

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 03-0034
)
Martine Colette, an individual;)
Wildlife Waystation, a California)
corporation; and Robert H. Lorsch,)
an individual,)
) **Decision and Order as to**
Respondents) **Martine Colette and Robert H. Lorsch**

PROCEDURAL HISTORY

On August 15, 2003, Peter Fernandez, Administrator, Animal and Plant and 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 under 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 Under Various Statutes (7 C.F.R. §§ 1.130-.151). The Complaint alleges Martine Colette and Wildlife Waystation violated the Animal Welfare Act and the Regulations. On September 22, 2003, the Administrator filed a First Amended

Complaint, alleging additional violations of the Animal Welfare Act and the Regulations by Ms. Colette and Wildlife Waystation and adding Robert H. Lorsch as a respondent.

On March 15, 2004, the Administrator filed the Second Amended Complaint, the operative pleading in the instant proceeding, which Ms. Colette, Wildlife Waystation, and Mr. Lorsch timely answered.

Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] conducted a hearing in Los Angeles, California, on February 5-9, February 12-16, June 11-15, and June 25-28, 2007. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Robert M. Yaspan, Law Offices of Yaspan & Thau, Woodland Hills, California, represented Mr. Lorsch. Rosemarie S. Lewis, Law Offices of Borton Petrini, LLP, Los Angeles, California, represented Ms. Colette. Sara Pikofsky, Thelen, Reid, Brown, Raysman & Steiner, LLP, Washington, DC, represented Wildlife Waystation. The parties called 29 witnesses and the Chief ALJ admitted over 75 exhibits into evidence. On September 14, 2007, the Chief ALJ entered a Consent Decision and Order as to Respondent Wildlife Waystation resolving all claims with regard to Wildlife Waystation.

The Administrator, Ms. Colette, and Mr. Lorsch completed all briefing by March 3, 2008. On August 4, 2008, the Chief ALJ issued a Decision: (1) concluding Martine Colette did not exhibit animals during the period that the alleged violations

occurred; (2) concluding Robert H. Lorsch did not commit violations of the Animal Welfare Act or the Regulations; and (3) dismissing the case against Martine Colette and Robert H. Lorsch.

On October 27, 2008, the Administrator filed “Complainant’s Appeal of Initial Decision and Order” [hereinafter Appeal Petition]. On December 2, 2008, Robert H. Lorsch filed a response to the Administrator’s Appeal Petition. On February 19, 2009, the Hearing Clerk transmitted the record to me for consideration and decision. Based upon a review of the record: (1) I dismiss the case against Mr. Lorsch; (2) I find Ms. Colette violated the Animal Welfare Act and the Regulations; (3) I order Ms. Colette to cease and desist from violating the Animal Welfare Act and the Regulations; and (4) I assess Ms. Colette a \$2,000 civil penalty.

DECISION

Statutory and Regulatory Background

One of the objectives of the Animal Welfare Act is to insure that animals intended for use for exhibition purposes are provided humane care and treatment. In order to be subject to the Animal Welfare Act, the animals must be in, or substantially affect, interstate or foreign commerce. (7 U.S.C. § 2131.)

The Animal Welfare Act defines the term “person” as including any individual, partnership, firm, joint stock company, corporation, association, trust, estate, or other legal entity (7 U.S.C. § 2132(a)). An “exhibitor” is any person (public or private)

exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary of Agriculture, and the term “exhibitor” includes carnivals, circuses, and zoos exhibiting animals whether operated for profit or not (7 U.S.C. § 2132(h)). The act, omission, or failure of any person acting for, or employed by, an exhibitor or a person licensed as an exhibitor is deemed the act, omission, or failure of the exhibitor, as well as of the act omission, or failure of the person (7 U.S.C. § 2139.)

The Animal Welfare Act requires the Secretary of Agriculture to issue standards to govern the humane handling, care, treatment, and transportation of animals by exhibitors (7 U.S.C. § 2143(a)). Compliance with the Animal Welfare Act and the Regulations is accomplished by an enforcement program which includes inspections and investigations by United States Department of Agriculture [hereinafter USDA] personnel (7 U.S.C. § 2146(a)). When violations of the Animal Welfare Act or the Regulations are discovered, the Secretary of Agriculture may order the violator to cease and desist the violations, assess civil penalties, and suspend or revoke an exhibitor’s Animal Welfare Act license. Parties cited by the Secretary of Agriculture have the right to notice and opportunity for hearing. (7 U.S.C. § 2149(a)-(b).)

Background of Regulatory Problems

The Wildlife Waystation is a last resort for animals that would otherwise likely be euthanized. Undisputed testimony established that USDA and various state agencies

frequently asked Ms. Colette for assistance with animals. In September 1995, USDA requested that Ms. Colette assist in the retrieval of animals from a closed facility—Liger Town—after a number of animals had escaped from that facility and had been shot (Tr. 2121-23).¹ Although the facility was located in Idaho, Ms. Colette acceded to the USDA request to move the animals to Wildlife Waystation, a number of which still live at Wildlife Waystation (Tr. 2121-23, 4215-17). Ms. Colette testified that she accepted animals at the request of numerous organizations, public and private, including Wyoming Fish and Game (Tr. 2124), the Los Angeles County animal control agency, and the Michigan Humane Society.

