

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)
) AWA Docket No. 04-0014
)
Eric John Drogosch, an individual,)
d/b/a Animal Adventures America,)
)
Respondent) **Decision and Order**

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a “Complaint” on March 15, 2004. Complainant 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 Standards]; 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].

Complainant alleges Eric John Drogosch, an individual, d/b/a Animal Adventures America [hereinafter Respondent], willfully violated the Regulations and Standards (Compl. ¶¶ 7-20).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on March 25, 2004.¹ Respondent failed to file an answer to the Complaint within 20 days after service as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). The Hearing Clerk sent Respondent a letter dated April 20, 2004, informing Respondent of his failure to file a timely answer to the Complaint.

On April 30, 2004, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a “Motion for Adoption of Proposed Decision and Order” [hereinafter Motion for Default Decision] and a proposed “Decision and Order by Reason of Admission of Facts” [hereinafter Proposed Default Decision]. On May 6, 2004, the Hearing Clerk served Respondent with Complainant’s Motion for Default Decision and Complainant’s Proposed Default Decision.² On May 27, 2004, Respondent

¹United States Postal Service Domestic Return Receipt for Article Number 7003 0500 0000 1056 0236.

²United States Postal Service Domestic Return Receipt for Article Number 7003 0500 0000 1056 0489.

filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.³

On July 28, 2004, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Victor W. Palmer [hereinafter the ALJ] issued a "Decision and Order by Reason of Admission of Facts" [hereinafter Initial Decision and Order]: (1) concluding Respondent willfully violated the Regulations and Standards as alleged in the Complaint; (2) directing Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; and (3) revoking Respondent's Animal Welfare Act license (Initial Decision and Order at 6-10).

On October 8, 2004, Respondent appealed to, and requested oral argument before, the Judicial Officer. On October 19, 2004, Complainant filed "Complainant's Response to Respondent's Petition for Appeal." On October 21, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Respondent's request for oral argument before the Judicial Officer, which, pursuant to section 1.145(d) of the Rules of Practice (7 C.F.R. § 1.145(d)), the Judicial Officer may grant, refuse, or limit, is refused, because Complainant and Respondent have thoroughly addressed the issues and the issues are not complex. Thus, oral argument would appear to serve no useful purpose.

³Letter from Eric Drogosch to the Secretary, United States Department Agriculture, dated May 21, 2004.

Based upon a careful review of the record, I agree with the ALJ's Initial Decision and Order. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt, with minor substantive changes, the ALJ's Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the ALJ's conclusions of law, as restated.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

.....

CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING OF CERTAIN ANIMALS

§ 2131. Congressional statement of policy

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

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

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in

using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

§ 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[.]

§ 2146. Administration and enforcement by Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, 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 regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale. The Secretary shall inspect each research facility at least once each year and, in the case of deficiencies or deviations from the standards promulgated under this chapter, shall conduct such follow-up inspections as may be necessary until all deficiencies or deviations from such standards are corrected. The Secretary shall promulgate such rules and regulations as he deems necessary to permit inspectors to confiscate or destroy in a humane manner any animal found to be suffering as a result of a failure to comply with any provision of this chapter or any regulation or standard issued thereunder if (1) such animal is held by a dealer, (2) such animal is held by an exhibitor, (3) such animal is held by a research facility and is no longer required by such research facility to carry out the research, test, or experiment for which such animal has been utilized, (4) such animal is held by an operator of an auction sale, or (5) such animal is held by an intermediate handler or a carrier.

§ 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.

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than \$2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. . . .

(c) Appeal of final order by aggrieved person; limitations; exclusive jurisdiction of United States Courts of Appeals

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, aggrieved by a final order of the Secretary issued pursuant to this section may, within

60 days after entry of such an order, seek review of such order in the appropriate United States Court of Appeals in accordance with the provisions of sections 2341, 2343 through 2350 of title 28, and such court shall have exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of the Secretary's order.

§ 2151. Rules and regulations

The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.

