UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	AWA Docket No. 05-0032
	)	
Cheryl Morgan, an individual,	)	
d/b/a Exotic Pet Co.,	)	
	)	
Respondent	)	**Order Denying Petition to Reconsider**

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on September 9, 2005. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges Cheryl Morgan [hereinafter Respondent] willfully violated the Regulations and Standards (Compl. ¶¶ 6-11). The Hearing Clerk served Respondent

with the Complaint, the Rules of Practice, and a service letter on November 9, 2005.[1] Respondent failed to file an answer to the 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 December 6, 2005, 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 [hereinafter Motion for Default Decision] and a proposed Decision and Order as to Cheryl Morgan by Reason of Admission of Facts [hereinafter Proposed Default Decision]. On December 28, 2005, Respondent requested an extension of time within which "to solve this misunderstanding."[2] On December 29, 2005, Acting Chief Administrative Law Judge Jill S. Clifton [hereinafter the Acting Chief ALJ] granted Respondent an extension of time within which to respond to Complainant's Motion for Default Decision. On January 31, 2006, Respondent filed timely objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. On February 23, 2006, Complainant filed Complainant's Reply to Respondent's Objections to Motion for Adoption of Proposed Decision and Order.

On March 29, 2006, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order [hereinafter Initial Decision]: (1) concluding

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[1]Memorandum to the File dated November 9, 2005, and signed by Tonya Fisher, Legal Technician.

[2]Letter from Respondent to the United States Department of Agriculture, Office of Administrative Law Judges, dated and filed December 28, 2005.

Respondent willfully violated the Regulations and Standards as alleged in the Complaint; (2) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondent a $16,280 civil penalty; and (4) revoking Respondent's Animal Welfare Act licenses (Animal Welfare Act license number 74-C-0406 and Animal Welfare Act license number 74-B-0530) (Initial Decision at 2-3, 22).

On May 1, 2006, Respondent appealed to the Judicial Officer. On May 26, 2006, Complainant filed Complainant's Response to Respondent's Appeal Petition. On June 6, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. On July 6, 2006, I issued a Decision and Order: (1) concluding Respondent willfully violated the Regulations and Standards as alleged in the Complaint; (2) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondent a $16,280 civil penalty; and (4) revoking Respondent's Animal Welfare Act licenses (Animal Welfare Act license number 74-C-0406 and Animal Welfare Act license number 74-B-0530).[3]

On July 21, 2006, Respondent filed a Petition for Reconsideration. On August 10, 2006, Complainant filed a response to Respondent's Petition for Reconsideration. On August 11, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent's Petition for Reconsideration.

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[3] *In re Cheryl Morgan*, __ Agric. Dec. ___, slip op. at 6-7, 45 (July 6, 2006).

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondent raises two issues in Respondent's Petition for Reconsideration. First, Respondent asserts she did not receive the Complaint on November 9, 2005, and contends she filed a timely response to the Complaint (Respondent's Pet. for Recons. at 1).

The record does not support Respondent's contention that she filed a timely response to the Complaint. The Hearing Clerk, by certified mail, sent Respondent the Complaint, the Rules of Practice, and the Hearing Clerk's service letter dated September 9, 2005. The United States Postal Service marked the envelope containing the Complaint, the Rules of Practice, and the Hearing Clerk's September 9, 2005, service letter "unclaimed" and returned it to the Hearing Clerk. On November 9, 2005, the Hearing Clerk, by ordinary mail, sent the Complaint, the Rules of Practice, and the Hearing Clerk's September 9, 2005, service letter to Respondent at the same address as the Hearing Clerk used for the September 9, 2005, certified mailing.[4] Section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)) provides, if the Hearing Clerk sends a document by certified mail and it is returned by the United States Postal Service marked "unclaimed," the document shall be deemed to be received by the party on the date of remailing by ordinary mail to the same address. Thus, Respondent is deemed to have received the Complaint, the Rules of Practice, and the Hearing Clerk's September 9, 2005, service letter on November 9, 2005, and Respondent's time for filing a response to

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[4]See note 1.

the Complaint is calculated from November 9, 2005, not the date Respondent actually received the Complaint.

To meet the requirement of due process of law, it is only necessary that notice of a proceeding be sent in a manner "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).[5] As held in *Stateside Machinery Co., Ltd. v. Alperin*, 591 F.2d 234, 241-42 (3d Cir. 1979):

> Whether a method of service of process accords an intended recipient with due process depends on "whether or not the form of . . . service [used] is *reasonably calculated* to give him actual notice of the proceedings and an opportunity to be heard." *Milliken*, 311 U.S. at 463, 61 S. Ct. at 343 (emphasis added); *see Mullane v. Central Hanover Bank & Trust Co.*, 339

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[5]*See also Trimble v. United States Dep't of Agric.*, 87 F. App'x 456, 2003 WL 23095662 (6th Cir. 2003) (holding that sending a complaint to the respondent's last known business address by certified mail is a constitutionally adequate method of notice and lack of actual receipt of the certified mailing does not negate the constitutional adequacy of the attempt to accomplish actual notice); *DePiero v. City of Macedonia*, 180 F.3d 770, 788-89 (6th Cir. 1999) (holding service of a summons at the plaintiff's last known address is sufficient where the plaintiff is not incarcerated and where the city had no information about the plaintiff's whereabouts that would give the city reason to suspect the plaintiff would not actually receive the notice mailed to his last known address), *cert. denied*, 528 U.S. 1105 (2000); *Weigner v. City of New York*, 852 F.2d 646, 649-51 (2d Cir. 1988) (stating the reasonableness and hence constitutional validity of any chosen method of providing notice may be defended on the ground that it is in itself reasonably certain to inform those affected; the state's obligation to use notice "reasonably certain to inform those affected" does not mean that all risk of non-receipt must be eliminated), *cert. denied*, 488 U.S. 1005 (1989); *NLRB v. Clark*, 468 F.2d 459, 463-65 (5th Cir. 1972) (stating due process does not require receipt of actual notice in every case).

