

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 05-0003
)
Diana R. McCourt, an individual)
formerly known as Diana R.)
Cziraky; and Siberian Tiger)
Conservation Association, a)
a Delaware corporation,)
)
Respondents) **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 October 14, 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 issued under 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 Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges Diana R. McCourt and Siberian Tiger Conservation Association [hereinafter Respondents] knowingly failed to obey the Secretary of

Agriculture's cease and desist order issued in *In re Diana R. Cziraky*, 61 Agric. Dec. 327 (2002) (Consent Decision) (unpublished) and willfully violated the Animal Welfare Act and the Regulations (Compl. ¶¶ 4-11).

The Hearing Clerk served Respondents with the Complaint, the Rules of Practice, and a service letter on October 21, 2004.¹ Respondents were required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) to file an answer to the Complaint within 20 days after service. Respondents filed a motion to extend the time to answer the Complaint² and an answer to the Complaint³ on November 24, 2004, 34 days after the Hearing Clerk served Respondents with the Complaint. On January 13, 2005, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] granted Respondents' request to extend the time to file an answer and deemed Respondents' answer timely filed.⁴

On January 19, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Decision and Order as to Diana McCourt and Siberian Tiger Conservation Association [hereinafter Motion for

¹United States Postal Service Domestic Return Receipts for Article Number 7000 1670 0003 5453 1013 and Article Number 7000 1670 0003 5453 1020.

²Motion for Extension of Time to Answer the Complaint by Respondents Diana R. McCourt ("McCourt") and the Siberian Tiger Conservation Association ("Association") [hereinafter Motion for Extension of Time to File Answer].

³Answer of Respondents Diana R. McCourt ("McCourt") and Siberian Tiger Conservation Association ("Association") [hereinafter Answer].

⁴Order Granting Request for Extension of Time to File Answer.

Default Decision] and a proposed Decision and Order as to Diana McCourt and Siberian Tiger Conservation Association [hereinafter Proposed Default Decision]. On January 28, 2005, Respondents filed objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision.⁵ On February 9, 2005, the Chief ALJ denied Complainant's Motion for Default Decision.⁶

On February 22, 2005, Complainant appealed the Chief ALJ's denial of Complainant's Motion for Default Decision to the Judicial Officer.⁷ On March 9, 2005, Respondents filed a response in opposition to Complainant's Appeal Petition.⁸ On March 16, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I disagree with the Chief ALJ's denial of Complainant's Motion for Default Decision. Therefore, I: (1) reverse the Chief ALJ's February 9, 2005, denial of Complainant's Motion for Default Decision; and (2) issue this Decision and Order based upon Respondents' failure to file a timely answer to the Complaint.

⁵Respondents' Memorandum in Opposition to Motion for Adoption of Decision and Order.

⁶Ruling Denying Motion for Adoption of Decision and Order.

⁷Complainant's Appeal Petition.

⁸Respondents' Memo Contra Complainant's Appeal Petition.

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; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and country fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary[.]

§ 2149. Violations by licensees

.....

(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. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. Any such civil penalty may be compromised by the Secretary. Upon any failure to pay the penalty assessed by a final order under this section, the Secretary shall request the Attorney General to institute a civil action in a district court of the United States or other United States court for any district in which such person is found or resides or transacts business, to collect the penalty, and such court shall have jurisdiction to hear and decide any such action. Any person who knowingly

fails to obey a cease and desist order made by the Secretary under this section shall be subject to a civil penalty of \$1,500 for each offense, and each day during which such failure continues shall be deemed a separate offense.

(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), 2149(b)-(c), 2151.

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

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PART VI—PARTICULAR PROCEEDINGS

....

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

....

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the “Federal Civil Penalties Inflation Adjustment Act of 1990”.

