is instituted.

7 C.F.R. § 1.132. Moreover, the Order to Show Cause is the document by virtue of which the Administrator instituted the instant proceeding. While the Order to Show Cause

contains three requests,[10] the Order to Show Cause is not a motion or request filed in accordance with 7 C.F.R. § 1.143. The Order to Show Cause explicitly states Respondents' failure to file a timely response to the Order to Show Cause will constitute an admission of all the material allegations of the Order to Show Cause, as follows:

> WHEREFORE, it is hereby requested that for the purpose of determining whether Animal Welfare Act license 42-B-0168 should be terminated in accordance with the Act and the Regulations issued under the Act, this Order to Show Cause shall be served upon the respondents. 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 Order to Show Cause.
>
> The Animal and Plant Health Inspection Service requests that unless respondents fail to file an answer within the time allowed therefor, or file an answer admitting all the material allegations of this Order to Show Cause, this proceeding be set for oral hearing in conformity with the Rules of Practice governing proceedings under the Act[.]

Order to Show Cause at 6-7. In addition, the Hearing Clerk's letter, dated February 25, 2011, served on Respondents with the Order to Show Cause and the Rules of Practice, states Respondents' failure to file a timely response to the Order to Show Cause with the Hearing Clerk shall constitute an admission of the allegations of the Order to Show Cause and a waiver of the right to hearing, as follows:

---

[10]The Administrator requests: (1) that the Hearing Clerk serve the Order to Show Cause on Respondents, (2) that the proceeding be set for oral hearing, and (3) issuance of such orders as are authorized by the Animal Welfare Act and warranted under the circumstances (Order to Show Cause at 6-7).

> Enclosed is a copy of the Order to Show Cause Why Animal Welfare Act License 42-B-0168 Should Not be Terminated, which has been filed in the above-captioned proceeding. Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. Please familiarize yourself with the rules and note that the comments which follow are not a substitute for the rule requirements.
>
> The rules specify that you may represent yourself or obtain legal counsel. If an attorney does not file an appearance on your behalf, it shall be presumed that you have elected to represent yourself. Most importantly, **you have 20 days from receipt of this letter to file with the Hearing Clerk an original and three copies of your written and signed answer to the complaint**. It is necessary that your answer set forth any defense you wish to assert, admit, deny, or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint shall constitute an admission of those allegations and waive your right to an oral hearing.

Letter, dated February 25, 2011, from the Hearing Clerk to Respondents at 1 (emphasis in original).

Further still, Respondents do not assert that the Order to Show Cause is not a valid form of complaint. Instead, Respondents assert they responded to the Order to Show Cause, but they sent their response to the Order to Show Cause to the Administrator's counsel, rather than to the Hearing Clerk.[11]

---

[11]Motion for Default Decision attached to which is Carolyn Arends' April 1, 2011, e-mail to Ms. Carroll stating Respondents mailed the response to the Order to Show Cause to Ms. Carroll; Respondents' April 26, 2011, filing at second unnumbered page stating Respondents sent their response to the Order to Show Cause to the wrong address; and Respondents' May 2, 2011, filing at third unnumbered page stating Respondents sent their response to the Order to Show Cause to the wrong address.

Therefore, I reject the ALJ's conclusion that the Order to Show Cause is a motion or request filed in accordance with 7 C.F.R. § 1.143. Instead, I find the Order to Show Cause is a "complaint," as defined in the Rules of Practice, and is the document by which the Administrator instituted the instant proceeding. In order to avoid being deemed to have admitted the allegations of the Order to Show Cause and to avoid waiving the right to hearing, as provided in 7 C.F.R. §§ 1.136(c) and 1.139, Respondents were required to file a timely response to the Order to Show Cause with the Hearing Clerk.

Second, the Administrator contends the ALJ's conclusion that Ms. Carroll's receipt of Respondents' response to the Order to Show Cause equates to filing with the Hearing Clerk, is error (Appeal Pet. at 5-7).

The record establishes that Respondents mailed their response to the Order to Show Cause to counsel for the Administrator, rather than to the Hearing Clerk[12] as required by the Rules of Practice.[13] The Order to Show Cause, the Rules of Practice, and the Hearing Clerk's letter dated February 25, 2011, all of which the Hearing Clerk served on Respondents on February 28, 2011, state that Respondents' response to the Order to

---

[12]Motion for Default Decision attached to which is a redacted letter dated March 18, 2011, from Respondents to Colleen A. Carroll, Attorney for Complainant, Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue, S.W., Washington, DC 20250-1417 and an envelope in which that letter was mailed which is addressed to Colleen A. Carroll, Attorney for Complainant, Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue, S.W., Washington, DC 20250-1417.

