

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	AWA Docket No. 15-0152
)	AWA Docket No. 15-0153
Cricket Hollow Zoo, Inc., an Iowa)	AWA Docket No. 15-0154
corporation; Pamela J. Sellner, an)	AWA Docket No. 15-0155
individual; Thomas J. Sellner, an)	
individual; and Pamela J. Sellner)	
Tom J. Sellner, an Iowa general)	
partnership, d/b/a Cricket Hollow)	
Zoo,)	
)	
Respondents)	Order Denying Appeal

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], instituted this administrative disciplinary proceeding on July 30, 2015, by filing a Complaint. The Administrator instituted this proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [Animal Welfare Act];¹ the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice]. The Administrator alleges Cricket Hollow Zoo, Inc.; Pamela J. Sellner; Thomas J. Sellner; and Pamela J. Sellner Tom J. Sellner, d/b/a Cricket Hollow Zoo [Respondents], willfully violated the

¹See, in particular, 7 U.S.C. § 2149.

Animal Welfare Act and the Regulations.²

On October 28, 2015, the Animal Legal Defense Fund filed a motion for leave to intervene in this proceeding.³ The Respondents and the Administrator each filed a response in opposition to the Animal Legal Defense Fund's Motion to Intervene.⁴ On December 4, 2015, the Animal Legal Defense Fund filed a reply to the Administrator's response to the Animal Legal Defense Fund's Motion to Intervene.⁵

On December 30, 2015, Acting Chief Administrative Law Judge Janice K. Bullard [Chief ALJ] issued an Order Denying Motion to Intervene. On February 4, 2016, the Animal Legal Defense Fund appealed the Chief ALJ's Order Denying Motion to Intervene to the Judicial Officer.⁶ On March 7, 2016, the Administrator filed a response in opposition to the Animal Legal Defense Fund's Appeal Petition and Appeal Brief.⁷ The Respondents failed to file a response to the Animal Legal Defense Fund's Appeal Petition and Appeal Brief, and, on March 10, 2016, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for

²Compl. ¶¶ 9-19 at 3-20.

³Motion for Leave to Intervene by the Animal Legal Defense Fund [Motion to Intervene].

⁴Resistance to Motion for Leave to Intervene by the Animal Legal Defense Fund filed by the Respondents on November 23, 2015; Complainant's Response to Motion to Intervene filed by the Administrator on November 23, 2015.

⁵Animal Legal Defense Fund's [Requested] Reply to Complainant's Response to Motion to Intervene.

⁶Petition Appealing Order Denying Animal Legal Defense Fund's Motion to Intervene & Request for Oral Argument [Appeal Petition] and Brief in Support of Petition Appealing Order Denying Animal Legal Defense Fund's Motion to Intervene [Appeal Brief].

⁷Complainant's Response to Petition for Appeal.

consideration and decision.

CONCLUSIONS BY THE JUDICIAL OFFICER

Animal Legal Defense Fund's Request for Oral Argument

The Animal Legal Defense Fund's request for oral argument,⁸ which the Judicial Officer may grant, refuse, or limit,⁹ is refused because the issues raised in the Animal Legal Defense Fund's Appeal Petition have been thoroughly briefed by the Animal Legal Defense Fund and the Administrator and oral argument would serve no useful purpose.

Discussion

Based upon a careful consideration of the record, I conclude the Animal Legal Defense Fund's February 4, 2016, appeal of the Chief ALJ's December 30, 2015, Order Denying Motion to Intervene must be denied.

The Animal Legal Defense Fund takes no position on whether this proceeding is formal adjudication or informal adjudication; however, the Animal Legal Defense Fund argues 5 U.S.C. § 554(c) requires agencies to give all third parties an opportunity to participate in formal adjudications and 5 U.S.C. § 555(b) requires agencies to provide an avenue for the involvement of interested persons in informal adjudications (Appeal Brief ¶ III(a)(i)-(ii) at 7-10).