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS.—The Congress finds that—

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE—The purpose of this Act is to establish a mechanism that shall—

(1) allow for regular adjustment for inflation of civil monetary penalties;

- (2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and
- (3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term—

- (1) “agency” means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;
- (2) “civil monetary penalty” means any penalty, fine, or other sanction that—
 - (A)(i) is for a specific monetary amount as provided by Federal law; or
 - (ii) has a maximum amount provided for by Federal law; and
 - (B) is assessed or enforced by an agency pursuant to Federal law; and
 - (C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and
- (3) “Consumer Price Index” means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter—

- (1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 et seq.], the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], the Occupational Safety and Health Act of 1970 [29 U.S.C. 651 et seq.], or the Social Security Act [42 U.S.C. 301 et seq.], by the inflation adjustment described under section 5 of this Act; and
- (2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL
MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT.—The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest—

- (1) multiple of \$10 in the case of penalties less than or equal to \$100;
- (2) multiple of \$100 in the case of penalties greater than \$100 but less than or equal to \$1,000;
- (3) multiple of \$1,000 in the case of penalties greater than \$1,000 but less than or equal to \$10,000;
- (4) multiple of \$5,000 in the case of penalties greater than \$10,000 but less than or equal to \$100,000;
- (5) multiple of \$10,000 in the case of penalties greater than \$100,000 but less than or equal to \$200,000; and
- (6) multiple of \$25,000 in the case of penalties greater than \$200,000.

(b) DEFINITION.—For purposes of subsection (a), the term “cost-of-living adjustment” means the percentage (if any) for each civil monetary penalty by which—

- (1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds
- (2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.—The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

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PART 3—DEBT MANAGEMENT

....

SUBPART E—ADJUSTED CIVIL MONETARY PENALTIES

§ 3.91 Adjusted civil monetary penalties.

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties—*

....

(2) *Animal and Plant Health Inspection Service.*

....

(v) Civil penalty for a violation of Animal Welfare Act, codified at 7 U.S.C. 2149(b), has a maximum of \$2,750; and knowing failure to obey a cease and desist order has a civil penalty of \$1,650.

7 C.F.R. § 3.91(a), (b)(2)(v).

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. This term excludes retail pet stores, horse and dog races, organizations sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, field trials, coursing events, purebred dog and cat shows and any other fairs or exhibitions intended to advance agricultural arts and sciences as may be determined by the Secretary.

PART 2—REGULATIONS

SUBPART A—LICENSING

§ 2.1 Requirements and application.

(a)(1) Any person operating or desiring to operate as a dealer, exhibitor, or operator of an auction sale, except persons who are exempt from the licensing requirements under paragraph (a)(3) of this section, must

have a valid license. A person must be 18 years of age or older to obtain a licence. A person seeking a license shall apply on a form which will be furnished by the AC Regional Director in the State in which that person operates or intends to operate. The applicant shall provide the information requested on the application form, including a valid mailing address through which the licensee or applicant can be reached at all times, and a valid premises address where animals, animal facilities, equipment, and records may be inspected for compliance. The applicant shall file the completed application form with the AC Regional Director.

....

SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY CARE

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

....

(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;
- (2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care; [and]

....

(4) Adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia[.]

....

SUBPART I—MISCELLANEOUS

....

§ 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.

9 C.F.R. §§ 1.1; 2.1(a)(1), .40(b)(1)-(2), (4), .131(a)(1), (b)(1) (2004).

DECISION

Statement of the Case

Respondents failed to file an answer to the Complaint 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 the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) 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 or the admission by the answer of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted as findings of fact. 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 Diana R. McCourt is an individual formerly known as Diana R. Cziraky, and whose address is 22143 Deal Road, Gambier, Ohio 43022. At all times

material to this proceeding, Respondent Diana R. McCourt was an exhibitor, as that term is defined in the Animal Welfare Act and the Regulations.

2. Respondent Siberian Tiger Conservation Association is a Delaware corporation whose agent for service of process is The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801. At all times material to this proceeding, Respondent Siberian Tiger Conservation Association was an exhibitor, as that term is defined in the Animal Welfare Act and the Regulations.

3. Respondents exhibit exotic felines (lions and tigers) to the public. Respondents' exhibition business is significant. According to their website, Respondents charge each customer \$200 to be a "day-trainer," which program involves no meaningful "training" of either the animal or human participants and is simply an exhibition of Respondents' animals to the public in the guise of "training." Respondents purport to have thousands of customers each year and also solicit and accept donations from the public.

