

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 12-0339
)
Action Wildlife Foundation, Inc.,)
)
Respondent) **Decision and Order**

PROCEDURAL HISTORY

On April 6, 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 March 27, 2007, January 8, 2008, August 19, 2008, and

February 3, 2009, Action Wildlife Foundation, Inc., willfully violated the Regulations.¹ On June 8, 2012, Action Wildlife Foundation, Inc., filed an answer in which Action Wildlife Foundation, Inc., denied the material allegations of the Complaint.²

Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] conducted a hearing on January 29-30, 2013, in Wallingford, Connecticut. Sharlene Deskins, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. John R. Williams, New Haven, Connecticut, represented Action Wildlife Foundation, Inc. The Administrator called two witnesses and Action Wildlife Foundation, Inc., called four witnesses. The Administrator introduced 12 exhibits, identified as CX 1-CX 12, which the ALJ received in evidence. Action Wildlife Foundation, Inc., introduced 129 exhibits, identified as RX 1-RX 129, which the ALJ received in evidence. Action Wildlife Foundation, Inc., withdrew RX 129 (Tr. 242-43).³

¹Compl. at 2-6 ¶¶ II-V.

²Answer to Complaint.

³References to the transcript of the January 29-30, 2013, hearing are designated as “Tr.” and the page number.

On July 29, 2013, the ALJ filed a Decision and Order: (1) concluding Action Wildlife Foundation, Inc., willfully violated the Regulations, as alleged in paragraphs II.A., II.B.1, II.B.2, II.B.3, II.B.4, II.B.5, II.B.6, III.A., III.B.1, III.B.2, III.B.3, III.B.4, III.B.6, III.B.7, III.B.8, III.B.9, IV.A., IV.B., IV.C.2, IV.C.3, V.A., V.B.2, and V.B.3 of the Complaint; (2) concluding the Administrator failed to prove Action Wildlife Foundation, Inc., willfully violated the Regulations, as alleged in paragraphs III.B.5, IV.C.1, and V.B.1 of the Complaint; (3) ordering Action Wildlife Foundation, Inc., to cease and desist from violations of the Animal Welfare Act and the Regulations; (4) assessing Action Wildlife Foundation, Inc., a \$30,000 civil penalty; and (5) suspending Action Wildlife Foundation, Inc.'s Animal Welfare Act license (Animal Welfare Act license number 16-C-0057) for 60 days.⁴

On August 22, 2013, Action Wildlife Foundation, Inc., filed an Appeal Petition, and, on September 9, 2013, the Administrator filed Complainant's Opposition to the Respondent's Appeal Petition. On September 13, 2013, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

DECISION

Action Wildlife Foundation, Inc.'s Request for Oral Argument

⁴ALJ's Decision and Order at 24-27.

Action Wildlife Foundation, Inc.'s request for oral argument on appeal, which the Judicial Officer may grant, refuse, or limit,⁵ is refused because the issues are not complex and oral argument would serve no useful purpose.

⁵7 C.F.R. § 1.145(d).

Action Wildlife Foundation, Inc.’s Appeal Petition

Action Wildlife Foundation, Inc., raises two issues in its Appeal Petition. First, Action Wildlife Foundation, Inc., contends the ALJ’s assessment of a \$30,000 civil penalty is excessive and unduly harsh given the nature of Action Wildlife Foundation, Inc.’s violations and the fact that Action Wildlife Foundation, Inc., is a private charity wholly funded by James Mazzarelli, the founder of Action Wildlife Foundation, Inc. (Appeal Pet. at 1 ¶ 1).

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.⁶ The fact that an entity that violates the Animal Welfare Act and the Regulations is a charitable, non-profit institution wholly funded by one individual is not a factor required to be considered by the Secretary of Agriculture when determining the amount of the civil penalty. While Mr. Mazzarelli’s generosity (Tr. 77-80) is highly commendable, I find Mr. Mazzarelli’s generosity and the fact that Action Wildlife Foundation, Inc., is a charitable, non-profit institution (Tr. 78), irrelevant to the determination of the amount of the civil penalty.

⁶7 U.S.C. § 2149(b).

Based upon the number of animals which Action Wildlife Foundation, Inc., held during the period relevant to this proceeding, I find Action Wildlife Foundation, Inc., operates a large business.⁷ The gravity of Action Wildlife Foundation, Inc.'s violation of 9 C.F.R. § 3.133, which resulted in multiple deaths of red deer, elk, and four-horned sheep (Tr. 44, 281-84, 290-93, 345, 358-61; CX 7 at 1-2), is great.

