

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 03-0024
)
Karen Schmidt, d/b/a)
SCR Kennels,)
)
Respondent) **Decision and Order**

PROCEDURAL HISTORY

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on April 17, 2003. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that on January 24, 2000, July 18, 2000, May 8, 2001, October 24, 2001, and January 9, 2003, Karen Schmidt, d/b/a SCR Kennels [hereinafter

Respondent], committed 33 willful violations of the Regulations and Standards (Compl. ¶¶ II-VII). On May 12, 2003, Respondent filed an answer denying the material allegations of the Complaint.

On November 3 and 4, 2004, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] conducted a hearing in Springfield, Missouri. Robert A. Ertman, Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented Complainant. Respondent appeared pro se and was assisted by Dr. Jerome Schmidt.

On March 7, 2006, after Complainant and Respondent filed post-hearing briefs, the Chief ALJ filed a Decision [hereinafter Initial Decision] concluding Respondent committed seven violations of the Regulations and Standards and assessing Respondent a \$2,500 civil penalty (Initial Decision at 1, 22, 24).

On April 4, 2006, Respondent appealed to the Judicial Officer. On June 30, 2006, Complainant filed a response to Respondent's appeal petition. On July 10, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I affirm the Chief ALJ's Initial Decision. Complainant's exhibits are designated by "CX." The transcript is divided into two volumes, one volume for each day of the 2-day hearing. References to "Tr. I" are to the volume of the transcript that relates to the November 3, 2004, segment of the hearing

and references to “Tr. II” are to the volume of the transcript that relates to the November 4, 2004, segment of the hearing.

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—

....

(f) The term “dealer” means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition, or use as a pet, or (2) any dog for hunting, security, or breeding purposes, except that this term does not include—

(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer; or

(ii) any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than \$500 gross income from the sale of other animals during any calendar year[.]

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person’s license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

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

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than \$2,500 for each such violation, and the

Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. 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.

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.

....

Dealer means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog at the wholesale level for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animal to a research facility, an exhibitor, or a dealer (wholesale); any retail outlet where dogs are sold for hunting, breeding, or security purposes; or any person who does not sell or negotiate the purchase or sale of any wild or exotic animal, dog, or cat and who derives no more than \$500 gross income from the sale of animals other than wild or exotic animals, dogs, or cats during any calendar year.

PART 2—REGULATIONS

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

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

. . . .

PART 3—STANDARDS

SUBPART A—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF DOGS AND CATS

FACILITIES AND OPERATING STANDARDS

§ 3.1 Housing facilities, general.

. . . .

(e) *Storage.* Supplies of food and bedding must be stored in a manner that protects the supplies from spoilage, contamination, and vermin infestation. The supplies must be stored off the floor and away from the walls, to allow cleaning underneath and around the supplies. Foods requiring refrigeration must be stored accordingly, and all food must be stored in a manner that prevents contamination and deterioration of its nutritive value. All open supplies of food and bedding must be kept in leakproof containers with tightly fitting lids to prevent contamination and spoilage. Only food and bedding that is currently being used may be kept in the animal areas. Substances that are toxic to the dogs or cats but are required for normal husbandry practices must not be stored in food storage and preparation areas, but may be stored in cabinets in the animal areas.

. . . .

§ 3.4 Outdoor housing facilities.

....

(c) *Construction.* Building surfaces in contact with animals in outdoor housing facilities must be impervious to moisture. Metal barrels, cans, refrigerators or freezers, and the like must not be used as shelter structures. The floors of outdoor housing facilities may be of compacted earth, absorbent bedding, sand, gravel, or grass, and must be replaced if there are any prevalent odors, diseases, insects, pests, or vermin. All surfaces must be maintained on a regular basis. Surfaces of outdoor housing facilities—including houses, dens, etc.—that cannot be readily cleaned and sanitized, must be replaced when worn or soiled.

....

§ 3.6 Primary enclosures.

Primary enclosures for dogs and cats must meet the following minimum requirements:

(a) *General requirements.* . . .

(2) Primary enclosures must be constructed and maintained so that they:

(i) Have no sharp points or edges that could injure the dogs and cats[.]

....

ANIMAL AND HUSBANDRY STANDARDS

....

§ 3.11 Cleaning, sanitization, housekeeping, and pest control.

