

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:)	AWA Docket No. 09-0196
)	
For the Birds, Inc., an Idaho corporation;)	
Jerry LeRoy Korn, an individual;)	
Michael Scott Korn, an individual; and)	
Raymond Willis, an individual,)	
)	Decision and Order as to
Respondents)	Raymond Willis

PROCEDURAL HISTORY

On September 14, 2009, Kevin Shea, Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this proceeding by filing a Complaint. The Administrator instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued pursuant to the Animal Welfare Act (9 C.F.R. § 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary of Agriculture Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator alleges, from June 11, 2008, through the filing of the Complaint, Raymond Willis: (1) operated as an exhibitor without an Animal Welfare Act license, in willful violation of 9 C.F.R. §§ 2.1(a) and 2.100(a); (2) failed to have an attending veterinarian who provided veterinary care to respondents' animals, in willful violation of 9 C.F.R. § 2.40(a); (3) failed to employ an attending veterinarian under formal arrangements and with appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use, in willful violation of 9 C.F.R. § 2.40(a)(1)-(2); (4) failed to establish and maintain programs of adequate veterinary care, in willful violation of 9 C.F.R. § 2.40(b); (5) failed to handle animals as expeditiously and carefully as possible in a manner that would not cause the animals trauma, unnecessary discomfort, behavioral stress, or physical harm, in willful violation of 9 C.F.R. § 2.131(b)(1); and (6) 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, in willful violation of 9 C.F.R. § 2.131(c)(1).¹ On October 6, 2009, Mr. Willis filed an answer denying the material allegations of the Complaint.

¹Compl. at 5-10 ¶¶ 14, 21, 25, 29, 33, and 37.

On March 13, 2012, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] conducted a hearing in Washington, DC. Mr. Willis, who represents himself in this proceeding, did not appear at the hearing. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. During the hearing, the Administrator moved for issuance of a decision based upon admissions deemed to have been made as a result of Mr. Willis's failure to appear at the hearing (Tr. 11-12).² In this regard, the Rules of Practice provide, as follows:

§ 1.141 Procedure for hearing.

....

(e) *Failure to appear.* (1) A respondent who, after being duly notified, fails to appear at the hearing without good cause, shall be deemed to have waived the right to an oral hearing in the proceeding and to have admitted any facts which may be presented at the hearing. Such failure by the respondent shall also constitute an admission of all the material allegations of fact contained in the complaint. Complainant shall have an election whether to follow the procedure set forth in § 1.139 or whether to present evidence, in whole or in part, in the form of affidavits or by oral testimony before the Judge.

Failure to appear at a hearing shall not be deemed to be a waiver of the right to be served with a copy of the Judge's decision and to appeal and request oral argument before the Judicial Officer with respect thereto in the manner provided in § 1.145.

²References to the transcript of the March 13, 2012, hearing are designated as "Tr."

7 C.F.R. § 1.141(e)(1). The ALJ granted the Administrator's motion (Tr. 12-13), and the Administrator introduced the testimony of 11 witnesses³ and moved the admission of exhibits, all of which the ALJ admitted in evidence.

On March 16, 2012, pursuant to 7 C.F.R. § 1.141(e)(1), the ALJ issued "Decision and Order as to Only Raymond Willis" [hereinafter the ALJ's Decision] in which the ALJ: (1) concluded that Mr. Willis violated the Regulations as alleged in the Complaint; (2) ordered Mr. Willis to cease and desist from violating the Animal Welfare Act and the Regulations; (3) permanently disqualified Mr. Willis from obtaining an Animal Welfare Act license; and (4) assessed Mr. Willis a \$6,000 civil penalty (ALJ's Decision at 10-12).

On April 17, 2012, Mr. Willis filed "Appeal and Request for Oral Hearing Before the Judicial Officer" [hereinafter Appeal Petition]. On April 26, 2012, the Administrator filed a response to Mr. Willis's Appeal Petition. On May 2, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I adopt, except for minor non-substantive changes, the ALJ's Decision as the final agency decision as to Mr. Willis.

DECISION

³Frank Lolli, Keith Schuller, Susan Dahnke, Craig Perry, Jeff Rosenthal, Joelene Janicek Gould, Kelly Kitchens, John Breidenbach, Dawn Talbott, and Toby Hauntz testified by telephone. Retired United States Department of Agriculture investigator Kirk B. Miller testified in person.

