

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,)	
)	Order Denying Respondents'
Respondents)	Petition for Reconsideration

PROCEDURAL HISTORY

On May 28, 2013, Tri-State Zoological Park of Western Maryland, Inc., and Robert L. Candy [hereinafter Respondents] filed a Petition for Reconsideration requesting that I reconsider *In re Tri-State Zoological Park of Western Maryland, Inc.*, ___ Agric. Dec. ___ (Mar. 22, 2013). On June 10, 2013, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed a response to Respondents' Petition for Reconsideration, and on June 13, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, Respondents' Petition for Reconsideration.

DISCUSSION

The rules of practice applicable to this proceeding¹ provide that a party to a proceeding may file a petition to reconsider the decision of the Judicial Officer, as follows:

§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.

(a) *Petition requisite. . . .*

. . . .

(3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition to rehear or reargue the proceeding or to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3). The purpose of a petition for reconsideration is to seek correction of manifest errors of law or fact. Petitions for reconsideration are not to be used as vehicles merely for registering disagreement with the Judicial Officer's decisions. A petition for reconsideration is only granted, absent highly unusual circumstances, if the Judicial Officer has committed error or if there is an intervening change in the controlling law. Based upon my review of the record, in light of the issues raised by Respondents in their Petition for Reconsideration, I find no error of law or fact necessitating modification of *In re Tri-State*

¹The rules of practice applicable to this proceeding are 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].

Zoological Park of Western Maryland, Inc., __ Agric. Dec. __ (Mar. 22, 2013). Moreover, Respondents do not assert an intervening change in controlling law, and I find no highly unusual circumstances necessitating modification of the March 22, 2013, Decision and Order. Therefore, I deny Respondents' Petition for Reconsideration. I note that the Rules of Practice do not require a petition for reconsideration in order to exhaust administrative remedies. Therefore, review by the appropriate judicial forum is available without a party seeking reconsideration by the Judicial Officer. (7 C.F.R. § 1.145(i).)

Respondents raise seven issues in their Petition for Reconsideration. First, Respondents contend the evidence does not support my conclusion that Respondents violated the Regulations (Pet. for Recons. at 1-33).

I have carefully reviewed the evidentiary basis for my conclusions of law and again find the Administrator proved each of the violations identified in *In re Tri-State Zoological Park of Western Maryland, Inc.*, __ Agric. Dec. __, slip op. at 56-61 (Conclusions of Law ¶¶ 6a-6ff) (Mar. 22, 2013), by a preponderance of the evidence. Therefore, I reject Respondents' contention that I erroneously concluded Respondents violated the Regulations.

Second, Respondents contend I erroneously concluded Respondents' violations of the Regulations were willful (Pet. for Recons. at 1).

An act is willful if the violator intentionally does an act which is prohibited or intentionally fails to do an act which is required, irrespective of evil motive or reliance on

erroneous advice, or acts with careless disregard of statutory requirements.² A review of the record reveals that all of Respondents' violations either were intentional or were committed with careless disregard of the requirements of the Regulations. Therefore, I reject Respondents' contention that I erroneously concluded their violations of the Regulations were willful.

Third, Respondents contend the Administrator filed the Complaint in violation of "rules, regulations, and procedural mandates dictated by the USDA guide book" (Pet. for Recons. at 2 ¶ III). Specifically, Respondents assert a United States Department of Agriculture inspector did not recommend that the Administrator file the Complaint and the Administrator did not conduct an investigation prior to filing the Complaint (Pet. for Recons. at 1-2). I infer Respondents contend I erroneously failed to dismiss the Complaint in light of the Administrator's alleged procedural errors.

The Rules of Practice provide that the Administrator may file a complaint alleging a violation of the Animal Welfare Act or the Regulations based upon reason to believe that a person has violated the Animal Welfare Act or the Regulations, as follows:

²*In re Jeffrey W. Ash*, __ Agric. Dec. ___, slip op. at 16-17 (Sept. 14, 2012); *In re Kathy Jo Bauck*, 68 Agric. Dec. 853, 860-61 (2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); *In re D&H Pet Farms, Inc.*, 68 Agric. Dec. 798, 812-13 (2009); *In re Jewel Bond*, 65 Agric. Dec. 92, 107 (2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); *In re James E. Stephens*, 58 Agric. Dec. 149, 180 (1999); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 306 (1978), *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978).