The Administrative Procedure Act requires agencies to give "interested parties" an opportunity to participate in formal adjudications, as follows:

⁸Appeal Pet. at 2.

⁹7 C.F.R. § 1.145(d).

§ 554. Adjudications

....

- (c) The agency shall give all interested parties opportunity for—
- (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and
 - (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice in accordance with sections 556 and 557 of this title.

5 U.S.C. § 554(c). The Administrative Procedure Act does not define the term “interested parties”; however, the Administrative Procedure Act defines the term “party,” as follows:

§ 551. Definitions

For the purpose of this subchapter—

....

- (3) “party” includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes[.]

5 U.S.C. § 551(3). The Animal Legal Defense Fund is not named or admitted as a party in this proceeding and, while the Animal Legal Defense Fund argues it should be permitted to intervene in this proceeding, I find no basis for concluding that the Animal Legal Defense Fund is “entitled as of right to be admitted as a party.” Therefore, I find the Animal Legal Defense Fund is not an “interested party,” as that term is used in 5 U.S.C. § 554(c), and I reject the Animal Legal Defense Fund’s contention that 5 U.S.C. § 554(c) requires the United States Department of Agriculture to allow the Animal Legal Defense Fund to participate in this proceeding.

The Administrative Procedure Act provides for the appearance of “interested persons” in agency proceedings, as follows:

§ 555. Ancillary matters

.....
 (b) So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function.

5 U.S.C. § 555(b). The Administrative Procedure Act does not define the term “interested person”; however, even if I were to find that the Animal Legal Defense Fund is an “interested person,” as that term is used in 5 U.S.C. § 555(b), I would deny the Animal Legal Defense Fund’s Appeal Petition because the appearance of the Animal Legal Defense Fund in this proceeding would disrupt the orderly conduct of public business.

As the Chief ALJ explained, the only issues in this Animal Welfare Act enforcement proceeding are whether the Respondents committed the violations of the Animal Welfare Act and the Regulations alleged in the Complaint and, if the Respondents are found to have committed some or all of the alleged violations, the appropriate sanction that should be imposed on the Respondents.¹⁰ The Animal Legal Defense Fund’s stated interests in this proceeding are beyond the scope of this proceeding. Neither the Animal Welfare Act nor enforcement proceedings instituted under the Animal Welfare Act are for the purpose of furthering the Animal Legal Defense Fund’s interests. Rather, the purposes of the Animal Welfare Act are set out in the congressional statement of policy in 7 U.S.C. § 2131, and enforcement proceedings instituted under the Animal Welfare Act are designed to accomplish the purposes of the Animal Welfare Act.

¹⁰Chief ALJ’s Order Denying Motion to Intervene.

Moreover, 7 U.S.C. § 2149, the statutory provision under which this proceeding is conducted, provides that, prior to the imposition of an administrative sanction, a dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale who allegedly violates the Animal Welfare Act must be given notice and opportunity for hearing.¹¹ The Animal Welfare Act does not give third parties the right to participate in administrative disciplinary proceedings instituted by the Administrator against dealers, exhibitors, research facilities, intermediate handlers, carriers, or operators of auction sales pursuant to 7 U.S.C. § 2149. Further, while the Rules of Practice do not explicitly foreclose intervention, the Rules of Practice do not explicitly provide for intervention by third parties,¹² and the Judicial Officer has long held that the Rules of Practice do not provide for intervention by third parties.¹³

¹¹7 U.S.C. § 2149(a)-(b).

