

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 12-0538
)
James G. Woudenberg, d/b/a)
R & R Research,)
)
Respondent) **Decision and Order**

PROCEDURAL HISTORY

On July 20, 2012, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding by filing a Complaint. The Administrator 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 pursuant to the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator alleges, on or about April 18, 2008, June 3, 2008, June 10, 2008, August 28, 2008, and November 4, 2008, in willful violation of 9 C.F.R. § 2.132(a), James G. Woudenberg obtained at least four dogs and one cat from sources that the Regulations do not permit Mr. Woudenberg to utilize as sources of dogs or cats.¹ On August 9, 2012,

¹Compl. ¶ II(A)-(E) at 2.

Mr. Woudenberg filed Respondent's Answer to Complaint [hereinafter Answer] in which Mr. Woudenberg denied the material allegations of the Complaint and requested an oral hearing.

On July 10-11, 2013, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] conducted a hearing in Detroit, Michigan. Sharlene A. Deskins, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Nancy L. Kahn, Foster, Swift, Collins & Smith, PC, Farmington Hills, Michigan, represented Mr. Woudenberg. The Administrator called six witnesses and Mr. Woudenberg called two witnesses.² The Administrator introduced 30 exhibits which were received in evidence and are identified as CX 1-CX 30. Mr. Woudenberg introduced 15 exhibits which were received in evidence and are identified as RX 1, RX 4-RX 5, RX 11, RX 13, RX 17, RX 19-RX 20, RX 24, RX 27-RX 28, RX 30, and RX 32-RX 34.

On December 20, 2013, after the parties submitted post hearing briefs, the ALJ issued a Decision and Order in which the ALJ found the Administrator failed to prove by a preponderance of the evidence that Mr. Woudenberg violated 9 C.F.R. § 2.132(a) and dismissed the Complaint with prejudice.³

On March 19, 2014, the Administrator filed Complainant's Appeal Petition [hereinafter the Administrator's Appeal Petition] and, on April 17, 2014, the Administrator filed Complainant's Brief in Support of Its Appeal Petition [hereinafter the Administrator's Appeal Brief]. On May 13, 2014, Mr. Woudenberg filed Respondent's Brief in Opposition to

²References to the transcript of the July 10-11, 2013, hearing are designated as "Tr." and the page number.

³ALJ's Decision and Order at 29.

Complainant's Appeal Petition.

On June 3, 2014, the Hearing Clerk transmitted to the Office of the Judicial Officer what the Hearing Clerk purported to be the record of the proceeding. In early August 2014, I reviewed the Hearing Clerk's transmittal and determined that Mr. Woudenberg's exhibits and the Administrator's exhibits had not been transmitted to the Office of the Judicial Officer. I then requested that the Hearing Clerk transmit Mr. Woudenberg's exhibits and the Administrator's exhibits to the Office of the Judicial Officer. On August 8, 2014, the Hearing Clerk informed me that, after a search of the records maintained by the Office of the Hearing Clerk, he was unable to locate the exhibits in question. However, the Hearing Clerk had obtained copies of the exhibits from Ms. Deskins, counsel for the Administrator, and provided the Office of the Judicial Officer with copies of Mr. Woudenberg's exhibits and the Administrator's exhibits.

On August 15, 2014, after a second unsuccessful search of the Hearing Clerk's records, I conducted a conference call with Ms. Deskins and Ms. Kahn, counsel for Mr. Woudenberg, to discuss the manner in which the Hearing Clerk had acquired copies of the exhibits.⁴ During the conference call, Ms. Kahn agreed to examine the copies of the exhibits that Ms. Deskins provided to the Hearing Clerk to determine if Mr. Woudenberg had any objection to the substitution of the copies of the exhibits provided by Ms. Deskins for the exhibits the ALJ had filed with the Hearing Clerk.

On August 15, 2014, the Hearing Clerk mailed to Ms. Kahn copies of the exhibits which had been provided by Ms. Deskins. Mr. Woudenberg did not object to the substitution of the

⁴Sherida Hardy, the legal assistant employed by the Office of the Judicial Officer, also participated on the conference call.

copies of the exhibits provided by Ms. Deskins for the exhibits the ALJ had filed with the Hearing Clerk.