Statement of the Case

After being notified of the time, place, and manner of the hearing, Mr. Willis, without good cause, failed to appear at the March 13, 2012, hearing. Pursuant to 7 C.F.R. § 1.141(e)(1), a respondent who, after being duly notified, fails to appear at a hearing, without good cause, is deemed to have waived the right to an oral hearing in the proceeding, to have admitted any facts presented at the hearing, and to have admitted the material allegations of fact contained in the complaint. Accordingly, the facts presented at the March 13, 2012, hearing and the material allegations of fact contained in the Complaint are adopted as findings of fact.

Findings of Fact

1. Raymond Willis is an individual whose mailing address is in West Virginia. From at least June 11, 2008, through the filing of the Complaint on September 14, 2009, Raymond Willis was an officer and a director of For the Birds, Inc., and was (1) operating as an “exhibitor,” as that term is defined in the Animal Welfare Act and the Regulations, and/or (2) acting for, or employed by, an exhibitor (For the Birds, Inc., and/or Jerry LeRoy Korn), and Raymond Willis’s acts, omissions, or failures within the scope of his employment or office are, pursuant to 7 U.S.C. § 2139, deemed to be his own acts, omissions, or failures (Compl. at 3 ¶ 6).

2. Raymond Willis operated a moderate-sized business exhibiting farm, wild, and exotic animals. The gravity of Raymond Willis's violations of the Animal Welfare Act and the Regulations is great and include repeated instances in which Raymond Willis knowingly exhibited animals without a valid Animal Welfare Act license, failed to provide animals with adequate veterinary care, and failed to handle animals humanely. (Compl. at 4 ¶ 8.)

3. Raymond Willis does not have a history of violations of the Animal Welfare Act or the Regulations; however, Raymond Willis has not shown good faith. Raymond Willis was made aware of the licensing, handling, and veterinary care requirements of the Animal Welfare Act and nevertheless repeatedly and knowingly demonstrated an unwillingness to comply with the prohibition against exhibiting animals without a valid Animal Welfare Act license and with the requirements for exhibiting animals safely (Compl. at 4 ¶ 9). The testimony and exhibits introduced at the March 13, 2012, hearing establish by more than a preponderance of the evidence that Raymond Willis, in his capacity as principal of For the Birds, Inc., operated as an exhibitor without being licensed to do so, as alleged in the Complaint. The evidence introduced at the March 13, 2012, hearing also establishes that Raymond Willis handled animals in a manner that exposed people and animals to harm and that Raymond Willis failed, on multiple occasions, to provide minimally adequate care to the animals and, specifically, failed to provide the animals with necessary veterinary care.

4. From June 11, 2008, through the filing of the Complaint, Raymond Willis operated as an exhibitor without having been licensed by the Secretary of Agriculture to do so, and specifically, operated a zoo (Compl. at 5-6 ¶ 14).

5. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to have an attending veterinarian who provided adequate veterinary care to respondents' animals (Compl. at 7 ¶ 21).

6. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to employ an attending veterinarian under formal arrangements and with appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use (Compl. at 8 ¶ 25).

7. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to establish and maintain programs of adequate veterinary care (Compl. at 8 ¶ 29).

8. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to handle animals as expeditiously and carefully as possible in a manner that would not cause the animals trauma, unnecessary discomfort, behavioral stress, or physical harm (Compl. at 9 ¶ 33).

9. From June 11, 2008, through the filing of the Complaint, Raymond Willis 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, and specifically, allowed the public to handle tigers without any barrier or distance (Compl. at 10 ¶ 37).

Conclusions of Law

1. From June 11, 2008, through the filing of the Complaint, Raymond Willis operated as an exhibitor without having been licensed by the Secretary of Agriculture to do so, and specifically, operated a zoo, in willful violation of 9 C.F.R. § 2.1(a).⁴

2. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to have an attending veterinarian who provided adequate veterinary care to respondents' animals, in willful violation of 9 C.F.R. § 2.40(a).

3. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to employ an attending veterinarian under formal arrangements and with appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use, in willful violation of 9 C.F.R. § 2.40(a)(1)-(2).

⁴The Administrator alleged and the ALJ concluded that Mr. Willis's failure to obtain an Animal Welfare Act license also is a violation of 9 C.F.R. § 2.100(a) (Compl. at 5-6 ¶ 14; ALJ's Decision at 10). I conclude only that Mr. Willis willfully violated 9 C.F.R. § 2.1(a); however, my failure to conclude that Mr. Willis also violated 9 C.F.R. § 2.100(a) does not affect the disposition of this proceeding.

4. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to establish and maintain programs of adequate veterinary care, in willful violation of 9 C.F.R. § 2.40(b).

