

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	AWA Docket No. 04-0033
)	
For The Birds, Inc., an Idaho)	
corporation; and Jerry L. Korn,)	
an individual, and Susan F. Korn,)	
an individual, d/b/a For The Birds;)	
and Ben Korn, an individual,)	
)	
Respondents)	Remand Order as to Susan F. Korn

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 8, 2004. 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 that during the period March 2001 through August 2003, For The Birds, Inc., Jerry L. Korn, Susan F. Korn, and Ben Korn willfully violated the Regulations and Standards (Compl. ¶¶ 8-52). For The Birds, Inc., Jerry L. Korn, and Susan F. Korn failed to file answers 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 January 19, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed: (1) a Motion for Adoption of Decision and Order as to Respondent Jerry L. Korn [hereinafter Motion for Default Decision as to Jerry L. Korn] and a proposed Decision and Order as to Respondent Jerry L. Korn [hereinafter Proposed Default Decision as to Jerry L. Korn]; (2) a Motion for Adoption of Decision and Order as to Respondent Susan F. Korn [hereinafter Motion for Default Decision as to Susan F. Korn] and a proposed Decision and Order as to Respondent Susan F. Korn [hereinafter Proposed Default Decision as to Susan F. Korn]; and (3) a Motion for Adoption of Decision and Order as to For The Birds, Inc. [hereinafter Motion for Default Decision as to For The Birds, Inc.], and a proposed Decision and Order as to Respondent For The Birds, Inc. [hereinafter Proposed Default Decision as to For The Birds, Inc.].

On January 27, 2005, the Hearing Clerk served: (1) Jerry L. Korn with Complainant's Motion for Default Decision as to Jerry L. Korn, Complainant's Proposed Default Decision as to Jerry L. Korn, and a service letter; and (2) For The Birds, Inc., with Complainant's Motion for Default Decision as to For The Birds, Inc., Complainant's

Proposed Default Decision as to For The Birds, Inc., and a service letter.¹ On February 16, 2005, Jerry L. Korn and For The Birds, Inc., filed objections to Complainant's Motion for Default Decision as to Jerry L. Korn, Complainant's Proposed Default Decision as to Jerry L. Korn, Complainant's Motion for Default Decision as to For The Birds, Inc., and Complainant's Proposed Default Decision as to For The Birds, Inc.² On February 25, 2005, the Hearing Clerk served Susan F. Korn with Complainant's Motion for Default Decision as to Susan F. Korn, Complainant's Proposed Default Decision as to Susan F. Korn, and a service letter.³

On February 25, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order [hereinafter Initial Decision]: (1) concluding For The Birds, Inc., Jerry L. Korn, and Susan F. Korn willfully violated the Regulations and Standards; (2) directing For The Birds, Inc., Jerry L. Korn, and Susan F. Korn to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (3) assessing For The Birds, Inc., Jerry L. Korn, and Susan F. Korn, jointly and severally, a \$28,050 civil penalty (Initial Decision at 21-30).

On March 11, 2005, Complainant filed Complainant's Appeal Petition. For The Birds, Inc., and Jerry L. Korn failed to file responses to Complainant's Appeal Petition.

¹United States Postal Service Domestic Return Receipts for Article Number 7003 2260 0005 5721 3786 and Article Number 7003 2260 0005 5721 3779.

²Objection to Motion for Adoption of Decision and Order as to Respondents Jerry L. Korn, For the Birds, Inc., and Ben Korn; and Request for Telephonic Hearing.

³Memorandum to File from Tonya Fisher dated February 25, 2005.

On May 26, 2005, Susan F. Korn filed a late-filed response to Complainant's Appeal Petition. On May 27, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision as to For The Birds, Inc., Jerry L. Korn, and Susan F. Korn. Simultaneous with my filing this Remand Order as to Susan F. Korn, I file a Decision and Order as to For The Birds, Inc., and Jerry L. Korn.

CONCLUSION BY THE JUDICIAL OFFICER

Section 1.139 of the Rules of Practice provides that a respondent may file objections to a complainant's motion for a default decision within 20 days after service of the motion, as follows:

§ 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 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.

7 C.F.R. § 1.139.

The record establishes that the Hearing Clerk served Susan F. Korn with Complainant's Motion for Default Decision as to Susan F. Korn and Complainant's Proposed Default Decision as to Susan F. Korn on February 25, 2005,⁴ the same day the ALJ issued the Initial Decision. As the ALJ did not provide Susan F. Korn with 20 days

⁴See note 3.

within which to file objections to Complainant's Motion for Default Decision as to Susan F. Korn and Complainant's Proposed Default Decision as to Susan F. Korn, the proceeding as it relates to Susan F. Korn should be remanded to the ALJ to provide Susan F. Korn an opportunity to file objections in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

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

ORDER

1. Administrative Law Judge Peter M. Davenport's February 25, 2005, Initial Decision as it relates to Susan F. Korn is vacated.

2. The proceeding, as it relates to Susan F. Korn, is remanded to Administrative Law Judge Peter M. Davenport:

(a) to provide Susan F. Korn an opportunity to file objections to Complainant's Motion for Default Decision as to Susan F. Korn and Complainant's Proposed Default Decision as to Susan F. Korn in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139); and

(b) for further proceedings as to Susan F. Korn in accordance with the Rules of Practice.

Done at Washington, DC

June 22, 2005

William G. Jenson
Judicial Officer