§ 1.133 Institution of proceedings.

....

(b) *Filing of complaint or petition for review.* (1) If there is reason to believe that a person has violated or is violating any provision of a statute listed in § 1.131 or of any regulation, standard, instruction or order issued pursuant thereto, whether based upon information furnished under paragraph (a) of this section or other information, a complaint may be filed with the Hearing Clerk pursuant to these rules.

7 C.F.R. § 1.133(b)(1). The Rules of Practice do not require that the Administrator receive a recommendation that he institute a proceeding from a United States Department of Agriculture inspector prior to filing a complaint and do not require that the Administrator conduct an investigation prior to filing a complaint.³ Therefore, I reject Respondents' contention that my failure to dismiss the Complaint, is error.

Fourth, Respondents contend I erroneously rejected their argument that the Regulations are void for vagueness (Pet. for Recons. at 2-3).

³*In re Kathy Jo Bauck*, 68 Agric. Dec. 853, 859 (2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010).

A regulation is unconstitutionally vague if the regulation is so unclear that ordinary people cannot understand what conduct is prohibited or required or that it encourages arbitrary and discriminatory enforcement.⁴ I have reviewed each of the regulations which I concluded Respondents violated.⁵ I find that none of those regulations is unconstitutionally vague.⁶ Nonetheless, difficulty may arise when defining certain regulatory terms, such as “adequate

⁴ *Thomas v. Hinson*, 74 F.3d 888, 889 (8th Cir. 1996); *Georgia Pacific Corp. v. Occupational Safety & Health Review Comm'n*, 25 F.3d 999, 1004-05 (11th Cir. 1994); *Throckmorton v. NTSB*, 963 F.2d 441, 444 (D.C. Cir. 1992); *The Great American Houseboat Co. v. United States*, 780 F.2d 741, 746 (9th Cir. 1986); *United States v. Sun & Sand Imports, Ltd.*, 725 F.2d 184, 187 (2d Cir. 1984).

⁵ I concluded that Respondents violated 9 C.F.R. §§ 2.40(a), 2.40(b)(2)-(3), 2.75(b), 2.131(c), 3.84(d), 3.125(a), 3.125(d), 3.127(b), 3.127(d), 3.131(a), 3.131(c), 3.131(d), and 3.132. *In re Tri-State Zoological Park of Western Maryland, Inc.*, __ Agric. Dec. ___, slip op. at 56-61 (Conclusions of Law ¶¶ 6a-6ff) (Mar. 22, 2013).

⁶ I have previously rejected vagueness doctrine challenges to the Regulations, including challenges to three of the specific regulations which I concluded Respondents violated. See *In re Kathy Jo Bauck*, 68 Agric. Dec. 853, 865 (2009) (finding 9 C.F.R. § 2.11(a)(6) is not so unclear that ordinary people cannot understand what is prohibited or so unclear that it encourages arbitrary and discriminatory enforcement by the Secretary of Agriculture), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); *In re The International Siberian Tiger Foundation*, 61 Agric. Dec. 53, 78-79 (2002) (concluding 9 C.F.R. § 2.131(b)(1) (2000) provides the respondents with adequate notice of the manner in which the respondents' animals are to be handled during public exhibition); *In re Judie Hansen* (Order Denying Pet. for Recons.), 58 Agric. Dec. 369, 382-83 (1999) (holding 9 C.F.R. § 3.131(c) is not unconstitutionally vague merely because it does not specify the amount of dirt that constitutes noncompliance), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam), *printed in* 59 Agric. Dec. 533 (2000); *In re John D. Davenport*, 57 Agric. Dec. 189, 214 (1998) (concluding 9 C.F.R. §§ 2.40, 2.75(b)(1), 2.100, 2.131(a)(1), 3.128, 3.129(a), 3.137(d), 3.138(a), and 3.140(a) are not unconstitutionally vague), *appeal dismissed*, No.

veterinary care” found in 9 C.F.R. § 2.40(a), and applying those terms to the facts of a given situation. However, regulations are not unconstitutionally vague merely because they are ambiguous or difficult to determine whether marginal cases fall within their language.⁷ Therefore, I reject Respondents’ contention that my rejection of their argument that the Regulations are void for vagueness, is error.

