

UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re: ) AWA Docket No. D-06-0005  
)  
Mark Levinson, )  
)  
Petitioner ) **Decision and Order**

**PROCEDURAL HISTORY**

On March 10, 2006, Mark Levinson [hereinafter Petitioner] applied for an Animal Welfare Act license. On April 10, 2006, Elizabeth Goldentyer, Regional Director, Animal Care, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Regional Director], denied Petitioner's application based on her determination that Petitioner was unfit to be licensed as a result of his violations of New York State laws pertaining to the transportation and ownership of animals. On May 9, 2006, Petitioner filed a request for a hearing pursuant to 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]. Petitioner seeks an order reversing the

Regional Director's April 10, 2006, denial of his application for an Animal Welfare Act license and directing the United States Department of Agriculture to grant Petitioner an Animal Welfare Act license.<sup>1</sup>

On May 26, 2006, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Respondent], filed Respondent's Response to Petitioner's Request for Hearing asserting that a hearing is unnecessary inasmuch as there is no issue of material fact.

On June 7, 2006, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] issued a Decision and Order Affirming Respondent's Denial of Petitioner's License Application [hereinafter Initial Decision]: (1) finding a hearing would serve no useful purpose; (2) affirming the Regional Director's April 10, 2006, denial of Petitioner's application for an Animal Welfare Act license; and (3) providing Petitioner may again apply for an Animal Welfare Act license 1 year from the date of the Initial Decision.<sup>2</sup>

On June 20, 2006, Petitioner appealed to, and sought oral argument before, the Judicial Officer. On July 11, 2006, Respondent filed a response to Petitioner's appeal petition and request for oral argument. On July 14, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

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<sup>1</sup>Petitioner's letter to the Office of the Hearing Clerk, dated and filed May 9, 2006 [hereinafter Petitioner's Request for Hearing].

<sup>2</sup>Initial Decision at 2-3.

Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision; therefore, I affirm the Regional Director's April 10, 2006, denial of Petitioner's application for an Animal Welfare Act license.

**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.

**§ 2133. Licensing of dealers and exhibitors**

The Secretary shall issue licenses to dealers and exhibitors upon application therefor in such form and manner as he may prescribe and upon payment of such fee established pursuant to 2153 of this title: *Provided*, That no such license shall be issued until the dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary pursuant to section 2143 of this title: *Provided, however*, That any retail pet store or other person who derives less than a substantial portion of his income (as determined by the Secretary) from the breeding and raising of dogs or cats on his own premises and sells any such dog or cat to a dealer or research facility shall not be required to obtain a license as a dealer or exhibitor under this chapter. The Secretary is further authorized to license, as dealers or exhibitors, persons who do not qualify as dealers or exhibitors within the meaning of this chapter upon such persons' complying with the requirements specified above and agreeing, in writing, to comply with all the requirements of this chapter and the regulations promulgated by the Secretary hereunder.

**§ 2134. Valid license for dealers and exhibitors required**

No dealer or exhibitor shall sell or offer to sell or transport or offer for transportation, in commerce, to any research facility or for exhibition or for use as a pet any animal, or buy, sell, offer to buy or sell, transport or offer for transportation, in commerce, to or from another dealer or exhibitor under this chapter any animals, unless and until such dealer or exhibitor shall have obtained a license from the Secretary and such license shall not have been suspended or revoked.

**§ 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.

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 2—REGULATIONS**

**Subpart A—Licensing**

....

**§ 2.3 Demonstration of compliance with standards and regulations.**

....

(b) Each applicant for an initial license must be inspected by APHIS and demonstrate compliance with the regulations and standards, as required in paragraph (a) of this section, before APHIS will issue a license. If the first inspection reveals that the applicant's animals, premises, facilities, vehicles, equipment, other premises, or records do not meet the requirements of this subchapter, APHIS will advise the applicant of existing deficiencies and the corrective measures that must be completed to come into compliance with the regulations and standards. An applicant who fails the first inspection will have two additional chances to demonstrate his or her compliance with the regulations and standards through a second inspection by APHIS. The applicant must request the second inspection, and if applicable, the third inspection, within 90 days following the first inspection. If the applicant fails inspection or fails to request reinspections within the 90-day period, he or she will forfeit the application fee and cannot reapply for a license for a period of 6 months from the date of the failed third inspection or the expiration of the time to request a third inspection. Issuance of a license will be denied until the applicant demonstrates upon inspection that the animals, premises, facilities, vehicles, equipment, other premises, and records are in compliance with all regulations and standards in this subchapter.