¹²The United States Department of Agriculture conducts proceedings in which third parties are allowed to intervene; however, the rules of practice applicable to those proceedings explicitly provide for intervention. See, e.g., 7 C.F.R. § 1.171 (expressly providing that the Judicial Officer or an administrative law judge may permit a person, upon a showing of substantial interest in the outcome of a proceeding, to intervene in a proceeding conducted under the cease and desist provisions of the Capper-Volstead Act (7 U.S.C. §§ 291-292)); 7 C.F.R. § 15.67 (expressly providing that a hearing officer may grant a petition to intervene in a proceeding conducted by the United States Department of Agriculture pursuant to title VI, section 602, of the Civil Rights Act of 1964 (42 U.S.C. § 2000d-1)); 7 C.F.R. § 47.12 (expressly providing that the Secretary of Agriculture or an examiner may permit a person, upon good cause shown, to intervene in a reparation proceeding instituted under the Perishable Agricultural Commodities Act, 1930, as amended (7 U.S.C. §§ 499a-499s)); 7 C.F.R. § 900.57 (expressly providing that the Secretary of Agriculture or an administrative law judge may permit a person, upon a showing of substantial interest in the outcome of a proceeding, to intervene in a proceeding to consider a petition to modify or to be exempted from a marketing order); 9 C.F.R. § 202.121 (expressly providing that a presiding officer may permit a person, upon good cause shown, to intervene in a reparation proceeding instituted under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. §§ 181-229b)).

¹³See Meadowbrook Farms Cooperative (Order Denying Appeal Petition), P. & S. Docket No. D-09-0097, 68 Agric. Dec. 1170, 1174 (U.S.D.A. Oct. 5, 2009) (stating the Rules of

Practice make no provision for intervention in a disciplinary proceeding, which is a matter solely between the respondent and the complainant); Midland Banana & Tomato Co., PACA Docket Nos. D-93-548, D-93-549, 54 Agric. Dec. 1239, 1243 (U.S.D.A. Aug. 16, 1995) (same), *aff'd*, 104 F.3d 139 (8th Cir.), *cert. denied sub nom.* Heimann v. Department of Agric., 522 U.S. 951 (1997); Syracuse Sales Co., P. & S. Docket Nos. D-92-52, D-92-89, 52 Agric. Dec. 1511, 1513 (U.S.D.A. Nov. 5, 1993) (same), *appeal dismissed*, No. 94-9505 (10th Cir. Apr. 29, 1994); Bananas, Inc. (Order Denying Intervention), PACA Docket No. 2-6064, 42 Agric. Dec. 426 (U.S.D.A. Mar. 3, 1983) (same).

As the Administrative Procedure Act does not require that the Chief ALJ allow the Animal Legal Defense Fund to intervene in this proceeding and neither the Animal Welfare Act nor the Rules of Practice provide for intervention in an administrative disciplinary proceeding conducted pursuant to 7 U.S.C. § 2149, I deny the Animal Legal Defense Fund's February 4, 2016, appeal of the Chief ALJ's December 30, 2015, Order Denying Motion to Intervene.

Even if I were to find the Animal Legal Defense Fund could intervene in this proceeding (which I do not so find) and the Animal Legal Defense Fund is a party that, under the Rules of Practice, may appeal an administrative law judge's ruling to the Judicial Officer,¹⁴ I would deny the Animal Legal Defense Fund's February 4, 2016, appeal of the Chief ALJ's December 30, 2015, Order Denying Motion to Intervene. The Rules of Practice provide only for appeal of an administrative law judge's decision to the Judicial Officer and limit the time during which a party may appeal an administrative law judge's decision, as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.

7 C.F.R. § 1.145(a). The Rules of Practice define the word "decision," as follows:

¹⁴See *Marine Mammal Conservancy, Inc. v. Department of Agric.*, 134 F.3d 409, 413 (D.C. Cir. 1998) (stating we do not view 7 C.F.R. § 1.145(a) as a clear bar to Marine Mammal Conservancy, Inc.'s appeal of the administrative law judge's refusal to allow it to intervene).

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:

....

Decision means: (1) The Judge's initial decision made in accordance with the provisions of 5 U.S.C. 556 and 557, and includes the Judge's (i) findings and conclusions and the reasons or basis therefor on all material issues of fact, law or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and orders submitted by the parties; and

(2) The decision and order by the Judicial Officer upon appeal of the Judge's decision.