7 U.S.C. §§ 2131, 2132(h), 2146(a), 2149(a)-(c), 2151.

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE, DEPARTMENT OF AGRICULTURE

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

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

.....

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. This term includes carnivals, circuses, animal acts, zoos, and educational exhibits, exhibiting such animals whether operated for profit or not.

PART 2—REGULATIONS

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SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

§ 2.40 Attending veterinarian and adequate veterinary care (dealers and exhibitors).

(a) Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate veterinary care to its animals in compliance with this section.

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor[.]

.....

(b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:

(1) The availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of this subchapter[.]

SUBPART G—RECORDS

§ 2.75 Records: Dealers and exhibitors.

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(b)(1) Every dealer other than operators of auction sales and brokers to whom animals are consigned, and exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning animals other than dogs and cats, purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control, or which is transported, sold, euthanized, or otherwise disposed of by that dealer or exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.

(i) The name and address of the person from whom the animals were purchased or otherwise acquired;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom an animal was sold or given;

(v) The date of purchase, acquisition, sale, or disposal of the animal(s);

(vi) The species of the animal(s); and

(vii) The number of animals in the shipment.

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

(a) Each dealer, exhibitor, operator of an auction sale, and intermediate handler shall comply in all respects with the regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals.

SUBPART I—MISCELLANEOUS

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§ 2.126 Access and inspection of records and property.

(a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:

(1) To enter its place of business;

(2) To examine records required to be kept by the Act and the regulations in this part;

(3) To make copies of the records;

(4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and

(5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.

§ 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.

.....

(b)(1) During public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of animals and the public.

.....

(c)(1) Animals shall be exhibited only for periods of time and under conditions consistent with their good health and well-being.

PART 3—STANDARDS

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SUBPART F—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF WARBLOODED ANIMALS OTHER THAN DOGS, CATS, RABBITS, HAMSTERS, GUINEA PIGS, NONHUMAN PRIMATES, AND MARINE MAMMALS

FACILITIES AND OPERATING STANDARDS

§ 3.125 Facilities, general.

(a) *Structural strength.* The facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.

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§ 3.127 Facilities, outdoor.

.....

(b) *Shelter from inclement weather.* Natural or artificial shelter appropriate to the local climatic conditions for the species concerned shall

be provided for all animals kept outdoors to afford them protection and to prevent discomfort to such animals. Individual animals shall be acclimated before they are exposed to the extremes of the individual climate.

(c) *Drainage.* A suitable method shall be provided to rapidly eliminate excess water. The method of drainage shall comply with applicable Federal, State, and local laws and regulations relating to pollution control or the protection of the environment.

(d) *Perimeter fence.* On or after May 17, 2000, all outdoor housing facilities (*i.e.*, facilities not entirely indoors) must be enclosed by a perimeter fence that is of sufficient height to keep animals and unauthorized persons out. Fences less than 8 feet high for potentially dangerous animals, such as, but not limited to, large felines (*e.g.*, lions, tigers, leopards, cougars, etc.), bears, wolves, rhinoceros, and elephants, or less than 6 feet high for other animals must be approved in writing by the Administrator. The fence must be constructed so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it or under it and having contact with the animals in the facility, and so that it can function as a secondary containment system for the animals in the facility. It must be of sufficient distance from the outside of the primary enclosure to prevent physical contact between animals inside the enclosure and animals or persons outside the perimeter fence. Such fences less than 3 feet in distance from the primary enclosure must be approved in writing by the Administrator. A perimeter fence is not required:

(1) Where the outside walls of the primary enclosure are made of sturdy, durable material, which may include certain types of concrete, wood, plastic, metal, or glass, and are high enough and constructed in a manner that restricts entry by animals and unauthorized persons and the Administrator gives written approval; or

(2) Where the outdoor housing facility is protected by an effective natural barrier that restricts the animals to the facility and restricts entry by animals and unauthorized persons and the Administrator gives written approval; or

(3) Where appropriate alternative security measures are employed and the Administrator gives written approval; or

(4) For traveling facilities where appropriate alternative security measures are employed; or

(5) Where the outdoor housing facility houses only farm animals, such as, but not limited to, cows, sheep, goats, pigs, horses (for regulated purposes), or donkeys, and the facility has in place effective and customary containment and security measures.