The gravity of Respondents' violations is great, and Respondents' violations involve willful, deliberate violations of the licensing and handling regulations. The violations demonstrate a lack of good faith on the part of Respondents.

Respondent Diana R. McCourt has been the subject of two previous administrative enforcement cases under the Animal Welfare Act, and Respondent Siberian Tiger Conservation Association has been the subject of one previous administrative enforcement case. *In re The International Siberian Tiger Foundation* (Decision as to The

International Siberian Tiger Foundation, Diana Cziraky, The Siberian Tiger Foundation, and Tiger Lady), 61 Agric. Dec. 53 (2002) (where the Secretary of Agriculture found that the respondents repeatedly violated section 2.131(b)(1) of the Regulations (9 C.F.R. § 2.131(b)(1)), found that Respondent Diana R. McCourt exhibited animals while her Animal Welfare Act license was suspended, in violation of section 2.10 of the Regulations (9 C.F.R. § 2.10), and revoked Respondent Diana R. McCourt's Animal Welfare Act license - number 31-C-0123); *In re Diana R. Cziraky*, 61 Agric. Dec. 327 (2002) (Consent Decision) (unpublished) (where the respondents admitted all of the violations and agreed to a liquidated civil penalty of \$10,000).

4. On November 2, 2003, Respondents knowingly failed to obey the cease and desist order issued by the Secretary of Agriculture pursuant to section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) in *In re Diana R. Cziraky*, 61 Agric. Dec. 327 (2002) (Consent Decision) (unpublished). The cease and desist order specifically provides that “Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations and Standards, and shall not engage in activities for which a license under the Act is required.” Pursuant to section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) and 7 C.F.R. § 3.91(b)(2)(v), any person who knowingly fails to obey a cease and desist order shall be subject to a civil penalty of \$1,650 for each offense, and each day during which the failure to obey a cease and desist order continues shall be deemed a separate offense.

5. From February 15, 2002, to the date of the filing of the Complaint, Respondent Diana R. McCourt operated as an exhibitor, as that term is defined in the Regulations, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

6. From February 15, 2002, to the date of the filing of the Complaint, Respondent Siberian Tiger Conservation Association operated as an exhibitor, as that term is defined in the Regulations, without having obtained an Animal Welfare Act license from the Secretary of Agriculture.

7. On November 2, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate personnel, and specifically, personnel capable of handling tigers safely.

8. On November 2, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent and control injuries, and specifically, Respondents allowed members of the public (customers) to handle juvenile and adult lions and tigers inside the animals' enclosure.

9. On November 2, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling, and specifically, Respondents themselves lacked the ability to adequately care for and handle two tigers safely and humanely, and failed to employ personnel capable of doing so.

10. On November 2, 2003, Respondents 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, and specifically, Respondents allowed members of the public (customers) to enter the enclosure housing juvenile and adult tigers and lions, while the animals were inside the enclosure, thus placing themselves in a position where the animals could easily injure them, and in turn, be injured or killed.

11. On November 2, 2003, Respondents, during public exhibition, failed to handle animals 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, under the guise of “day-training,” Respondents invited groups of customers to enter the primary enclosure housing juvenile and adult lions and tigers (while the animals were inside the enclosure) and allowed customers to handle the juvenile and adult lions and tigers neither with a barrier between the animals and the people nor with any distance between the animals and the people.

Conclusions of Law

1. On November 2, 2003, Respondents knowingly failed to obey the cease and desist order issued by the Secretary of Agriculture pursuant to section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) in *In re Diana R. Cziraky*, 61 Agric. Dec. 327 (2002) (Consent Decision) (unpublished). The cease and desist order specifically provides that

“Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the Regulations and Standards, and shall not engage in activities for which a license under the Act is required.” Pursuant to section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) and 7 C.F.R. § 3.91(b)(2)(v), any person who knowingly fails to obey such a cease and desist order shall be subject to a civil penalty of \$1,650 for each offense, and each day during which the failure to obey a cease and desist order continues shall be deemed a separate offense.

