

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 05-0005
)
Marilyn Shepherd,)
)
Respondent) **Decision and Order**

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on November 29, 2004. The Administrator instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator alleges, during the period April 2002 through December 2002, Marilyn Shepherd violated the Animal Welfare Act and the Regulations by selling, in commerce, at least 165 dogs on at least 26 occasions, without the required Animal

Welfare Act license. The Administrator seeks assessment of a civil penalty, issuance of a cease and desist order from future violations of the Animal Welfare Act and the Regulations, and permanent disqualification from obtaining an Animal Welfare Act license. Ms. Shepherd filed a timely answer to the Complaint denying the material allegations of the Complaint and requesting an oral hearing.

On May 2, 2006, Chief Administrative Law Judge Marc R. Hillson [hereinafter the Chief ALJ] conducted an oral hearing in Springfield, Missouri. Robert A. Ertman represented the Administrator. Ronnie Williams, Ms. Shepherd's spouse, represented Ms. Shepherd. The Administrator called four witnesses and introduced seven exhibits into evidence, CX 1 through CX 7. Ms. Shepherd called one witness and introduced three exhibits into evidence, RX 2 through RX 4.

On August 31, 2006, the Chief ALJ issued a Decision [hereinafter Initial Decision] concluding Marilyn Shepherd willfully committed 165 violations of the Animal Welfare Act on 26 occasions by operating as a dealer without obtaining the required Animal Welfare Act license. The Chief ALJ ordered Marilyn Shepherd to cease and desist from violating the Animal Welfare Act and the Regulations, assessed Ms. Shepherd a \$25,000 civil penalty, and permanently disqualified Ms. Shepherd from becoming licensed under the Animal Welfare Act. On October 10, 2006, Ms. Shepherd filed a "Request for Judicial Review" which I treat as an appeal to the Judicial Officer.

DECISION

Factual Background

There are few, if any, facts in dispute. Marilyn Shepherd owns and operates a kennel in Ava, Missouri (CX 5-CX 6). During the period April 2002 through December 2002, Ms. Shepherd did not have an Animal Welfare Act license, but she was licensed as an Animal Care Facility by the State of Missouri (CX 5-CX 6). Ms. Shepherd had previously been licensed under the Animal Welfare Act, but in two enforcement actions initiated by the Animal and Plant Health Inspection Service, Ms. Shepherd's Animal Welfare Act license had been suspended. *In re Marilyn Shepard*, 61 Agric. Dec. 478 (2002); *In re Marilyn Shepherd*, 57 Agric. Dec. 242 (1998).

Animal and Plant Health Inspection Service investigators determined that, on at least 26 occasions during the period April 2002 through December 2002, Marilyn Shepherd sold a total of 165 dogs to NVK Kennels (CX 1, CX 3). NVK Kennels is licensed as a class "B" dealer under the Animal Welfare Act and is located in Seneca, Kansas (CX 1). Deborah Hubbard, a buyer-driver for NVK Kennels, obtained the dogs in question from Ms. Shepherd's kennel in Ava, Missouri (CX 2, CX 7). Ms. Hubbard, who lives in Missouri, is an employee of NVK Kennels (CX 7). Her job responsibility was "to contact dog breeders and book puppies for purchase for NVK Kennels." (CX 7.) When Ms. Hubbard first contacted Marilyn Shepherd to inquire about the availability of dogs for purchase, Ms. Hubbard explained to Ms. Shepherd that she was employed by NVK

Kennels and that NVK Kennels would be the purchaser of the puppies (CX 7).

Ms. Hubbard lived in Kansas when she first contacted Ms. Shepherd about purchasing puppies for NVK Kennels (CX 7). After learning that Ms. Hubbard planned to move to Missouri, Ms. Shepherd waited until Ms. Hubbard resided in Missouri before Ms. Shepherd sold puppies to NVK Kennels (CX 7).

Ms. Shepherd would contact Ms. Hubbard when Ms. Shepherd had puppies she wanted to sell (CX 7). Ms. Hubbard would then go to Ms. Shepherd's kennel in the NVK Kennels van and take custody of the puppies (CX 2, CX 7). Ms. Hubbard signed for the puppies, but never personally paid Ms. Shepherd for the puppies. All payments were made by check issued by NVK Kennels (CX 1, CX 7). After taking custody of the puppies, Ms. Hubbard would take them to a veterinarian, obtain health certificates, and then transport the puppies across the state border to NVK Kennels facilities in Kansas (Tr. 19-21). Some of the health certificates indicated the owner of the puppies was NVK Kennels, while others indicated the owner of the puppies was Ms. Hubbard (Tr. 21).

Daniel Hutchings, a senior investigator for the Animal and Plant Health Inspection Service, interviewed Ms. Shepherd on March 18, 2003 (CX 4). Ms. Shepherd acknowledged that she sold all of the 165 puppies but claims she sold the puppies to Ms. Hubbard (CX 4). However, Ms. Shepherd confirmed that NVK Kennels issued the checks paying for the puppies (CX 4).

Dr. Jerome Schmidt, a veterinarian who runs a dog auction business, testified that, under the policy of the American Kennel Club, which he follows, ownership of a dog transfers to the new owner when the dog “cross[es] the auction block” before payment is made (Tr. 64).