(a) *Cleaning of primary enclosures.* Excreta and food waste must be removed from primary enclosures daily, and from under primary enclosures as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent soiling of the dogs or cats contained in the primary enclosures, and to reduce disease hazards, insects, pests and odors. When steam or water is used to clean the primary enclosure, whether by hosing, flushing, or other methods, dogs and cats must be removed, unless the enclosure is large enough to ensure the animals would not be harmed, wetted, or distressed in the process. Standing water must be removed from the primary enclosure and animals in other primary enclosures must be

protected from being contaminated with water and other wastes during the cleaning. The pans under primary enclosures with grill-type floors and the ground areas under raised runs with mesh or slatted floors must be cleaned as often as necessary to prevent accumulation of feces and food waste and to reduce disease hazards pests, insects and odors.

....

(c) *Housekeeping for premises.* Premises where housing facilities are located, including buildings and surrounding grounds, must be kept clean and in good repair to protect the animals from injury, to facilitate the husbandry practices required in this subpart, and to reduce or eliminate breeding and living areas for rodents and other pests and vermin. Premises must be kept free of accumulations of trash, junk, waste products, and discarded matter. Weeds, grasses, and bushes must be controlled so as to facilitate cleaning of the premises and pest control, and to protect the health and well-being of the animals.

(d) *Pest control.* An effective program for the control of insects, external parasites affecting dogs and cats, and birds and mammals that are pests, must be established and maintained so as to promote the health and well-being of the animals and reduce contamination by pests in animal areas.

9 C.F.R. §§ 1.1; 2.100(a); 3.1(e), .4(c) .6(a)(2)(i), .11(a), (c)-(d).

DECISION

Decision Summary

Complainant alleges Respondent committed 33 willful violations of the Regulations and Standards on January 24, 2000, July 18, 2000, May 8, 2001, October 24, 2001, and January 9, 2003 (Compl. ¶¶ II-VII). Complainant withdrew the allegations that Respondent violated the Regulations and Standards on January 24, 2000, and July 18, 2000 (Complainant's Reply Memorandum at 3; Complainant's Response to Appeal at 2), leaving 26 alleged violations at issue. The Chief ALJ found Respondent committed seven violations of the Regulations and Standards and dismissed the remaining 19 alleged

violations. Complainant does not appeal the Chief ALJ's dismissal of 19 of the violations alleged in the Complaint; therefore, the only violations at issue are the seven violations found by the Chief ALJ. I affirm the Chief ALJ's conclusion that Respondent committed seven violations of the Regulations and Standards and the Chief ALJ's assessment of a \$2,500 civil penalty against Respondent.

Discussion

Respondent

Respondent is an individual doing business as SCR Kennels, located at 6740 Highway F, Hartville, Missouri. Respondent holds Animal Welfare Act Class A Dealer License number 43A2135. SCR Kennels is a breeding dog kennel, and, at the time of the most recent United States Department of Agriculture inspection that is the subject of this proceeding, January 9, 2003, SCR Kennels had 150 breeding female dogs, over 20 breeding male dogs, and a number of puppies. The primary function of SCR Kennels is to sell puppies in commerce, and SCR Kennels sold 442 puppies in 2001. (CX 6 at 1.)

The October 24, 2001, Inspection

Animal and Plant Health Inspection Service, Animal Care, inspectors Sandra Meek and Jan Feldman inspected Respondent's facility on October 24, 2001. Respondent and Dr. Schmidt accompanied the two inspectors. Sandra Meek and Jan Feldman memorialized their findings in an inspection report (CX 17). In addition to the narrative in the inspection report, Jan Feldman took a number of photographs to document their

observations (CX 18-CX 27). Complainant proved by a preponderance of the evidence one of the nine violations alleged as a result of the October 24, 2001, inspection.

Complainant alleges that on October 24, 2001, Respondent did not maintain primary enclosures in such a manner as to protect the animals from injury in violation of sections 2.100(a) and 3.6(a)(2)(i) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.6(a)(2)(i)) (Compl. ¶ V(F)). Complainant documented a number of incidences in which broken wires or sharp edges in the enclosures presented potential injury hazards to the dogs sheltered in the enclosures. Sandra Meek testified that the six photographs which comprise CX 23 demonstrate that several enclosures had broken wires, which were protruding in a manner which could cause harm to the dogs (Tr. I at 36-38). In her inspection report, Sandra Meek stated 18 primary enclosures posed safety threats to the dogs as a result of broken wires or side/bottom panels (CX 17 at 2), but her testimony and the photographs only document two enclosures which posed safety threats to the dogs (Tr. I at 66-67).

