

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 05-0019
)
Jerome Schmidt, d/b/a)
Top of the Ozark Auction,)
)
Respondent) **Order Denying Petition to Reconsider**

PROCEDURAL HISTORY

On March 26, 2007, I issued a Decision and Order concluding Jerome Schmidt, d/b/a Top of the Ozark Auction [hereinafter Dr. Schmidt], violated the regulations and standards issued under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Regulations and Standards].¹ On April 20, 2007, Dr. Schmidt filed a petition to reconsider that Decision and Order.² On April 30, 2007, Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed a response to Dr. Schmidt's Petition to

¹*In re Jerome Schmidt*, __ Agric. Dec. ____ (Mar. 26, 2007).

²“Reconsideration Petition” [hereinafter Petition to Reconsider].

Reconsider,³ and the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Dr. Schmidt's Petition to Reconsider.

Based upon a careful review of the record, I deny Dr. Schmidt's Petition to Reconsider and reinstate the Order in *In re Jerome Schmidt*, __ Agric. Dec. ____ (Mar. 26, 2007). The Administrator's exhibits are designated by "CX." Transcript references are designated by "Tr."

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Dr. Schmidt raises six issues in his Petition to Reconsider. First, Dr. Schmidt asserts United States Department of Agriculture inspectors violated the Regulations and Standards when conducting inspections at Top of the Ozark Auction. Dr. Schmidt asserts, until August 2004, the Regulations and Standards required United States Department of Agriculture inspectors to conduct inspections only when accompanied by the owner of the facility and the United States Department of Agriculture inspectors who inspected Top of the Ozark Auction violated this requirement.

The record establishes that Dr. Schmidt, the owner of Top of the Ozark Auction, did not accompany Sandra K. Meek and Jan R. Feldman, the United States Department of Agriculture inspectors who conducted the inspections at issue in the instant proceeding, during their inspections. However, neither the Animal Welfare Act nor the Regulations and Standards requires that United States Department of Agriculture inspectors conduct

³"Complainant's Opposition to Respondent's Petition for Reconsideration of the Judicial Officer's Decision and Order" [hereinafter Response to Petition to Reconsider].

inspections of a facility only when accompanied by the owner of that facility;⁴ therefore, I reject Dr. Schmidt's contention that United States Department of Agriculture inspectors violated the Regulations and Standards when they inspected Top of the Ozark Auction.

Second, Dr. Schmidt contends the inspections at issue in this proceeding were unreasonable searches in violation of the Fourth Amendment to the Constitution of the United States.

Dr. Schmidt raises the issue of the constitutionality of the inspections of Top of the Ozark Auction for the first time in his Petition to Reconsider. It is well settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer;⁵ therefore, Dr. Schmidt's Fourth Amendment argument comes too late for me to consider. Moreover, even if Dr. Schmidt had raised the issue timely, I would reject it. The United States Court of Appeals for the Seventh Circuit has specifically addressed the issue of warrantless inspections conducted under the Animal Welfare Act and has held that a

⁴Section 2.126(b) of the Regulations and Standards (9 C.F.R. § 2.126(b)) was amended, effective August 13, 2004, to require dealers to make a responsible adult available to accompany Animal and Plant Health Inspection Service officials during the inspection process (69 Fed. Reg. 42,089, 42,102 (July 14, 2004)). During the only inspection at issue in the instant proceeding that occurred after the effective date of this amendment, Dr. Schmidt made a responsible adult available to accompany the United States Department of Agriculture inspector (CX 16 at 2).

⁵*In re Bodie S. Knapp*, 64 Agric. Dec. 253, 289 (2005); *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., 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).

search conducted by the United States Department of Agriculture pursuant to the Animal Welfare Act fits within the exception to the warrant requirement for “closely regulated” industries.⁶

Third, Dr. Schmidt asserts I erroneously concluded Sandra Meek prepared inspection reports that accurately reflect the conditions at Top of the Ozark Auction.