2. From February 15, 2002, to the date of the filing of the Complaint, Respondent Diana R. McCourt operated as an exhibitor, as that term is defined in the Regulations, without having obtained an Animal Welfare Act license from the Secretary of Agriculture, in willful violation of section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

3. From February 15, 2002, to the date of the filing of the Complaint, Respondent Siberian Tiger Conservation Association operated as an exhibitor, as that term is defined in the Regulations, without having obtained an Animal Welfare Act license from the Secretary of Agriculture, in willful violation of section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1)).

4. On November 2, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the availability of appropriate

personnel, and specifically, personnel capable of handling tigers safely, in willful violation of section 2.40(b)(1) of the Regulations (9 C.F.R. § 2.40(b)(1)).

5. On November 2, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included the use of appropriate methods to prevent and control injuries, and specifically, Respondents allowed members of the public (customers) to handle juvenile and adult lions and tigers inside the animals' enclosure, in willful violation of section 2.40(b)(2) of the Regulations (9 C.F.R. § 2.40(b)(2)).

6. On November 2, 2003, Respondents failed to establish and maintain a program of adequate veterinary care that included adequate guidance to personnel involved in the care and use of animals regarding handling, and specifically, Respondents themselves lacked the ability to adequately care for and handle two tigers safely and humanely, and failed to employ personnel capable of doing so, in willful violation of section 2.40(b)(4) of the Regulations (9 C.F.R. § 2.40(b)(4)).

7. On November 2, 2003, Respondents 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, and specifically, Respondents allowed members of the public (customers) to enter the enclosure housing juvenile and adult tigers and lions, while the animals were inside the enclosure, thus placing themselves in a position where the animals could easily injure them, and in turn, be injured or killed, in willful violation of the handling regulations (9 C.F.R. § 2.131(a)(1) (2004)).

8. On November 2, 2003, Respondents, during public exhibition, failed to handle animals 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, under the guise of “day-training,” Respondents invited groups of customers to enter the primary enclosure housing juvenile and adult lions and tigers (while the animals were inside the enclosure) and allowed customers to handle the juvenile and adult lions and tigers neither with a barrier between the animals and the people nor with any distance between the animals and the people, in willful violation of the handling regulations (9 C.F.R. § 2.131(b)(1) (2004)).

COMPLAINANT’S APPEAL PETITION

Complainant contends the Chief ALJ’s denial of Complainant’s Motion for Default Decision is error. Complainant requests that I reverse the Chief ALJ’s ruling denying Complainant’s Motion for Default Decision or vacate the Chief ALJ’s ruling denying Complainant’s Motion for Default Decision and remand the proceeding to the Chief ALJ for issuance of a decision and order in accordance with the Rules of Practice. (Complainant’s Appeal Pet. at 5-15.)

The Chief ALJ denied Complainant’s Motion for Default Decision on the ground that he had granted Respondents’ Motion for Extension of Time to File Answer and had deemed Respondents’ Answer timely filed (Ruling Denying Motion for Adoption of Decision and Order). I find the Chief ALJ’s Order Granting Request for Extension of

Time to File Answer, in which the Chief ALJ deemed Respondents' Answer timely filed, and the Chief ALJ's Ruling Denying Motion for Adoption of Decision and Order, error.

Respondents filed a Motion for Extension of Time to File Answer on November 24, 2004, 14 days after Respondents' Answer was required to be filed. Motions for extensions of time filed after the deadline for filing the document for which the extension is sought have been consistently rejected in proceedings conducted under the Rules of Practice.⁹ Therefore, I find the Chief ALJ's Order Granting Request for Extension of Time to File Answer, error. Moreover, a late-filed answer cannot cure a default¹⁰ or be deemed to be timely filed.¹¹ Therefore, I find the Chief ALJ erred when he