ANIMAL HEALTH AND HUSBANDRY STANDARDS

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§ 3.132 Employees.

A sufficient number of adequately trained employees shall be utilized to maintain the professionally acceptable level of husbandry practices set forth in this subpart. Such practices shall be under a supervisor who has a background in animal care.

9 C.F.R. §§ 1.1; 2.40(a)(1), (b)(1), .75(b)(1), .100(a), .126(a), .131(a)(1), (b)(1), (c)(1); 3.125(a), .127(b)-(d), .132.

**ADMINISTRATIVE LAW JUDGE'S
INITIAL DECISION AND ORDER
(AS RESTATED)**

Statement of Case

Respondent failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the prescribed time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) and the failure to deny or otherwise respond to an allegation in the complaint shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer constitutes a waiver of hearing. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Eric John Drogosch is an individual, doing business as Animal Adventures America, whose business mailing address is 8199 CR 310, Terrell, Texas 75160.

2. At all times material to this proceeding, Respondent was an “exhibitor” as that term is defined in the Animal Welfare Act and the Regulations. Between November 2001 and November 9, 2003, Respondent held Animal Welfare Act license number 74-C-0536, which Animal Welfare Act license was cancelled and had not been reinstated as of the issuance of the Complaint.

3. Respondent has a small business, with approximately 10 exotic animals, including tigers, leopards, and lions. The gravity of the violations alleged in the Complaint is great. These violations include repeated instances in which Respondent: (a) failed to allow inspectors access to his animals, premises, and records; (b) failed to provide minimally adequate housing to animals; and (c) failed to handle tigers carefully and in compliance with the Regulations and Standards (which failure resulted in injuries to a child). Respondent has continually failed to comply with the Regulations and Standards, after having been repeatedly advised of deficiencies. Respondent was previously cited in June 2001 for exhibiting animals without a valid Animal Welfare Act license.

4. On September 30, 2003, Respondent failed to employ a full-time attending veterinarian or a part-time attending veterinarian under formal arrangements that include a written program of veterinary care.

5. On September 30, 2003, Respondent failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate facilities, including adequate enclosures and a secure perimeter fence.

6. On September 30, 2003, Respondent failed to make, keep, and maintain records that fully and correctly disclose information concerning animals in Respondent's possession or under Respondent's control or disposed of by Respondent.

7. On February 2, 2002, Respondent failed to allow Animal and Plant Health Inspection Service officials, during business hours, to enter his place of business, to examine records, to make copies, to inspect and photograph animals, and to document conditions and areas of noncompliance.

8. On August 15, 2002, Respondent failed to allow Animal and Plant Health Inspection Service officials, during business hours, to enter his place of business, to examine records, to make copies, to inspect and photograph animals, and to document conditions and areas of noncompliance.

9. On August 16, 2002, Respondent failed to allow Animal and Plant Health Inspection Service officials, during business hours, to enter his place of business, to examine records, to make copies, to inspect and photograph animals, and to document conditions and areas of noncompliance.

10. On August 28, 2002, Respondent failed to allow Animal and Plant Health Inspection Service officials, during business hours, to enter his place of business, to examine records, to make copies, to inspect and photograph animals, and to document conditions and areas of noncompliance.

11. On June 8, 2002, Respondent failed to handle animals as expeditiously and carefully as possible in a manner that would not cause trauma, unnecessary discomfort, behavioral stress, or physical harm.

12. On June 8, 2002, Respondent failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, Respondent exhibited a tiger to four children without any barrier or distance.

13. On June 8, 2002, Respondent failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, Respondent exhibited a tiger to a child without any barrier or distance.

14. On June 8, 2002, Respondent exhibited animals under conditions that were inconsistent with the animals' well-being. Specifically, Respondent exhibited a tiger cub to the public outside of any enclosures and allowed the public to excessively handle the young animal.

