

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,)
) **Order Denying Administrator's**
) **Petition to Reconsider**
Respondents)

PROCEDURAL HISTORY

On August 15, 2003, Peter Fernandez, 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 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.

Former Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ]¹ 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

¹The Chief ALJ retired from federal service effective January 2, 2010.

Ms. Colette did not exhibit animals during the period that the alleged violations occurred; (2) concluding Mr. Lorsch did not commit violations of the Animal Welfare Act or the Regulations; and (3) dismissing the case against Ms. Colette and Mr. Lorsch.

On October 27, 2008, the Administrator filed “Complainant’s Appeal of Initial Decision and Order” [hereinafter Appeal Petition]. On December 2, 2008, Mr. 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. On August 21, 2009, I issued a Decision and Order as to Martine Colette and Robert H. Lorsch in which: (1) I dismissed the case against Mr. Lorsch; (2) I found Ms. Colette violated the Animal Welfare Act and the Regulations; (3) I ordered Ms. Colette to cease and desist from violating the Animal Welfare Act and the Regulations; and (4) I assessed Ms. Colette a \$2,000 civil penalty.

On November 10, 2009, the Administrator filed “Complainant’s Petition for Reconsideration” [hereinafter the Administrator’s Petition to Reconsider]. On February 16, 2010, Ms. Colette filed “Respondent Martine Colette’s Reply to Complainant’s Petition for Reconsideration” [hereinafter Ms. Colette’s Reply to Administrator’s Petition to Reconsider]. On March 15, 2010, Mr. Lorsch filed “Opposition of Robert H. Lorsch to Complainant’s Petition for Reconsideration” [hereinafter Mr. Lorsch’s Reply to Administrator’s Petition to Reconsider]. On

March 17, 2010, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

I reviewed the Administrator's Petition to Reconsider, Ms. Colette's Reply to Administrator's Petition to Reconsider, and Mr. Lorsch's Reply to Administrator's Petition to Reconsider and re-examined the record in light of the issues raised in the Administrator's Petition to Reconsider. I considered all issues raised in the Administrator's Petition to Reconsider, but do not discuss those issues I found without merit. Based on my review, I deny the Administrator's Petition to Reconsider.

CONCLUSIONS BY THE JUDICIAL OFFICER

Discussion

Petitions to reconsider should be used sparingly. The purpose of a petition to reconsider is to seek correction of manifest errors of law or fact. Petitions to reconsider are not to be used as vehicles merely for registering disagreement with the Judicial Officer's decisions. A petition to reconsider is only granted, absent highly unusual circumstances, if the Judicial Officer has committed error or if there is an intervening change in the controlling law. Based upon my review of the record, in light of the issues raised in the Administrator's Petition to Reconsider, I find no error of fact or law necessitating modification of the August 21, 2009, Decision and Order as to Martine Colette and Robert H. Lorsch. Moreover, the Administrator does not assert an intervening change in controlling law, and I find no highly unusual circumstances

necessitating modification of the August 21, 2009, Decision and Order as to Martine Colette and Robert H. Lorsch. Therefore, I deny the Administrator’s Petition to Reconsider.

In the Petition to Reconsider, the Administrator discusses the meaning of the terms “exhibitor” and “exhibiting.” The term “exhibitor” is defined in the Animal Welfare Act, as follows:

§ 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). Neither the term “exhibit” nor the term “exhibiting” is defined in the Animal Welfare Act or the Regulations. For that definition I use the dictionary:

exhibit . . . **1:** to present to view: SHOW, DISPLAY: as . . . **d:** to show publicly: put on display in order to attract notice to what is interesting or instructive or for purposes of competition or demonstration <~ goods in a store> <~ a painting> : show off <proudly ~ed a fine buck he had shot>

Webster’s Third New International Dictionary 796 (1971).

In one of the alleged violations in the Second Amended Complaint, the Administrator charged Ms. Colette with operating

as an exhibitor, as that term is defined in the Act (7 U.S.C. § 2132(h)) and the Regulations (9 C.F.R. § 1.1), and specifically [Ms. Colette] operated a zoo, as that term is defined in the Regulations (9 C.F.R. § 1.1), at 14831 Little Tujunga Canyon Road, Los Angeles, California, held fund-raising and other events at that location at which she displayed animals to the public, and made animals available for viewing at off-site events, while her license under the Act (number 93-C-0295) was suspended, in willful violation of sections 2.10(c) and 2.100(a) of the Regulations. 9 C.F.R. §§ 2.10(c), 2.100(a).