7 C.F.R. § 1.132.

The Chief ALJ's December 30, 2015, Order Denying Motion to Intervene is not a "decision" as that word is defined in the Rules of Practice. Moreover, the Chief ALJ has not yet issued an initial decision in this proceeding in accordance with 5 U.S.C. §§ 556 and 557. Therefore, even if I were to find the Animal Legal Defense Fund could intervene in this proceeding and the Animal Legal Defense Fund is a "party," as that word is used in 7 C.F.R. § 1.145(a), the Animal Legal Defense Fund's appeal of the Chief ALJ's ruling denying the Animal Legal Defense Fund's Motion to Intervene would be rejected as premature.

The Rules of Practice provide that, within specified time limits after the administrative law judge has issued a decision, a party who disagrees with any ruling by the administrative law judge may appeal the administrative law judge's decision to the Judicial Officer;¹⁵ however, the Rules of Practice do not permit an interlocutory appeal of an administrative law judge's ruling.¹⁶

¹⁵7 C.F.R. § 1.145(a).

¹⁶Oxcart Industry Services, Inc. (Order Dismissing Appeal), AWA Docket No. 15-0180, 2016 WL 692537, at *2 (U.S.D.A. Feb. 11, 2016) (dismissing the respondent's interlocutory

For the foregoing reasons, the following Order is issued.

ORDER

The Animal Legal Defense Fund's February 4, 2016, appeal of the Chief ALJ's December 30, 2015, Order Denying Motion to Intervene, is denied.

Done at Washington, DC
March 14, 2016

William G. Jenson
Judicial Officer

appeal of an administrative law judge's ruling denying the respondent's motion for summary decision); Spinale (Order Dismissing Interlocutory Appeal), PACA Docket No. D-09-0189, PACA-APP Docket No. 10-0138, 2014 WL 4311072, at *2 (U.S.D.A. Aug. 5, 2014) (dismissing the respondents' interlocutory appeal of an administrative law judge's ruling denying the respondents' request for continuance of the hearing); Black (Order Dismissing Interlocutory Appeal), HPA Docket No. 04-0003, 64 Agric. Dec. 681, 684 (U.S.D.A. May 3, 2005) (dismissing the complainant's interlocutory appeal of an administrative law judge's order deferring consideration of the complainant's motion for a default decision); Lion Raisins, Inc. (Order Dismissing Appeal as to Al Lion, Jr., Dan Lion, and Jeff Lion), I&G Docket No. 01-0001, 63 Agric. Dec. 830, 834 (U.S.D.A. July 28, 2004) (dismissing the respondents' interlocutory appeal of an administrative law judge's ruling denying the respondents' motion for summary judgment); Velasam Veal Connection (Order Dismissing Appeal), FMIA Docket No. 96-8, PPIA Docket No. 96-7, 55 Agric. Dec. 300, 304 (U.S.D.A. June 25, 1996) (dismissing the respondents' interlocutory appeal of an administrative law judge's postponement of a ruling on the respondents' request for reinstatement of inspection services and immediate hearing); Feuerstein, D.V.M. (Order Dismissing Appeal), V.A. Docket No. 88-2, 48 Agric. Dec. 896 (U.S.D.A. Dec. 19, 1989) (dismissing the respondent's interlocutory appeal of an administrative law judge's ruling denying the respondent's motion to dismiss); Landmark Beef Processors, Inc. (Order Dismissing Appeal), P. & S. Docket No. 6174, 43 Agric. Dec. 1541 (U.S.D.A. Oct. 2, 1984) (dismissing the respondent's interlocutory appeal filed prior to the respondent's receiving service of an administrative law judge's written decision); LeaVell (Order Dismissing Appeal by Respondent Spencer Livestock, Inc.), P. & S. Docket No. 5707, 40 Agric. Dec. 783 (U.S.D.A. Dec. 4, 1980) (dismissing the respondent's interlocutory appeal of an administrative law judge's ruling denying the respondent's motion to dismiss).