In the mid-1990's, when the dismantling of a biomedical lab in New York necessitated the placement of many primates in other facilities, Ms. Colette agreed to house approximately 50 chimpanzees at Wildlife Waystation (Tr. 4039-42). Dr. Conrad Mahoney, who was the head of the biomedical lab, initiated the contact with Ms. Colette and has returned to Wildlife Waystation approximately twice a year since then to conduct physical examinations of the chimps (Tr. 4047-50). At the time the chimps arrived, Wildlife Waystation did not have the proper facilities to care for that number of chimps. The chimps were originally housed in Q1, the original quarantine facility, and Q2, an old barn, where 32 or 33 of the chimps were temporarily housed. The intention was that the

¹Transcript references are designated "Tr._." Exhibits entered by the Administrator are designated "CX _." Exhibits entered by Robert H. Lorsch are designated "RLX _."

chimps, many of which were not fully grown, would stay in these two structures until a new suitable building could be constructed (Tr. 4109-21).

Also, in the mid 1990's, Ms. Colette and Wildlife Waystation accepted from another source, a self-mutilating chimp known as Sammy (Tr. 4897-4900). Ms. Colette accepted Sammy knowing he was self-mutilating because she thought she would be able to provide proper care for him and because she felt sorry for him (Tr. 4902-03).

Dr. Mahoney saw Sammy regularly beginning in 1996 and stated he was the worst self-mutilating chimp he had ever seen. He testified about the difficulty of determining the triggers for self-mutilating behavior; how even finding a trigger does not mean that another trigger will not turn up. Dr. Mahoney further testified that medications, which frequently have to be adjusted, are a critical part of treatment and that a self-mutilating chimp can never be assumed to be fully cured. (Tr. 4070-73.) Dr. Mahoney felt the attempts by Ms. Colette and Wildlife Waystation to find the proper therapeutic treatment for Sammy were "robust." (Tr. 4089.)

The attempts to get the appropriate permits to construct proper housing for the chimps led to a multi-year imbroglio. Extensive testimony demonstrated that, for example, the California State Fish and Game Commission would not issue certain permits and Los Angeles County, because of zoning issues, would not consent to the building of the new enclosure for the chimps. Furthermore, Wildlife Waystation had issues with water and waste regulations, as well as other regulatory problems. (Tr. 2190-95.) In

order to find resolutions to many of these issues, the Los Angeles County Board of Supervisors created a task force to assist Wildlife Waystation to comply with Los Angeles County ordinances and regulations (Tr. 1372-74). At Ms. Colette's request, Mr. Lorsch agreed to deal with the various government agencies on behalf of Wildlife Waystation (Tr. 2186-91).

Facts

Martine Colette has a long history of caring for animals. While not formally trained in animal care, Ms. Colette was exposed to, and cared for, exotic animals from her youth. (Tr. 4187, 4194.) After moving to the United States, Ms. Colette began caring for unwanted animals when she was living in Hollywood. Ms. Colette eventually established Wildlife Waystation on property she purchased in the foothills of the San Fernando Valley outside Los Angeles. (Tr. 4197.) Wildlife Waystation has tended to the needs of many thousands of animals since it was created in the mid-1970's, having as many as 1,200 animals on the premises at a time (Tr. 4212). Wildlife Waystation has been a resource for the government, both state and federal. These government agencies, including USDA, have called on Wildlife Waystation when there has been a need to provide for animals when another facility has closed or wild animals are in need of rescue. (Tr. 4191, 4215-16.) At the time of the hearing, Wildlife Waystation cared for approximately 250 to 300 animals (Tr. 4219).

Ms. Colette has held an Animal Welfare Act exhibitor license for Wildlife Waystation in her name since the license was first issued in 1976. Ms. Colette has held various positions with Wildlife Waystation during its existence. (Tr. 4183-85.) Her personal residence is on property adjacent to Wildlife Waystation. Typically, visitors to Ms. Colette's residence must traverse portions of Wildlife Waystation's property. (Tr. 4205.) Wildlife Waystation is supported through "memberships, animal sponsor programs, donations, fund raising activities, bequests, donations." (Tr. 4207.)

Mr. Lorsch is a successful businessman and a philanthropist (Tr. 2164-80). Mr. Lorsch has been a contributor to Wildlife Waystation for a number of years and became more involved with Wildlife Waystation in an attempt to resolve governmental compliance issues (Tr. 2181-2202). Mr. Lorsch has never been an employee of Wildlife Waystation, but has served at various times as "best friend" and advocate.

While this Decision and Order as to Martine Colette and Robert H. Lorsch is confined to whether Ms. Colette and Mr. Lorsch committed violations, or are liable for violations, as alleged in the Second Amended Complaint, familiarity with events that preceded the inspections that are the subject of the Second Amended Complaint is helpful to understand the context of the instant proceeding. On October 31, 2002, Wildlife Waystation and Martine Colette agreed to the entry of a Consent Decision as to Wildlife Waystation and Martine Colette (CX 2) [hereinafter the October 31, 2002, Consent Decision] that resolved numerous allegations against Martine Colette and Wildlife

Waystation for violations of the Animal Welfare Act. Martine Colette and Wildlife Waystation admitted 299 violations of the Animal Welfare Act and the Regulations. The October 31, 2002, Consent Decision did not assess a civil penalty but suspended the Animal Welfare Act license issued under the name “Martine Colette d.b.a. Wildlife Waystation” for 30 days, with the suspension to continue until the Animal and Plant Health Inspection Service [hereinafter APHIS] determined that Martine Colette and Wildlife Waystation were in compliance with the Animal Welfare Act and the Regulations. The October 31, 2002, Consent Decision directed that Martine Colette and Wildlife Waystation “shall cease and desist from violating the Act and the Regulations and Standards, and shall not engage in activities for which a license under the Act is required.”