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**§ 2.11 Denial of initial license application.**

(a) A license will not be issued to any applicant who:

....

(6) Has made any false or fraudulent statements or provided any false or fraudulent records to the Department or other government agencies, or has pled *nolo contendere* (no contest) or has been found to have violated any Federal, State, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals, or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act.

(b) An applicant whose license application has been denied may request a hearing in accordance with the applicable rules of practice for the purpose of showing why the application for license should not be denied. The license denial shall remain in effect until the final legal decision has been rendered. Should the license denial be upheld, the applicant may again apply for a license 1 year from the date of the final order denying the application, unless the order provides otherwise.

9 C.F.R. §§ 2.3(b), .11(a)(6), (b).

**MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED  
ENVIRONMENTAL CONSERVATION LAW  
CHAPTER 43-B OF THE CONSOLIDATED LAWS  
ARTICLE 11—FISH AND WILDLIFE**

**Title 5—Fish and Wildlife Management Practices Cooperative Program;  
Prohibitions; Taking of Fish, Wildlife, Shellfish and Crustacea  
for Scientific or Propagation Purposes; Destructive Wildlife;  
Rabies Control; Guides; Endangered Species**

**§ 11-0511. Possession and transportation of wildlife**

Subject to the provisions of section 11-0512 of this article, no person shall, except under a license or permit first obtained from the department containing the prominent warning notice specified in subdivision nine of section 11-0917 of this article, possess, transport or cause to be transported, imported or exported any live wolf, wolfdog, coyote, coydog, fox, skunk, venomous reptile or raccoon, endangered species designated pursuant to section 11-0535 of this title, species named in section 11-0536 of this title

or other species of native or non-native live wildlife or fish where the department finds that possession, transportation, importation or exportation of such species of wildlife or fish would present a danger to the health or welfare of the people of the state, an individual resident or indigenous fish or wildlife population. Environmental conservation officers, forest rangers and members of the state police may seize every such animal possessed without such license or permit. No action for damages shall lie for such seizure, and disposition of seized animals shall be at the discretion of the department.

**§ 11-0512. Possession, sale, barter, transfer, exchange and import of wild animals as pets prohibited**

1. No person shall knowingly possess, harbor, sell, barter, transfer, exchange or import any wild animal for use as a pet in New York state, except as provided in subdivision three of this section.

....

3. Any person who possesses or harbors a wild animal for use as a pet at the time that this section takes effect may retain possession of such animal for the remainder of its life, provided that such person:

- a. Has not been convicted of any offense relating to cruelty to animals or under a judicial order prohibiting possession of animals;
- b. Applies to the department within six months of the effective date of this section, and obtains from the department, a license pursuant to subdivision four of this section; and
- c. Complies with all applicable federal, state, or local laws, including any ordinance, rule or regulation adopted by a local board of health, or any rules and regulations established by the department as requisites for ownership of such wild animal.

N.Y. Env'tl. Conserv. Law §§ 11-0511, 11-0512.1, .3 (McKinney 2005).

## DECISION

### Discussion

The Secretary of Agriculture is authorized to promulgate regulations as the Secretary deems necessary in order to effectuate the purposes of the Animal Welfare Act, to require exhibitors to obtain Animal Welfare Act licenses, and to issue Animal Welfare Act licenses to exhibitors.<sup>3</sup> The Secretary of Agriculture's power to require and issue licenses under the Animal Welfare Act includes the power to deny licenses to applicants.<sup>4</sup>

Section 2.11(a)(6) of the Regulations and Standards (9 C.F.R. § 2.11(a)(6)) provides that an Animal Welfare Act license will not be issued to any applicant who has been found to have violated any federal, state, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals. Petitioner admits he was convicted of, and paid fines for, his violations of New York State laws pertaining to the transportation and ownership of animals.<sup>5</sup> In addition, Respondent supplied certified copies of New York State Department of Environmental Conservation, Division of Law Enforcement, documents which corroborate Petitioner's admissions.<sup>6</sup> I conclude the

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<sup>3</sup>7 U.S.C. §§ 2133, 2134, 2151.

