



UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

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In re:)	
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EDGAR ABERNATHY, an individual dba)	HPA Docket No. 17-0081
ABERNATHY STABLES;)	HPA Docket No. 17-0082
CARROLL COUNTS, an individual)	HPA Docket No. 17-0083
VIRGINIA COUNTS, an individual; and)	HPA Docket No. 17-0084
DARIUS NEWSOME, an individual;)	
)	
Respondents.)	

ORDER DENYING RESPONDENTS' MOTION TO STRIKE AND EXCLUDE

Appearances:

Colleen A. Carroll, Esq., and Elizabeth M. Kruman, Esq., with the Office of the General Counsel, United States Department of Agriculture, Washington D.C., for Complainant, the Administrator of the Animal and Plant Health Inspection Service; and

Jan Rochester, Esq., Magnolia, Kentucky, for the Respondents, Edgar Abernathy, Carroll Counts, Virginia Counts, and Darius Newsome.

This proceeding was instituted under the Horse Protection Act, as amended¹ (“HPA” or “Act”) by a complaint filed on January 9, 2017, by the Administrator of the Animal Health Protection Service (“APHIS”), Complainant, alleging that Respondents Edgar Abernathy, doing business as Abernathy Stables, Carroll Counts, Virginia Counts, and Darius Newsome violated the HPA. On September 5, 2017, Respondents, by and through counsel Jan Rochester, Esquire, filed a Motion to Strike and Exclude.

For the reasons discussed herein, Respondents’ Motion to Strike and Exclude is DENIED.

PROCEDURAL HISTORY

On January 9, 2017, APHIS filed a Complaint against Respondents alleging violations of the HPA. On February 6, 2017, Respondents filed a timely answer to the Complaint, including a

Motion to Strike paragraphs 10 through 28 of the Complaint (“Respondents’ Motion 1”), and a Proposed Decision and Order. On February 7, 2017, Complainant filed a Response to Respondents’ Motion to Strike. On June 22, 2017, Respondents’ Motion to Strike was denied.

On March 8, 2017, Complainant filed an unsigned Complainant’s List of Witnesses and Exhibits. On June 22, 2017, then Chief Administrative Law Judge Bobbie McCartney issued an Order Setting Deadlines for Submissions (“Exchange Order”), which directed Complainant to file a list of exhibits and witnesses with the Hearing Clerk by August 22, 2017, at 4:30 p.m., and to deposit the list and copies of exhibits for next business day delivery to Respondents or Respondents’ counsel. The Order also directed Respondents to file a list of exhibits and witnesses with the Hearing Clerk by October 23, 2017, at 4:30 p.m., and to deposit the list and copies of exhibits for next day delivery to Complainant’s counsel. On August 24, 2017, Complainant filed a Supplemental List of Witnesses, signed with an “/s/” by Colleen Carroll, counsel for Complainant.

On September 5, 2017, Respondents filed a Motion to Strike and Exclude (“Respondents’ Motion 2”). Complainant filed a Response to Respondents’ Motion to Strike and to Exclude (“Complainant’s Response”) on September 27, 2017. On November 9, 2017, the captioned cases were reassigned to the undersigned Administrative Law Judge Channing D. Strother.

DISCUSSION

Respondents move that Complainant’s Witness and Exhibits List filed March 8, 2017, and Complainant’s Supplemental List of Witnesses filed August 24, 2017, be stricken, and that all potential exhibits provided pursuant to the March 8, 2017 list be excluded from the record.