5. From June 11, 2008, through the filing of the Complaint, Raymond Willis failed to handle animals as expeditiously and carefully as possible in a manner that would not cause the animals trauma, unnecessary discomfort, behavioral stress, or physical harm, in willful violation of 9 C.F.R. § 2.131(b)(1).

6. From June 11, 2008, through the filing of the Complaint, Raymond Willis 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 the animals and the public, and specifically, allowed the public to handle tigers without any barrier or distance, in willful violation of 9 C.F.R. § 2.131(c)(1).

Mr. Willis's Appeal Petition

The Rules of Practice provide that a party may appeal an administrative law judge's decision to the Judicial Officer, as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who

disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

7 C.F.R. § 1.145(a). Mr. Willis's Appeal Petition contains numerous assertions that do not relate to: (1) the ALJ's Decision, (2) any ruling by the ALJ, or (3) the deprivation of Mr. Willis's rights. I do not address these assertions as they do not concern matters that may be raised in an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145(a). However, Mr. Willis's Appeal Petition does contain an allegation that the ALJ deprived him of due process.

First, Mr. Willis contends the ALJ deprived him of due process by changing the location of the hearing without providing him adequate notice of the change of the location of the hearing (Appeal Pet. at 8).

On July 28, 2011, the ALJ informed the parties that a hearing would be held in Boise, Idaho, commencing March 13, 2012, with an exact location in Boise, Idaho, to be determined 2 or 3 months before the commencement of the hearing (July 28, 2011, Hearing Notice at 1-2 ¶¶ 1, 4). The ALJ also informed the parties that she intended to change the location of the

hearing from Boise, Idaho, to Washington, DC, if the respondents failed to comply with the ALJ's July 28, 2011, pre-hearing deadlines and instructions (July 28, 2011, Hearing Notice at 1 ¶ 2; July 28, 2011, Prehearing Deadlines and Instructions at 3 ¶ 11).

On March 2, 2012, the Administrator filed a motion requesting that the ALJ change the location of the hearing from Boise, Idaho, to Washington, DC, based upon the respondents' failure to comply with the ALJ's July 28, 2011, pre-hearing deadlines and instructions (Complainant's Motion to Change Hearing Location and to Take Testimony by Telephone at 1-3 ¶ D). On March 7, 2012, the ALJ granted the Administrator's motion (Order Granting Complainant's Motion to Change Hearing Location and to Take Testimony By Telephone), and Mr. Willis asserts he was informed of the ALJ's order changing the hearing location on March 9, 2012 (Appeal Pet. at 6).

The record before me establishes that the respondents failed to comply with the ALJ's July 28, 2011, pre-hearing deadlines and instructions. The ALJ informed Mr. Willis in both the Hearing Notice and the Prehearing Deadlines and Instructions, filed 7 months 13 days before the date of the hearing, that the respondents' failure to comply with the pre-hearing deadlines and instructions would result in a change of the location of the hearing from Boise, Idaho, to Washington, DC. Under these circumstances, I find the ALJ's March 7, 2012, Order Granting Complainant's Motion to Change Hearing Location and to Take Testimony By Telephone provided Mr. Willis adequate notice of the change of the hearing location, and I

conclude the ALJ did not deprive Mr. Willis of due process when she changed the location of the hearing.⁵

Second, Mr. Willis contends the ALJ deprived him of due process by taking testimony by telephone because “[a] telephone hearing is not an acceptable alternative to facing one’s accusers in person.” (Appeal Pet. at 8.)

⁵Administrative law judges have the authority under the Rules of Practice to set the place of a hearing and change the place of a hearing with or without a motion requesting a particular hearing location (7 C.F.R. §§ 1.141(b), .144(c)(2)).

On March 2, 2012, the Administrator requested that the ALJ permit the taking of testimony by telephone (Complainant's Motion to Change Hearing Location and to Take Testimony by Telephone at 3-5 ¶ II). The Administrator cited a number of reasons for the request, including the cost of having witnesses attend an in-person hearing in either Boise, Idaho, or Washington, DC, the inconvenience to witnesses of having to travel to the place of the hearing, and the fact that the testimony of each witness who would give testimony by telephone would be corroborated by other evidence. The Administrator asserted that permitting witnesses to testify by telephone would provide a full and fair evidentiary hearing, would not prejudice any party, and would cost less than conducting the hearing by personal attendance of the witnesses in Boise, Idaho, or Washington, DC. (Complainant's Motion to Change Hearing Location and to Take Testimony by Telephone at 3-5 ¶ II.) On March 7, 2012, the ALJ granted the Administrator's request to take testimony of witnesses by telephone rather than in-person appearance (Order Granting Complainant's Motion to Change Hearing Location and to Take Testimony by Telephone), and, at the hearing, 10 witnesses testified by telephone.⁶

⁶See note 3.