DECISION

Statutory and Regulatory Framework

The purposes of the Animal Welfare Act are set forth in a congressional statement of policy, as follows:

§ 2131. Congressional statement of policy

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

- (1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;
- (2) to assure the humane treatment of animals during transportation in commerce; and
- (3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

7 U.S.C. § 2131.

The Animal Welfare Act provides that the Secretary of Agriculture shall issue licenses to dealers in such form and manner as the Secretary may prescribe (7 U.S.C. § 2133) and defines the term “dealer,” as follows:

§ 2132. Definitions

When used in this chapter—

.....

(f) The term “dealer” means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than \$500 gross income from the sale of other animals during any calendar year[.]

7 U.S.C. § 2132(f).

The Secretary of Agriculture is authorized to promulgate regulations in order to effectuate the purposes of the Animal Welfare Act (7 U.S.C. § 2151). The Regulations restrict the sources from which a dealer may obtain dogs and cats, as follows:

§ 2.132 Procurement of dogs, cats, and other animals; dealers.

(a) A class “B” dealer may obtain live random source dogs and cats only from:

(1) Other dealers who are licensed under the Act and in accordance with the regulations in part 2;

(2) State, county, or city owned and operated animal pounds or shelters; and

(3) A legal entity organized and operated under the laws of the State in which it is located as an animal pound or shelter, such as a humane shelter or contract pound.

.....

(d) No dealer or exhibitor shall knowingly obtain any dog, cat, or other animal from any person who is required to be licensed but who does not hold a current, valid, and unsuspended license. No dealer or exhibitor shall knowingly obtain any dog or cat from any person who is not licensed, other than a pound or shelter, without obtaining a certification that the animals were born and raised on that person’s premises and, if the animals are for research purposes, that the person has sold fewer than 25 dogs and/or cats that year, or, if the animals are for

use as pets, that the person does not maintain more than three breeding female dogs and/or cats.

9 C.F.R. § 2.132(a), (d).

The Regulations define the term “random source,” as follows:

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

... ..

Random source means dogs and cats obtained from animal pounds or shelters, auction sales, or from any person who did not breed and raise them on his or her premises.

9 C.F.R. § 1.1.

Discussion

Mr. Woudenberg admits he is located in Michigan and operates under the business name R & R Research. Mr. Woudenberg also admits he is a dealer and a class “B” licensee under the Animal Welfare Act and holds Animal Welfare Act license number 34-B-0001. (Answer ¶ I(A)-(B)).

The preponderance of the evidence establishes that, on or about the dates alleged in the Complaint, four individuals donated five live animals to Mr. Woudenberg. Specifically, on or about April 18, 2008, Gilbert Beemer donated a dog to Mr. Woudenberg (CX 1); on or about June 3, 2008, Mr. Beemer donated a dog to Mr. Woudenberg (CX 2); on or about June 10, 2008, Max Hawley donated a dog to Mr. Woudenberg (Tr. at 154-56; CX 12); on or about August 28, 2008, Sandra Castle donated a cat to Mr. Woudenberg (Tr. at 40-42; CX 18); and on or about

November 4, 2008, Katherine Snyder donated a dog to Mr. Woudenberg (Tr. at 137-38; CX 25).

At the time of their respective donations, Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder each completed and signed a personal animal release form for each animal he or she donated to Mr. Woudenberg (Tr. at 42-43, 139, 156; CX 1-CX 2, CX 12, CX 18, CX 25). The personal animal release form was created by Mr. Woudenberg and, at all times material to this proceeding, Mr. Woudenberg required each person who surrendered animals to him to complete and sign the form, which reads as follows:

R & R RESEARCH
19256 W. KENDAVILLE RD., HOWARD CITY, MICHIGAN 49329
(231) 937-5680

PERSONAL ANIMAL RELEASE

Name _____ Date _____
Address _____
_____ Phone

Driv. Lic. # _____

License Plate# _____

OWNER STATEMENT: "I Certify that I have bred, raised, and do own the animal(s) listed below, and I understand that they may be used in research or testing."

Owner's signature _____

List of Animals received

USDA# SEX DESCRIPTION/BREED

Rec'd by _____

Carrie Bongard is a licensed veterinary technician who has worked for the United States Department of Agriculture as an animal care inspector since 2002 (Tr. at 58-59). Ms. Bongard's job duties require her to inspect dealers' facilities in Michigan, including Mr. Woudenberg's facility (Tr. at 59-60). Ms. Bongard's inspections of dealers include a review of records of acquisition and disposition of animals. Ms. Bongard traces the source of animals donated to Mr. Woudenberg by reviewing certifications signed by donors and documenting her findings. (Tr. at 61-62, 128-30; CX 4, CX 13, CX 19, CX 24).