I find nothing in the record indicating the 10 inspection reports at issue in this proceeding are inaccurate. Moreover, I find the conditions at Top of the Ozark Auction, as reflected on the 10 inspection reports, which were prepared contemporaneously with Sandra Meek’s observations, corroborated by other evidence in the record. Ms. Meek testified as to the accuracy of the inspection reports.⁷ Jan Feldman assisted Ms. Meek during five of the 10 inspections at issue in this proceeding and testified, based on her observations at Top of the Ozark Auction, she agreed with all of the violations cited by Ms. Meek on the inspection reports related to these five inspections.⁸ Moreover, Ms. Meek took photographs of some of Dr. Schmidt’s violations during two of the 10 inspections at issue in this proceeding.⁹ The photographs confirm violations cited by Ms. Meek on the inspection reports that relate to these two inspections. Further still,

⁶*Lesser v. Espy*, 34 F.3d 1301, 1306 (7th Cir. 1994).

⁷Tr. 12-75.

⁸Tr. 77-79.

⁹CX 37-CX 48.

Dr. Schmidt testified that he agreed with some of the violations cited in the inspection reports.¹⁰

Finally, I note, in the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their official duties.¹¹ United States Department of

¹⁰Tr. 300-02.

¹¹See *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) (stating the potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing plea negotiation; the great majority of prosecutors are faithful to their duties and absent clear evidence to the contrary, courts presume public officers properly discharge their duties); *INS v. Miranda*, 459 U.S. 14, 18 (1982) (per curiam) (stating, although the length of time to process the application is long, absent evidence to the contrary, the court cannot find that the delay was unwarranted); *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926) (stating a presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume they have properly discharged their official duties); *Sunday Lake Iron Co. v. Wakefield TP*, 247 U.S. 350, 353 (1918) (stating the good faith of taxing officers and the validity of their actions are presumed; when assailed, the burden of proof is on the complaining party); *Lawson Milk Co. v. Freeman*, 358 F.2d 647, 649 (6th Cir. 1966) (stating, without a showing that the action of the Secretary of Agriculture was arbitrary, his action is presumed to be valid); *Panno v. United States*, 203 F.2d 504, 509 (9th Cir. 1953) (stating a presumption of regularity attaches to official acts of the Secretary of Agriculture in the exercise of his congressionally delegated duties); *In re Karl Mitchell* (Order Granting Complainant's Pet. for Recons.), 60 Agric. Dec. 647, 665-67 (2001) (holding, in the absence of clear evidence to the contrary, Animal and Plant Health Inspection Service inspectors are presumed to be motivated only by the desire to properly discharge their official duties); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 220-22 (2000) (stating, in the absence of evidence to the contrary, Food Safety and Inspection Service inspectors are presumed to have properly issued process deficiency records), *aff'd in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001), *appeal withdrawn*, No. 01-6214 (2d Cir. Apr. 30, 2002); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 280-82 (1998) (stating, in the absence of clear evidence to the contrary, United States Department of Agriculture inspectors and investigators are presumed to have properly discharged their duty to document violations of the Animal Welfare Act); *In re Auvil Fruit Co.*, 56 Agric. Dec. 1045, 1079 (1997) (stating, without a showing that the official acts of the Secretary of

(continued...)

Agriculture inspectors are presumed to be motivated only by a desire to properly discharge their official duties and to have properly discharged their duty to document violations of the Animal Welfare Act accurately. Sandra Meek testified she was employed by the United States Department of Agriculture as an animal care inspector.¹² Based upon Ms. Meek's employment status, I infer she was a salaried United States Department of Agriculture employee and her salary, benefits, and continued employment by the United States Department of Agriculture were not dependent upon her findings during the inspections of Top of the Ozark Auction. Ms. Meek appears to have had no reason to record her findings in other than an impartial fashion.

Fourth, Dr. Schmidt asserts I erroneously ignored the testimony of his witnesses.

