

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	AWA Docket No. 03-0023
)	
John F. Cuneo, Jr., an individual;)	
The Hawthorn Corporation,)	
an Illinois corporation; Thomas M.)	
Thompson, an individual; James G.)	
Zajicek, an individual; John N.)	
Caudill, III, an individual; John N.)	
Caudill, Jr., an individual;)	
Walker Brother's Circus, Inc.,)	
a Florida corporation; and David A.)	
Creech, an individual,)	
)	Decision and Order as to
Respondents)	James G. Zajicek

PROCEDURAL HISTORY

The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on April 11, 2003. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133 (2002)) [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) [hereinafter the Rules of Practice]. On September 22, 2003, Complainant filed an Amended Complaint.

Complainant alleges: (1) on or about June 6, 2001, through on or about July 6, 2001, James G. Zajicek [hereinafter Respondent] willfully violated section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (2002)) by operating as an exhibitor without an Animal Welfare Act license; (2) on June 26, 2001, Respondent willfully violated section 2.131(a)(1) of the Regulations (9 C.F.R. § 2.131(a)(1) (2002)) by failing to handle Ronnie, an Asian elephant, as carefully as possible in a manner that did not cause trauma, physical harm, and unnecessary discomfort to the animal; (3) on June 26, 2001, Respondent willfully violated section 2.131(a)(2)(i) of the Regulations (9 C.F.R. § 2.131(a)(2)(i) (2002)) by using physical abuse to train, work, and handle Ronnie, an Asian elephant; (4) on June 26, 2001, Respondent willfully violated section 2.131(b)(2) of the Regulations (9 C.F.R. § 2.131(b)(2) (2002)) by failing to provide Joy, an African elephant, a rest period between performances equal to the time of one performance; and (5) on June 26, 2001, Respondent willfully violated section 2.131(c)(1) of the Regulations (9 C.F.R. § 2.131(c)(1) (2002)) by exhibiting Joy, an African elephant, under conditions inconsistent with good health and well-being (Amended Compl. Alleged Violations ¶¶ 7,

9-16).¹ On January 20, 2004, Respondent filed an answer denying the material allegations of the Amended Complaint.

On March 8 through 11, 2004, March 25, 2004, and October 28, 2004, the Chief ALJ conducted a hearing in Washington, DC. Colleen A. Carroll and Bernadette R. Juarez represented Complainant. Vincent J. Colatriano and Derek L. Shaffer, Cooper & Kirk, PLLC, Washington, DC, represented Respondent.

On August 17, 2005, after Complainant and Respondent filed post-hearing briefs, the Chief ALJ issued a Decision as to James G. Zajicek [hereinafter Initial Decision] finding Complainant failed to prove Respondent violated the Regulations as alleged in the Amended Complaint and dismissing the Amended Complaint as it relates to Respondent (Initial Decision at 1, 36).

¹Complainant also alleged that John F. Cuneo, Jr.; The Hawthorn Corporation; Thomas M. Thompson; John N. Caudill, III; John N. Caudill, Jr.; Walker Brother's Circus, Inc.; and David A. Creech violated the Regulations (Amended Compl. Alleged Violations ¶¶ 1-6, 8-61). Complainant and John F. Cuneo, Jr.; The Hawthorn Corporation; Thomas M. Thompson; John N. Caudill, III; John N. Caudill, Jr.; and Walker Brother's Circus, Inc., agreed to consent decisions. Administrative Law Judge Jill S. Clifton entered the consent decision as to Thomas M. Thompson on May 15, 2003. *In re John F. Cuneo, Jr.* (Consent Decision as to Thomas M. Thompson), 62 Agric. Dec. 194 (2003). Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] entered the consent decisions as to John F. Cuneo, Jr.; The Hawthorn Corporation; John N. Caudill, III; John N. Caudill, Jr.; and Walker Brother's Circus, Inc., in March 2004. *In re John F. Cuneo, Jr.* (Consent Decision as to John F. Cuneo, Jr., and The Hawthorn Corporation), 63 Agric. Dec. 314 (2004); *In re John F. Cuneo, Jr.* (Consent Decision as to John N. Caudill, III, John N. Caudill, Jr., and Walker Brother's Circus, Inc.), 63 Agric. Dec. 314 (2004). The record reveals the Hearing Clerk has not served David A. Creech with the Amended Complaint.

On October 28, 2005, Complainant filed “Complainant’s Appeal Petition.” On December 22, 2005, Respondent filed “Response of Respondent James G. Zajicek to Complainant’s Appeal Petition.” On December 30, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. Based upon a careful review of the record, I dismiss the Amended Complaint as it relates to Respondent.

DECISION

Complainant appeals the Chief ALJ’s dismissal of the allegations that Respondent violated section 2.131(a)(1) and (a)(2)(i) of the Regulations (9 C.F.R. § 2.131(a)(1), (a)(2)(i) (2002)) (Amended Compl. Alleged Violations ¶¶ 9-14).² Complainant’s basis for these six alleged violations of section 2.131(a)(1) and (a)(2)(i) of the Regulations (9 C.F.R. § 2.131(a)(1), (a)(2)(i) (2002)) is Respondent’s purported striking an elephant during a performance on June 26, 2001, at Marne, Michigan, resulting in a “mark . . . about one half to three quarters of an inch long” on the trunk of the elephant (Complainant’s Exhibit 15).

²Section 2.131(a)(1) and (a)(2)(i) of the Regulations provides, as follows:

§ 2.131 Handling of animals.