15. Respondent failed to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals (9 C.F.R. §§ 3.125-.142), as follows:

a. On September 30, 2003, Respondent failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it. Specifically, Respondent failed to construct a perimeter fence around the enclosure.

b. On August 28, 2002, Respondent failed to maintain housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, Respondent failed to repair damaged metal siding in the lion enclosure.

c. On August 30, 2002, Respondent failed to maintain housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, Respondent failed to repair damaged metal siding in the lion enclosure.

d. On August 28 and August 30, 2002, Respondent failed to provide four adult tigers housed outdoors with appropriate natural or artificial shelter.

e. On August 28 and August 30, 2002, Respondent failed to have a sufficient number of adequately trained employees to carry out the level of husbandry practices and care required by the Regulations and Standards.

f. On February 12, 2002, Respondent failed to maintain housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, Respondent failed to repair and/or replace the siding and roof of the tiger enclosure so that it contained the four animals securely and safely.

g. On February 12, 2002, Respondent failed to maintain housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, Respondent failed to repair and/or replace the door and bottom of the lion enclosure.

h. On February 12, 2002, Respondent failed to provide a suitable method to rapidly eliminate excess water. Specifically, Respondent failed to eliminate standing water in the tiger enclosure.

Conclusions of Law

1. On September 30, 2003, Respondent failed to employ a full-time attending veterinarian or a part-time attending veterinarian under formal arrangements that include a written program of veterinary care, in willful violation of section 2.40(a)(1) of the Regulations and Standards (9 C.F.R. § 2.40(a)(1)).

2. On September 30, 2003, Respondent failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate facilities, including adequate enclosures and a secure perimeter fence, in willful violation of section 2.40(b)(1) of the Regulations and Standards (9 C.F.R. § 2.40(b)(1)).

3. On September 30, 2003, Respondent failed to make, keep, and maintain records that fully and correctly disclose information concerning animals in Respondent's possession or under Respondent's control or disposed of by Respondent, in willful violation of section 2.75(b)(1) of the Regulations and Standards (9 C.F.R. § 2.75(b)(1)).

4. On February 2, 2002, Respondent failed to allow Animal and Plant Health Inspection Service officials, during business hours, to enter his place of business, to examine records, to make copies, to inspect and photograph animals, and to document conditions and areas of noncompliance, in willful violation of section 2.126(a) of the Regulations and Standards (9 C.F.R. § 2.126(a)).

5. On August 15, 2002, Respondent failed to allow Animal and Plant Health Inspection Service officials, during business hours, to enter his place of business, to examine records, to make copies, to inspect and photograph animals, and to document conditions and areas of noncompliance, in willful violation of section 2.126(a) of the Regulations and Standards (9 C.F.R. § 2.126(a)).

6. On August 16, 2002, Respondent failed to allow Animal and Plant Health Inspection Service officials, during business hours, to enter his place of business, to examine records, to make copies, to inspect and photograph animals, and to document conditions and areas of noncompliance, in willful violation of section 2.126(a) of the Regulations and Standards (9 C.F.R. § 2.126(a)).

7. On August 28, 2002, Respondent failed to allow Animal and Plant Health Inspection Service officials, during business hours, to enter his place of business, to

examine records, to make copies, to inspect and photograph animals, and to document conditions and areas of noncompliance, in willful violation of section 2.126(a) of the Regulations and Standards (9 C.F.R. § 2.126(a)).

8. On June 8, 2002, Respondent failed to handle animals as expeditiously and carefully as possible in a manner that would not cause trauma, unnecessary discomfort, behavioral stress, or physical harm, in willful violation of section 2.131(a)(1) of the Regulations and Standards (9 C.F.R. § 2.131(a)(1)).

9. On June 8, 2002, Respondent failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, Respondent exhibited a tiger to four children without any barrier or distance, in willful violation of section 2.131(b)(1) of the Regulations and Standards (9 C.F.R. § 2.131(b)(1)).

10. On June 8, 2002, Respondent failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public. Specifically, Respondent exhibited a tiger to a child without any barrier or distance, in willful violation of section 2.131(b)(1) of the Regulations and Standards (9 C.F.R. § 2.131(b)(1)).