<sup>4</sup>*In re Mary Bradshaw*, 50 Agric. Dec. 499, 507 (1991).

<sup>5</sup>Petitioner's Request for Hearing at 5-6; Petitioner's Brief in Support of Petition for Appeal at 3.

<sup>6</sup>Respondent's Response to Petitioner's Request for Hearing, Attach. A, which indicates Petitioner was convicted of, and was fined for, importing bobcats into

(continued...)



Regional Director's April 10, 2006, denial of Petitioner's application for an Animal Welfare Act license is warranted in law and justified in fact.

### **Petitioner's Request for Oral Argument**

Petitioner's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit,<sup>7</sup> is refused because the issues are not complex and oral argument would appear to serve no useful purpose.

### **Petitioner's Appeal Petition**

Petitioner raises five issues in Petitioner's Petition for Appeal of Administrative Law Judge's Decision Upholding the Denial of Class C Animal Exhibitors License Application [hereinafter Appeal Petition] and Brief in Support of Petition for Appeal. First, Petitioner contends "[t]he agency misconstrued and misapplied [s]ection 2.11(a)(6) [of the Regulations and Standards (9 C.F.R. § 2.11(a)(6))] by claiming that it mandates the denial of [Petitioner's] license application."<sup>8</sup>

Petitioner does not cite, and I cannot locate, the portion of the Initial Decision in which the ALJ states section 2.11(a)(6) of the Regulations and Standards (9 C.F.R. § 2.11(a)(6)) mandates denial of Petitioner's March 10, 2006, Animal Welfare Act license

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<sup>6</sup>(...continued)

New York State and possessing bobcats within New York State without a license, in violation of N.Y. Env'tl. Conserv. Law §§ 11-0511, 11-0512.1 (McKinney 2005).

<sup>7</sup>7 C.F.R. § 1.145(d).

<sup>8</sup>Petitioner's Appeal Pet. at 1-2; Petitioner's Brief in Support of Pet. for Appeal at 4-5.

application. The ALJ states the Regional Director's denial of Petitioner's Animal Welfare Act license application is based upon a determination that Petitioner is unfit to be licensed as a result of having been found to have violated New York State laws pertaining to the transportation and ownership of animals. The ALJ does not conclude that denial of Petitioner's application for an Animal Welfare Act license is mandated by section 2.11(a)(6) of the Regulations and Standards (9 C.F.R. § 2.11(a)(6)), but, instead, concludes the Secretary of Agriculture is authorized under the Animal Welfare Act to deny Petitioner's application for an Animal Welfare Act license and finds the denial reasonable under the circumstances.<sup>9</sup>

Second, Petitioner, relying on *In re Eric John Drogosch*, 63 Agric. Dec. 623 (2004); *In re Otto Berosini*, 54 Agric. Dec. 886 (1995); and *In re Mary Bradshaw*, 50 Agric. Dec. 499 (1991), asserts his violations of New York State laws do not prevent him from being licensed under the Animal Welfare Act because the United States Department of Agriculture has issued Animal Welfare Act licenses to applicants who have previously violated federal regulations.<sup>10</sup>

None of the cases cited by Petitioner, *Drogosch*, *Berosini*, and *Bradshaw*, supports Petitioner's contention that the United States Department of Agriculture issues Animal Welfare Act licenses to applicants who have been determined to have previously violated

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<sup>9</sup>Initial Decision at 2-3.

<sup>10</sup>Petitioner's Appeal Pet. at 2; Petitioner's Brief in Support of Pet. for Appeal at 5.

federal regulations. In *Drogosch*, the United States Department of Agriculture issued Mr. Drogosch an Animal Welfare Act license in November 2001, after citing Mr. Drogosch in June 2001, for exhibiting animals without an Animal Welfare Act license. However, I find nothing in *Drogosch* to indicate that the United States Department of Agriculture actually determined that Mr. Drogosch had violated the Regulations and Standards prior to granting his application for an Animal Welfare Act license. To the contrary, the date of the agency decision in *Drogosch* is October 28, 2004, almost 3 years after the United States Department of Agriculture issued Mr. Drogosch an Animal Welfare Act license.