The inspections and other activities that are the subject of the instant proceeding all occurred during the period before Ms. Colette’s Animal Welfare Act license was reinstated. The suspension of Ms. Colette’s Animal Welfare Act license could not, by the terms of the October 31, 2002, Consent Decision, be lifted until APHIS made a determination that Ms. Colette and Wildlife Waystation were in compliance with the Animal Welfare Act and the Regulations. During the summer of 2003, Ms. Colette requested that APHIS conduct an inspection of Wildlife Waystation so that the suspension of Ms. Colette’s Animal Welfare Act license could be lifted. (Tr. 308-09.)

The inspections that are the subject of this Decision and Order as to Martine Colette and

Robert H. Lorsch were not “routine” unannounced inspections, rather, the inspections were scheduled at Ms. Colette’s request in order to have the suspension of her Animal Welfare Act license lifted (Tr. 3535-36).

Apparently, unbeknownst to Ms. Colette at the time she requested the inspection to determine if her Animal Welfare Act license should be reinstated, the Administrator had filed a Complaint alleging that, between the date of the October 31, 2002, Consent Decision and the date of the Complaint (August 15, 2003), Ms. Colette and Wildlife Waystation had exhibited animals without a valid Animal Welfare Act license. The Hearing Clerk served Ms. Colette and Wildlife Waystation with the Complaint on August 23, 2003.²

The initial inspection occurred approximately a week after Ms. Colette’s request and lasted from August 19-21, 2003. The APHIS inspection team, comprised of Jeanne Lorang, Dr. Kathleen Garland, Sylvia Taylor, and Dr. Alexandra Andricos, informed Wildlife Waystation personnel that Wildlife Waystation was not fully compliant with the Regulations (CX 3). The APHIS inspection team conducted an exit interview with Wildlife Waystation personnel, including Ms. Colette, at which time the alleged deficiencies were discussed (Tr. 201-02). Mr. Lorsch also participated in the exit interview, via telephone (CX 36; Tr. 3252-53).

²United States Postal Service Domestic Return Receipt for article number 7001 2510 0002 0111 4906 (Wildlife Waystation) and United States Postal Service Domestic Return Receipt for article number 7099 3400 0014 4581 6232 (Ms. Colette).

APHIS conducted a follow-up inspection on September 16, 2003. At this inspection, Ms. Lorang and Dr. Garland were generally accompanied by A.J. Durtschi, Wildlife Waystation's operations manager. At the close of the inspection, Mr. Durtschi insisted that the exit conference include, via telephone, Mr. Lorsch (CX 36; Tr. 250). When Ms. Lorang began to explain the problems she and Dr. Garland found, Mr. Lorsch became upset (Tr. 252-53). In particular, when Ms. Lorang discussed the condition of a chimpanzee named Sammy, a long-time resident of Wildlife Waystation with a long history of self-mutilation,³ Mr. Lorsch frequently interrupted, referred to the findings of the APHIS inspectors as "stupid," and made sarcastic comments.

The September 16, 2003, inspection report (CX 4) does not indicate that the inspectors had any problems with Mr. Lorsch. Ms. Lorang testified at the hearing that, although she never felt intimidated by Mr. Lorsch's conduct, she considered his actions abusive (Tr. 676, 681). Dr. Garland, who did not speak during the exit interview, testified she was most troubled by the condescending tone of Mr. Lorsch's comments (Tr. 3592-93). The APHIS inspectors each testified that they felt Mr. Lorsch was acting in an abusive manner, but they did not raise the issue during the exit interview with Mr. Lorsch or Mr. Durtschi (Tr. 680-81, 2627-28). Ms. Lorang testified that she and Dr. Garland, on returning to their car, mentioned to each other that they had thought of

³Sammy's condition previously had never been mentioned as a basis for a violation, and, in fact, had not even been mentioned at the August 19-21, 2003, inspection.

stopping the exit interview and leaving the premises. They testified that Mr. Durtschi apologized to them and that Mr. Lorsch telephoned Ms. Lorang the next day and apologized to her. (Tr. 251-53.) Although the APHIS inspectors testified they discussed Mr. Lorsch's conduct with APHIS management personnel, no formal memorandum was written concerning Mr. Lorsch's conduct until many months after the event allegedly took place. APHIS guidance required that alleged abuse be documented in a memorandum written within 24 hours of the abuse.⁴

The following day, September 17, 2003, counsel for the Administrator signed the First Amended Complaint, which was filed with the Hearing Clerk on September 22, 2003. In addition to the violations that were the subject of the Complaint, the First Amended Complaint added Mr. Lorsch as a respondent, and added allegations based on the inspections of August 19-21, 2003, and September 16, 2003.