Action Wildlife Foundation, Inc., has not shown good faith. Despite the death and injury of animals that resulted from housing incompatible animals in the same enclosures, Action Wildlife Foundation, Inc., continued to house incompatible animals in the same enclosures for an extended period of time, and the record establishes that Action Wildlife Foundation, Inc., repeatedly violated the Regulations during the period March 27, 2007, through February 3, 2009. Finally, Action Wildlife Foundation, Inc., has a history of violations. An ongoing pattern of violations establishes a history of previous violations for the purposes of 7 U.S.C. § 2149(b).

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

⁷Jan Baltrush, an Animal and Plant Health Inspection Service [hereinafter APHIS] animal care inspector who inspected Action Wildlife Foundation, Inc., testified that Action Wildlife Foundation, Inc., held over 200 regulated animals (Tr. 34). Mr. Mazzarelli testified that Action Wildlife Foundation, Inc., held over 100 animals and probably close to 200 animals in 2007 (Tr. 267-68).

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.

The Administrator, one of the officials charged with administering the Animal Welfare Act, recommended to the ALJ and continues to recommend that Action Wildlife Foundation, Inc., be assessed a \$30,000 civil penalty for its violations of the Regulations (Complainant's Proposed Findings of Fact, Conclusions of Law, Order and Brief in Support Thereof at 22-24; Complainant's Opposition to Respondent's Appeal Pet. at 2-3).

I conclude Action Wildlife Foundation, Inc., committed 23 violations of the Regulations during the period March 27, 2007, through February 3, 2009. Action Wildlife Foundation, Inc., could be assessed a maximum civil penalty of \$186,250 for 23 violations of

the Regulations.⁸ After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the factors required to be considered in 7 U.S.C. § 2149(b) and the remedial purposes of the Animal Welfare Act, I conclude the \$30,000 civil penalty recommended by the Administrator and assessed by the ALJ for Action Wildlife Foundation, Inc.'s violations of the Regulations is appropriate and necessary to ensure Action Wildlife Foundation, Inc.'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.

⁸Prior to June 18, 2008, the Animal Welfare Act, authorized the Secretary of Agriculture to assess a civil penalty of not more than \$2,500 for each violation of the Animal Welfare Act and the Regulations (7 U.S.C. § 2149(b)). However, the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note) provides that the head of each agency shall, by regulation, adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency by increasing the maximum civil penalty for each civil monetary penalty by a cost-of-living adjustment. Effective June 23, 2005, the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under 7 U.S.C. § 2149(b) for each violation of the Animal Welfare Act and the Regulations by increasing the maximum civil penalty from \$2,500 to \$3,750 (7 C.F.R. § 3.91(b)(2)(ii) (2006)). On June 18, 2008, Congress amended 7 U.S.C. § 2149(b) to provide that the Secretary of Agriculture may assess a civil penalty of not more than \$10,000 for each violation of the Animal Welfare Act and the Regulations (Pub. L. No. 110-246 § 14214, 122 Stat. 1664, 2228 (2008)). Thus, the Secretary of Agriculture may assess Action Wildlife Foundation, Inc., a civil penalty of not more than \$3,750 for each of Action Wildlife Foundation, Inc.'s seven violations of the Regulations committed before June 18, 2008, and a civil penalty of not more than \$10,000 for each of Action Wildlife Foundation, Inc.'s 16 violations of the Regulations committed after June 18, 2008.

I reject Action Wildlife Foundation, Inc.'s contention that the ALJ's assessment of a \$30,000 civil penalty for its violations of the Regulations is excessive and unduly harsh.

Second, Action Wildlife Foundation, Inc., contends the ALJ's 60-day suspension of Action Wildlife Foundation, Inc.'s Animal Welfare Act license is excessive and unduly harsh given the nature of Action Wildlife Foundation, Inc.'s violations and the importance of Action Wildlife Foundation, Inc., to the semi-rural community which it serves (Appeal Pet. at 1-2 ¶ 2).