11. On June 8, 2002, Respondent exhibited animals under conditions that were inconsistent with the animals' well-being. Specifically, Respondent exhibited a tiger cub

to the public outside of any enclosures and allowed the public to excessively handle the young animal, in willful violation of section 2.131(c)(1) of the Regulations and Standards (9 C.F.R. § 2.131(c)(1)).

12. Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals (9 C.F.R. §§ 3.125-.142), by failing to comply with the general facilities standards (9 C.F.R. § 3.125), as follows:

a. On August 28, 2002, Respondent failed to maintain housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, Respondent failed to repair damaged metal siding in the lion enclosure, in willful violation of section 3.125(a) of the Regulations and Standards (9 C.F.R. § 3.125(a)).

b. On August 30, 2002, Respondent failed to maintain housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, Respondent failed to repair damaged metal siding in the lion enclosure, in willful violation of section 3.125(a) of the Regulations and Standards (9 C.F.R. § 3.125(a)).

c. On February 12, 2002, Respondent failed to maintain housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, Respondent failed to repair

and/or replace the siding and roof of the tiger enclosure so that it contained the four animals securely and safely, in willful violation of section 3.125(a) of the Regulations and Standards (9 C.F.R. § 3.125(a)).

d. On February 12, 2002, Respondent failed to maintain housing facilities structurally sound and in good repair to protect the animals housed in the facilities from injury and to contain them. Specifically, Respondent failed to repair and/or replace the door and bottom of the lion enclosure, in willful violation of section 3.125(a) of the Regulations and Standards (9 C.F.R. § 3.125(a)).

13. Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals (9 C.F.R. §§ 3.125-.142), by failing to comply with the outdoor facilities standards (9 C.F.R. § 3.127), as follows:

a. On August 28 and August 30, 2002, Respondent failed to provide four adult tigers housed outdoors with appropriate natural or artificial shelter, in willful violation of section 3.127(b) of the Regulations and Standards (9 C.F.R. § 3.127(b)).

b. On February 12, 2002, Respondent failed to provide a suitable method to rapidly eliminate excess water. Specifically, Respondent failed to eliminate standing water in the tiger enclosure, in willful violation of section 3.127(c) of the Regulations and Standards (9 C.F.R. § 3.127(c)).

c. On September 30, 2003, Respondent failed to construct a perimeter fence so that it protects the animals in the facility by restricting animals and unauthorized persons from going through it. Specifically, Respondent failed to construct a perimeter fence around the enclosure, in willful violation of section 3.127(d) of the Regulations and Standards (9 C.F.R. § 3.127(d)).

14. Respondent willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates, and marine mammals (9 C.F.R. §§ 3.125-.142), by failing to comply with the animal health and husbandry standards (9 C.F.R. § 3.132), as follows:

a. On August 28 and August 30, 2002, Respondent failed to have a sufficient number of adequately trained employees to carry out the level of husbandry practices and care required by the Regulations and Standards, in willful violation of section 3.132 of the Regulations and Standards (9 C.F.R. § 3.132).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's Appeal Petition

Respondent raises two issues in his Petition of Appeal [hereinafter Appeal Petition]. First, Respondent asserts the ALJ's findings of fact relate to a facility that Respondent previously owned, and Respondent currently owns a facility which complies with the Animal Welfare Act and the Regulations and Standards (Appeal Pet. at first and second unnumbered pages).

Respondent, by his failure to file a timely answer to the Complaint, is deemed to have admitted the violations of the Regulations and Standards alleged in the Complaint.⁴ Respondent's subsequent correction of those violations neither eliminates Respondent's violations of the Regulations and Standards⁵ nor constitutes a meritorious basis for denying Complainant's Motion for Default Decision.⁶ Therefore, even if I found that, subsequent to Respondent's violations of the Regulations and Standards, Respondent corrected the violations, I would not find the ALJ's Initial Decision and Order error.