[13]7 C.F.R. §§ 1.136(a), .147(g).

Show Cause must be filed with the Hearing Clerk. I have consistently held that delivery to a location or person other than the Hearing Clerk does not constitute filing with the Hearing Clerk.[14] Moreover, I have specifically held that a complainant's counsel's receipt of a respondent's response to a complaint does not constitute filing with the Hearing Clerk.[15] Therefore, I find the ALJ's conclusion that Ms. Carroll's receipt of Respondents' response to the Order to Show Cause equates to Respondents' filing their response to the Order to Show Cause with the Hearing Clerk, is error.

Third, the Administrator contends the ALJ's conclusion that Respondents timely filed their response to the Order to Show Cause, is error (Appeal Pet. at 7-10).

---

[14]*See In re Heartland Kennels, Inc*., 61 Agric. Dec. 492, 537 (2002) (stating an incarcerated pro se respondent's delivery of a document to prison authorities for forwarding to the Hearing Clerk does not constitute filing with the Hearing Clerk); *In re Jack Stepp* (Ruling Denying Respondents' Pet. for Recons. of Order Lifting Stay), 59 Agric. Dec. 265, 268 (2000) (stating neither respondents' mailing the Reply to Motion to Lift Stay nor the United States Postal Service's delivering the Reply to Motion to Lift Stay to the United States Department of Agriculture, Mail & Reproduction Management Division, constitutes filing with the Hearing Clerk); *In re Sweck's, Inc.*, 58 Agric. Dec. 212, 213 n.1 (1999) (stating appeal petitions must be filed with the Hearing Clerk; indicating that the hearing officer erred when he instructed litigants that appeal petitions must be filed with Judicial Officer); *In re Severin Peterson* (Order Denying Late Appeal), 57 Agric. Dec. 1304, 1310 n.3 (1998) (stating that neither the applicants' mailing their appeal petition to Regional Director, National Appeals Division, nor receipt of the applicants' appeal petition by the National Appeals Division, Eastern Regional Office, nor the National Appeals Division's delivering the applicants' appeal petition to the Office of the Judicial Officer, constitutes filing with the Hearing Clerk).

[15]*In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504, 514 (1996) (stating, even if the respondent's answer had been received by complainant's counsel within the time for filing the answer, respondent's answer would not be timely because complainant's counsel's receipt of the respondent's answer does not constitute filing with the Hearing Clerk), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997).

On February 28, 2011, the Hearing Clerk served Respondents with the Order to Show Cause.[16] The Rules of Practice require that Respondents file their response to the Order to Show Cause within 20 days after the Hearing Clerk serves them with the Order to Show Cause.[17] Therefore, Respondents were required to file their response to the Order to Show Cause no later than March 21, 2011.[18] Counsel for the Administrator asserts she did not receive Respondents' response to the Order to Show Cause until

---

[16]United States Postal Service Domestic Return Receipt for article number 7009 1680 0001 9852 2268 and United States Postal Service Domestic Return Receipt for article number 7009 1680 0001 9852 2237.

[17]7 C.F.R. § 1.136(a).

[18]Twenty days after February 28, 2011, was March 20, 2011. However, March 20, 2011, was a Sunday. The Rules of Practice provide that when the time for filing a document or paper expires on a Sunday, the time for filing shall be extended to the next business day, as follows:

> **§ 1.147 Filing; service; extensions of time; and computation of time.**
>
> . . . .
>
> (h) *Computation of time*. Saturdays, Sundays and Federal holidays shall be included in computing the time allowed for the filing of any document or paper: *Provided*, That, when such time expires on a Saturday, Sunday, or Federal holiday, such period shall be extended to include the next following business day.

7 C.F.R. § 1.147(h).

The next business day after Sunday, March 20, 2011, was Monday, March 21, 2011. Therefore, Respondents were required to file their response to the Order to Show Cause no later than Monday, March 21, 2011.

March 23, 2011.[19] In support of counsel's assertion, the Administrator attached to the Motion for Default Decision a copy of the envelope containing Respondents' response to the Order to Show Cause indicating that Respondents' response to the Order to Show Cause was received by the United States Department of Agriculture, Mail & Reproduction Management Division, Mail Services Branch, on March 23, 2011. Therefore, even if I were to conclude that the Administrator's counsel's receipt of Respondents' response to the Order to Show Cause equates to filing with the Hearing Clerk (which I do not so conclude), I would find Respondents' response to the Order to Show Cause was late-filed and deem Respondents' failure to file a timely response an admission of the allegations of the Order to Show Cause and a waiver of hearing.

