

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 11-0222
)
Tri-State Zoological Park of Western)
Maryland, Inc., a Maryland corporation;)
and Robert L. Candy, an individual,)
)
Respondents)

**Order Granting in Part the Administrator's
Petition for Reconsideration**

On April 4, 2013, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed Complainant's Petition for Reconsideration requesting that I reconsider *In re Tri-State Zoological Park of Western Maryland, Inc.*, __ Agric. Dec. __ (Mar. 22, 2013). On May 9, 2013, Tri-State Zoological Park of Western Maryland, Inc. [hereinafter Tri-State], and Robert L. Candy filed a response to the Administrator's petition for reconsideration, and on May 10, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, the Administrator's petition for reconsideration.

DISCUSSION

The Administrator raises five issues in his petition for reconsideration. First, the Administrator contends Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] erroneously failed to find that Tri-State and Mr. Candy violated the Regulations as alleged in paragraphs 4, 5c, 12a, 15, 16b, 16c, 16d, 17a, 17b, 19, 20f, 21b, and 21d of the Complaint (Complainant's Pet. for Recons. at 6-8 ¶ 1).

The ALJ concluded that the Administrator failed to prove by a preponderance of the evidence the violations alleged in paragraphs 4, 5c, 12a (with respect to a cougar enclosure), 15, 16b, 16c, 16d, 17a, 17b, 19, 20f, 21b (with respect to cougar and bobcat enclosures), and 21d of the Complaint. Based upon a careful consideration of the record, I affirm the ALJ's conclusion that the Administrator failed to prove these alleged violations of the Regulations by a preponderance of the evidence.

Second, the Administrator contends the ALJ erroneously found three violations of the Regulations that were not alleged in the Complaint and asserts, while I corrected the ALJ's error, I did not comment on the correction in *In re Tri-State Zoological Park of Western Maryland, Inc.*, ___ Agric. Dec. ___ (Mar. 22, 2013) (Complainant's Pet. for Recons. at 8 ¶ 2).

I agree with the Administrator's assertion that I did not comment on my failure to find violations that the Administrator did not allege in the Complaint; however, I reject the

Administrator's contention that my failure to comment on violations that are not alleged in the Complaint, is error.

Third, the Administrator asserts I erroneously failed to refer to paragraph 16e of the Complaint in the list of alleged violations that the ALJ concluded the Administrator proved by a preponderance of the evidence and I erroneously failed to refer to paragraph 21d of Complaint in the list of alleged violations that the ALJ concluded the Administrator failed to prove by a preponderance of the evidence (Complainant's Pet. for Recons. at 8-9 ¶ B).

I agree with the Administrator that I did not properly reference paragraph 16e of the Complaint and failed to reference paragraph 21d of Complaint in the description of the ALJ's Decision and Order which I set forth in *In re Tri-State Zoological Park of Western Maryland, Inc.*, ___ Agric. Dec. ___, slip op. at 2-3 (Mar. 22, 2013). Therefore, I amend the description of the ALJ's Decision and Order by adding a reference to paragraph 16e of the Complaint in the list of alleged violations of the Regulations that the ALJ concluded the Administrator proved by a preponderance of the evidence and by adding a reference to paragraph 21d of the Complaint in the list of alleged violations that the ALJ concluded the Administrator failed to prove by a preponderance of the evidence, as follows:

On August 1, 2012, after the parties filed post-hearing briefs, the ALJ issued a Decision and Order in which the ALJ: (1) concluded Tri-State and Mr. Candy willfully violated the Regulations as alleged in paragraphs 5a, 5b, 5d, 5e, 6, 7, 8a, 8d, 8e, 9a, 9b, 9c, 11, 12a (with respect to a lion enclosure), 12b, 13, 14, 16a, 16e, 18, 20b, 20c, 20d, 20e, 21b (with respect to a lion

enclosure), 22, 23a, 24a, 24b, 25, 26a, and 26c of the Complaint; (2) concluded the Administrator failed to prove by a preponderance of the evidence that Tri-State and Mr. Candy violated the Regulations as alleged in paragraphs 4, 5c, 5f, 8b, 8c, 10, 12a (with respect to a cougar enclosure), 15, 16b, 16c, 16d, 17a, 17b, 19, 20a, 20f, 21a, 21b (with respect to cougar and bobcat enclosures), 21c, 21d, 23b, 23c, and 26b of the Complaint; (3) ordered Tri-State and Mr. Candy to cease and desist from violating the Animal Welfare Act and the Regulations; and (4) suspended Tri-State's Animal Welfare Act license (Animal Welfare Act license number 51-C-0064) for a period of 45 days (ALJ's Decision and Order at 67-72).

Fourth, the Administrator contends I did not address his sanction recommendation (Complainant's Pet. for Recons. at 9-10 ¶ C).

I specifically rejected the Administrator's sanction recommendation, as follows:

The Animal and Plant Health Inspection Service has recommended that Tri-State's Animal Welfare Act license be suspended for a period of 6 months. I find that recommendation overly harsh, considering that many of the conditions on which violations were based have been corrected by Tri-State and Mr. Candy. Considering the remedial nature of the Animal Welfare Act and the fact that no violations resulted in harm to the animals or to the public, I find a 45-day suspension of Tri-State's Animal Welfare Act license and a cease and desist order should be sufficient to deter Tri-State, Mr. Candy, and others from future violations of the Animal Welfare Act and the Regulations.

In re Tri-State Zoological Park of Western Maryland, Inc., __ Agric. Dec. __, slip op. at 48

(Mar. 22, 2013). Therefore, I reject the Administrator's contention that I erroneously failed to address his sanction recommendation.

Fifth, the Administrator, citing CX 15a-CX 15d, asserts Tri-State and Mr. Candy continue to violate the Animal Welfare Act and the Regulations. The Administrator

contends, based upon this continued non-compliance, suspension of Tri-State's Animal Welfare Act license, until Tri-State and Mr. Candy comply with the Animal Welfare Act and the Regulations, is necessary. (Complainant's Pet. for Recons. at 10 ¶ C.)

The evidence cited by the Administrator, CX 15a-CX 15d, relates to violations of the Animal Welfare Act and the Regulations in 2011. The record contains no evidence to support the Administrator's assertion that Tri-State and Mr. Candy continued to violate the Animal Welfare Act and the Regulations on April 4, 2013, the date the Administrator filed Complainant's Petition for Reconsideration.

For the foregoing reasons, the following Order is issued.

ORDER

The Administrator's petition for reconsideration, filed April 4, 2013, is granted in part, as discussed in this Order Granting in Part the Administrator's Petition for Reconsideration, *supra*.

Done at Washington, DC

May 13, 2013

William G. Jenson
Judicial Officer