Ms. Bongard could not specifically recall conducting the trace backs that she recorded on the four dogs and the cat in question in this proceeding, but she spoke with Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder and made notes of her discussions. Ms. Bongard's notes reflect that Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder told Ms. Bongard that they had not raised from birth the animals they donated to Mr. Woudenberg. (CX 4, CX 13, CX 19, CX 24). Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder each admitted his or her owner statement was false in that each of the animals identified on the personal animal release forms in question had been acquired from a previous owner rather than bred and raised by Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder, as stated on the personal animal release forms (Tr. at 43, 138-39, 156; CX 4-CX 7, CX 13-CX 15, CX 19-CX 21, CX 24, CX 28). When Ms. Bongard learned that Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder had donated animals that they had not raised from birth to Mr. Woudenberg, Ms. Bongard cited Mr. Woudenberg for violating 9 C.F.R. § 2.132(a) (RX 1 at 6; CX 3).

A preponderance of the evidence establishes Mr. Woudenberg asks each donor whether the donated animal was born and raised on the donor's premises, and, if the donor responds in

the negative, Mr. Woudenberg rejects the animal (Tr. at 425-26). If the donor responds in the affirmative, Mr. Woudenberg gives the donor a personal animal release form to complete and sign. Mr. Woudenberg verifies the information on the personal animal release form by comparing it with the donor's driver's license. If a personal animal release form is incomplete or if the information does not match the donor's identification, Mr. Woudenberg does not accept the donation. (Tr. at 230-33, 240, 341-43, 365-67, 385-88; RX 20). Mr. Woudenberg did not doubt that Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder raised the animals they donated, as Mr. Woudenberg's business is located in a rural area where many residents raise animals (Tr. at 366-67; RX 20).

The record contains no evidence that the donors in question were "dealers," as that term is defined in the Animal Welfare Act and the Regulations, who were required to obtain Animal Welfare Act licenses, or that the donors in question worked for, operated, or were in any way connected with animal pounds or animal shelters.

The Administrator's Appeal Brief

The Administrator raises five issues in the Administrator's Appeal Brief. First, the Administrator contends the ALJ erroneously found the Administrator failed to prove that Mr. Woudenberg violated 9 C.F.R. § 2.132(a), as alleged in the Complaint (Administrator's Appeal Brief at 3-9).

The Regulations provide that a class "B" dealer may obtain live random source dogs and cats only from three sources: (1) another dealer licensed under the Animal Welfare Act; (2) a state, county, or city owned and operated animal pound or animal shelter; and (3) a legal entity organized and operated under the laws of the state in which the legal entity is located, as an

animal pound or animal shelter (9 C.F.R. § 2.132(a)).

Mr. Beemer donated two live dogs to Mr. Woudenberg, Mr. Hawley donated one live dog to Mr. Woudenberg, Ms. Snyder donated one live dog to Mr. Woudenberg, and Ms. Castle donated one live cat to Mr. Woudenberg. Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder admit they did not breed and raise the dogs and the cat in question. Therefore, I conclude, Mr. Woudenberg obtained live random source dogs from Mr. Beemer, Mr. Hawley, and Ms. Snyder and obtained a live random source cat from Ms. Castle.⁵ None of these donors were dealers licensed under the Animal Welfare Act and none of these donors worked for, operated, or were in any way connected with an animal pound or animal shelter. Therefore, I conclude the Administrator proved by a preponderance of the evidence that Mr. Woudenberg violated 9 C.F.R. § 2.132(a) by obtaining four live random source dogs and a live random source cat from sources that the Regulations do not permit Mr. Woudenberg to utilize as sources of live random source dogs and cats.

⁵The term “random source” means dogs and cats obtained from animal pounds, animal shelters, auction sales, or any person who did not breed and raise the dogs and cats on his or her premises (9 C.F.R. § 1.1).