Inspector Lorang reinspected the facility on October 14, 2003, accompanied by Dr. Alexandra Andricos. Mr. Durtschi represented Wildlife Waystation during this reinspection. In the inspection report presented to Mr. Durtschi, violations were again cited for environment enhancement and for lack of sufficient numbers of experienced employees, particularly with regard to the "special needs" of Sammy. These alleged violations were included in the Second Amended Complaint, filed March 15, 2004. A

⁴Research Facilities Inspection Guide (RLX 128); Exhibitor Inspection Guide (RLX 130).

reinspection on November 3, 2003, revealed no violations, and APHIS lifted the suspension of Ms. Colette's Animal Welfare Act license.

Discussion

The Chief ALJ's Decision is thorough and well-reasoned. The Chief ALJ found the various on-site and off-site activities cited by APHIS, including fund-raising, recruitment of volunteers, and invitations to prospective donors to visit Wildlife Waystation did not constitute "exhibiting" under the Animal Welfare Act and the Regulations; therefore, in the Chief ALJ's view, the Administrator failed to demonstrate by a preponderance of the evidence that Martine Colette and Robert H. Lorsch exhibited while Ms. Colette's Animal Welfare Act license was suspended pursuant to the October 31, 2002, Consent Decision. The Chief ALJ also found, although Mr. Lorsch was rude during the September 16, 2003, exit conference, Mr. Lorsch's conduct did not constitute "abuse" under the Animal Welfare Act and the Regulations. Finally, the Chief ALJ found the Administrator failed to demonstrate violations by Ms. Colette and Mr. Lorsch for noncompliance with the attending veterinarian regulations, for adequacy and appropriate documentation of environment enhancement, and for exposed food, control of insects, structural integrity, and the presence of hand-washing facilities.

I agree with most, but not all, of the Chief ALJ's holdings. The Administrator's appeal was limited and focused on whether Ms. Colette and Mr. Lorsch were "exhibitors." I only discuss the issues raised on appeal by the Administrator. I need not,

and do not, discuss items in the Chief ALJ’s decision that were not raised by the Administrator, as these issues have been waived.

The Administrator states “[a] person operating a ‘zoo’ is, by definition, an ‘exhibitor.’” (Appeal Pet. at 5.) To support this proposition, the Administrator cites 7 U.S.C. § 2132(h) and 9 C.F.R. § 1.1. As noted by the Administrator, the two definitions are “nearly identical.” (Appeal Pet. at 4.) The relevant part of the definition states:

§ 2132. Definitions

When used in this chapter—

....

(h) The term “exhibitor” means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not[.]

7 U.S.C. § 2132(h). Therefore, a zoo is by definition an exhibitor and must be licensed under the Animal Welfare Act.

Robert H. Lorsch

The Administrator’s position is that Mr. Lorsch “violated the Regulations by virtue of his actions both as an exhibitor himself and as agent of the other two respondents.” (Appeal Pet. at 28 (emphasis in the original).) The Administrator’s argument in support of this position is unpersuasive.

The Administrator’s primary argument is that “Mr. Lorsch is an exhibitor because he operated a zoo.” (Appeal Pet. at 28-29.) I interpret the Administrator’s meaning of

“operate” to be “manage,” “supervise,” “be in charge of” or some similar definition suggesting that Mr. Lorsch was a principal decision-maker relating to the day-to-day function of the organization. While there is no dispute that Mr. Lorsch actively participated in certain aspects of Wildlife Waystation, the Administrator failed to demonstrate that Mr. Lorsch “operated” Wildlife Waystation. The Administrator relies on a 12-item list of areas in which Mr. Lorsch participated at Wildlife Waystation (Appeal Pet. at 31-33) to demonstrate that Mr. Lorsch “was guiding the overall operations of the Wildlife Waystation.” (Appeal Pet. at 33.) This list includes:

- being the “best friend” of Wildlife Waystation,
- working as an unpaid representative of Wildlife Waystation in dealing with city and county officials,
- fund-raising for Wildlife Waystation,
- inviting potential Wildlife Waystation donors to events at Ms. Colette’s house,
- writing a column in the Wildlife Waystation newsletter,
- attending board of director meetings, even though he was not on the board, and making recommendations to the board regarding web functions, telephone service, and the hiring of an operations manager,
- leading efforts to resolve Wildlife Waystation’s regulatory problems, including attempts to get APHIS to reinstate Wildlife Waystation’s Animal Welfare Act license, and
- participating in two exit conferences with APHIS inspectors.

Neither the list nor other evidence in the record convinces me that Mr. Lorsch operated Wildlife Waystation. Therefore, the Administrator failed to demonstrate that Mr. Lorsch was an exhibitor because he “operated” a zoo. Moreover, none of these activities are prohibited by the Animal Welfare Act. Therefore, the Administrator failed to demonstrate that Mr. Lorsch violated the Animal Welfare Act by his own actions.

Furthermore, the Administrator relies on 7 U.S.C. § 2139 to impute the actions of an organization (Wildlife Waystation) to a person affiliated with that organization (Robert H. Lorsch). However, the Animal Welfare Act imputes the actions of an individual to an organization (licensee), not the other way around, as argued by the Administrator (Appeal Pet. at 28).

§ 2139. Principal-agent relationship established

When construing or enforcing the provisions of this chapter, the act, omission, or failure of any person acting for or employed by . . . an exhibitor or a person licensed as . . . an exhibitor pursuant to the second sentence of section 2133 of this title . . ., within the scope of his employment or office, shall be deemed the act, omission, or failure of such . . . exhibitor [or] licensee . . ., as well as of such person.