Contrary to Dr. Schmidt's assertion, I read and carefully considered all of the testimony given by Dr. Schmidt's witnesses prior to issuing the March 26, 2007, Decision

¹¹(...continued)

Agriculture are arbitrary, his actions are presumed to be valid); *In re Mil-Key Farm, Inc.*, 54 Agric. Dec. 26, 55 (1995) (stating, without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); *In re Hershey Chocolate U.S.A.*, 53 Agric. Dec. 17, 55 (1994) (stating, without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid), *aff'd*, No. 1:CV-94-945 (M.D. Pa. Feb. 3, 1995); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1361 (1978) (rejecting the respondent's theory that United States Department of Agriculture shell egg graders switched cases of eggs to discredit the respondent, in view of the presumption of regularity supporting acts of public officials), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

¹²Tr. 12.

and Order, and, in the March 26, 2007, Decision and Order, I addressed the testimony given by each of Dr. Schmidt's 12 witnesses.¹³

Fifth, Dr. Schmidt asserts the administrative law judge who conducted the hearing in the instant proceeding, denied Dr. Schmidt the right to call witnesses in his favor in violation of the Sixth Amendment to the Constitution of the United States.

Dr. Schmidt raises the issue of the violation of the Sixth Amendment to the Constitution of the United States for the first time in his Petition to Reconsider. It is well settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer;¹⁴ therefore, Dr. Schmidt's Sixth Amendment argument comes too late for me to consider. Moreover, even if Dr. Schmidt had raised the issue timely, I would reject it.

The record does not support Dr. Schmidt's assertion that the administrative law judge denied him the right to call witnesses in his favor. During the hearing, Dr. Schmidt stated he did not want to call "any more witnesses,"¹⁵ and, at the close of the hearing, Dr. Schmidt stated he did not wish to offer any additional evidence.¹⁶ Further, the Sixth Amendment is explicitly confined to criminal prosecutions, as follows:

¹³*In re Jerome Schmidt*, ___ Agric. Dec. ___, slip op. at 22-40, 73-74 (Mar. 26, 2007).

¹⁴See note 5.

¹⁵Tr. 208.

¹⁶Tr. 305.

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 defence.

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 Dr. Schmidt 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.¹⁷ Thus, I conclude Dr. Schmidt's

¹⁷See *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*, 409 F.3d 919, 927 (8th Cir. 2004) (stating the protections provided by the Sixth Amendment are explicitly confined to criminal prosecutions); *Williams v. 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 Karen Schmidt*, ___ Agric. Dec. ___, slip op. at 22-23 (Aug. 30, 2006) (concluding the Sixth Amendment is not applicable to administrative proceedings instituted under the Animal Welfare Act); *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).

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

Sixth, Dr. Schmidt asserts he has been singled out for selective enforcement by the United States Department of Agriculture.

The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation;¹⁸ however, sometimes enforcement of a valid law can be a means of violating constitutional rights by invidious discrimination and courts have, under the doctrine of selective enforcement, dismissed cases or taken other action if a defendant (Dr. Schmidt in this proceeding) proves that the prosecutor (the Administrator in this proceeding) singled out a defendant because of membership in a protected group or exercise of a constitutionally protected right.¹⁹

Dr. Schmidt bears the burden of proving that he is the target of selective enforcement. One claiming selective enforcement must demonstrate that the enforcement policy had a discriminatory effect and that it was motivated by a discriminatory purpose.²⁰ In order to prove a selective enforcement claim, Dr. Schmidt must show one of two sets of circumstances. Dr. Schmidt must show: (1) membership in a protected group;

¹⁸*Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Snowden v. Hughes*, 321 U.S. 1, 8 (1944).

¹⁹*Futernick v. Sumpter Twp.*, 78 F.3d 1051, 1056 (6th Cir.), *cert. denied sub nom. Futernick v. Caterino*, 519 U.S. 928 (1996).

²⁰*United States v. Armstrong*, 517 U.S. 456, 465 (1996); *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982).