In *Berosini*, the United States Department of Agriculture issued Mr. Berosini an Animal Welfare Act license on April 26, 1993, after citing Mr. Berosini for violating the Regulations and Standards. However, I find nothing in *Berosini* to indicate that the United States Department of Agriculture actually determined that Mr. Berosini had violated the Regulations and Standards prior to granting his application for an Animal Welfare Act license. To the contrary, the date of the agency decision in *Berosini* is September 11, 1995, more than 2 years 4 months after the United States Department of Agriculture issued Mr. Berosini an Animal Welfare Act license.

Finally, in *Bradshaw*, the United States Department of Agriculture issued Ms. Bradshaw an Animal Welfare Act license on August 24, 1988, after citing Ms. Bradshaw for violating the Animal Welfare Act and the Regulations and Standards.

However, I find nothing in *Bradshaw* to indicate that the United States Department of Agriculture actually determined that Ms. Bradshaw had violated the Animal Welfare Act and the Regulations and Standards prior to granting her application for an Animal Welfare Act license. To the contrary, the date of the agency decision in *Bradshaw* is May 17, 1991, more than 2 years 8 months after the United States Department of Agriculture issued Ms. Bradshaw an Animal Welfare Act license.

*Drogosch, Berosini, and Bradshaw* were disciplinary proceedings instituted pursuant to section 19 of the Animal Welfare Act (7 U.S.C. § 2149) against respondents who were alleged to have failed to comply with the Animal Welfare Act and the Regulations and Standards. *Drogosch, Berosini, and Bradshaw* do not involve applications for Animal Welfare Act licenses granted after the United States Department of Agriculture determined the applicants had previously violated the Animal Welfare Act or the Regulations and Standards. In the instant proceeding, the Regional Director denied Petitioner's Animal Welfare Act license application pursuant to sections 3 and 21 of the Animal Welfare Act (7 U.S.C. §§ 2133, 2151) and section 2.11(a)(6) of the Regulations and Standards (9 C.F.R. § 2.11(a)(6)) based upon her determination that Petitioner is unfit to be licensed as a result of his violations of New York State laws pertaining to the transportation and ownership of animals. I find *Drogosch, Berosini, and Bradshaw* inapposite.

Third, Petitioner asserts that, prior to submitting the March 10, 2006, application for an Animal Welfare Act license that is the subject of this proceeding, he had previously applied for an Animal Welfare Act license, which the United States Department of Agriculture denied in September 2005. Petitioner contends he addressed all of the United States Department of Agriculture's concerns in connection with his previous license application and the United States Department of Agriculture "played 'bait and switch' and denied the [March 10, 2006,] re-application on different grounds."<sup>11</sup>

Respondent submitted a copy of Petitioner's August 25, 2004, application for an Animal Welfare Act license, corroborating Petitioner's assertion that he applied for an Animal Welfare Act license prior to submitting the March 10, 2006, application, which is the subject of this proceeding.<sup>12</sup> The record indicates the parties do not dispute that on September 7, 2005, the Regional Director, pursuant to section 2.3(b) of the Regulations and Standards (9 C.F.R. § 2.3(b)), terminated Petitioner's August 25, 2004, application for an Animal Welfare Act license because Petitioner failed three pre-licensing inspections and the licensing process had not been completed within 90 days following the first pre-licensing inspection.<sup>13</sup>

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<sup>11</sup>Petitioner's Appeal Pet. at 2-3; Petitioner's Brief in Support of Pet. for Appeal at 6-8.

<sup>12</sup>Respondent's Response to Petitioner's Appeal Pet. and Request for Oral Argument, Attach. J at 1.