Second Amended Complaint at ¶ 30. This allegation raises two distinct violations:

(1) displaying animals at the Little Tujunga Canyon Road location while Ms. Colette's Animal Welfare Act license was suspended; and (2) displaying animals at other locations while Ms. Colette's Animal Welfare Act license was suspended.

The Regulation cited in the Second Amended Complaint requires animals to be exhibited in order to conclude a violation has occurred:

§ 2.10 Licensees whose licenses have been suspended or revoked.

....

(c) Any person whose license has been suspended or revoked shall not buy, sell, transport, *exhibit*, or deliver for transportation, any animal during the period of suspension or revocation.

9 C.F.R. § 2.10(c) (emphasis added). Both the Second Amended Complaint and 9 C.F.R. § 2.10(c) require the display of animals to the public in order to conclude a violation of 9 C.F.R. § 2.10(c) has occurred. Except in the two instances in which I found violations, the Administrator failed to present evidence demonstrating that any animals were

exhibited or could be viewed by the public. Without such evidence, I cannot find a violation of 9 C.F.R. § 2.10(c).²

The Administrator appears to confuse the definition of “exhibiting” with the statutory term “exhibitor.” There is a distinction; they are not one and the same. A zoo is, by definition, an exhibitor (9 C.F.R. § 1.1). A zoo is subject to the Animal Welfare Act and the Regulations 24 hours a day, 365 days a year. However, an exhibitor may not be exhibiting animals 24 hours a day, 365 days a year. A zoo must comply with the Regulations. However, that same zoo cannot be found in violation of 9 C.F.R. § 2.10(c) if it does not buy, sell, transport, deliver for transportation, or exhibit animals. The Administrator demonstrated that Ms. Colette exhibited animals on two occasions, November 3, 2002 – the Safari for Life event and July 2, 2003 – Chimp Independence day. Ms. Colette’s Animal Welfare Act license was suspended on both days. Therefore, I found Ms. Colette violated the Animal Welfare Act and 9 C.F.R. § 2.10(c) on those two occasions. Because the Administrator failed to show that Ms. Colette, or anybody working for her, exhibited animals on any other occasion during the suspension of Ms. Colette’s Animal Welfare Act license, the Administrator failed to meet the burden of proof necessary to find a violation of 9 C.F.R. § 2.10(c) on any other occasion.

²The Administrator did present some evidence that some visitors did see or could have seen animals. (*See, e.g.*, RLX 81 at ¶ 39.) However, the Administrator failed to connect a display of an animal, if any took place, to a specific violation alleged in the Second Amended Complaint. Absent such connection, I cannot conclude that violations of 9 C.F.R. § 2.10(c) took place on the dates alleged in the Second Amended Complaint.

The Administrator contends I erroneously failed to find that Ms. Colette violated 9 C.F.R. § 2.4 (Administrator's Pet. to Reconsider at 25).

§ 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. The Administrator correctly points out that Ms. Colette, as the Animal Welfare Act licensee, is responsible for the actions of Mr. Lorsch. (7 U.S.C. § 2139.) Therefore, if Mr. Lorsch's actions were sufficient to violate 9 C.F.R. § 2.4, Ms. Colette would also have violated 9 C.F.R. § 2.4. I, again, read the transcripts discussing the exit interview on September 16, 2003 (Tr. 250-63, 671-94, 3585-3608), and the statement from the investigator (CX 36). I do not find Mr. Lorsch violated 9 C.F.R. § 2.4; therefore, I do not find Ms. Colette violated 9 C.F.R. § 2.4.

The Administrator contends I disregarded the Chief ALJ's "Contingent Findings." The decision of the Judicial Officer is the final decision of the Secretary of Agriculture. With all due respect to the Chief ALJ, his decision does not carry forward once it is appealed. His "contingent findings" are nothing more than a suggestion to the reviewing authority regarding what he might hold if the proceeding were to be remanded. I reviewed the Chief ALJ's position when the Administrator appealed and issued a Decision and Order as to Martine Colette and Robert H. Lorsch. The Administrator has presented me with nothing to change my view.

Conclusion

The Administrator's Petition to Reconsider is denied. Therefore the Order issued in the Decision and Order as to Martine Colette and Robert H. Lorsch is not changed. For clarity, I re-state that Order.

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 Order Denying Administrator's Petition to Reconsider 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 Order Denying Administrator's Petition to Reconsider.³ The date of entry of the Order in this Order Denying Administrator's Petition to Reconsider is July 9, 2010.

Done at Washington, DC

July 9, 2010

William G. Jenson
Judicial Officer

³7 U.S.C. § 2149(c).