(2) prosecution; (3) that others in a similar situation, not members of the protected group, would not be prosecuted; and (4) that the prosecution was initiated with discriminatory intent.²¹ Dr. Schmidt has not shown that he is a member of a protected group, that no disciplinary proceeding would be instituted against others in a similar situation that are not members of the protected group, or that the instant proceeding was initiated with discriminatory intent. In the alternative, Dr. Schmidt must show: (1) he exercised a protected right; (2) the Administrator's stake in the exercise of that protected right; (3) the unreasonableness of the Administrator's conduct; and (4) that this disciplinary proceeding was initiated with intent to punish Dr. Schmidt for exercise of the protected right.²²

Dr. Schmidt has not shown any of these circumstances.

For the foregoing reason and the reasons set forth in *In re Jerome Schmidt*, ___ Agric. Dec. ___ (Mar. 26, 2007), Dr. Schmidt's Petition to Reconsider is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider. Dr. Schmidt's Petition to Reconsider was timely filed and automatically stayed *In re Jerome Schmidt*, ___ Agric. Dec. ___ (Mar. 26, 2007). Therefore, since Dr. Schmidt's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in *In re Jerome Schmidt*, ___ Agric. Dec. ___

²¹See *Futernick v. Sumpter Twp.*, 78 F.3d 1051, 1056 n.7 (6th Cir.), *cert. denied sub nom. Futernick v. Caterino*, 519 U.S. 928 (1996).

²²*Id.*

(Mar. 26, 2007), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition to Reconsider.

For the foregoing reasons, the following Order is issued.

ORDER

1. Dr. Schmidt, his agents and employees, successors and assigns, directly or indirectly through any corporate or other device, shall cease and desist from violating the Regulations and Standards, and in particular shall cease and desist from:

- (a) Failing to remove excreta from primary enclosures to prevent soiling of animals;
- (b) Failing to provide housing facilities that are structurally sound and in good repair;
- (c) Failing to ensure that primary surfaces coming in contact with animals are free of jagged edges or sharp points that might injure the animals;
- (d) Failing to provide a waste disposal system that keeps animals free from contamination and allows the animals to stay clean and dry;
- (e) Failing to keep housing facilities clean and in good repair to facilitate husbandry practices;
- (f) Failing to provide primary enclosures for dogs that are structurally sound and maintained in good repair so that they protect the dogs from injury and have no sharp points or edges that could injure the dogs;

- (g) Failing to provide primary enclosures for dogs that contain the dogs securely;
- (h) Failing to provide primary enclosures which have sufficient space to allow each dog to stand and sit in a comfortable position;
- (i) Failing to spot-clean and sanitize hard surfaces with which dogs come in contact;
- (j) Failing to provide an effective program for the control of insects and rodents;
- (k) Failing to maintain housing facilities so as to keep them free of trash;
- (l) Failing to house dogs in enclosures with suitable absorbent material to absorb and cover excreta;
- (m) Failing to provide enclosures large enough to ensure each animal has sufficient space to stand and sit erect; and
- (n) Housing dogs in enclosures which have bare wire strand floors.

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

2. Dr. Schmidt is assessed a \$6,800 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:

Frank Martin, Jr.
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, Frank Martin, Jr., within 60 days after service of this Order on Dr. Schmidt. Dr. Schmidt shall state on the certified check or money order that payment is in reference to AWA Docket No. 05-0019.

RIGHT TO JUDICIAL REVIEW

Dr. Schmidt has the right to seek judicial review of the Order in this Order Denying Petition to Reconsider 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 Order Denying Petition to Reconsider. Dr. Schmidt must seek judicial

review within 60 days after entry of the Order in this Order Denying Petition to Reconsider.²³ The date of entry of the Order in this Order Denying Petition to Reconsider is May 9, 2007.

Done at Washington, DC

May 9, 2007

William G. Jenson
Judicial Officer

²³7 U.S.C. § 2149(c).