The ALJ dismissed the Complaint based upon her conclusions that Mr. Woudenberg complied with 9 C.F.R. § 2.132(d) (ALJ Decision and Order at 20)⁶ and that, pursuant to 9 C.F.R. § 2.132(d), a class “B” dealer may obtain random source dogs and cats from a person who does not hold an Animal Welfare Act license (ALJ Decision and Order at 28).⁷ While I agree with the ALJ that Mr. Woudenberg complied with 9 C.F.R. § 2.132(d), I do not agree that 9 C.F.R. § 2.132(d) permits a class “B” dealer to obtain random source dogs and cats from a person who does not hold an Animal Welfare Act license. In other words, I conclude 9 C.F.R. § 2.132(d) does not add a permitted source of live random source dogs and cats to those permitted sources listed in 9 C.F.R. § 2.132(a)(1)-(3). The basis for my conclusion is that, by definition, a dog or cat that is bred and raised on the premises of the person from whom the class “B” dealer obtains the dog or cat is not a “random source” dog or cat. See 9 C.F.R. § 1.1.

The donors in question were not licensed under the Animal Welfare Act and were not required to be licensed under the Animal Welfare Act. Mr. Woudenberg obtained the necessary certification from each donor that his or her donated animal was bred and raised by the donor. While each of the completed and signed certifications was false, I find very little evidence that Mr. Woudenberg knew or should have known that the certifications provided by Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder were false. Further, the evidence establishes that

⁶The ALJ states: “The regulation [(9 C.F.R. § 2.132(d))] prohibits Respondent from knowingly accepting animals from unlicensed sources without obtaining a certification [that the animals were born and raised on that person’s premises]. Respondent secured the requisite certifications. Therefore, Respondent did not violate [9] C.F.R. [§ 2].132(d), or by imputation, violate [9] C.F.R. § [2].132(a).”

⁷The ALJ states: “Class ‘B’ dealers may accept random source animals from other dealers, from shelter[s] and pounds, and from unlicensed individuals who have bred and raised the animals and who sell or donate up to 25 animals in a year. 9 C.F.R. § [2].132(a)-(d).”

Mr. Woudenberg took precautions to verify the accuracy of the certifications prior to accepting the animals in question. Under the circumstances established in this proceeding, I find Mr. Woudenberg complied with 9 C.F.R. § 2.132(d), even though each certification was false.

However, Mr. Woudenberg's compliance with 9 C.F.R. § 2.132(d) does not negate Mr. Woudenberg's violation of 9 C.F.R. § 2.132(a). Compliance with 9 C.F.R. § 2.132(d) only requires that a dealer obtain a certification from the person surrendering the animal that the animal was born and raised on that person's premises, namely, a certification that the animal is not a random source animal. In other words, it is possible, as occurred in this proceeding, for a dealer to obtain a random source animal from a person who falsely or mistakenly certifies that the animal is not a random source animal and to comply with 9 C.F.R. § 2.132(d). However, if the person from whom the class "B" dealer obtains that random source animal is not a permitted source of random source animals under 9 C.F.R. § 2.132(a), the dealer is in violation of 9 C.F.R. § 2.132(a), despite having complied with 9 C.F.R. § 2.132(d).

Second, the Administrator asserts he did not name Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder as respondents in the Complaint and the issue of their violation of the Animal Welfare Act was not before the ALJ. The Administrator requests that I strike the ALJ's conclusion that there is no evidence to support findings that Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder violated the Animal Welfare Act. (Administrator's Appeal Brief at 2 n.1).

As an initial matter, I agree with the Administrator that Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder are not named respondents in the Complaint and the issue of their violation of the Animal Welfare Act was not before the ALJ. However, I find nothing in the

ALJ's Decision and Order indicating the ALJ was under the misapprehension that Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder are respondents in this proceeding or that the ALJ dismissed the Complaint based upon the ALJ's conclusion that the Complaint contained unsupported allegations that Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder violated the Animal Welfare Act.

Third, the Administrator states the ALJ erroneously denied the Administrator's motion that the ALJ withdraw from the proceeding (Administrator's Appeal Brief at 2 n.2).

The Rules of Practice provide that any party to a proceeding may request that an administrative law judge withdraw from the proceeding, as follows:

§ 1.144 Judges.

.....
(b) *Disqualification of Judge.* (1) Any party to the proceeding may, by motion made to the Judge, request that the Judge withdraw from the proceeding because of an alleged disqualifying reason. Such motion shall set forth with particularity the grounds of alleged disqualification. The Judge may then either rule upon or certify the motion to the Secretary, but not both.