Fourth, the Administrator contends the ALJ, relying on the Federal Rules of Civil Procedure, erroneously enlarged Respondents' time for filing a response to the Order to Show Cause (Appeal Pet. at 10-13).

Rule 1 of the Federal Rules of Civil Procedure provides that the Federal Rules of Civil Procedure govern procedure in the United States district courts, as follows:

> **Rule 1. Scope and Purpose**
>
> These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.

---

[19]Appeal Pet. at 1; Motion for Default Decision at 2.

Fed. R. Civ. P. 1. The Federal Rules of Civil Procedure are not applicable to administrative proceedings conducted before the Secretary of Agriculture under the Animal Welfare Act and the Rules of Practice.[20] Therefore, I find the ALJ's application of the Federal Rules of Civil Procedure to the instant proceeding, error.

Fifth, the Administrator contends the ALJ's denial of the Administrator's Motion for Default Decision is error because Respondents did not deny, or respond to, the allegations of the Order to Show Cause (Appeal Pet. at 13-15).

The Rules of Practice address the contents of a response to a complaint, the consequences of the failure to file a timely response to a complaint, and the consequences of the failure to deny, or otherwise respond to, an allegation of a complaint, as follows:

> **§ 1.136 Answer.**
>
> . . . .
>
> (b) *Contents*. The answer shall:
>
> (1) Clearly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent; or
>
> (2) State that the respondent admits all the facts alleged in the complaint; or
>
> (3) State that the respondent admits the jurisdictional allegations of the complaint and neither admits nor denies the remaining allegations and consents to the issuance of an order without further procedure.
>
> (c) *Default*. Failure to file an answer within the time provided under paragraph (a) of this section 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

---

[20] *In re Heartland Kennels, Inc*., 61 Agric. Dec. 492, 535 (2002); *In re Karl Mitchell*, 60 Agric. Dec. 91, 123 (2001), *aff'd*, 42 F. App'x 991 (9th Cir. 2002); *In re Anna Mae Noell*, 58 Agric. Dec. 130, 147 (1999), *appeal dismissed sub nom. The Chimp Farm, Inc. v. U.S. Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000).

> deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

7 C.F.R. § 1.136(b)-(c). Moreover, the failure to file an answer, or the admission by answer of all the material allegations of fact contained in a complaint, constitutes a waiver of hearing.[21] Even if Respondents had timely filed their response to the Order to Show Cause with the Hearing Clerk, a default decision would be appropriate because the Respondents' response to the Order to Show Cause does not deny, or respond to, the allegations of the Order to Show Cause. Respondents' response to the Order to Show Cause contains a settlement proposal, and, even if read liberally, does not address any of the allegations in the Order to Show Cause.[22]

> Even construing Kollman's letter liberally, the contents of his July 22, 2005 letter simply do not equate to a denial or other response to any of the allegations against him in the Complaint. Therefore, the USDA did not err when it concluded, pursuant to Rule of Practice 1.136(c), 7 C.F.R. § 1.136(c), that Kollman failed to deny or otherwise respond to any of the material allegations of the Complaint and thus was deemed to have admitted all those allegations.

Ramos v. U.S. Dep't of Agric., 322 F. App'x 814, 821 (11th Cir. 2009) (unpublished).

---

[21] 7 C.F.R. § 1.139.

[22] Motion for Default Decision attached to which is Respondents' response to Order to Show Cause, which the Administrator redacted to remove the specifics of Respondents' settlement proposal; Respondent's May 2, 2011, filing attached to which is Respondents' unredacted response to the Order to Show Cause; and Respondents' response to the Administrator's Appeal Petition attached to which is Respondents' unredacted response to the Order to Show Cause.

Sixth, the Administrator contends the ALJ erroneously applied equitable tolling to the instant proceeding (Appeal Pet. at 15-20).

The ALJ held Respondents' sending their response to the Order to Show Cause to the Administrator's counsel constitutes the type of defective pleading that supports equitable tolling of the time for Respondents' filing a response to the Order to Show Cause (ALJ's Decision 4-6).

Equitable tolling does not apply in the instant proceeding. The Rules of Practice do not provide for equitable relief.[23] Moreover, where equitable tolling is authorized, it has been applied in very limited circumstances – which are not present in the instant proceeding.

> Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass. We have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.

Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990) (footnotes omitted). The instant proceeding presents no inequity. Respondents' response to the Order to Show Cause was not filed during the period for filing an answer. Moreover, I do not find Respondents were induced or tricked by the Administrator into missing the deadline for

---

[23] *In re J. Reid Hoggan*, 35 Agric. Dec. 1812, 1817-19 (1976) (neither the administrative law judges nor the Judicial Officer can provide equitable relief under the Rules of Practice).

filing a response to the Order to Show Cause. Respondents received the same information sent to all similarly-situated respondents, Respondents were advised as to the procedure for filing an answer, Respondents were advised as to the consequences for failing to file an answer, and Respondents were advised as to the consequences for failing to respond to any allegation of the Order to Show Cause. Respondents' response to the Order to Show Cause did not respond to any allegation in the Order to Show Cause, Respondents' response to the Order to Show Cause was not filed with the Hearing Clerk, and Respondents' response to the Order to Show Cause was not timely.

The ALJ found that extraordinary circumstances justified equitable tolling of the 20-day time limit for filing an answer. The extraordinary circumstances were an ambiguity as to Julie Arends' role in C&JA and Julie Arends' hospitalization and illness. The record contains no ambiguity as to Julie Arends' role in C&JA. Her name appears on the Animal Welfare Act license renewal application and the Animal Welfare Act dealer's license.[24] Further still, Respondents failed to deny the allegations that describe Julie Arends' relationship to C&JA, which allegations are admitted pursuant to the Rules of Practice. Respondents do not assert that Respondents' failure to file a timely response to the Order to Show Cause was due to Julie Arends' illness or hospitalization, and I find nothing in the record to support a finding that Respondents' failure to file a timely response to the Order to Show Cause was due to Julie Arends' illness or hospitalization.

---

[24]Order to Show Cause at Complainant's Exhibit 1.

Generally, physical incapacity is not a basis for failing to issue, or for setting aside, a default decision.[25]

The ALJ also considered Julie Arends' *pro se* status in applying equitable tolling.[26] A party's *pro se* status is not relevant to whether that party filed a timely answer or to whether a motion for default decision should be granted.[27] Moreover, even if equitable tolling is available, *pro se* status does not warrant its application.

---

[25]*In re Mary Jean Williams* (Order Denying Pet. to Reconsider as to Deborah Ann Milette), 64 Agric. Dec. 1673, 1678 (2005) (stating, generally, physical and mental incapacity are not bases for setting aside a default decision); *In re Jim Aron*, 58 Agric. Dec. 451, 462 (1999) (stating the respondent's automobile accident, loss of memory, payment of taxes, status as a United States citizen, and status as a veteran of the United States Army are not bases for setting aside the default decision); *In re Anna Mae Noell*, 58 Agric. Dec. 130, 146 (1999) (stating respondent's age, ill health, and hospitalization are not bases for setting aside the default decision), *appeal dismissed sub nom. The Chimp Farm, Inc. v. U.S. Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re James J. Everhart*, 56 Agric. Dec. 1400, 1417 (1997) (holding the respondent's disability is not a mitigating factor and forms no basis for setting aside or modifying a default decision).

[26]ALJ's Decision at 5-6.

[27]*In re Loreon Vigne* (Order Denying Pet. to Reconsider), 68 Agric. Dec. 362, 364 (2009) (stating the Rules of Practice do not distinguish between persons who appear pro se and persons represented by counsel; Ms. Vigne's status as a pro se litigant is not a basis on which to set aside her waiver of the right to an oral hearing); *In re Octagon Sequence of Eight, Inc.* (Order Denying Pet. for Rehearing as to Lancelot Kollman Ramos), 66 Agric. Dec. 1283, 1286 (2007) (holding the respondent's status as a pro se litigant is not a basis on which to grant his petition for rehearing or set aside the default decision); *In re Anna Mae Noell*, 58 Agric. Dec. 130, 146 (1999) (stating lack of representation by counsel is not a basis for setting aside the default decision), *appeal dismissed sub nom. The Chimp Farm, Inc. v. U.S. Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re Dean Byard* (Decision as to Dean Byard), 56 Agric. Dec. 1543, 1559 (1997) (stating the respondent's decision to proceed pro se does not operate as an excuse for the respondent's failure to file an answer).

> *Pro se* status, ignorance of the law, and administrative processes that "are too slow or involve too much delay" do not warrant equitable tolling. *Wakefield v. R.R. Ret. Bd.*, 131 F.3d 967, 970 (11th Cir. 1997). Furthermore, the liberal construction given to *pro se* pleadings "does not mean liberal deadlines." *Wayne v. Jarvis*, 197 F.3d 1098, 1104 (11th Cir. 1999), *overruled on other grounds by Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003).

Robinson v. Schafer, 305 F. App'x 629, 630 (11th Cir. 2008) (per curiam).

For the foregoing reasons, the following Order is issued.

ORDER

Animal Welfare Act license number 42-B-0168 is terminated. This Order shall become effective on the 60th day after service of this Order on Respondents.

Done at Washington, DC

November 15, 2011

_____

William G. Jenson
Judicial Officer