From Dr. Schmidt's testimony, it appears that repair of enclosures is a constant activity at Respondent's facility, particularly with dachshunds, which have a tendency to chew or claw at the enclosures. It is evident from CX 23 that there were many shiny clips on the enclosures indicating repairs were made not long before the inspection, i.e., Respondent appeared to be fairly diligent in monitoring and repairing broken wires. On the other hand, it is uncontroverted that at least two enclosures had broken wires which

could cause injury to the dogs; thus, I conclude Complainant proved by a preponderance of the evidence a violation of sections 2.100(a) and 3.6(a)(2)(i) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.6(a)(2)(i)) existed at the time of the October 24, 2001, inspection.

The January 9, 2003, Inspection

On January 9, 2003, Sandra Meek once again inspected Respondent's facility. On this occasion, Sandra Meek was accompanied by Animal and Plant Health Inspection Service senior inspector Daniel Hutchings. Sandra Meek prepared an inspection report (CX 33), and Daniel Hutchings took photographs (CX 34-43). Respondent and Dr. Schmidt accompanied the two inspectors. Complainant proved by a preponderance of the evidence 6 of the 11 violations alleged as a result of the January 9, 2003, inspection.

Complainant alleges that on January 9, 2003, Respondent stored chemicals, cleaning substances, and food supplies in an unsafe manner in violation of sections 2.100(a) and 3.1(e) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.1(e)) (Compl. ¶ VII(B)). Sandra Meek testified that she observed an open bag of chemical insecticide near the bulk food (Tr. I at 42-43). Complainant introduced two photographs which document this observation (CX 34).

Respondent did not deny that the open bag of insecticide was located as described by Sandra Meek, but rather downplayed the significance of the location of the insecticide. Dr. Schmidt identified the insecticide as Rotenone and emphasized that it was a safe

insecticide for dogs and humans and was commonly used in gardening. He stated there were no open food containers near the Rotenone and it presented no danger. (Tr. II at 124-27.)

Complainant has sustained its burden in regard to this allegation. While an insecticide may be safe to use under certain conditions, the Regulations and Standards clearly provide that insecticide must be stored either in an area separate from the food storage and preparation areas or in a cabinet in the animal areas.

Complainant alleges that on January 9, 2003, Respondent failed to maintain building surfaces in good repair in violation of sections 2.100(a) and 3.4(c) of the Regulations and Standards (9 C.F.R. §§ 2.100(a), 3.4(c)) (Compl. ¶ VII(G)). Animal and Plant Health Inspection Service inspectors cited Respondent for having a broken hinge on a single door in one of the outdoor enclosures, causing the door to hang at an angle (CX 33 at 3). A photograph confirms that the door to a shelter is indeed hanging by its top hinge (CX 38). Respondent admits that the hinge was broken, but points out that the different color of the door where the hinge is missing indicates that the hinge could not have been broken for a very long time (Respondent's Post-Hearing Brief at 33-34; Tr. I at 74). In addition, Sandra Meek testified that the missing hinge did not prevent animals from entering or leaving the shelter (Tr. I at 74). Nevertheless, the hinge is missing, and I find Complainant proved by a preponderance of the evidence a violation of sections 2.100(a) and 3.4(c) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.4(c)).

Complainant alleges that on January 9, 2003, Respondent failed to maintain building surfaces in good repair in violation of sections 2.100(a) and 3.6(a)(2)(i)-(iii) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.6(a)(2)(i)-(iii)) (Compl. ¶ VII(H)). Animal and Plant Health Inspection Service inspectors cited Respondent for allowing primary enclosures to present sharp points or edges which could injure the dogs. Sandra Meek testified that a number of enclosures had broken or protruding wires and one enclosure had a sheet of tin with sharp edges (Tr. I at 46-47).