Due process is flexible and calls for such procedural protections as the particular situation demands.⁷ Courts have applied a balancing test that examines: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of the private interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁸ Therefore, I reject Mr. Willis's apparent contention that taking witness testimony by telephone is per se a violation of the due process clause of the Constitution of the United States. Moreover, after examining Mr. Willis's interests affected by this proceeding, the risk that Mr. Willis is erroneously deprived of those interests by taking testimony by telephone, the probable value of taking the in-person testimony of the 10 witnesses who testified by telephone, and the government's fiscal and administrative burdens that the in-person testimony would have entailed, I find the ALJ did not deprive Mr. Willis of due process by taking testimony by telephone.⁹

⁷*Gilbert v. Homar*, 520 U.S. 924, 930 (1997); *Sandin v. Conner*, 515 U.S. 472, 503 (1995); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

⁸*Wilkinson v. Austin*, 545 U.S. 209, 224-25 (2005); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

⁹The Rules of Practice provide that an administrative law judge may, in his or her sole

Mr. Willis's Petition to Reopen the Hearing

Mr. Willis requests that I reopen the hearing to take further evidence, that an administrative law judge other than Jill S. Clifton conduct the reopened hearing in Boise, Idaho, and that an attorney other than Colleen A. Carroll represent the Administrator (Appeal Pet. at 10). The Rules of Practice provide that a petition to reopen a hearing must state the nature and purpose of the evidence to be adduced and set forth a good reason why such evidence was not adduced at the hearing, as follows:

§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of the decision of the Judicial Officer.

(a) *Petition requisite. . . .*

(2) *Petition to reopen hearing.* A petition to reopen a hearing to take further evidence may be filed at any time prior to the issuance of the decision of the Judicial Officer. Every such petition shall state briefly the nature and purpose of the evidence to be adduced, shall show that such evidence is not merely cumulative, and shall set forth a good reason why such evidence was not adduced at the hearing.

7 C.F.R. § 1.146(a)(2). Mr. Willis does not set forth a good reason for his failure to appear at the March 13, 2012, hearing and adduce evidence at the hearing. Therefore, I deny

Mr. Willis's request that I reopen the hearing to take further evidence.

discretion or in response to a motion by a party, conduct a proceeding by telephone if the administrative law judge finds a hearing conducted by telephone: (1) would provide a full and fair evidentiary hearing; (2) would not prejudice any party; and (3) would cost less than conducting the hearing by audio-visual telecommunication or by personal attendance of any individual who is expected to participate in the hearing (7 C.F.R. § 1.141(b)(4)).

Mr. Willis's Request for Oral Argument

Mr. Willis's request for oral argument (Appeal Pet. at 10), which the Judicial Officer may grant, refuse, or limit,¹⁰ is refused because the issues are not complex and oral argument would serve no useful purpose.

For the foregoing reasons, the following Order is issued.

¹⁰7 C.F.R. § 1.145(d).

ORDER

1. Raymond Willis, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and, in particular, shall cease and desist from:

- a. operating as an exhibitor without an Animal Welfare Act license;
- b. failing to have an attending veterinarian to provide adequate veterinary care to animals;
- c. failing to employ an attending veterinarian under formal arrangements and with appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use;
- d. failing to establish and maintain programs of adequate veterinary care;
- e. failing to handle animals as expeditiously and carefully as possible in a manner that does not cause the animals trauma, unnecessary discomfort, behavioral stress, or physical harm; and
- f. failing to handle animals during public exhibition so there is 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 the animals and the public.

Paragraph 1 of this Order shall become effective upon service of this Order on Raymond Willis.

2. Raymond Willis is permanently disqualified from obtaining an Animal Welfare Act license.

Paragraph 2 of this Order shall become effective upon service of this Order on Raymond Willis.

3. Raymond Willis is assessed a \$6,000 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, Regulatory, and Food Safety 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 Raymond Willis. Raymond Willis shall state on the certified check or money order that payment is in reference to AWA Docket No. 09-0196.

RIGHT TO JUDICIAL REVIEW

Raymond Willis has the right to seek judicial review of the Order in this Decision and Order as to Raymond Willis in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §_ 2341-2350. Raymond Willis must seek judicial review within 60 days

after entry of the Order in this Decision and Order as to Raymond Willis.¹¹ The date of entry of the Order in this Decision and Order as to Raymond Willis is August 7, 2012.

Done at Washington, DC

August 7, 2012

William G. Jenson
Judicial Officer

¹¹7 U.S.C. § 2149(c).