<sup>13</sup>Petitioner's Request for Hearing, Attach. 4; Respondent's Response to

As Petitioner asserts, the grounds for the Regional Director's denial of Petitioner's March 10, 2006, application for an Animal Welfare Act license are different from the grounds for the Regional Director's termination of Petitioner's August 25, 2004, application for an Animal Welfare Act license. However, I find no requirement that once an application has been terminated, the Regional Director is prohibited from denying the applicant's subsequent application on grounds different from the grounds for termination of the earlier application.

Fourth, Petitioner asserts his violations of New York State laws were inadvertent; therefore, his violations do not form a sufficient basis for the Regional Director's denial of his March 10, 2006, application for an Animal Welfare Act license.<sup>14</sup>

Petitioner is presumed to know the law;<sup>15</sup> therefore, when Petitioner acquired bobcats, he was presumed to know that he was required by New York State law to obtain a license from the New York State Department of Environmental Conservation for the transportation and possession of bobcats. Moreover, it appears that in June and July 2004, Dr. Deborah Bayazit, Petitioner's veterinarian, and New York State Environmental Conservation Officer John C. Billotto informed Petitioner that possession of bobcats in

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<sup>13</sup>(...continued)

Petitioner's Appeal Pet. and Request for Oral Argument, Attach. J at 9.

<sup>14</sup>Petitioner's Brief in Support of Pet. for Appeal at 8.

<sup>15</sup>See *Atkins v. Parker*, 472 U.S. 115, 130 (1985); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925).

New York State without a license is illegal.<sup>16</sup> Nevertheless, in August 2005, Petitioner imported two bobcats into New York State without obtaining the required license.<sup>17</sup>

Under these circumstances, I reject Petitioner's assertion that his violations of New York State laws were inadvertent.

Fifth, Petitioner asserts, unless I reverse the Regional Director's April 10, 2006, denial of Petitioner's application for an Animal Welfare Act license, Petitioner will be permanently banned from obtaining an Animal Welfare Act license.<sup>18</sup>

Nothing in the ALJ's Initial Decision suggests that Petitioner is permanently banned from obtaining an Animal Welfare Act license. To the contrary, the ALJ states "Petitioner may again apply for a license one year from the day of this Order."<sup>19</sup>

Moreover, I find Petitioner's claim that he will be permanently banned from obtaining an Animal Welfare Act license mere speculation.

### **Findings of Fact**

1. Petitioner is an individual whose mailing address is 89 Gerard Drive, East Hampton, New York 11937.

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<sup>16</sup>Respondent's Response to Petitioner's Appeal Pet. and Request for Oral Argument, Attach. C at 1-3, 5; Attach. E at 1.

<sup>17</sup>Respondent's Response to Petitioner's Appeal Pet. and Request for Oral Argument, Attach. D at 10-11; Attach. G; Attach. H at 2.

<sup>18</sup>Petitioner's Brief in Support of Pet. for Appeal at 8.

<sup>19</sup>Initial Decision at 3.

2. On January 4, 2006, Petitioner was convicted of violating sections 11-0511 and 11-0512.1 of the laws of the State of New York pertaining to the transportation and ownership of animals, and was fined \$1,000.

3. In March 2006, Petitioner submitted an application for an Animal Welfare Act license to the United States Department of Agriculture.

4. On April 10, 2006, pursuant to section 2.11(a)(6) of the Regulations and Standards (9 C.F.R. § 2.11(a)(6)), the Regional Director denied Petitioner's March 2006, application for an Animal Welfare Act license based upon Petitioner's conviction of violating New York State laws pertaining to the transportation and ownership of animals.

#### **Conclusions of Law**

1. The Secretary of Agriculture has jurisdiction in this proceeding.
2. Denial of Petitioner's application for an Animal Welfare Act license is in accordance with section 2.11(a)(6) of the Regulations and Standards (9 C.F.R. § 2.11(a)(6)) and is reasonable.

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

#### **ORDER**

1. I affirm the Regional Director's April 10, 2006, denial of Petitioner's March 2006, Animal Welfare Act license application.



2. Petitioner may again apply for an Animal Welfare Act license 1 year from the date of this Order. The date of this Order is September 11, 2006.

Done at Washington, DC

September 11, 2006

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William G. Jenson  
Judicial Officer