7 C.F.R. § 1.144(b)(1).

The Administrator, by motion made to the ALJ, requested that the ALJ withdraw from the proceeding on the ground that the ALJ was personally biased against the Administrator and Ms. Deskins. The Administrator cites the ALJ's conduct and the ALJ's inappropriate comments during the first day of the hearing, July 10, 2013, as evidence of the ALJ's personal bias. (Tr. at 310-11). However, the Administrator fails to describe the ALJ's conduct which supports the Administrator's allegation of ALJ bias. Moreover, while Ms. Deskins stated "[y]our comments yesterday at many times were inappropriate" (Tr. at 310-11), the Administrator

specifically references only one “comment”⁸ as support for the Administrator’s contention that the ALJ was personally biased against the Administrator and Ms. Deskins (Tr. at 313). The ALJ’s instruction, cited by the Administrator as evidence of ALJ bias, followed a discussion of the requirements of the Jencks Act in which the ALJ concluded the discussion by instructing: “Say no more, Ms. Deskins, nothing more.” (Tr. at 201). The instruction was not directed to the Administrator. Moreover, while the instruction was directed to Ms. Deskins, the context establishes that the instruction was merely meant to bring the discussion of the requirements of the Jencks Act to a close and to maintain order during the hearing. I do not find the instruction evidences personal bias on the part of the ALJ; therefore, I decline to reverse the ALJ’s denial of the Administrator’s motion that the ALJ withdraw from the proceeding.

Fourth, the Administrator contends the ALJ erroneously found the Administrator failed to comply with a proper request for production of Harry G. Dawson’s witness statement pursuant to 7 C.F.R. § 1.141(h)(1)(iii) and, based upon this finding, erroneously struck Mr. Dawson’s testimony (Administrator’s Appeal Brief at 9-16).

The Rules of Practice provide for the production of witness statements, as follows:

§ 1.141 Procedure for hearing.

....

(h) *Evidence—(1) In general.*

....

(iii) After a witness called by the complainant has testified on direct examination, any other party may request and obtain the production of any statement, or part thereof, of such witness in the possession of the complainant which relates to the subject matter as to which the witness has testified. Such production shall be made according to the procedures and subject to the definitions and limitations prescribed in the Jencks Act (18 U.S.C. 3500).

⁸I find the “comment” referenced by the Administrator is actually an instruction.

7 C.F.R. § 1.141(h)(1)(iii).

The Administrator asserts the ALJ requested production of Mr. Dawson's witness statement on behalf of Mr. Woudenberg and contends the ALJ erroneously failed to deny the request because the request was made by the ALJ rather than by a party to the proceeding (Administrator's Appeal Brief at 11).

The Rules of Practice specifically provide that a "party," other than the complainant, may request production of the statement of any witness called by the complainant (7 C.F.R. § 1.141(h)(1)(iii)). I find no provision allowing an administrative law judge to make the request on behalf of a party. However, I reject the Administrator's assertion that the ALJ requested production of Mr. Dawson's witness statement on behalf of Mr. Woudenberg, and I find Ms. Kahn made the request at issue, as follows:

[BY MS. KAHN:]

Q When you do an investigation such as this one does your role include looking at the regulations and deciding whether a violation has occurred or do you just go out and get specific facts?

[BY MR. DAWSON:]

A I gather the facts, interview people, authenticate documents, prepare a report and submit that as an investigative report.

....

Q Is there a report like that for this case, did you make any investigative report separate and apart from these affidavits and the documents that we have been given by the complainant regarding this case?

A Yes.

Q Do you have a copy with you today?

A I don't.

Q Is there any reason why that can't be produced by the U.S.D.A.?

Tr. at 192-93.

The Administrator also contends the ALJ erroneously failed to deny Mr. Woudenberg's request for Mr. Dawson's witness statement as untimely because the request was not made immediately after Mr. Dawson's direct examination (Administrator's Appeal Brief at 10).

A request for a witness statement pursuant to 7 C.F.R. § 1.141(h)(1)(iii) must be made at the proper time, but neither the Jencks Act nor the Rules of Practice require that the request be made immediately at the close of direct examination. Although a request for a witness statement, pursuant to 7 C.F.R. § 1.141(h)(1)(iii), should be denied if it comes too early or too late, a request made during the course of cross-examination is timely.⁹ Here, the request was made during the course of Ms. Kahn's cross-examination of Mr. Dawson; therefore, I find Mr. Woudenberg's request for Mr. Dawson's witness statement was timely, and I reject the Administrator's contention that the ALJ erroneously failed to reject Mr. Woudenberg's request as untimely.