7 U.S.C. § 2139. This provision does not state that the actions of the organization are deemed the actions of an individual. Therefore, if any action by Wildlife Waystation demonstrates that Wildlife Waystation violated the Animal Welfare Act, that violation may not be imputed to Mr. Lorsch. Mr. Lorsch is responsible for the violation if he personally committed the act that violated the Animal Welfare Act or the Regulations.

Before I finish the discussion of Mr. Lorsch, I must discuss his participation in the September 16, 2003, inspection exit interview with the APHIS inspectors. The Administrator alleges that statements Mr. Lorsch made during his telephonic participation in the exit interview were abusive and in violation of section 2.4 of the Regulations, which provides, as follows:

§ 2.4 Non-interference with APHIS officials.

A licensee or applicant for an initial license shall not interfere with, threaten, abuse (including verbally abuse), or harass any APHIS official in the course of carrying out his or her duties.

9 C.F.R. § 2.4. Mr. Lorsch's interrupting all speakers during the exit interview was clearly impolite. However, I do not find the interruptions a violation of section 2.4 of the Regulations (9 C.F.R. § 2.4). One indication whether Mr. Lorsch's behavior during the exit interview was abuse is the reaction of the APHIS inspectors. Although the APHIS inspectors testified that they thought Mr. Lorsch was verbally abusive, they did not end the interview early and did not memorialize the alleged abuse until months after the interview, even though APHIS guidance provides a procedure for handling abuse during inspections. This procedure includes documentation of the abuse within 24 hours after the abuse takes place (RLX 130 at 51-53). If the APHIS inspectors felt abused, they should have followed the procedure in a timely fashion. While this lack of reaction by Ms. Lorang and Dr. Garland is not conclusive that no abuse took place, combine it with the testimony by Ms. Lorang that Mr. Lorsch was "nondiscriminatory" in who he

interrupted (Tr. 632-33) and the testimony by Dr. Garland that the negative adjectives were directed at the findings, not the inspectors (Tr. 3260), leads me to conclude that Mr. Lorsch's statements were not "abuse," as that term is used in section 2.4 of the Regulations (9 C.F.R. § 2.4).

Therefore, I hold that Mr. Lorsch did not violate the Animal Welfare Act or the Regulations, and I dismiss the Second Amended Complaint as it applies to Mr. Lorsch.

Martine Colette

The Administrator argues that the off-site fund-raising events that benefitted Wildlife Waystation were events at which Ms. Colette exhibited animals (Appeal Pet. at 15). The Administrator disagreed with the Chief ALJ's position stating "[f]ocusing on the respondents' ultimate purpose (money) does not alter the central fact that they (like many other exhibitors) were simply offering animals for viewing to members of the public with the expectation of a benefit. This is the quintessence of 'exhibiting,' and it is no different than any other exhibitor's animal displays." (Appeal Pet. at 16.) This argument would have merit, except that the person who brought the animals to the off-site fund-raising event was an exhibitor with its own valid Animal Welfare Act license and, therefore, was responsible for compliance with the Animal Welfare Act (Chief ALJ's Decision at 25).

The Administrator's argument that Ms. Colette should be found to have exhibited animals without an Animal Welfare Act license without regard to who owns the animals

is a strawman. While it is true that who owns the animals is immaterial to whether the animals were exhibited by Ms. Colette, the Administrator disregards the fact that exhibitors with valid Animal Welfare Act exhibitor licenses were responsible for the animals at these events. I hold that at any off-site exhibition of animals, if one or more Animal Welfare Act licensed exhibitors is responsible for the exhibition of the animals, the statutory license requirements for exhibiting are met.

Ms. Colette argues that bringing the llamas to the Safari for Life program on November 3, 2002, did not violate the Animal Welfare Act because the llamas were not “regulated” animals. The Animal Welfare Act defines the term “animal,” as follows:

§ 2132. Definitions

When used in this chapter—

....

(g) The term “animal” means any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warmblooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet; but such term excludes (1) birds, rats of the genus *Rattus*, and mice of the genus *Mus*, bred for use in research, (2) horses not used for research purposes, and (3) other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or livestock or poultry used or intended for use for improving animal nutrition, breeding, management, or production efficiency, or for improving the quality of food or fiber. With respect to a dog, the term means all dogs including those used for hunting, security, or breeding purposes.

7 U.S.C. § 2132(g). Ms. Colette does not explain her justification for claiming the llamas were not “regulated.” All creatures that meet the definition of “animal” are governed by

the Animal Welfare Act. Llamas are warmblooded; therefore, llamas fall within the definition of the term “animal” in the Animal Welfare Act. These particular llamas were transported to the Safari for Life event and exhibited to the attendees. This activity brings the llamas under the purview of the Animal Welfare Act. Ms. Colette admits she brought llamas to the Safari for Life (Martine Colette’s Response to Complainant’s Proposed Findings of Fact at 12). Therefore, Ms. Colette exhibited these llamas at the Safari for Life.

In order to demonstrate the *prima facie* case that Ms. Colette violated the Animal Welfare Act when she brought the llamas to the Safari for Life, the Administrator has the burden to present evidence:

1. that Ms. Colette did not possess a valid Animal Welfare Act license;
2. that the llamas were “animals,” as defined in the Animal Welfare Act; and
3. that the llamas were exhibited.