⁹*In re Lion Raisins, Inc.*, 63 Agric. Dec. ____, slip op. at 10-11 (Feb. 9, 2004) (Order Vacating the ALJ's Denial of Complainant's Motion for Default Decision and Remand Order) (concluding the respondents' request to file an answer to the complaint and respondents' answer to the complaint, filed 50 days after the time expired for filing respondents' answer, do not cure the respondents' default); *In re Heartland Kennels, Inc.*, 61 Agric. Dec. 492, 536 (2002) (holding, where the respondents were required to file their answer no later than November 4, 2001, the respondents' request for an extension of time within which to file their answer, filed September 16, 2002, comes far too late to be considered); *In re Everflora, Inc.*, 57 Agric. Dec. 1314, 1318 n.3 (1998) (Ruling Denying Respondents' Motion for Extension of Time) (denying a motion to extend the time for filing an appeal petition where the motion was filed 1 day after the time expired for filing the appeal petition); *In re Peter A. Lang*, 57 Agric. Dec. 59, 61 n.2 (denying the complainant's motion for an extension of time to file a response to the respondent's appeal petition filed 13 minutes late), *aff'd*, 189 F.3d 473, 1999 WL 512009 (9th Cir. 1999) (Table) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 58 Agric. Dec. 742 (1999).

¹⁰*In re Lion Raisins, Inc.*, 63 Agric. Dec. ____, slip op. at 10-11 (Feb. 9, 2004) (Order Vacating the ALJ's Denial of Complainant's Motion for Default Decision and Remand Order).

¹¹*In re Jack Stepp*, 59 Agric. Dec. 265, 269 n.2 (2000) (Ruling Denying

(continued...)

deemed Respondents' late-filed Answer timely filed. Instead, I find Respondents' Answer, which was filed 14 days after the due date, untimely.

Respondents are deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint because they failed to file an answer to the Complaint within 20 days after the Hearing Clerk served them with the Complaint. The Hearing Clerk served Respondents with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on October 21, 2004.¹² Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

§ 1.136 Answer.

(a) *Filing and service.* Within 20 days after the service of the complaint . . . , the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding

. . . .

(c) *Default.* Failure to file an answer within the time provided under paragraph (a) of this section shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

¹¹(...continued)

Respondents' Pet. for Recons.) (stating the Judicial Officer is bound by the Rules of Practice and cannot deem the respondents' late-filed reply to a motion to lift stay to have been timely filed).

¹²See note 1.

§ 1.139 Procedure upon failure to file an answer or admission of facts.

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint informs Respondents of the consequences of failing to file a timely answer, as follows:

[T]his complaint shall be served upon the respondents, who shall file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Act (7 C.F.R. § 1.130 et seq.). Failure to file an answer shall constitute an admission of all the material allegations of this complaint.

Compl. at 5.

Similarly, the Hearing Clerk informed Respondents in the October 14, 2004, service letter that a timely answer must be filed pursuant to the Rules of Practice and that

failure to file a timely answer to any allegation in the Complaint would constitute an admission of that allegation, as follows:

October 14, 2004

Diana R. McCourt
f/k/a Diana R. Cziraky
22143 Deal Raod [sic]
Gambier, Ohio 43022

The Corporation Trust Company
Corporation Trust Center
1209 Orange Street
Wilmington, Delaware 19801

Dear Sir or Madam:

Subject: In re: DIANA R. McCOURT, an individual formerly known as Diana R. Cziraky; and SIBERIAN TIGER CONSERVATION ASSOCIATION, a Delaware corporation; Respondents - AWA Docket No. 05-0003

Enclosed is a copy of a Complaint, which has been filed with this office under the Animal Welfare Act.

Also enclosed is a copy of the Rules of Practice, which govern the conduct of these proceedings. You should familiarize yourself with the Rules in that the comments which follow are not a substitute for their exact requirements.

The Rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have **20 days from the receipt of this letter to file with the Hearing Clerk an original and three copies of your written and signed Answer to the Complaint.**

It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the Complaint. Your Answer may include a request for an oral hearing. Failure to file an Answer or filing an Answer which does not deny the material allegations of the Complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law

Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding, should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081, South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case, should be directed to the attorney whose name and telephone number appears on the last page of the Complaint.