The Administrator contends the ALJ erroneously refused the Administrator's offer to provide Mr. Dawson's investigative report to the ALJ for an *in camera* examination to determine which, if any, of the documents in the investigative report were producible under 7 C.F.R. § 1.141(h)(1)(iii) (Administrator's Appeal Brief at 11-13).

The record establishes that the Administrator offered to provide Mr. Dawson's

⁹*In re Miguel A. Machado* (Decision and Remand Order as to Respondent Cozzi), 42 Agric. Dec. 820, 844 (1983).

investigative report to the ALJ, but the ALJ refused the Administrator's offer (Tr. at 197-201); however, the record does not establish that the Administrator's offer at this point in the hearing, was for the purposes of an *in camera* examination in accordance with the procedures articulated in *In re Miguel A. Machado* (Decision and Remand Order as to Respondent Cozzi), 42 Agric. Dec. 820, 852-57 (1983). Subsequently, the ALJ agreed to conduct an *in camera* examination of Mr. Dawson's investigative report and Ms. Deskins stated the Administrator was not asking for an *in camera* examination (ALJ's Decision and Order at 23; Tr. at 256-57). In light of the ALJ's agreement to conduct an *in camera* examination of Mr. Dawson's investigative report and the Administrator's refusal to provide the investigative report to the ALJ for an *in camera* examination, I decline to disturb the ALJ's ruling striking Mr. Dawson's testimony.

Fifth, the Administrator contends the ALJ erroneously failed to assess Mr. Woudenberg a civil penalty and erroneously failed to revoke Mr. Woudenberg's Animal Welfare Act license (Administrator's Appeal Brief at 16-17).

The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction

to be imposed and are generally entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. However, I have repeatedly stated the recommendations of administrative officials as to the sanction are not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.¹⁰

The purpose of assessing a civil penalty is not to punish the violator, but to deter the violator, as well as others, from similar behavior.¹¹ When determining the amount of the civil penalty to be assessed for violations of the Animal Welfare Act and the Regulations, the Secretary of Agriculture is required to give due consideration to four factors: (1) the size of the business of the person involved, (2) the gravity of the violations, (3) the person's good faith, and (4) the history of previous violations.¹²

I find Mr. Woudenberg operates a small business. Mr. Woudenberg's violations of 9 C.F.R. § 2.132(a) did not result in injury or harm to the animals and did not present a risk of injury or harm to the animals. Moreover, the record contains no evidence that the five random source animals which were donated to Mr. Woudenberg had been stolen. Therefore, I do not

¹⁰*In re Craig A. Perry* (Decision as to Craig A. Perry and Perry's Wilderness Ranch & Zoo, Inc.), __ Agric. Dec. __, slip op. at 20-21 (Sept. 6, 2013); *In re Lee Marvin Greenly* (Decision as to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.), __ Agric. Dec. __, slip op. at 33-34 (Aug. 5, 2013), *aff'd per curiam*, No. 13-2882 (8th Cir. Aug. 22, 2014); *In re Sam Mazzola*, 68 Agric. Dec. 822, 849 (2009), *dismissed*, 2010 WL 2988902 (6th Cir. Oct. 27, 2010); *In re Lorenza Pearson*, 68 Agric. Dec. 685, 731 (2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011).

¹¹*In re David M. Zimmerman*, 56 Agric. Dec. 433, 461 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 46 (1998).

¹²7 U.S.C. § 2149(b).

find Mr. Woudenberg's violations of 9 C.F.R. § 2.132(a) grave.

The record establishes that Mr. Woudenberg made a good faith attempt to comply with 9 C.F.R. § 2.132. Moreover, I do not find that Mr. Woudenberg's violations of 9 C.F.R. § 2.132(a) were willful violations.¹³ The record establishes that Mr. Woudenberg obtained a written certification from the owner of each donated animal stating the donated animal was bred and raised by the owner, namely, not a random source animal. Mr. Woudenberg did not know or have reason to know that Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder falsely certified that the animals they donated to Mr. Woudenberg were not random source animals. Moreover, Mr. Woudenberg took precautions to ensure that the certifications were accurate. Therefore, I conclude Mr. Woudenberg's violations of 9 C.F.R. § 2.132(a) were not intentional and did not result from Mr. Woudenberg's careless disregard of regulatory requirements. Had Mr. Beemer's, Mr. Hawley's, Ms. Castle's, and Ms. Snyder's certifications been accurate, Mr. Woudenberg would not only have been in compliance with 9 C.F.R. § 2.132(d), but also, would not have violated 9 C.F.R. § 2.132(a), which only applies when a class "B" dealer obtains live random source dogs and cats.