Testimony on the broken wires was a bit hazy, as were the photographs that purported to show the wires. The sheet of tin does appear to have sharp edges (CX 39 at 2-4). Respondent contends no dogs were in the enclosure at the time of the inspection; however, the Regulations and Standards make no exception for primary enclosures that do not contain dogs at the time of inspection. I find the sheet of tin in the enclosure constitutes a violation of sections 2.100(a) and 3.6(a)(2)(i) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.6(a)(2)(i)).

Complainant alleges that on January 9, 2003, Respondent failed “to clean and sanitize enclosures as often as necessary to prevent an excessive accumulation of dirt, hair and fecal and food wastes” in violation of sections 2.100(a) and 3.11(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.11(a)) (Compl. ¶ VII(I)). An outdoor enclosure (identified as enclosure 13) had a substantial accumulation of waste material (CX 33 at 4). Respondent stated the enclosure had not been used for nearly 1 year before

the inspection. Nevertheless, it is clear that an animal had been using the enclosure, since the amount of waste in the enclosure was excessive (CX 41 at 9). Len Clayton, a Missouri Department of Agriculture animal health officer called by Respondent, admitted on cross-examination that the enclosure in question appeared not to be in compliance with Missouri regulations (Tr. II at 15). Tom Jacques, also an animal health officer with the Missouri Department of Agriculture, testified similarly (Tr. II at 31-32). If an animal had not used the enclosure, it is reasonable to surmise that the excessive waste observed by the inspectors and documented photographically would not have accumulated. I find Complainant proved by a preponderance of the evidence Respondent has not complied with sections 2.100(a) and 3.11(a) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.11(a)).

Complainant also alleges that on January 9, 2003, Respondent failed to maintain housing premises free of accumulations of dirt, fecal matter, hair, and debris in violation of sections 2.100(a) and 3.11(c) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.11(c)) (Compl. ¶ VII(J)). Complainant introduced photographs and testimony relating to conditions caused by a broken drainage pipe in Respondent's sewage system. The record clearly establishes that one of the pipes of the sewage system that served the kennel broke and, as a result of this break, waste matter accumulated in quantities that normally would not be present in a kennel complying with the requirements of the Regulations and Standards regarding sanitation and cleanliness (CX 42; Tr. I at 51-52).

Although the violation was the result of an accident, the fact remains that Respondent committed a violation of sections 2.100(a) and 3.11(c) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.11(c)) caused by the sewage problem.

Finally, Complainant alleges that on January 9, 2003, Respondent failed to provide an effective program of pest control in violation of sections 2.100(a) and 3.11(d) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.11(d)) (Compl. ¶ VII(K)). Complainant introduced evidence of rodent holes on the premises near the outdoor pens (CX 43). The allegation was that these were active rodent dens, but no rodents were actually seen entering or exiting these dens during the course of the inspection. However, Daniel Hutchings, who is an experienced trapper, as well as an inspector for the United States Department of Agriculture, testified that the two rodent holes depicted in CX 43 were being used on a regular basis on January 9, 2003 (Tr. I at 11-12). In addition, Sandra Meek indicated that rodents were living in the rodent holes depicted in CX 43 (Tr. I at 52-53). I find Complainant proved by a preponderance of the evidence that Respondent failed to have an effective program of pest control on January 9, 2003, in violation of sections 2.100(a) and 3.11(d) of the Regulations and Standards (9 C.F.R. §§ 2.100(a); 3.11(d)).

Sanctions

Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) requires, when considering the amount of a civil penalty, the Secretary of Agriculture to give due consideration to four factors: (1) the size of the business of the person involved in the violations; (2) the gravity of the violations; (3) the violator's good faith; and (4) the violator's history of previous violations.

On January 9, 2003, Respondent had 150 breeding female dogs, over 20 breeding male dogs, and a number of puppies. In 2001, Respondent sold 442 puppies. (CX 6 at 1.) Based on the number of dogs held by Respondent on January 9, 2003, and the number of puppies sold in 2001, I find Respondent operates a large business.