All parties acknowledge that Ms. Colette’s Animal Welfare Act license was suspended when the Safari for Life took place. The llamas meet the definition of the term “animal.” Finally, allowing the public to see the llamas at the Safari for Life is within the meaning of the term “exhibited.” The evidence presented by the Administrator meets the burden of proof allowing me to conclude the Administrator proved his *prima facie* case. However, proving the *prima facie* case only shifts the burden, allowing Ms. Colette to rebut the Administrator’s case. Ms. Colette contends the llamas were not “regulated”

animals without presenting any legal or factual support for her theory. Therefore, Ms. Colette failed to overcome the *prima facie* case.

Because on November 3, 2002, Ms. Colette did not hold a valid Animal Welfare Act license when she exhibited the llamas, which I find are “animals,” as defined under the Animal Welfare Act, I find Ms. Colette violated the Animal Welfare Act.

A similar analysis applies to determine if Ms. Colette violated the Animal Welfare Act when the “orientation tours” were conducted at Wildlife Waystation and when the press visited Wildlife Waystation on Chimp Independence Day. The Administrator has the burden to demonstrate a *prima facie* case for each of these allegations.

Regarding the volunteer recruitment orientation tours, the Administrator must show Ms. Colette did not have a valid Animal Welfare Act license, the animals were exhibited, and those to whom the animals were exhibited were “the public,” not individuals affiliated with Wildlife Waystation. The Administrator’s effort to prove a *prima facie* case that Ms. Colette violated the Animal Welfare Act by conducting the orientation tours fails because there is no evidence that animals were exhibited. I reviewed the testimony and affidavits discussing these tours. (*See, e.g.*, CX 13.) While the record contains ample evidence that the tours took place, and, without deciding, I will assume for the purposes of this argument that at least some of the individuals on the tours were members of the public without any connection to Wildlife Waystation, I find no evidence that any animals were “made available for viewing” by members of the public.

Without this evidence, the Administrator failed to make a *prima facie* case that Ms. Colette violated the Animal Welfare Act when volunteer recruitment orientation tours of Wildlife Waystation were conducted.

On July 2, 2003, “Chimp Independence Day” at Wildlife Waystation, Ms. Colette held a press conference to open the new chimpanzee housing facilities. Invited to the festivities were members of the press, as well as local and state officials. Members of the press are generally considered “the public” for Animal Welfare Act purposes. Therefore, if animals were exhibited on Chimp Independence Day, Ms. Colette violated the Animal Welfare Act because she did not have a valid Animal Welfare Act license. The evidence whether animals were exhibited during Chimp Independence Day is limited to the testimony of Jerry Brown, publicist for Wildlife Waystation, who testified, as follows:

[BY MS. CARROLL:]

Q. Okay. Did you attend an event around July 2, 2003 where the media was invited to the Waystation to view the new chimpanzee enclosures?

[BY MR. BROWN:]

A. Yes.

....

Q. Okay. And was the media present at that event?

A. Yes.

Q. And you attended?

A. Yes.

.....

Q. And were there animals there, too?

A. Well, there were the animals that call Wildlife Waystation home, yes.

Q. In the area where the gathering occurred?

A. The chimpanzee were in their enclosure always away from where we were, but don't believe we exhibited anything or the Waystation.

Q. You mean took it out of its cage?

A. Yes. It was a press conference basically to announce.

Q. Okay. Were the animals visible to the people who attended?

A. Yes.

Tr. 1497-99. This testimony is all the evidence that indicates that animals were exhibited on Chimp Independence Day. However, I find the evidence is sufficient for the Administrator to make a *prima facie* case that Ms. Colette violated the Animal Welfare Act by exhibiting⁵ animals without a license on Chimp Independence Day. Ms. Colette had the opportunity to rebut this evidence, yet failed to do so. Therefore, I find that

⁵Although the Animal Welfare Act and the Regulations do not define the term "exhibiting," I hold that the definition is sufficiently broad to encompass a situation in which members of the public are at a facility where captive animals could be expected to be present, such as a zoo, and animals are visible to the public. Conversely, if the facility invites the public to an event and animals are not available for viewing because of some positive action by the facility, such as moving the animals from the area where the public will be present or holding the event in an area of the facility without animals, then the facility did not "exhibit" animals under the Animal Welfare Act.

Ms. Colette violated the Animal Welfare Act by exhibiting animals without a license on Chimp Independence Day.

Sanctions

The Administrator seeks an order that Martine Colette cease and desist from violating the Animal Welfare Act and the Regulations. The Administrator further seeks to revoke Ms. Colette's Animal Welfare Act license. Finally, the Administrator seeks two civil penalties, one for \$15,780 for 58 violations of the Animal Welfare Act and the Regulations and the other for \$14,025 for failing to obey the cease and desist order in the October 31, 2002, Consent Decision. (Complainant's Proposed Finding of Fact; Proposed Conclusions of Law; Proposed Order; and Brief in Support Thereof as to Respondent Martine Colette at 16-17.)

USDA's sanction policy provides that the administrative law judges and the Judicial Officer must give appropriate weight to sanction recommendations of administrative officials, as follows:

[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.

In re S.S. Farms Linn County, Inc. (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991). 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.⁶ I find the Administrator's recommendation is based on many more violations than I conclude Ms. Colette committed; therefore, I do not rely on the Administrator's recommendation.