I do not find assessment of a civil penalty or revocation of Mr. Woudenberg's Animal Welfare Act license justified by the facts. I find, under the circumstances in this proceeding, the

¹³An 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. *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).

issuance of a cease and desist order against Mr. Woudenberg is sufficient to ensure Mr. Woudenberg's compliance with the Animal Welfare Act and the Regulations in the future, to deter others from violating the Animal Welfare Act and the Regulations, and to thereby fulfill the remedial purposes of the Animal Welfare Act.

Respondent's Brief in Opposition to Complainant's Appeal Brief

In addition to his response to the Administrator's Appeal Brief, Mr. Woudenberg raises one issue in Respondent's Brief in Opposition to Complainant's Appeal Brief. Mr. Woudenberg contends the Administrator was required to file an appeal petition within 30 days after the Hearing Clerk served the Administrator with the ALJ's Decision and Order and the Administrator failed to file a timely appeal petition (Respondent's Brief in Opposition to Complainant's Appeal Brief at 22-23).

The Rules of Practice provide that a party may file an appeal petition within 30 after receiving service of an administrative law judge's written 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, . . . 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 record does not establish the date the Hearing Clerk served the Administrator with the ALJ's December 20, 2013, Decision and Order; however, I infer the Hearing Clerk served the Administrator with the ALJ's Decision and Order on or before January 13, 2014, based upon the Administrator's January 13, 2014, motion to extend the time

for filing an appeal petition.¹⁴

¹⁴Complainant's Motion for Extension of Time.

I granted the Administrator's January 13, 2014, motion for an extension of time and extended the time for filing an appeal petition to March 21, 2014.¹⁵ The Administrator filed the Administrator's Appeal Petition on March 19, 2014, two days prior to the expiration of the extended time for filing the Administrator's Appeal Petition, but after the 30-day period for filing an appeal petition in 7 C.F.R. § 1.145(a).

Mr. Woudenberg, citing *Reinhart v. U.S. Dep't of Agric.*, 39 F. App'x 954 (6th Cir. 2002), contends the time for seeking review of an administrative order is mandatory and jurisdictional and the time for filing an appeal petition may not be extended beyond the period provided in 7 C.F.R. § 1.145(a). Mr. Woudenberg argues any appeal petition filed after the period provided in 7 C.F.R. § 1.145(a) is late-filed irrespective of any order by the Judicial Officer purportedly extending the time for filing the appeal petition.

As an initial matter, *Reinhart v. U.S. Dep't of Agric.*, 39 F. App'x 954 (6th Cir. 2002), is inapposite. *Reinhart* does not concern an appeal of an administrative law judge's decision to the Judicial Officer pursuant to 7 C.F.R. § 1.145(a), but, instead, concerns the appeal of the Judicial Officer's decision in *In re William J. Reinhart*, 59 Agric. Dec. 721 (2000), to the United States Court of Appeals for the Sixth Circuit, pursuant to 15 U.S.C. § 1825(b)(2). Moreover, the Rules of Practice specifically provide that the time for filing any document or paper required or authorized to be filed under the Rules of Practice may be extended, as follows:

§ 1.147 Filing; service; extensions of time; and computation of time.

....

(f) *Extensions of time.* The time for the filing of any document or paper required or authorized under the rules in this part to be filed may be extended by

¹⁵Order Extending Time for Filing Complainant's Appeal Petition.

the Judge or the Judicial Officer as provided in § 1.143, if, in the judgment of the Judge or the Judicial Officer, as the case may be, there is good reason for the extension. In all instances in which time permits, notice of the request for extension of time shall be given to the other party with opportunity to submit views concerning the request.

7 C.F.R. § 1.147(f). Therefore, I reject Mr. Woudenberg's contention that the time for filing an appeal petition may not be extended beyond the period provided in 7 C.F.R. § 1.145(a), and I reject Mr. Woudenberg's contention that the Administrator's Appeal Petition was late-filed.

Findings of Fact

1. Mr. Woudenberg is an individual with a mailing address in Michigan, who, at all times material to this proceeding, operated under the business name R & R Research.

2. At all times material to this proceeding, Mr. Woudenberg operated as a "dealer," as that term is defined in the Animal Welfare Act and the Regulations.