Sincerely,

/s/

Joyce A. Dawson
Hearing Clerk

On November 24, 2004, 34 days after the Hearing Clerk served Respondents with the Complaint, Respondents filed a Motion for Extension of Time to File Answer and an Answer.

On January 19, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Default Decision and a Proposed Default Decision. On January 28, 2005, Respondents filed an objection to Complainant's Motion for Default Decision stating the Chief ALJ had granted Respondents' motion for

an extension of time to answer the Complaint and had deemed Respondents' Answer timely filed.¹³

As discussed in this Decision and Order, *supra*, the Chief ALJ's ruling granting Respondents' late-filed motion for extension of time to file an answer and the Chief ALJ's ruling that Respondents' late-filed answer was timely filed, are error. Therefore, Respondents' objection to Complainant's Motion for Default Decision is without merit and the Chief ALJ's Ruling Denying Motion for Adoption of Decision and Order is error.

The Rules of Practice provides that an answer must be filed within 20 days after service of the complaint (7 C.F.R. § 1.136(a)), and Respondents' Answer to the Complaint was required to be filed no later than November 10, 2004. Respondents filed an Answer to the Complaint on November 24, 2004, 34 days after the Hearing Clerk served Respondents with the Complaint. Respondents' failure to file a timely answer to the Complaint is deemed, for purposes of this proceeding, an admission of the allegations in the Complaint and constitutes a waiver of hearing (7 C.F.R. §§ 1.136(c), .139, .141(a)).

Accordingly, there are no issues of fact on which a meaningful hearing could be held in this proceeding. Application of the default provisions of the Rules of Practice

¹³Respondents' Memorandum in Opposition to Motion for Adoption of Decision and Order.

does not deprive Respondents of rights under the due process clause of the Fifth Amendment to the Constitution of the United States.¹⁴

RESPONDENTS' RESPONSE TO COMPLAINANT'S APPEAL PETITION

Respondents state four bases for their opposition to Complainant's Appeal Petition. First, Respondents contend Complainant did not oppose Respondents' Motion for Extension of Time to File Answer (Respondents' Memo Contra Complainant's Appeal Pet. at 1-2).

Complainant's failure to file a response to Respondents' Motion for Extension of Time to File Answer is not a basis for granting a motion for an extension of time filed after the expiration of the time for filing the document which is the subject of the motion for extension of time. As stated in this Decision and Order, *supra*, motions for extensions of time filed after the deadline for filing the document for which the extension is sought

¹⁴*See United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). *See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

have been consistently rejected in proceedings conducted under the Rules of Practice.¹⁵

Moreover, the record indicates that Complainant conveyed his opposition to Respondents' Motion for Extension of Time to File Answer to the Chief ALJ's secretary, who subsequently informed the Chief ALJ of Complainant's opposition (Order Granting Request for Extension of Time to File Answer at 1).

Second, Respondents contend the Rules of Practice should be construed liberally to permit the parties to plead their respective positions and not so strictly as to prevent a respondent from going to trial and making its defense on the merits. Respondents contend liberal construction is particularly appropriate where no prejudice to Complainant can be demonstrated. (Respondents' Memo Contra Complainant's Appeal Pet. at 2.)

Respondents are deemed, for purposes of this proceeding, to have admitted the allegations of the Complaint. Under these circumstances, there are no issues of fact on which a meaningful hearing could be held in this proceeding. Therefore, even if I found that Complainant would not be prejudiced by my remanding the proceeding to the Chief ALJ for a hearing, that finding would not constitute a basis for remanding the proceeding to the Chief ALJ for a hearing.¹⁶

¹⁵See note 9.

¹⁶See *In re Heartland Kennels, Inc.*, 61 Agric. Dec. 492, 538-39 (2002) (stating, even if the complainant would not be prejudiced by remanding the proceeding to the chief administrative law judge for a hearing, that finding would not constitute a basis for setting aside the chief administrative law judge's decision and remanding the proceeding to the chief administrative law judge for a hearing); *In re Anna Mae Noell*, 58 Agric. Dec. 130, (continued...)