First, Respondents contend, six months after its filing, that Complainant’s List of

¹ 15 U.S.C. § 1821 *et. seq.*

Witnesses and Exhibits filed on March 8, 2017, should be stricken because it was filed without original or electronic signature. The list contains a signature line/block for Complainant's counsel, Colleen Carroll,² but the signature line does not have an ink or typed signature; an electronic signature of the sort enabled for pdf format documents; or a "/s/." Respondents offer scant support for the contention that the Witness and Exhibits List must be signed to be properly filed. Respondents state, without citation, that

The signing of a pleading either by original signature or electronic signature is an affirmation that the document is valid, that the attorney is acting in good faith, without delay, and is presenting the pleading for proper purposes.³

While I agree that filings must be made in good faith, the U.S. Department of Agriculture ("USDA") Rules of Practice Governing Formal Adjudicatory Administrative Proceedings ("Rules of Practice"), Title 7, Part 1 of the Code of Federal Regulations, specifically require that answers,⁴ consent decisions,⁵ and certificates of service⁶ be signed when filed. There is no requirement under the USDA Rules of Practice that all filings be signed or that a filing without signature must be stricken. Respondents also cite the Federal Rules of Civil Procedure, Rule 5(3), which is not applicable in this matter.⁷

² Respondents' Motion 2, Exhibit 1.

³ Respondents' Motion 2 at 2-3.

⁴ 7 C.F.R. § 1.136(a).

⁵ 7 C.F.R. § 1.138.

⁶ 7 C.F.R. § 1.147(d)(4).

⁷ *In Re: Dean Byard, Larue Mcwaters, & Ann Mcwaters.*, 56 Agric. Dec. 1543, 1559 (1997) (holding that the Federal Rules of Civil Procedure do not apply to the Department's adjudicatory proceedings). Respondents refer to Complainant's List of Witnesses and Exhibits as a "pleading." Respondents' Motion 2 at 1. The USDA Rules of Practice and Procedure do not define "pleading" but consistently refer to pleadings as consisting of complaints and answers. *See*

While the signing of all filings with the Hearing Clerk by a party or a party representative is a reasonable practice, I cannot find that the rules require it, or for that matter, that the sanction for failure to sign a list of witnesses and exhibits, if such signing were required, should be a striking of that filing and exclusion from the record of the exhibits or witnesses on such a list. Respondents make no contention that Complainant's counsel has acted other than in good faith, has acted to delay, or has made a filing for improper purposes.

In response, among other things, Complainant states the list "inadvertently, . . . did not bear an 'S' signature."⁸ Respondents aver no actual prejudice from the lack of a signature on the March 8, 2017 Exhibits and Witness List. These circumstances would constitute good cause for failure to sign an Exhibit and Witnesses List, if such signature was required.

Second, Respondents contend that "Following the filing of the March 8, 2017 filing by the Complainant of their List of Witnesses and Exhibits, none of the exhibits noted therein were 'timely' provided counsel for the Respondents nor filed with the Clerk."⁹ The June 22, 2017 Exchange Order set an August 22, 2017, due date for Complainant's witness and exhibits list, and stated "Complainant's counsel shall also deposit for next day business day delivery to Moving Respondents or Moving Respondents' counsel, by commercial carrier such as Fed EX, UPS, or other comparable service, copies of the exhibits and list."

Based on the timeline provided in both Respondents' Motion 2 and Complainant's Response, Complainant provided Respondents with electronic copies of proposed exhibits CX 1,

e.g., 7 C.F.R. § 1.143(b)(1). This limitation of the term "pleading" is consistent with the Federal Rules of Civil Procedure (specifically Rule 7(a)), on which rules Respondents rely but, as noted, do not apply here.

⁸ Complainant's Response at 1.

⁹ *Id.* at 1.

