

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 09-0155
)
Terranova Enterprises, Inc.,)
a Texas corporation, d/b/a Animal)
Encounters, Inc.; Douglas Keith)
Terranova, an individual; Will)
Ann Terranova, an individual;)
Farin Fleming, an individual;)
Sloan Damon, an individual;)
Craig Perry, an individual, d/b/a)
Perry's Exotic Petting Zoo;)
Perry's Wilderness Ranch & Zoo,)
Inc., an Iowa corporation; Eugene)
"Trey" Key, III, an individual; and)
Key Equipment Company, Inc.,)
an Oklahoma corporation, d/b/a)
Culpepper & Merriweather Circus,) **Decision and Order as to**
) **Craig Perry and Perry's**
Respondents) **Wilderness Ranch & Zoo, Inc.**

PROCEDURAL HISTORY

On July 23, 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. On June 8, 2010, the Administrator filed an

Amended Complaint, which is the operative pleading in this proceeding. The Administrator alleges: (1) during the period August 7, 2008, through August 17, 2008, Craig Perry operated as an “exhibitor,” as that term is defined in the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act], and the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations], without an Animal Welfare Act license, in willful violation of 9 C.F.R. § 2.1(a); and (2) on December 15, 2009, during business hours, Mr. Perry and Perry’s Wilderness Ranch & Zoo, Inc. [hereinafter PWR], failed to allow Animal and Plant Health Inspection Service officials to enter Mr. Perry and PWR’s place of business and conduct an inspection of their facilities, animals, and records, in willful violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126(a). The Administrator also alleges Mr. Perry and PWR willfully violated the Animal Welfare Act and the Regulations at the Iowa State Fair, during the period August 7, 2008, through August 16, 2008. These violations [hereinafter the Iowa State Fair violations] concern handling, care, housing, and feeding of elephants exhibited at the Iowa State Fair by Terranova Enterprises, Inc., and Douglas Keith Terranova [hereinafter the Terranova Respondents].¹ On June 30, 2010, Mr. Perry and PWR filed an answer denying the material allegations of the Amended Complaint and raising affirmative defenses.

¹Amended Compl. at 16-19 and 22 ¶¶ G 11-G 13, G 15-G 16, H 1.

During the period February 17, 2011, through February 25, 2011, Administrative Law Judge Janice K. Bullard [hereinafter the ALJ] conducted a hearing in person in Washington, DC, and, by audio-visual telecommunication with Mr. Perry and PWR who were located in Ames, Iowa. Larry J. Thorson, Ackley, Kopecky & Kingery, LLP, Cedar Rapids, Iowa, represented Mr. Perry and PWR. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator.

On December 20, 2011, after the parties submitted post-hearing briefs, the ALJ filed a “Decision and Order (Craig Perry d/b/a Perry’s Exotic Petting Zoo; Perry’s Wilderness Ranch & Zoo, Inc.)” [hereinafter the ALJ’s Perry Decision] in which the ALJ concluded that, on December 15, 2009, Mr. Perry and PWR failed to allow Animal and Plant Health Inspection Service officials access to Mr. Perry and PWR’s place of business to conduct an inspection, in violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126. The ALJ concluded Mr. Perry and PWR’s violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126 was not willful and ordered Mr. Perry and PWR to cease and desist from further violations of the Animal Welfare Act and the Regulations. (ALJ’s Perry Decision at 27.) The ALJ dismissed the remaining violations alleged against Mr. Perry and PWR (ALJ’s Perry Decision at 26).

On January 27, 2012, the Administrator filed “Complainant’s Petition for Appeal as to Respondents Craig Perry and Perry’s Wilderness Ranch & Zoo, Inc.” [hereinafter Appeal Petition]. On February 24, 2012, Mr. Perry and PWR filed “Response to Appeal Petition of

Complainant” [hereinafter Response to Appeal Petition]. On March 2, 2012, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I adopt the ALJ’s conclusion that Mr. Perry and PWR violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126, except I conclude the violation was willful, and I assess Mr. Perry and PWR a civil penalty for their willful violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126.

DECISION

Discussion

The Administrator raises three issues on appeal. First, the Administrator contends, while the ALJ correctly concluded that Mr. Perry and PWR violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126 on December 15, 2009, the ALJ erroneously concluded the violation was not willful (Appeal Pet. at 6-9). Mr. Perry and PWR agree they violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126, but contend the ALJ correctly concluded their violation was not willful (Response to Appeal Pet. at 2-5, 11).

The Animal Welfare Act authorizes the Secretary of Agriculture to conduct inspections and investigations to determine whether any exhibitor has violated or is violating the Animal Welfare Act or the Regulations and requires exhibitors to allow access to their places of business, facilities, animals, and records, as follows:

§ 2146. Administration and enforcement by Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale.

7 U.S.C. § 2146(a).

The Regulations require that each exhibitor allow Animal and Plant Health Inspection Service officials access to the exhibitor's place of business, records, facilities, property, and animals, as follows:

§ 2.126 Access and inspection of records and property.