Many of Respondent's violations are minor. Respondent's ongoing pattern of violations on October 24, 2001, and January 9, 2003, establishes a "history of previous violations" for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) and a lack of good faith. However, Respondent's history of previous violations and lack of good faith is, to some extent, mitigated by the evidence of Respondent's correction of violations.¹

¹Corrections of violations do not eliminate the fact that the violations occurred, but corrections are commendable and can be taken into account when determining the sanction to be imposed. *In re Jewel Bond* (Order Denying Pet. to Reconsider), ___ Agric. Dec. ___, slip op. at 6 (July 6, 2006); *In re Eric John Drogosch*, 63 Agric. Dec. 623, 643 (2004); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 644 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Susan DeFrancesco*, 59 Agric. Dec. 97, 112

(continued...)

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), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

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

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

¹(...continued)

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

gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497.

Complainant seeks assessment of a \$2,500 civil penalty against Respondent and a cease and desist order (Complainant's Response to Appeal at 1).

Respondent could be assessed a maximum civil penalty of \$19,250 for her seven violations of the Regulations and Standards.² 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 section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)), the remedial purposes of the Animal Welfare Act, and the recommendations of the administrative officials, I conclude a cease and desist order and assessment of a \$2,500 civil penalty are appropriate and necessary to ensure Respondent's compliance with the Animal Welfare Act and the Regulations and Standards in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to fulfill the remedial purposes of the Animal Welfare Act.

²Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than \$2,500 for each violation of the Animal Welfare Act and the Regulations and Standards. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil penalty that may be assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each violation of the Animal Welfare Act and the Regulations and Standards by increasing the maximum civil penalty from \$2,500 to \$2,750 (7 C.F.R. § 3.91(b)(2)(v)).

Respondent's Appeal Petition

Respondent raises seven issues in Respondent's Petition of Appeal [hereinafter Appeal Petition] and "Defendant's Proposed Findings of Fact & Evidence to Appeal the March 7, 2006 Decision & Dismiss All Charges Against Karen Schmidt d/b/a SCR Kennel" [hereinafter Brief in Support of Appeal Petition]. First, Respondent contends the Chief ALJ erroneously failed to dismiss the Complaint based upon his finding that the United States Department of Agriculture engaged in misconduct in the instant proceeding, *In re Jerome Schmidt*, AWA Docket No. 05-0019, and *In re Marilyn Shepard*, 61 Agric. Dec. 478 (2002), and with respect to Dr. Jerome Schmidt's business (Respondent's Appeal Pet. at 1; Respondent's Brief in Support of Appeal Pet. ¶ I).

The Chief ALJ did not find the United States Department of Agriculture engaged in misconduct. Instead, the Chief ALJ described Respondent's allegations of inappropriate United States Department of Agriculture conduct; referred Respondent's allegations to the United States Department of Agriculture, Office of Inspector General; and made his determination of whether Respondent violated the Regulations and Standards as alleged in the Complaint based upon the evidence (Initial Decision at 3-4). I agree with the manner in which the Chief ALJ handled Respondent's allegations of misconduct, and I agree with the Chief ALJ that the evidence supports his findings that Respondent committed seven violations of the Regulations and Standards. Therefore, I find no basis to dismiss the Complaint based on Respondent's allegations of misconduct.

Second, Respondent contends the 16-month period between the close of the November 3-4, 2004, hearing and the issuance of the Initial Decision had a direct relationship to the United States Department of Agriculture's agenda against Dr. Jerome Schmidt and caused Respondent to sell many of her dogs (Respondent's Appeal Pet. at 1; Respondent's Brief in Support of Appeal Pet. ¶ II).

I have carefully examined the arguments in Respondent's Brief in Support of Appeal Petition. I find no relationship between the date of the issuance of the Initial Decision in the instant proceeding and the proceeding instituted under the Animal Welfare Act against Dr. Jerome Schmidt, *In re Jerome Schmidt*, AWA Docket No. 05-0019. The instant proceeding and *In re Jerome Schmidt*, AWA Docket No. 05-0019, are two distinct proceedings. The disposition of the instant proceeding is not affected by *In re Jerome Schmidt*, AWA Docket No. 05-0019, and Respondent's position in the instant proceeding is not disadvantaged by the 16-month period between the close of the November 3-4, 2004, hearing and the issuance of the Initial Decision. Moreover, while Respondent's decision to sell many of her dogs may have been influenced by the instant proceeding, Respondent was not required to sell her dogs because the Initial Decision was pending and Respondent's decision to sell her dogs is not relevant to the disposition of this proceeding.