Third, Respondents contend Complainant should not be permitted to raise issues that could have been raised in an opposition to Respondents' Motion for Extension of Time to File Answer (Respondents' Memo Contra Complainant's Appeal Pet. at 2-3).

It is well-settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer.¹⁷ However, Complainant appeals the Chief ALJ's February 9, 2005,

¹⁶(...continued)

146 (1999) (stating, even if the complainant would not be prejudiced by allowing the respondents to file a late answer, that finding would not constitute a basis for setting aside the default decision), *appeal dismissed sub nom. The Chimp Farm, Inc. v. United States Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000); *In re Dean Byard*, 56 Agric. Dec. 1543, 1561-62 (1997) (rejecting the respondent's contention that the complainant must allege or prove prejudice to complainant's ability to present its case before an administrative law judge may issue a default decision; stating the Rules of Practice does not require, as a prerequisite to the issuance of a default decision, that a respondent's failure to file a timely answer has prejudiced the complainant's ability to present its case).

¹⁷*In re William J. Reinhart*, 60 Agric. Dec. 241, 257 (2001) (Order Denying William J. Reinhart's Pet. for Recons.); *In re Marysville Enterprises, Inc.* (Decision as to Marysville Enterprises, Inc., d/b/a Marysville Hog Buying Co., and James L. Breeding), 59 Agric. Dec. 299, 329 (2000); *In re Mary Meyers*, 58 Agric. Dec. 861, 866 (1999) (Order Denying Pet. for Recons.); *In re Anna Mae Noell*, 58 Agric. Dec. 855, 859-60 (1999) (Order Denying the Chimp Farm, Inc.'s Motion to Vacate); *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. 413, 423-24 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 795 (1998) (Order Denying Pet. for Recons.); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1911 (1997), *aff'd*, 178 F.3d 743 (5th Cir. 1999), *cert. denied*, 528 U.S. 1021 (1999); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 473-74 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table), printed in 57 Agric. Dec. 46 (1998); *In re Barry Glick*, 55 Agric. Dec. 275, 282 (1996); *In re Jeremy Byrd*, 55 Agric. Dec. 443, 448 (1996); *In re Bama Tomato Co.*, 54 Agric. Dec. 1334, 1342 (1995), *aff'd*, 112 F.3d 1542 (11th Cir. 1997); *In re Stimson Lumber Co.*, 54 Agric. Dec. 155, 166 n.5 (1995); *In re Johnny E. Lewis*, 53 Agric. Dec. 1327, 1354-55 (1994), *aff'd in part, rev'd & remanded in part*, 73 F.3d 312 (11th Cir. 1996), *decision on remand*, 55 Agric. Dec. 246 (1996), *aff'd per curiam sub nom. Morrison v. Secretary of Agric.*, 111 F.3d 897 (11th Cir. 1997) (Table); *In re Craig Lesser*, 52 Agric. Dec. 155, 167 (1993), *aff'd*, 34 (continued...)

Ruling Denying Motion for Adoption of Decision and Order, not the Chief ALJ's January 13, 2005, Order Granting Request for Extension of Time to File Answer, as Respondents contend. Complainant raised the issue of Respondents' failure to file a timely answer in Complainant's Motion for Default Decision. Therefore, I reject Respondents' contention that Complainant raises new issues in Complainant's Appeal Petition.

Fourth, Respondents contend Complainant's argument concerning the timing of the death of Respondents' counsel's father, Mr. Herman Rogovin, is inappropriate, and, while in most circumstances Complainant's zeal would be admirable, Complainant's argument seems only vengeful in this instance (Respondents' Memo Contra Complainant's Appeal Pet. at 3-5).