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

- (1) To enter its place of business;
- (2) To examine records required to be kept by the Act and the regulations in this part;
- (3) To make copies of the records;
- (4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and
- (5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.

(b) The use of a room, table, or other facilities necessary for the proper examination of the records and inspection of the property or animals must be

extended to APHIS officials by the dealer, exhibitor, intermediate handler, or carrier, and a responsible adult shall be made available to accompany APHIS officials during the inspection process.

9 C.F.R. § 2.126.

A willful act under the Administrative Procedure Act (5 U.S.C. § 558(c)) is an act in which the violator intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or acts with careless disregard of statutory requirements.² It is undisputed that Mr. Perry intentionally left his and PWR's place of business during business hours on December 15, 2009, without designating a person to allow Animal and Plant Health Inspection Service officials to enter that place of business, and that, during Mr. Perry's absence, an Animal and Plant Health Inspection Service official attempted to enter the place of business to conduct the activities listed in 9 C.F.R. § 2.126. I conclude Mr. Perry's intentional conduct is by definition "willful" under the Administrative Procedure Act; thus, I conclude Mr. Perry and PWR willfully violated 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126 on December 15, 2009.

²*In re Kathy Jo Bauck*, 68 Agric. Dec. 853, 860-61 (2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); *In re D&H Pet Farms, Inc.*, 68 Agric. Dec. 798, 812-13 (2009); *In re Jewel Bond*, 65 Agric. Dec. 92, 107 (2006), *aff'd per curiam*, 275 F. App'x 547 (8th Cir. 2008); *In re James E. Stephens*, 58 Agric. Dec. 149, 180 (1999); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 306 (1978), *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978).

Second, the Administrator contends the ALJ erroneously failed to assess Mr. Perry and PWR a civil penalty for their December 15, 2009, violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126 (Appeal Pet. at 9-11).

The Animal Welfare Act authorizes the Secretary of Agriculture to assess any exhibitor a civil penalty of not more than \$10,000 for each violation of the Animal Welfare Act or the Regulations. With respect to the civil penalty, the Secretary of Agriculture is required to give due consideration 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. (7 U.S.C. § 2149(b).)

Mr. Perry and PWR operate a large-sized business. An exhibitor's failure to provide Animal and Plant Health Inspection Service officials access to the exhibitor's place of business in violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126 is a serious violation because it thwarts the Secretary of Agriculture's ability to monitor the exhibitor's compliance with the Animal Welfare Act and the Regulations and severely undermines the Secretary of Agriculture's ability to enforce the Animal Welfare Act. However, Mr. Perry's December 15, 2009, absence from his and PWR's place of business was in response to a medical emergency suffered by Mr. Perry's long-time friend and volunteer, Michael Pacek, and, shortly after Mr. Perry returned to the place of business and determined an Animal and Plant Health Inspection Service official had attempted to enter the place of business to conduct

an inspection, Mr. Perry contacted the Animal and Plant Health Inspection Service official and asked him to return to conduct the inspection or, in the alternative, to arrange another date for the inspection (Tr. 1776-82). Moreover, when Mr. Perry is absent from his and PWR's place of business during business hours, Mr. Perry designates a person to be available to provide Animal and Plant Health Inspection Service officials access to the place of business; however, due to the December 15, 2009, emergency, Mr. Perry did not have an opportunity to designate a person to be available to provide the Animal and Plant Health Inspection Service official access to the place of business (Tr. 1828-31). PWR has been an Animal Welfare Act licensee for approximately 20 years (Tr. 1699-1700), and the Administrator cites no previous violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126 either by Mr. Perry or by PWR.

The United States Department of Agriculture's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991):

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

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by

administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497. The Administrator recommends that I assess Mr. Perry and PWR, jointly and severally, a civil penalty of not less than \$1,000. However, I have repeatedly stated the recommendations of administrative officials as to the sanction are not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.³

After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the requirements of 7 U.S.C. § 2149(b), and the remedial purposes of the Animal Welfare Act, I conclude assessment of a \$500 civil penalty is appropriate and necessary to ensure Mr. Perry and PWR's compliance with the Animal Welfare Act and the Regulations in the future, to deter others from violating the Animal Welfare Act and the Regulations, and to fulfill the remedial purposes of the Animal Welfare Act.

³*In re Sam Mazzola*, 68 Agric. Dec. 822, 849 (2009), *dismissed*, 2011 WL 2988902 (6th Cir. Oct. 27, 2010); *In re Lorenza Pearson*, 68 Agric. Dec. 685, 731 (2009), *aff'd*, 411 F. App'x 866 (6th Cir. 2011); *In re Amarillo Wildlife Refuge, Inc.*, 68 Agric. Dec. 77, 89 (2009); *In re Alliance Airlines*, 64 Agric. Dec. 1595, 1608 (2005); *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364, 390 (2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 787 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re Excel Corp.*, 62 Agric. Dec. 196, 234 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (2002).