> U.S. 306, 315, 70 S. Ct. 652, 94 L.Ed. 865 (1950). As long as a method of service is reasonably certain to notify a person, the fact that the person nevertheless fails to receive process does not invalidate the service on due process grounds. In this case, Alperin attempted to deliver process by registered mail to defendant's last known address. That procedure is a highly reliable means of providing notice of pending legal proceedings to an adverse party. That Speigel nevertheless failed to receive service is irrelevant as a matter of constitutional law. [Omission and emphasis in original.]

Similarly, in *Fancher v. Fancher*, 8 Ohio App. 3d 79, 455 N.E.2d 1344, 1346 (Ohio Ct. App. 1982), the court held:

> It is immaterial that the certified mail receipt was signed by the defendant's brother, and that his brother was not specifically authorized to do so. The envelope was addressed to the defendant's address and was there received; this is sufficient to comport with the requirements of due process that methods of service be reasonably calculated to reach interested parties. *See Mullane v. Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, 314, 70 S. Ct. 652, 94 L.Ed. 865. [Footnote omitted.]

Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

> **§ 1.136 Answer.**
>
> (a) *Filing and service.* Within 20 days after the service of the complaint . . ., the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding . . . .
>
> . . . .
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> (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 deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

> The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

> (a) *Request for hearing*. Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed . . . . Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

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

Moreover, the Complaint informs Respondent of the consequences of failing to file a timely answer, as follows:

> [T]his complaint shall be served upon the respondent. The respondent 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.

Compl. at 15.

Respondent's answer was due no later than November 29, 2005. Respondent's first filing in this proceeding is dated and was filed December 28, 2005, 29 days after

Respondent's answer was due. On January 31, 2006, 2 months 2 days after Respondent's answer was due, Respondent filed a letter generally denying the allegations of the Complaint. Therefore, in accordance with the Rules of Practice, Respondent is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint and waived opportunity for hearing.

Second, Respondent contends she received an extension of time within which to file a response to the Complaint and she filed an answer within the time limit extended (Respondent's Pet. for Recons. at 1).

The record does not support Respondent's contention that she received an extension of time within which to file a response to the Complaint. On December 6, 2005, Complainant filed Complainant's Motion for Default Decision and Complainant's Proposed Default Decision. On December 28, 2005, in her first filing in this proceeding, Respondent requested an extension of time within which "to solve this misunderstanding." On December 29, 2005, the Acting Chief ALJ issued an order granting Respondent an extension of time within which to file objections to Complainant's Motion for Default Decision. The Acting Chief ALJ clearly states that the time for filing Respondent's response to the Complaint had expired on November 29, 2005:

> By letter dated December 28, 2005, Respondent Cheryl Morgan requested an extension "to solve this misunderstanding." I hereby grant Respondent Cheryl Morgan an extension through **Tuesday, January 31, 2006**, to file her response to Complainant's Motion for Adoption of

> Proposed Decision and Order. I grant the extension in my capacity as acting chief administrative law judge; the case has not yet been assigned to an administrative law judge.
>
> Respondent Cheryl Morgan failed to file a request for additional time by November 29, 2005, the deadline for filing an answer. It is not clear to me whether Respondent Cheryl Morgan recognizes how far this case has progressed. Respondent Cheryl Morgan is in default, having failed to file an answer by November 29, 2005. I wholeheartedly encourage Respondent Cheryl Morgan to contact the Attorney for APHIS, Bernadette R. Juarez, telephone number 202.720.2633 and FAX 202.690.4299, to try to settle the case.

Order Granting Additional Time to Respond to Complainant's Motion for Adoption of Proposed Decision and Order at 1. On January 31, 2006, 2 months 2 days after Respondent's answer was due, Respondent filed a letter generally denying the allegations of the Complaint. The record does not support Respondent's contention that her January 31, 2006, filing is a timely answer filed within a time limit extended by the Acting Chief ALJ.

For the foregoing reasons and the reasons set forth in *In re Cheryl Morgan*, __ Agric. Dec. ___ (July 6, 2006), Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider. Respondent's Petition for Reconsideration was timely filed and automatically stayed *In re Cheryl Morgan*, __ Agric. Dec. ___ (July 6, 2006). Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in *In re Cheryl*

Morgan, __ Agric. Dec. ___ (July 6, 2006), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition to Reconsider.

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

ORDER

1. Respondent, her agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards.

Paragraph 1 of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent is assessed a $16,280 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

Payment of the civil penalty shall be sent to, and received by, Bernadette R. Juarez within 60 days after service of this Order on Respondent. Respondent shall state on the certified check or money order that payment is in reference to AWA Docket No. 05-0032.

3. Respondent's Animal Welfare Act licenses (Animal Welfare Act license number 74-C-0406 and Animal Welfare Act license number 74-B-0530) are revoked.

Paragraph 3 of this Order shall become effective on the 60th day after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of the Order in this Order Denying Petition to Reconsider in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of the Order in this Order Denying Petition to Reconsider. Respondent must seek judicial review within 60 days after entry of the Order in this Order Denying Petition to Reconsider.[6] The date of entry of the Order in this Order Denying Petition to Reconsider is August 15, 2006.

Done at Washington, DC

August 15, 2006

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William G. Jenson
Judicial Officer

[6] 7 U.S.C. § 2149(c).