Fifth, Respondents assert they corrected violations immediately after United States Department of Agriculture inspectors found the violations or within the time required by United States Department of Agriculture inspectors. Respondents assert they will continue to work closely with the United States Department of Agriculture to ensure that they comply with the Animal Welfare Act and the Regulations. Respondents “feel that [they] continue to demonstrate a good faith effort to continue improvement.” (Pet. for Recons. at 29.) I infer Respondents contend the sanction in *In re Tri-State Zoological Park of Western Maryland, Inc.*, __ Agric. Dec. __ (Mar. 22, 2013), should be modified to reflect their correction of their violations of the Regulations.

98-60463 (5th Cir. Sept. 25, 1998).

⁷Great American Houseboat Co. v. United States, 780 F.2d 741, 747 (9th Cir. 1986); United States v. Sun & Sand Imports, Ltd., 725 F.2d 184, 187 (2d Cir. 1984).

Respondents' correction of their violations of the Regulations does not eliminate the fact that the violations occurred.⁸ Nonetheless, Respondents' correction of violations is commendable, and I took Respondents' correction of violations into account when determining the sanction to be imposed, 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 Respondents' contention that modification of the sanction imposed in *In re Tri-State Zoological Park of Western Maryland, Inc.*, __ Agric. Dec. ___, (Mar. 22, 2013), is necessary to reflect Respondents' correction of their violations of the Regulations.

⁸ *In re Lorenza Pearson*, 68 Agric. Dec. 685, 727-28 (2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); *In re Jewel Bond*, 65 Agric. Dec. 92, 109 (2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); *In re Eric John Drogosch*, 63 Agric. Dec. 623, 643 (2004); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 644 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Susan DeFrancesco*, 59 Agric. Dec. 97, 112 n.12 (2000); *In re Michael A. Huchital*, 58 Agric. Dec. 763, 805 n.6 (1999); *In re James E. Stephens*, 58 Agric. Dec. 149, 184-85 (1999).

Sixth, Respondents assert I erroneously failed to comment on harassment and unprofessional behavior by Animal and Plant Health Inspection Service employees (Pet. for Recons. at 29-30).

Respondents failed to establish harassment or unprofessional behavior by any Animal and Plant Health Inspection Service employee. Therefore, I reject Respondents' contention that my failure to comment on alleged harassment and unprofessional behavior by Animal and Plant Health Inspection Service employees, is error.

Seventh, Respondents assert the following are sanctions that have been imposed on them for their violations of the Regulations: (1) United States Department of Agriculture inspections of their facility, records, and animals; (2) citations of Animal Welfare Act violations by United States Department of Agriculture inspectors; (3) Respondents' litigation costs; and (4) Respondents' loss of business, revenue, and reputation. Respondents contend, in light of these purported sanctions that have already been imposed on them, my 45-day suspension of Animal Welfare Act license number 51-C-0064, is error. (Pet. for Recons. at 32.)

The Animal Welfare Act identifies the following sanctions that the Secretary of Agriculture is authorized to impose for violations of the Animal Welfare Act or the Regulations: (1) suspension or revocation of an Animal Welfare Act license, (2) assessment

of a civil penalty, and (3) issuance of a cease and desist order.⁹ United States Department of Agriculture Animal Welfare Act inspections, citations of Animal Welfare Act violations by United States Department of Agriculture inspectors, litigation costs, and the loss of business, revenue, and reputation, are not sanctions.

Respondents' Request for Oral Argument

Respondents request oral argument in connection with their Petition for Reconsideration (Pet. for Recons. at 33). Respondents' request for oral argument is denied because the issues in this proceeding are not complex and have been fully briefed by the parties.

Lifting of the Automatic Stay

The Rules of Practice provide that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition for reconsideration (7 C.F.R. § 1.146(b)). Respondents' Petition for Reconsideration was timely filed and automatically stayed *In re Tri-State Zoological Park of Western Maryland, Inc.*, ___ Agric. Dec. ___ (Mar. 22, 2013). Therefore, since Respondents' Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in *In re Tri-State Zoological Park of Western Maryland, Inc.*, ___ Agric. Dec. ___ (Mar. 22, 2013), is reinstated.

⁹7 U.S.C. § 2149(a)-(b).

For the foregoing reasons, the following Order is issued.

ORDER

Respondents' Petition for Reconsideration, filed May 28, 2013, is denied.

Done at Washington, DC

July 12, 2013

William G. Jenson
Judicial Officer