¹⁷(...continued)

F.3d 1301 (7th Cir. 1994); *In re Rudolph J. Luscher*, 51 Agric. Dec. 1026, 1026 (1992); *In re Lloyd Myers Co.*, 51 Agric. Dec. 782, 783 (1992) (Order Denying Pet. for Recons.), *aff'd*, 15 F.3d 1086 (9th Cir. 1994), 1994 WL 20019 (9th Cir. 1994) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 53 Agric. Dec. 686 (1994); *In re Van Buren County Fruit Exchange, Inc.*, 51 Agric. Dec. 733, 740 (1992); *In re Conesus Milk Producers*, 48 Agric. Dec. 871, 880 (1989); *In re James W. Hickey*, 47 Agric. Dec. 840, 851 (1988), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re Dean Daul*, 45 Agric. Dec. 556, 565 (1986); *In re E. Digby Palmer*, 44 Agric. Dec. 248, 253 (1985); *In re Evans Potato Co.*, 42 Agric. Dec. 408, 409-10 (1983); *In re Richard "Dick" Robinson*, 42 Agric. Dec. 7 (1983), *aff'd*, 718 F.2d 336 (10th Cir. 1983); *In re Daniel M. Winger*, 38 Agric. Dec. 182, 187 (1979), *appeal dismissed*, No. 79-C-126 (W.D. Wis. June 1979); *In re Lamers Dairy, Inc.*, 36 Agric. Dec. 265, 289 (1977), *aff'd sub nom. Lamers Dairy, Inc. v. Bergland*, No. 77-C-173 (E.D. Wis. Sept. 28, 1977), *printed in* 36 Agric. Dec. 1642, *aff'd*, 607 F.2d 1007 (7th Cir. 1979), *cert. denied*, 444 U.S. 1077 (1980).

Complainant argues Mr. Herman Rogovin's death on November 10, 2004, the last day Respondents' Answer could be filed, could not have caused Respondents' failure to file an answer during the previous 19 days. Complainant failed to consider Mr. Herman Rogovin's final illness, which occurred over several months just prior to his death (Respondents' Memo Contra Complainant's Appeal Pet. at 3).

Even if I were to find Complainant's argument inappropriate and vengeful, I would not affirm the Chief ALJ's denial of Complainant's Motion for Default Decision. The death of a parent is generally a very sad event, and I know from first-hand experience that the final illness of a parent can cause one to neglect duties other than those owed to the parent. Nonetheless, Respondents failed to file a timely motion for extension of time and failed to file a timely answer. Thus, Respondents are deemed, for purposes of this proceeding, to have admitted the allegations of the Complaint and waived opportunity for hearing. The final illness and subsequent death of Respondents' counsel's father, tragic though it is, does not constitute a meritorious basis for the Chief ALJ's denial of Complainant's Motion for Default Decision.¹⁸

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

¹⁸Complainant states he sympathizes with Respondents' counsel and derives no pleasure from his appeal of the Chief ALJ's Ruling Denying Motion for Adoption of Decision and Order (Complainant's Appeal Pet. at 8). I trust Complainant is aware that, while section 1.139 of the Rules of Practice (7 C.F.R. § 1.139) provides that a denial of a motion for a default decision may be appealed to the Judicial Officer, parties are not obliged by the Rules of Practice to appeal every denial of a motion for a default decision.

ORDER

1. Respondents, their agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations.

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

2. Respondent Diana R. McCourt is assessed an \$18,070 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Colleen A. Carroll within 60 days after service of this Order on Respondent Diana R. McCourt. Respondent Diana R. McCourt shall state on the certified check or money order that payment is in reference to AWA Docket No. 05-0003.

3. Respondent Siberian Tiger Conservation Association is assessed a \$16,420 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and sent to:

Colleen A. Carroll
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

Payment of the civil penalty shall be sent to, and received by, Colleen A. Carroll within 60 days after service of this Order on Respondent Siberian Tiger Conservation Association. Respondent Siberian Tiger Conservation Association shall state on the certified check or money order that payment is in reference to AWA Docket No. 05-0003.

RIGHT TO JUDICIAL REVIEW

Respondents have the right to seek judicial review of this 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 this Order. Respondents must seek judicial review within 60 days after entry of this Order.¹⁹ The date of entry of this Order is March 29, 2005.

Done at Washington, DC

March 29, 2005

William G. Jenson
Judicial Officer

¹⁹7 U.S.C. § 2149(c).