Second, Respondent contends the revocation of his Animal Welfare Act license is a severe sanction (Appeal Pet. at second unnumbered page).

⁴7 C.F.R. § 1.136(c).

⁵*In re Dennis Hill*, 63 Agric. Dec. ____, slip op. at 70-71 (Oct. 8, 2004); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 644 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Susan DeFrancesco*, 59 Agric. Dec. 97, 112 n.12 (2000); *In re Michael A. Huchital*, 58 Agric. Dec. 763, 805 n.6 (1999); *In re James E. Stephens*, 58 Agric. Dec. 149, 184-85 (1999); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 274 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 219 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1456 n.8 (1997), *aff'd*, 173 F.3d 422 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 869 (1998); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 466 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 46 (1998); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 272-73 (1997) (Order Denying Pet. for Recons.); *In re John Walker*, 56 Agric. Dec. 350, 367 (1997); *In re Mary Meyers*, 56 Agric. Dec. 322, 348 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 254 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206) (Table), printed in 58 Agric. Dec. 85 (1999); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1070 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)).

⁶*In re Dennis Hill*, 63 Agric. Dec. ____, slip op. at 70-71 (Oct. 8, 2004).

I agree with Respondent's contention that revocation of his Animal Welfare Act license is a severe sanction. However, I do not find the ALJ's revocation of Respondent's Animal Welfare Act license error.

A sanction by an administrative agency must be warranted in law and justified in fact.⁷ The Animal Welfare Act explicitly authorizes the Secretary of Agriculture to

⁷*Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187-89 (1973); *Havana Potatoes of New York Corp. v. United States*, 136 F.3d 89, 92-93 (2d Cir. 1997); *County Produce, Inc. v. United States Dep't of Agric.*, 103 F.3d 263, 265 (2d Cir. 1997); *Potato Sales Co. v. Department of Agric.*, 92 F.3d 800, 804 (9th Cir. 1996); *Valkering, U.S.A., Inc. v. United States Dep't of Agric.*, 48 F.3d 305, 309 (8th Cir. 1995); *Farley & Calfee, Inc. v. United States Dep't of Agric.*, 941 F.2d 964, 966 (9th Cir. 1991); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1107 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Cobb v. Yeutter*, 889 F.2d 724, 730 (6th Cir. 1989); *Spencer Livestock Comm'n Co. v. Department of Agric.*, 841 F.2d 1451, 1456-57 (9th Cir. 1988); *Harry Klein Produce Corp. v. United States Dep't of Agric.*, 831 F.2d 403, 406 (2d Cir. 1987); *Blackfoot Livestock Comm'n Co. v. Department of Agric.*, 810 F.2d 916, 922 (9th Cir. 1987); *Stamper v. Secretary of Agric.*, 722 F.2d 1483, 1489 (9th Cir. 1984); *Magic Valley Potato Shippers, Inc. v. Secretary of Agric.*, 702 F.2d 840, 842 (9th Cir. 1983); *J. Acevedo and Sons v. United States*, 524 F.2d 977, 979 (5th Cir. 1975) (*per curiam*); *Miller v. Butz*, 498 F.2d 1088, 1089 (5th Cir. 1974) (*per curiam*); *G.H. Miller & Co. v. United States*, 260 F.2d 286, 296-97 (7th Cir. 1958), *cert. denied*, 359 U.S. 907 (1959); *United States v. Hulings*, 484 F. Supp. 562, 566 (D. Kan. 1980); *In re Jeanne and Steve Charter*, 59 Agric. Dec. 650 (2000), *aff'd*, 230 F. Supp.2d 1121 (D. Mont. 2002), *appeal docketed*, No. 02-36140 (9th Cir. Dec. 16, 2002); *In re La Fortuna Tienda*, 58 Agric. Dec. 833, 842 (1999); *In re James E. Stephens*, 58 Agric. Dec. 149, 186 (1999); *In re Nkiambi Jean Lema*, 58 Agric. Dec. 291, 297 (1999); *In re Limeco, Inc.*, 57 Agric. Dec. 1548, 1571 (1998), *appeal dismissed*, No. 98-5571 (11th Cir. Jan. 28, 1999); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 951 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 273 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 917, 932 (1997), *aff'd*, 166 F.3d 1200 (Table), 1998 WL 863340 (2d Cir. 1998), *cert. denied*, 526 U.S. 1098 (1999); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 97 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 257 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206).