Third, Respondent contends the 16-month period between the close of the November 3-4, 2004, hearing and the issuance of the Initial Decision violated

Respondent's right to a speedy trial under the Sixth Amendment to the Constitution of the United States (Respondent's Appeal Pet. at 1; Respondent's Brief in Support of Appeal Pet. ¶ II).

The Sixth Amendment right to a speedy trial is explicitly confined to criminal prosecutions, as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VI.

The instant proceeding is not a criminal prosecution. Instead, the instant proceeding is a disciplinary administrative proceeding conducted under the Animal Welfare Act, in accordance with the Administrative Procedure Act, and the sanction imposed against Respondent is a civil penalty. It is well settled that the Sixth Amendment to the Constitution of the United States is only applicable to criminal proceedings and is not applicable to civil proceedings.³ Thus, I conclude Respondent's rights under the Sixth

³See *Austin v. United States*, 509 U.S. 602, 609 (1993) (stating the protections provided by the Sixth Amendment are explicitly confined to criminal prosecutions); *United States v. Ward*, 448 U.S. 242, 248 (1980) (stating the protections provided by the Sixth Amendment are explicitly confined to criminal prosecutions); *United States v. Zucker*, 161 U.S. 475, 481 (1895) (stating the Sixth Amendment relates to prosecution of an accused person which is technically criminal in nature); *United States v. Plumman*,
(continued...)

Amendment to the Constitution of the United States are not implicated in this administrative proceeding.

Fourth, Respondent contends her violations of section 3.6(a)(2)(i) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(i)) on October 24, 2001, and sections 3.1(e), 3.4(c), and 3.11(c) of the Regulations and Standards (9 C.F.R. §§ 3.1(e), .4(c), .11(c)) on January 9, 2003, were not willful (Respondent's Appeal Pet. at 1; Respondent's Brief in Support of Appeal Pet. ¶ III).

The Chief ALJ does not identify which, if any, of Respondent's violations of the Regulations and Standards he concluded were willful, but states "many of [Respondent's] violations were minor or non-willful." (Initial Decision at 23.) Moreover, my disposition of the instant proceeding is not based upon Respondent's willfulness; therefore, I find no purpose would be served by my determining whether Respondent's violations of section 3.6(a)(2)(i) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(i)) on October 24,

³(...continued)
409 F.3d 919, 927 (8th Cir. 2004) (stating the protections provided by the Sixth Amendment are explicitly confined to criminal prosecutions); *Williams v. State of Missouri*, 640 F.2d 140, 144 (8th Cir.) (stating the Sixth Amendment applies only during the pendency of the criminal case), *cert. denied*, 451 U.S. 990 (1981); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1132 (1998) (concluding the Sixth Amendment is not applicable to administrative proceedings instituted under the Animal Welfare Act), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam), *printed in* 59 Agric. Dec. 533 (2000); *In re Conrad Payne*, 57 Agric. Dec. 921, 931 (1998) (concluding the respondent's rights under the Sixth Amendment are not implicated in an administrative proceeding instituted under section 2 of the Act of February 2, 1903, as amended).

2001, and sections 3.1(e), 3.4(c), and 3.11(c) of the Regulations and Standards (9 C.F.R. §§ 3.1(e), .4(c), .11(c)) on January 9, 2003, were willful.

Fifth, Respondent contends the Chief ALJ erroneously concluded that she violated section 3.6(a)(2) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)) on January 9, 2003 (Respondent's Appeal Pet. at 1; Respondent's Brief in Support of Appeal Pet. ¶ III).

Complainant alleges Respondent failed to construct and maintain a primary structure so that it had no sharp points or edges that could injure dogs in violation of section 3.6(a)(2) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)) (Compl. ¶ VII(H)). The Chief ALJ found that, on January 9, 2003, a primary enclosure contained a sheet of tin with sharp edges which could injure Respondent's dogs and concluded Respondent violated section 3.6(a)(2) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)) (Initial Decision at 19-20). Respondent contends, because no dogs had been in the primary enclosure since December 25, 2001, Respondent did not violate section 3.6(a)(2) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)) on January 9, 2003 (Respondent's Brief in Support of Appeal Pet. ¶ III). I disagree with Respondent. Section 3.6(a)(2)(i) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(i)) provides that primary enclosures must be *maintained* so that they have no sharp points that *could* injure dogs. The Regulations and Standards make no exception for primary enclosures that do not contain dogs at the time of inspection. Instead, at all times, primary

enclosures must be maintained so that they have no sharp points that could possibly injure dogs.