I find two violations of the Animal Welfare Act, each for exhibiting animals without an Animal Welfare Act license. Each violation also violates the October 31, 2002, Consent Decision. I agree with the Administrator that the issuance of a cease and desist order is appropriate, and I also agree that assessment of a civil penalty is appropriate. With respect to the monetary civil penalty, the Animal Welfare Act requires the Secretary of Agriculture to give due consideration to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.⁷

Based on the number of animals at Wildlife Waystation, I find Ms. Colette operates a large business. While Ms. Colette's violations of the Animal Welfare Act and the Regulations (exhibiting animals without a valid Animal Welfare Act license) are

⁶*In re Lorenza Pearson*, ___ Agric. Dec. ___, slip op. at 69 (July 13, 2009); *In re Amarillo Wildlife Refuge, Inc.*, ___ Agric. Dec. ___, slip op. at 16 (Jan. 6, 2009); *In re Alliance Airlines*, 64 Agric. Dec. 1595, 1608 (2005); *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364, 390 (2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 787 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re Excel Corp.*, 62 Agric. Dec. 196, 234 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (2002).

⁷See 7 U.S.C. § 2149(b).

serious, I only find two violations. Moreover, I do not find Ms. Colette's violations posed a threat to the health and well-being of the animals. As evidenced by the October 31, 2002, Consent Decision, Ms. Colette has a history of previous violations. Ms. Colette could be assessed a maximum civil penalty of \$5,500 for her two violations of the Animal Welfare Act and the Regulations.⁸ After examining all the relevant circumstances in the instant proceeding, in light of USDA's sanction policy, and taking into account the requirements of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)), I conclude a cease and desist order and assessment of a \$2,000 civil penalty are appropriate and necessary to ensure Ms. Colette'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 fulfill the remedial purposes of the Animal Welfare Act.

Findings of Fact

⁸The Animal Welfare Act provides that the Secretary of Agriculture may assess a civil penalty of not more than \$2,500 for each violation of the Animal Welfare Act or the Regulations (7 U.S.C. § 2149(b)). Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, effective September 2, 1997, adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (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 \$2,750 (7 C.F.R. § 3.91(b)(2)(v) (2005)). Subsequently, the Secretary of Agriculture adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations occurring after June 23, 2005, by increasing the maximum civil penalty from \$2,500 to \$3,750 (7 C.F.R. § 3.91(b)(2)(ii) (2006)). Ms. Colette's violations occurred in 2002 and 2003; therefore, the maximum civil penalty that may be assessed for each violation is \$2,750.

1. Martine Colette is an individual residing at Wildlife Waystation, Los Angeles, California. During the time period relevant to the instant proceeding, Ms. Colette operated a “zoo,” as that term is defined in the Regulations, known as Wildlife Waystation. Ms. Colette holds Animal Welfare Act license number 93-C-0295, issued to “Martine Colette d.b.a. Wildlife Waystation.”

2. On October 31, 2002, Administrative Law Judge Jill S. Clifton issued a Consent Decision in *In re Martine Colette*, AWA Docket No. 00-0013. In the October 31, 2002, Consent Decision, Ms. Colette and Wildlife Waystation admitted to the commission of 299 violations of the Animal Welfare Act and the Regulations. The October 31, 2002, Consent Decision suspended the Animal Welfare Act exhibitor license issued to Martine Colette d.b.a. Wildlife Waystation, until an APHIS inspection supported the lifting of the suspension.

3. Robert H. Lorsch is a businessman and philanthropist who has been a financial contributor to Wildlife Waystation. Mr. Lorsch has held various positions with Wildlife Waystation, but has never been involved in the day-to-day management of Wildlife Waystation.

4. Mr. Lorsch volunteered to act as a representative of, and an advocate for, Wildlife Waystation in its dealings with federal, state, and local governments. In this capacity, Mr. Lorsch attended numerous meetings, presented and negotiated various

positions to resolve the numerous pending issues, and acted as Wildlife Waystation's agent for those purposes.

5. Mr. Lorsch also took actions to increase donations to Wildlife Waystation. In particular, Mr. Lorsch invited potential donors to fund-raisers, both off-site and at Ms. Colette's home.

6. At several off-site fund-raisers, animals not owned by Wildlife Waystation were exhibited by other Animal Welfare Act licensees for the benefit of Wildlife Waystation. On at least one occasion, Ms. Colette brought llamas to a fund-raiser. The llamas were exhibited to the individuals in attendance at the event.

7. On numerous occasions, potential volunteers were invited to Wildlife Waystation and taken on orientation tours. After the tours, some volunteers withdrew their applications. I find no evidence that animals were exhibited on these orientation tours.

8. In early August 2003, Ms. Colette requested that APHIS conduct an inspection of Wildlife Waystation to determine whether the Animal Welfare Act license suspension should be lifted. On August 15, 2003, shortly after the inspection was requested, but before the inspection was conducted, the Administrator issued a Complaint against Ms. Colette and Wildlife Waystation charging that they had violated the Animal Welfare Act by exhibiting without an Animal Welfare Act license.

9. Even though Ms. Colette and Wildlife Waystation presumed the inspection was simply to determine whether APHIS would lift the Animal Welfare Act license suspension, APHIS inspectors were prepared to cite Ms. Colette and Wildlife Waystation for any violations they believed existed.