revoke an exhibitor's Animal Welfare Act license if the exhibitor has violated or is violating the Animal Welfare Act.⁸ Respondent was licensed as an exhibitor at the time he violated the Regulations and Standards. Therefore, the ALJ's revocation of Respondent's Animal Welfare Act license is warranted in law.⁹

Moreover, the ALJ's revocation of Respondent's Animal Welfare Act license is justified by the facts. Respondent is deemed to have admitted committing approximately 21 willful violations of the Regulations and Standards. Many of Respondent's violations are serious violations that could have affected the health and well-being of Respondent's animals. Moreover, an exhibitor's failure to allow Animal and Plant Health Inspection Service officials to enter his place of business to conduct inspections, in willful violation of section 2.126(a) of the Regulations and Standards (9 C.F.R. § 2.126(a)), is extremely serious because it thwarts the Secretary of Agriculture's ability to monitor the exhibitor's compliance with the Animal Welfare Act and the Regulations and Standards and severely undermines the Secretary of Agriculture's ability to enforce the Animal Welfare Act and the Regulations and Standards.

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),

⁸7 U.S.C. § 2149(a).

⁹The Secretary of Agriculture also has authority under section 21 of the Animal Welfare Act (7 U.S.C. § 2151) to disqualify a person from becoming licensed. I discuss my reasons for affirming the ALJ's revocation of Respondent's Animal Welfare Act license, rather than imposing a disqualification, in this Decision and Order, *infra*.

50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993)

(not to be cited as precedent under 9th Circuit Rule 36-3):

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

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497.

Complainant seeks revocation of Respondent's Animal Welfare Act license and a cease and desist order (Complainant's Motion for Default Decision at 1). After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the remedial purposes of the Animal Welfare Act and the recommendations of the administrative officials, I conclude that a cease and desist order and revocation of Respondent's Animal Welfare Act license are appropriate and necessary to ensure Respondent's compliance with the Animal Welfare Act and the Regulations and Standards in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to fulfill the remedial purposes of the Animal Welfare Act.

Complainant's Response to Respondent's Appeal Petition

Complainant contends Respondent's Appeal Petition was late-filed, the ALJ's Initial Decision and Order became final on October 8, 2004, and the Judicial Officer has no jurisdiction to hear Respondent's appeal (Complainant's Response to Respondent's Petition for Appeal at 2-3).

The Hearing Clerk served Respondent with the ALJ's Initial Decision and Order on August 10, 2004.¹⁰ Respondent had 30 days after the date of service within which to file an appeal petition with the Hearing Clerk.¹¹ On September 3, 2004, before time for filing his appeal petition had expired, Respondent requested an extension of time within which to file an appeal petition.¹² On September 8, 2004, I extended the time for filing Respondent's appeal petition to October 8, 2004.¹³ On October 8, 2004, at 4:29 p.m., Respondent filed a timely appeal petition.¹⁴ Therefore, I reject Complainant's contentions that Respondent's Appeal Petition was late-filed, that the ALJ's Initial Decision and Order became final on October 8, 2004, and that I have no jurisdiction to hear Respondent's appeal.

¹⁰United States Postal Service Domestic Return Receipt for Article Number 7003 2260 0005 5721 4448.

¹¹7 C.F.R. § 1.145(a).

¹²Letter from Eric John Drogosch to Joyce Dawson, Hearing Clerk, filed September 3, 2004.

¹³Informal Order filed by the Judicial Officer on September 8, 2004.

¹⁴Respondent's Appeal Petition at first unnumbered page.