Sixth, Respondent contends the Chief ALJ erroneously concluded she violated section 3.11(a) of the Regulations and Standards (9 C.F.R. § 3.11(a)) on January 9, 2003 (Respondent's Appeal Pet. at 1; Respondent's Brief in Support of Appeal Pet. ¶ III).

Complainant alleges Respondent failed to clean and sanitize enclosures as often as necessary to prevent an excessive accumulation of dirt, hair, excreta, and food waste in violation of section 3.11(a) of the Regulations and Standards (9 C.F.R. § 3.11(a)) (Compl. ¶ VII(I)). The Chief ALJ found that, on January 9, 2003, an outdoor enclosure had a substantial accumulation of waste material and concluded Respondent violated section 3.11(a) of the Regulations and Standards (9 C.F.R. § 3.11(a)) (Initial Decision at 20-21). Respondent asserts three stock dogs that are not subject to the Animal Welfare Act defecate in the enclosure and no dogs subject to the Animal Welfare Act had been in the enclosure since February 2002. Respondent argues, under these circumstances, Respondent did not violate section 3.11(a) of the Regulations and Standards (9 C.F.R. § 3.11(a)) on January 9, 2003 (Respondent's Brief in Support of Appeal Pet. ¶ III). I disagree with Respondent. Section 3.11(a) of the Regulations and Standards (9 C.F.R. § 3.11(a)) provides that excreta must be removed from primary enclosures daily to reduce disease hazards, insects, pests, and odors. The Regulations and Standards make no

exception for primary enclosures that do not contain dogs at the time of inspection or that contain waste only from dogs that are not subject to the Animal Welfare Act.

Seventh, Respondent contends the Chief ALJ erroneously concluded she violated section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)) on January 9, 2003 (Respondent's Appeal Pet. at 1; Respondent's Brief in Support of Appeal Pet. ¶ III).

Complainant alleges Respondent failed to provide an effective program of pest control in violation of section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)) (Compl. ¶ VII(J)). The Chief ALJ found the presence of several rodent holes on January 9, 2003, was well documented and concluded Respondent violated section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)), although no rodents were actually seen entering or exiting these holes during the inspection of Respondent's premises (Initial Decision at 22). Respondent asserts the lack of any rodent activity and the condition of the rodent holes and the ground around the rodent holes establish that Respondent had an effective program of pest control, and Respondent did not violate section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)) on January 9, 2003 (Respondent's Brief in Support of Appeal Pet. ¶ III). I disagree with Respondent. Daniel Hutchings, who is an experienced trapper, as well as an inspector for the United States Department of Agriculture, testified that the two rodent holes depicted in CX 43 were being used on a regular basis on January 9, 2003 (Tr. I at 11-12). In addition, Sandra Meek indicated that rodents were living in the rodent holes depicted in CX 43 (Tr. I at

52-53). I find Complainant proved by a preponderance of the evidence that Respondent failed to have an effective program of pest control on January 9, 2003.

Findings of Fact

1. Respondent is an individual doing business as SCR Kennels, located at 6740 Highway F, Hartville, Missouri (CX 6 at 1).
2. Respondent holds Animal Welfare Act Class A Dealer License number 43A2135 (CX 6 at 1).
3. SCR Kennels is a breeding dog kennel. On January 9, 2003, SCR Kennels had 150 breeding female dogs, over 20 breeding male dogs, and a number of puppies. In 2001, SCR Kennels sold 442 puppies. (CX 6 at 1.)
4. On October 24, 2001, Respondent failed to maintain primary enclosures in such a manner as to protect all Respondent's dogs from injury. Specifically, two of Respondent's enclosures had broken wires or sharp edges in the enclosures that presented potential injury hazards to the dogs sheltered in those enclosures. (CX 17 at 2, CX 23; Tr. I at 36-38, 66-67.) (9 C.F.R. §§ 2.100(a); 3.6(a)(2)(i).)
5. On January 9, 2003, Respondent failed to store chemicals and food supplies in a safe manner. Specifically, Respondent stored an open bag of chemical insecticide near the bulk food. (CX 34; Tr. I at 42-43.) (9 C.F.R. §§ 2.100(a); 3.1(e).)
6. On January 9, 2003, Respondent failed to keep an outdoor housing facility in good repair. Specifically, one of Respondent's outdoor enclosures had a broken hinge

on a single door, causing the door to hang at an angle. (CX 33 at 3, CX 38.) (9 C.F.R. §§ 2.100(a); 3.4(c).)