Third, the Administrator contends the ALJ erroneously failed to find that Mr. Perry and PWR committed the Iowa State Fair violations (Appeal Pet. at 11-21).

The alleged Iowa State Fair violations concern elephants exhibited by the Terranova Respondents. The ALJ concluded, although the Terranova Respondents exhibited elephants at the Iowa State Fair upon Mr. Perry's invitation, no principal-agency relationship existed between Mr. Perry and PWR and the Terranova Respondents as a result of the exhibition and, as to Mr. Perry and PWR, the ALJ dismissed the Iowa State Fair violations (ALJ's Perry Decision at 26 ¶¶ 5-6).

The Administrator correctly argues that a principal-agency relationship need not be established to hold Mr. Perry and PWR liable for the Iowa State Fair violations (Appeal Pet. at 14). I have long held, when two or more persons exhibit animals jointly, they all can be liable for violations of the Animal Welfare Act and the Regulations that arise out of that exhibition and there is no requirement that their relationship meet the requirements for a partnership or joint venture.⁴ However, while the Administrator introduced some evidence

⁴*In re Gus White III*, 49 Agric. Dec. 123, 154 (1990) (stating, when two persons act together in the exhibition of animals, it is not necessary that their relationship meet all of the technical requirements of a partnership or joint venture in order to hold that both are exhibitors and jointly and severally liable for the violations); *In re Hank Post*, 47 Agric. Dec. 542, 547 (1988) (stating whether or not the shared duties of three persons constituted a joint venture is not the critical issue; the controlling consideration is that each person exercised control and authority over the way the animal was handled when exhibited and any one of them could have prevented the mishandling). *Cf. In re Micheal McCall*, 52 Agric. Dec. 986, 998 (1993)

that Mr. Perry and PWR jointly engaged in the exhibition of elephants with the Terranova Respondents at the Iowa State Fair, I do not find that the Administrator established joint exhibition by a preponderance of the evidence. Mr. Perry and PWR established that their employees and volunteers were prohibited from entering the elephant area and that Mr. Perry and PWR lacked control over the elephants (ALJ's Perry Decision at 20). Therefore, I agree with the ALJ's dismissal of the Iowa State Fair violations as to Mr. Perry and PWR.

Findings of Fact

1. Craig Perry is an individual whose business address is located in Center Point, Iowa 52213.
2. At all times material to this proceeding, Craig Perry was a corporate officer and director of Perry's Wilderness Ranch & Zoo, Inc.
3. Perry's Wilderness Ranch & Zoo, Inc., is an Iowa corporation.
4. At all times material to this proceeding, Perry's Wilderness Ranch & Zoo, Inc., was an Animal Welfare Act licensee and held Animal Welfare Act license number 42-C-0101.
5. On December 15, 2009, no one was at Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.'s place of business to allow an Animal and Plant Health Inspection Service

(stating the distinction between two kennels was so blurred as to make them, in reality, a single operation for which both individual kennel owners were jointly responsible).

official to enter the place of business to conduct an inspection of the facility, records, and animals.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Pursuant to 7 U.S.C. § 2139, Craig Perry's acts, omissions, or failures in his capacity as corporate officer and director of Perry's Wilderness Ranch & Zoo, Inc., are deemed to be his own as well as those of Perry's Wilderness Ranch & Zoo, Inc.
3. On December 15, 2009, Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., failed to allow an Animal and Plant Health Inspection Service official access to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.'s place of business to conduct an inspection, in willful violation of 7 U.S.C. § 2146(a) and 9 C.F.R. § 2.126.
4. An order instructing Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., to cease and desist from failing to allow Animal and Plant Health Inspection Service officials access to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.'s place of business to conduct the activities listed in 9 C.F.R. § 2.126 is warranted in law and justified by the facts.
5. An order assessing Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., jointly and severally, a \$500 civil penalty is warranted in law and justified by the facts.

For the foregoing reasons, the following Order is issued.

ORDER

1. Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., their agents, 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 and, in particular, shall cease and desist from failing to allow Animal and Plant Health Inspection Service officials access to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.'s place of business to conduct the activities listed in 9 C.F.R. § 2.126.

Paragraph 1 of this Order shall become effective upon service of this Order on Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.

2. Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., jointly and severally, are assessed a \$500 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 Craig Perry and Perry's Wilderness Ranch & Zoo, Inc. Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., shall state on the certified check or money order that payment is in reference to AWA Docket No. 09-0155.

RIGHT TO JUDICIAL REVIEW

Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., have the right to seek judicial review of the Order in this Decision and Order as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., in the appropriate United States Court of Appeals in accordance with 28 U.S.C. § 2341-2350. Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., must seek judicial review within 60 days after entry of the Order in this Decision and Order as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc.⁵ The date of entry of the Order in this Decision and Order as to Craig Perry and Perry's Wilderness Ranch & Zoo, Inc., is July 19, 2012.

Done at Washington, DC

July 19, 2012

William G. Jenson
Judicial Officer

⁵7 U.S.C. § 2149(c).