The Animal Welfare Act authorizes the Secretary of Agriculture to suspend an exhibitor's Animal Welfare Act license if the exhibitor is determined to have violated the Regulations, as follows:

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

7 U.S.C. § 2149(a). I conclude Action Wildlife Foundation, Inc., committed 23 violations of the Regulations during the period March 27, 2007, through February 3, 2009. The gravity of

Action Wildlife Foundation, Inc.'s violation of 9 C.F.R. § 3.133, which resulted in multiple deaths of red deer, elk, and four-horned sheep (Tr. 44, 281-84, 290-93, 345, 358-61; CX 7 at 1-2), is great. Therefore, I reject Action Wildlife Foundation, Inc.'s contention that the ALJ's 60-day suspension of its Animal Welfare Act license for its violations of the Regulations is excessive and unduly harsh.

Moreover, collateral effects of suspension of an Animal Welfare Act license are not relevant to the sanction to be imposed for violations of the Animal Welfare Act and the Regulations.⁹ Thus, even if I were to find that a 60-day suspension of Action Wildlife

⁹See *In re Lee Marvin Greenly* (Decision as to Lee Marvin Greenly and Minnesota Wildlife Connection, Inc.), __ Agric. Dec. __, slip op. at 28-29 (Aug. 5, 2013) (stating collateral effects of revocation of an exhibitor's Animal Welfare Act license, including the destruction of one of the few businesses in Sandstone, Minnesota, are not mitigating circumstances that can be taken into account when determining the sanction to be imposed for violations of the Animal Welfare Act and the Regulations); *In re Animals of Montana, Inc.*, 68 Agric. Dec. 92, 108 (2009) (stating the collateral effect of termination of Animals of Montana, Inc.'s Animal Welfare Act license on Mr. Hyde's career is not relevant to the determination of whether Animals of Montana, Inc., is unfit to be licensed); *In re Loreon Vigne*, 67 Agric. Dec. 1060, 1069 (2008) (stating the collateral effect of termination of Ms. Vigne's Animal Welfare Act license on her ability to retain possession of and breed ocelots is not relevant to the determination of whether Ms. Vigne is unfit to be licensed); *In re J. Wayne Shaffer*, 60 Agric. Dec. 444, 477 (2001) (stating the respondent's need for income to support himself is not a defense to his violations of the Animal Welfare Act and the Regulations or a mitigating circumstance to be considered when determining the amount of the civil penalty to be assessed for his violations of the Animal Welfare Act and the Regulations); *In re Michael A. Huchital, Ph.D.*, 58 Agric. Dec. 763, 815-16 (1999) (stating collateral effects of a civil penalty on a respondent's business and family are not relevant to determining the amount of the civil penalty to be assessed for violations of the Animal Welfare Act and the Regulations).

Foundation, Inc.'s Animal Welfare Act license would have a negative impact on the semi-rural area which Action Wildlife Foundation, Inc., serves, that collateral effect would not constitute a circumstance to be considered when determining the sanction to be imposed for Action Wildlife Foundation, Inc.'s violations of the Regulations.

I affirm the ALJ's Decision and Order, and, based upon my review of the record, I find, except for a modification of the effective dates in the ALJ's order, no change or modification of the ALJ's Decision and Order is warranted. The Rules of Practice provide that, under these circumstances, I may adopt an administrative law judge's decision, as follows:

§ 1.145 Appeal to Judicial Officer.

....

(i) *Decision of the judicial officer on appeal.* If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum.

7 C.F.R. § 1.145(i).

For the foregoing reasons, the following Order is issued.

ORDER

1. Action Wildlife Foundation, Inc., its agents, 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. This cease and desist order shall become effective upon service of this Order on Action Wildlife Foundation, Inc.

2. Action Wildlife Foundation, Inc.'s Animal Welfare Act license (Animal Welfare Act license number 16-C-0057) is suspended for a period of 60 days beginning 60 days after service of this Order on Action Wildlife Foundation, Inc.

3. Action Wildlife Foundation, Inc., is assessed a \$30,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

USDA APHIS GENERAL
P.O. Box 979043
St. Louis, MO 63197-9000

Payment of the civil penalty shall be sent to, and received by, USDA APHIS GENERAL within 60 days after service of this Order on Action Wildlife Foundation, Inc. Action Wildlife Foundation, Inc., shall state on the certified check or money order that payment is in reference to AWA Docket No. 12-0339.

RIGHT TO JUDICIAL REVIEW

Action Wildlife Foundation, Inc., 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. Action Wildlife Foundation, Inc., must seek judicial review within 60 days after entry of the Order in this Decision and Order.¹⁰ The date of entry of the Order in this Decision and Order is September 23, 2013.

Done at Washington, DC

September 23, 2013

William G. Jenson
Judicial Officer

¹⁰7 U.S.C. § 2149(c).