3. At all times material to this proceeding, Mr. Woudenberg was a "class 'B' licensee," as that term is defined in the Regulations.

4. At all times material to this proceeding, Mr. Woudenberg held Animal Welfare Act license number 34-B-0001.

5. On or about April 18, 2008, Mr. Woudenberg obtained a live dog from Mr. Beemer, who signed (or authorized his signature on) a certification that he had bred and raised the dog.

6. On or about June 3, 2008, Mr. Woudenberg obtained a live dog from Mr. Beemer, who signed (or authorized his signature on) a certification that he had bred and raised the dog.

7. On or about June 10, 2008, Mr. Woudenberg obtained a live dog from Mr. Hawley, who signed a certification that he had bred and raised the dog.

8. On or about August 28, 2008, Mr. Woudenberg obtained a live cat from Ms. Castle, who signed a certification that she had bred and raised the cat.

9. On or about November 4, 2008, Mr. Woudenberg obtained a live dog from Ms. Snyder, who signed a certification that she had bred and raised the dog.

10. At no time material to this proceeding, was Mr. Beemer, Mr. Hawley, Ms. Castle, or Ms. Snyder a “dealer,” as that term is defined in the Animal Welfare Act and the Regulations, required to obtain an Animal Welfare Act license.

11. At no time material to this proceeding, did Mr. Beemer, Mr. Hawley, Ms. Castle, or Ms. Snyder hold an Animal Welfare Act license.

12. At no time material to this proceeding, did Mr. Beemer, Mr. Hawley, Ms. Castle, or Ms. Snyder work for or operate an animal pound or animal shelter.

13. None of the animals that Mr. Woudenberg obtained from Mr. Beemer, Mr. Hawley, Ms. Castle, and Ms. Snyder, as described in Findings of Fact numbers 5 through 9, had been born and raised on Mr. Beemer’s, Mr. Hawley’s, Ms. Castle’s, or Ms. Snyder’s premises.

14. Mr. Woudenberg personally accepted the animals identified in Findings of Fact numbers 5 through 9 and confirmed the identities of the donors named in Findings of Fact numbers 5 through 9.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over this matter.
2. At all times material to this proceeding, Mr. Woudenberg was a “dealer,” as that term is defined in the Animal Welfare Act and the Regulations.

3. At all times material to this proceeding, Mr. Woudenberg was a “class ‘B’ licensee,” as that term is defined in the Regulations.

4. Class “B” dealers may obtain live random source dogs and cats only from: (1) another dealer who is licensed under the Animal Welfare Act; (2) a state, county, or city owned and operated animal pound or animal shelter; and (3) a legal entity organized and operated under the laws of the state in which the legal entity is located, as an animal pound or animal shelter (9 C.F.R. § 2.132(a)).

5. As Mr. Woudenberg obtained the four dogs and the cat that are the subject of this proceeding from persons who did not breed and raise them on their premises, the dogs and the cat are “random source” animals, as that term is defined in 9 C.F.R. § 1.1.

6. None of the donors of the four dogs and the cat in question was: (1) a dealer licensed under the Animal Welfare Act; (2) a state, county, or city owned and operated animal pound or animal shelter; or (3) a legal entity organized and operated under the laws of the state in which the legal entity is located, as an animal pound or animal shelter.

7. Mr. Woudenberg obtained live random source dogs and cats from sources that the Regulations do not permit Mr. Woudenberg to utilize as sources of random source dogs and cats, in violation of 9 C.F.R. § 2.132(a).

8. An order directing Mr. Woudenberg to cease and desist from violations of the Animal Welfare Act and the Regulations is appropriate.

For the foregoing reasons, the following Order is issued.

ORDER

Mr. Woudenberg, his agents and employees, successors and assigns, directly or through

any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations. In particular, Mr. Woudenberg shall cease and desist from obtaining live random source dogs and cats from sources that the Regulations do not permit Mr. Woudenberg to utilize as sources of live random source dogs and cats. This Order shall become effective upon service of this Order on Mr. Woudenberg.

RIGHT TO JUDICIAL REVIEW

Mr. Woudenberg has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §_ 2341-2350. Mr. Woudenberg must seek judicial review within 60 days after entry of the Order in this Decision and Order.¹⁶ The date of entry of the Order in this Decision and Order is September 12, 2014.

Done at Washington, DC

September 12, 2014

William G. Jenson
Judicial Officer

¹⁶7 U.S.C. § 2149(c).