Revocation of Respondent's Animal Welfare Act License

Complainant alleged, and Respondent is deemed to have admitted, that he held Animal Welfare Act license number 74-C-0536 between November 2001 and November 9, 2003. Animal Welfare Act license number 74-C-0536 was “cancelled” and, as of the date Complainant issued the Complaint, March 12, 2004, Animal Welfare Act license number 74-C-0536 had not been “reinstated.” (Compl. ¶ 1.) Based on the limited record before me, I infer that Animal Welfare Act license number 74-C-0536 was valid during the period that Respondent violated the Regulations and Standards, that sometime after November 8, 2003, Respondent's Animal Welfare Act license number 74-C-0536 was cancelled but that it could have been reinstated, and that, at the time the ALJ issued the Initial Decision and Order on July 28, 2004, Animal Welfare Act license number 74-C-0536 was not valid.

In *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1067-71 (1998), I held the appropriate sanction to be imposed against a former licensee whose Animal Welfare Act license would be revoked for a violation of the Regulations and Standards but for the violator's being unlicensed at the time the sanction is imposed, is disqualification from becoming licensed. I based this holding on a narrow reading of section 19(a) of the Animal Welfare Act (7 U.S.C. § 2149(a)) and the common meaning of the words *revoke* and *revocation*, which I fully explicated in *Zimmerman*.¹⁵ I overrule this holding in

¹⁵See *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1068-71 (1998).

Zimmerman for two reasons. First, the licensing provisions of the Regulations and Standards¹⁶ explicitly provide for revocation of an Animal Welfare Act license, but I cannot locate any reference to disqualification of a current or former licensee from becoming licensed. Second, despite the common definitions of *revoke* and *revocation*,¹⁷ numerous courts have upheld revocation of licenses that are not valid at the time of revocation.¹⁸ Therefore, I conclude, if a person holds a valid Animal Welfare Act license at the time he or she violates the Animal Welfare Act or the Regulations and Standards, the Secretary of Agriculture is authorized by section 19(a) of the Animal Welfare Act (7 U.S.C. § 2149(a)) to revoke that violator's Animal Welfare Act license even if the violator's Animal Welfare Act license is cancelled prior to revocation.

¹⁶See 9 C.F.R. §§ 2.1-.12.

¹⁷See *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1069 n.25 (1998).

¹⁸*Patel v. Kansas State Bd. of Healing Arts*, 920 P.2d 477, 480 (Kan. Ct. App. 1996) (stating cancellation of a license during the pendency of a disciplinary proceeding did not divest the board of jurisdiction to revoke the cancelled license); *Colorado State Bd. of Medical Examiners v. Boyle*, 924 P.2d 1113, 1116 (Colo. Ct. App. 1996) (holding the board had jurisdiction to revoke a lapsed license to practice medicine), *cert. denied*, 520 U.S. 1104 (1997); *Nicoletti v. State Bd. of Vehicle Manufacturers, Dealers and Salespersons*, 706 A.2d 891, 894 (Pa. Commw. Ct. 1998) (holding, since the licensee maintained a property interest in a lapsed salesperson's license and a suspended dealer's license, the board had jurisdiction to revoke the lapsed salesperson's license and the suspended dealer's license); *Marmorstein v. New York State Liquor Authority*, 144 N.Y.S.2d 275, 277-78 (N.Y. Sup. Ct. 1955) (stating the fact that a license had already been surrendered did not bar the board from revoking the license after a hearing); *American Employers' Ins. Co. v. Radzeweluk*, 4 N.Y.S.2d 74, 75, (N.Y. Sup. Ct. 1938) (stating the fact that a license had already been surrendered did not exonerate defendants from a previous violation nor prevent the subsequent revocation of the license because of such previous violation).

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

ORDER

1. Respondent, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Regulations and Standards.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent's Animal Welfare Act license (Animal Welfare Act license number 74-C-0536) is revoked.

The Animal Welfare Act license revocation provisions of this Order shall become effective on the 60th day after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of the Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of the Order. Respondent must seek judicial review within 60 days after entry of the Order.¹⁹ The date of entry of the Order is October 28, 2004.

Done at Washington, DC

October 28, 2004

William G. Jenson
Judicial Officer

¹⁹7 U.S.C. § 2149(c).