CX 2, and CX 4 on August 22, 2017, and sent by overnight courier a copy of exhibit CX 3— “a video that was too large to send electronically,” according to Complainant¹⁰—on August 23, 2017, that was delivered on August 24, 2017. Thus, Respondents complain that instead of their counsel receiving Complainant’s List of Witnesses and Exhibits and copies of all four of Complainant’s proposed exhibits on August 23, 2017 in hard copy by commercial carrier, the list was received many months earlier in March 2017, three of the four exhibits were received by electronic delivery a day earlier than the deadline imposed by the Exchange Order, and instead of receiving the remaining exhibit, which was too large to send by electronic means, on August 23, 2017, it was received on August 24, 2017. As a remedy, Respondents seek a ruling from me—in the nature of an order *in limine* inasmuch as no exhibits have been offered into evidence as no hearing has been held yet—that the proposed exhibits on Complainant’s list should be excluded from the record. Respondents allege no actual prejudice. It is difficult to even imagine any actual prejudice from the admitted receipt of proposed exhibits electronically a day before they would have been received in hard copy under the literal terms of the Exchange Order. That one exhibit consisting of a large electronic file was received a day later than would be expected under the literal terms of the Exchange Order, might, in some conceivable circumstance, be a basis for a short extension of the deadline for Respondents’ own witness and exhibits list. But there is no basis presented by Respondents for a ruling that the exhibits listed be excluded from the record. I note Respondents were able to file their October 20, 2017 Witness List and Notice of Exchange of Exhibits before the October 23, 2017 deadline.

Fourth, Respondents’ contention that Complainant was required to file copies of its proposed exhibits with the Hearing Clerk is incorrect and baseless. It is notable that Respondents

¹⁰ Complainant’s Response at 2.

did not file copies of the proposed exhibits listed on its own October 20, 2018 list with the Hearing Clerk. The Exchange Order does not require that listed potential exhibits be filed with the Hearing Clerk. There is no such requirement in the Rules of Practice or elsewhere.

Fifth, Respondents contend that Complainant's Supplemental List of Witnesses, filed on August 24, 2017, failed to comply with the deadline set out in the Order Setting Deadlines for Submissions. Respondents' contention is that a supplemental witness list filed two days after the proposed witness list deadline set in an Exchange Order must be rejected and the witnesses listed thereon excluded from the hearing. Yet, Respondents' own October 20, 2017 Witness and Exhibits List states "Respondents reserve the right to add or delete exhibits and/or witnesses prior to the hearing, and agrees to notify Complainant of any changes in advance of the hearing date."¹¹ The Exchange Order required Complainant to provide by the August 22, 2017 deadline a list of "witnesses that Complainant expects to rely upon to establish its case." The Exchange Order did not provide that such a list would set in stone the witnesses Complainant could call at hearing. In an appropriate instance, where a supplemental witness list unduly prejudiced an adverse party, without a counterbalancing demonstration of just cause, witnesses on a supplemental witness list might be excluded from a hearing. But here Respondents present no basis for concluding that Complainant did not, by August 22, 2017, file in good faith a list of the witnesses Complainant expected to rely on, and Respondents demonstrate no prejudice whatsoever from receiving notice of additional potential witnesses two days later for a hearing that has, even as of this date, not yet been scheduled.

Finally, Respondents contend the "Department takes a strong position on deadlines

¹¹ Respondents' Witness List and Notice of Exchange of Exhibits at 4.

imposed and believes in strict enforcement of those deadlines; and said strict enforcement and adherence to deadlines is supported by the Judicial Officer,"¹² citing four cases where a default decision was upheld due to failure of the respondents to file a timely answer. Respondents' reliance on default decisions setting out the treatment of the failure to timely answer complaints is unavailing. The Rules of Practice require a timely answer to a complaint, and provide severe consequences for a respondent's failure to do so. The rules contain no such provisions with respect to witness and exhibit lists and exhibits. In the circumstances presented here, I find Respondents' requested relief unsupported, inappropriate, and, indeed, unprecedented.

ORDER

Accordingly, Respondents' Motion to Strike is hereby **DENIED**.

Copies of this Order shall be served upon the parties and Counsel by the Hearing Clerk with courtesy copies to be provided by email where email addresses are available.

Done at Washington, D.C.,
this 25th day of May 2018


Channing D. Strother
Acting Chief Administrative Law Judge

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¹² Respondents' Motion 2 at 3.