(a)(1) Handling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.

(2)(i) Physical abuse shall not be used to train, work, or otherwise handle animals.

Section 2.131(a)(2)(i) of the Regulations (9 C.F.R. § 2.131(a)(2)(i) (2002)) provides physical abuse shall not be used to train, work, or otherwise handle animals. Complainant alleges Respondent's striking an elephant during the June 26, 2001, performance constituted the use of physical abuse to train (Amended Compl. Alleged Violations ¶ 12), work (Amended Compl. Alleged Violations ¶ 13), and otherwise handle (Amended Compl. Alleged Violations ¶ 14) the elephant. Based solely upon Complainant's theory of the case, I find Respondent's purported striking an elephant during the June 26, 2001, performance relates only to Respondent's working the elephant and does not relate to Respondent's training or otherwise handling the elephant. Therefore, I dismiss paragraphs 12 and 14 of the Alleged Violations in the Amended Complaint as those paragraphs relate to Respondent.

As for the four other alleged violations (Amended Compl. Alleged Violations ¶¶ 9-11, 13), Complainant did introduce evidence to support his contention that Respondent committed the violations. However, after weighing all the evidence, I agree with the Chief ALJ's conclusion that Complainant failed to prove by a preponderance of the evidence³ that Respondent violated the Regulations as alleged in paragraphs 9 through

³The proponent of an order has the burden of proof in proceedings conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Animal Welfare Act is preponderance of the evidence. *In re The International Siberian Tiger Foundation* (Decision as to The International Siberian Tiger Foundation, (continued...))

11 and 13 of the Alleged Violations in the Amended Complaint. Since the case turns on the particular testimony and exhibits in this proceeding, no useful purpose would be served by analyzing the evidence in detail. I note, however, that of the three United States Department of Agriculture employees who observed the performance in

³(...continued)

Diana Cziraky, The Siberian Tiger Foundation, and Tiger Lady), 61 Agric. Dec. 53, 79-80 n.3 (2002); *In re Reginald Dwight Parr*, 59 Agric. Dec. 629, 643-44 n.8 (2000) (Order Denying Respondent's Pet. for Recons.); *In re James E. Stephens*, 58 Agric. Dec. 149, 151 (1999); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1107-08 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1052 (1998); *In re Richard Lawson*, 57 Agric. Dec. 980, 1015 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 272 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 223 n.4 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 72 n.3 (1998), *aff'd*, 189 F.3d 473 (9th Cir. 1999) (Table) (not to be cited as precedent under 9th Circuit Rule 36-3); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1455-56 n.7 (1997), *aff'd*, 173 F.3d 422 (Table) (3d Cir. 1998), printed in 57 Agric. Dec. 869 (1998); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 461 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 169 n.4 (1997), *aff'd*, 172 F.3d 51 (Table), 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), printed in 58 Agric. Dec. 85 (1999); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 109 n.3 (1996); *In re Otto Berosini*, 54 Agric. Dec. 886, 912 (1995); *In re Micheal McCall*, 52 Agric. Dec. 986, 1010 (1993); *In re Ronnie Faircloth*, 52 Agric. Dec. 171, 175 (1993), *appeal dismissed*, 16 F.3d 409, 1994 WL 32793 (4th Cir. 1994), printed in 53 Agric. Dec. 78 (1994); *In re Craig Lesser*, 52 Agric. Dec. 155, 166 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066-67 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Terry Lee Harrison*, 51 Agric. Dec. 234, 238 (1992); *In re Gus White, III*, 49 Agric. Dec. 123, 153 (1990); *In re E. Lee Cox*, 49 Agric. Dec. 115, 121 (1990), *aff'd*, 925 F.2d 1102 (8th Cir.), reprinted in 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 860 (1991); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1283-84 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 553 (1988); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135, 146-47 (1986); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840, 1848 n.2 (1985), *appeal dismissed*, 786 F.2d 1168 (8th Cir.) (Table), *cert. denied*, 476 U.S. 1108 (1986).

which Respondent is alleged to have violated the Regulations, Dr. Denise M. Sofranko, Thomas P. Rippey, and Joseph Kovach, only Dr. Sofranko observed the alleged violations. Thomas Rippey testified he did not see Respondent do anything that could have possibly harmed the elephants participating in the performance or that could have been a possible violation of the Animal Welfare Act. Complainant failed to call Joseph Kovach as witness; however, Complainant did introduce a United States Department of Agriculture inspection report in which Joseph Kovach states he found no violations of the Animal Welfare Act or the Regulations during his June 26, 2001, inspection. (Transcript 76-79, 125-26, 204; Complainant's Exhibit 109 at 2.)

Complainant raises a number of issues relating to the Chief ALJ's discussion of the factors he relied upon to reach his conclusion that Complainant failed to prove Respondent violated the Regulations as alleged in the Amended Complaint (Complainant's Appeal Pet.). I do not adopt the Chief ALJ's discussion. Therefore, I find the issues raised by Complainant relating to the Chief ALJ's discussion, moot.

For the foregoing reasons, the following Order should be issued.

ORDER

Complainant failed to prove by a preponderance of the evidence that Respondent violated section 2.131(a)(1) and (a)(2)(i) of the Regulations (9 C.F.R. § 2.131(a)(1), (a)(2)(i) (2002)), as alleged in the Amended Complaint. Accordingly, the Amended Complaint, as it relates to Respondent, is dismissed.

Done at Washington, DC

May 2, 2006

William G. Jenson
Judicial Officer