10. At the inspection conducted August 19-21, 2003, APHIS inspectors found Wildlife Waystation was not in compliance with the Animal Welfare Act and the Regulations. The August 15, 2003, Complaint had not been served on Ms. Colette and Wildlife Waystation at the time of this 3-day inspection. The inspectors discussed the alleged noncompliance areas in an exit conference on August 21, 2003. Mr. Lorsch attended the exit conference via telephone. The inspectors did not inform Wildlife Waystation, Ms. Colette, or Mr. Lorsch that the areas of noncompliance presented the possibility that a disciplinary action would be instituted against Wildlife Waystation and Ms. Colette.

11. APHIS conducted a follow-up inspection on September 16, 2003. At this inspection, APHIS inspectors found that a number of the alleged noncompliant areas discussed after the first inspection were still in noncompliance. The APHIS inspectors also cited a number of alleged noncompliances involving the condition of Sammy, a chimp that had been self-mutilating since before he was moved to Wildlife Waystation nearly a decade earlier.

12. At the September 16, 2003, exit conference, Mr. Lorsch, who was again participating by telephone, became angry and spoke disparagingly about many of the observations of the inspectors. The APHIS inspectors did not advise Mr. Lorsch that he was being abusive, and Inspector Lorang stated she did not feel intimidated. Following the exit conference, A.J. Durtschi, the manager of Wildlife Waystation who attended the exit conference in person, apologized for Mr. Lorsch's conduct. The following day, Mr. Lorsch telephoned Inspector Lorang and likewise apologized.

13. Less than a week after the September 16, 2003, exit conference, the First Amended Complaint was filed, alleging violations based upon the August and September 2003 inspections, and, for the first time, naming Mr. Lorsch as a respondent.

14. On October 14, 2003, APHIS conducted an additional follow-up inspection, and additional alleged violations were documented. These alleged violations were included in the Second Amended Complaint filed March 15, 2004.

15. On November 3, 2003, APHIS reinspected the facility and found no further violations. As a result of this inspection, the suspension of the Animal Welfare Act license issued to Martine Colette d.b.a. Wildlife Waystation, was lifted.

16. At the September 2003 inspection, APHIS inspectors observed that the chimp, Sammy, who had been a self-mutilator prior to the time he had come to Wildlife Waystation, exhibited a number of open wounds that were the result of self-mutilation. Sammy had never been exhibited nor was there any indication that Sammy would ever be

exhibited. Wildlife Waystation had undertaken significant efforts to rehabilitate Sammy. Shortly after the September 2003 inspection, Wildlife Waystation hired a consultant who worked with Sammy with dramatic positive results.

Conclusions of Law

1. On November 3, 2002, llamas were brought to the Safari for Life event. Llamas are “animals,” as that term is defined in the Animal Welfare Act. The act of transporting the animals to the event and showing the animals at the Safari for Life event is sufficient to bring the animals under the purview of the Animal Welfare Act. Such activity requires me to find that Ms. Colette exhibited the llamas at the Safari for Life event on November 3, 2002. Because Ms. Colette’s Animal Welfare Act license was suspended on that date, pursuant to the October 31, 2002, Consent Decision, Ms. Colette violated the Animal Welfare Act by exhibiting the llamas.

2. Because there is no credible evidence that animals were exhibited during the volunteer orientation tours conducted at Wildlife Waystation, these tours did not violate the Animal Welfare Act.

3. On July 2, 2003, “Chimp Independence Day” at Wildlife Waystation, a press conference was held to announce the completion of the new chimpanzee facilities. The only people invited were local officials and the press. For this purpose, the press is considered the “public” under the Animal Welfare Act. Because there was testimony that

animals were visible, Ms. Colette exhibited animals without an Animal Welfare Act license, in violation of the Animal Welfare Act.

4. During the September 16, 2003, telephone exit conference with, among others, Inspector Lorang and Dr. Garland, Robert H. Lorsch was impolite. However, Mr. Lorsch's conduct during the telephone call did not rise to the level which would constitute "abuse" under the Animal Welfare Act and the Regulations.

5. Issues that were not raised by the Administrator on appeal are waived. Any issues that were raised by the Administrator and not addressed in this Decision and Order as to Martine Colette and Robert H. Lorsch were considered and found to be without merit.

For the foregoing reasons, the following Order is issued.

ORDER

1. Martine Colette, her agents, employees, successors, and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations, and in particular, shall cease and desist from exhibiting animals without a valid Animal Welfare Act license. Paragraph 1 of this Order shall become effective 1 day after the Order is served on Ms. Colette.

2. Martine Colette is assessed a \$2,000 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:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Ms. Carroll within 60 days after service of this Order on Ms. Colette. Ms. Colette shall state on the certified check or money order that payment is in reference to AWA Docket No. 03-0034.

RIGHT TO JUDICIAL REVIEW

Martine Colette has the right to seek judicial review of the Order in this Decision and Order as to Martine Colette and Robert H. Lorsch in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341-2350. Ms. Colette must seek judicial review within 60 days after entry of the Order in this Decision and Order as to Martine Colette and Robert H. Lorsch.⁹ The date of entry of the Order in this Decision and Order as to Martine Colette and Robert H. Lorsch is August 21, 2009.

Done at Washington, DC

August 21, 2009

William G. Jenson
Judicial Officer

⁹7 U.S.C. § 2149(c).