7. On January 9, 2003, Respondent failed to construct and maintain a primary enclosure so that it had no sharp points or edges that could injure dogs. Specifically, one enclosure had a sheet of tin with sharp edges. (CX 39 at 2-4; Tr. I at 46-47.) (9 C.F.R. §§ 2.100(a); 3.6(a)(2)(i).)

8. On January 9, 2003, Respondent failed to clean an enclosure as often as necessary to prevent an excessive accumulation of waste and dirt. Specifically, an outdoor enclosure (identified as enclosure 13) had a substantial accumulation of waste material. (CX 33 at 4, CX 41 at 9; Tr. II at 15, 31-32.) (9 C.F.R. §§ 2.100(a); 3.11(a).)

9. On January 9, 2003, Respondent failed to maintain housing facilities free of accumulations of dirt, fecal matter, hair, and debris. Specifically, one of the pipes of the sewage system that served the kennel broke and resulted in accumulations of waste matter in excessive amounts. (CX 42; Tr. I at 51-52.) (9 C.F.R. §§ 2.100(a); 3.11(c).)

10. On January 9, 2003, Respondent failed to provide an effective program of pest control. Specifically, rodent holes were on Respondent's premises near the outdoor pens. (CX 43; Tr. I at 11-12, 52-53.) (9 C.F.R. §§ 2.100(a); 3.11(d).)

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. On October 24, 2001, Respondent violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to maintain primary enclosures in such a manner as to protect all Respondent's dogs from injury, as required by section 3.6(a)(2)(i) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(i)).

3. On January 9, 2003, Respondent violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to store chemicals and food supplies in a safe manner, as required by section 3.1(e) of the Regulations and Standards (9 C.F.R. § 3.1(e)).

4. On January 9, 2003, Respondent violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to keep an outdoor housing facility in good repair, as required by section 3.4(c) of the Regulations and Standards (9 C.F.R. § 3.4(c)).

5. On January 9, 2003, Respondent violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to construct and maintain a primary enclosure so that it had no sharp points or edges that could injure dogs, as required by section 3.6(a)(2)(i) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(i)).

6. On January 9, 2003, Respondent violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to clean an enclosure as often as necessary to prevent an excessive accumulation of waste and dirt, as required by section 3.11(a) of the Regulations and Standards (9 C.F.R. § 3.11(a)).

7. On January 9, 2003, Respondent violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to maintain housing facilities free of accumulations of dirt, fecal matter, hair, and debris, as required by section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)).

8. On January 9, 2003, Respondent violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide an effective program of pest control, as required by section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)).

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

ORDER

1. Respondent, her 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 and Standards, and, in particular, shall cease and desist from:

- (a) Failing to maintain primary enclosures in a manner to protect dogs from injury;
- (b) Failing to store chemicals and food supplies in a safe manner;
- (c) Failing to maintain outdoor housing facilities in good repair;
- (d) Failing to ensure that primary enclosures have no sharp points or edges which could injure dogs;

(e) Failing to keep the enclosures free of excessive accumulations of waste and dirt;

(f) Failing to keep premises clean; and

(g) Failing to have an adequate program of pest control.

Paragraph 1 of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent is assessed a \$2,500 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:

Robert A. Ertman
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, Robert A. Ertman within 60 days after service of this Order on Respondent. Respondent shall state on the certified check or money order that payment is in reference to AWA Docket No. 03-0024.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to seek judicial review of the Order in this Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend

(in whole or in part), or to determine the validity of the Order in this Decision and Order. Respondent must seek judicial review within 60 days after entry of the Order in this Decision and Order.⁴ The date of entry of the Order in this Decision and Order is August 30, 2006.

Done at Washington, DC

August 30, 2006

William G. Jenson
Judicial Officer

⁴⁷ U.S.C. § 2149(c).