Discussion

The Animal Welfare Act regulates “animals and activities” that “are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof[.]” 7 U.S.C. § 2131. Section 4 of the Animal Welfare Act requires dealers to be licensed to sell puppies, as follows:

§ 2134. Valid license for dealers and exhibitors required

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

7 U.S.C. § 2134.

It is undisputed that Ms. Shepherd did not have an Animal Welfare Act license during the period April 2002 through December 2002. Ms. Shepherd’s primary contention is that she did not need an Animal Welfare Act license, as she was not engaged in “commerce” within the meaning of the Animal Welfare Act (Request for Judicial Review ¶ 5). Ms. Shepherd contends, because she delivered the dogs in question

to Deborah Hubbard, NVK Kennels' employee, within the State of Missouri, she cannot be found to have been engaged in commerce, even though it is undisputed that Ms. Shepherd and Ms. Hubbard were both aware the dogs were clearly intended to be taken to NVK Kennels' Kansas location (Request for Judicial Review ¶ 6). The Administrator contends the sale of these 165 dogs was in commerce and Ms. Shepherd's sale of these dogs without an Animal Welfare Act license violated the Animal Welfare Act and the Regulations.

Two prior cases involving Ms. Shepherd provide background to this discussion. In *In re Marilyn Shepherd*, 57 Agric. Dec. 242 (1998), Ms. Shepherd had been licensed as a dealer, but her Animal Welfare Act license expired when the Animal and Plant Health Inspection Service refused to re-license her. *Id.* at 257. Finding a number of violations, the Judicial Officer assessed Ms. Shepherd a \$2,000 civil penalty and issued a cease and desist order against Ms. Shepherd. Additionally, the Judicial Officer suspended Ms. Shepherd's Animal Welfare Act license for 7 days, stating, if she was not licensed at the time of the decision, she would be disqualified from obtaining an Animal Welfare Act license for 7 days and the disqualification period would continue until the \$2,000 civil penalty was paid. Ms. Shepherd paid the civil penalty, but there is no evidence that she applied for or received a new Animal Welfare Act license.

After a subsequent inspection of Ms. Shepherd's kennel, she was cited for a number of regulatory violations, as well as for operating without the required Animal

Welfare Act license. In that matter, *In re Marilyn Shepard*, 61 Agric. Dec. 478 (2002), Administrative Law Judge Dorothea Baker, while finding in favor of Ms. Shepherd on the regulatory counts, ruled Ms. Shepherd was in violation of the licensing requirement.

“The fact that all of the puppies were bred, born and sold in the State of Missouri and that while [Ms. Shepherd] had title, the puppies did not leave Missouri but were sold to an individual within the State of Missouri who subsequently sold over State lines, and who paid for the puppies from a Missouri bank, does not preclude the jurisdiction of the Secretary of Agriculture.” *In re Marilyn Shepard*, 61 Agric. Dec. at 482. Ms. Shepherd did not appeal Administrative Law Judge Dorothea Baker’s decision. Furthermore, there is no evidence that Ms. Shepherd paid the civil penalty assessed by Administrative Law Judge Baker.

The facts in the current case favor the Administrator’s position. Ms. Hubbard made it clear that she was not buying the puppies in her own right and that she was an employee of NVK Kennels. In addition, the checks in payment for the puppies were all issued by NVK Kennels. (CX 7.) There is no question that Ms. Shepherd knew the dogs she delivered to Ms. Hubbard were being sold to and delivered to an entity in Kansas.

In one of Ms. Shepherd’s earlier cases, Administrative Law Judge Baker cited an opinion of the Attorney General of the United States’ Office of Legal Counsel, issued in response to a request from the Secretary of Agriculture for an opinion regarding the constitutionality of the Animal Welfare Act. *In re Marilyn Shepard*, 61 Agric. Dec. at

483. In that opinion, the Office of Legal Counsel stated the Animal Welfare Act even applied to “purely intrastate activities” as long as these activities affect interstate commerce. By expanding the definition of “commerce” to include trade, traffic, transportation, or other commerce which affects trade, traffic, transportation, and commerce, Congress determined “that certain specified activities have a sufficient effect on commerce among the States to require regulation, even if they take place entirely within one State.” *In re Marilyn Shepard*, 61 Agric. Dec. at 490, Attach. A. Thus, Ms. Shepherd’s selling dogs to NVK Kennels via Ms. Hubbard without an Animal Welfare Act license would be a violation of the Animal Welfare Act even if the transactions did take place solely in Missouri. The evidence overwhelmingly shows the true purchaser was located in Kansas and the arrangements of having the dogs picked up in Missouri and “sold” to Ms. Hubbard (even though she was unequivocally acting on behalf of NVK Kennels) were little more than cynical attempts to bypass the requirements of the Animal Welfare Act.

Ms. Shepherd’s reliance on the American Kennel Club policy under which ownership of a dog transfers to the new owner at the time and point of delivery is neither controlling nor relevant. Ms. Shepherd clearly sold the 165 puppies to NVK Kennels, and Ms. Shepherd was well aware that the puppies were to be transported from Missouri to Kansas—in the NVK Kennels van—after issuance of veterinary health certificates. According to the Office of Legal Counsel opinion, even if the sale of the dogs was

completely within the State of Missouri and the dogs never subsequently crossed state lines, the sales would be subject to the jurisdiction of the Secretary of Agriculture. Under the facts of this case, where the transactions involved sales to an out-of-state company through its in-state employee and the out-of-state company directly paid for the puppies after delivery, I find, not only was Ms. Shepherd engaged in activities that were in commerce or affecting interstate commerce, but also Ms. Shepherd was directly engaged in interstate commerce.

Ms. Shepherd mentions several constitutional claims in passing. Without citing any authority, Ms. Shepherd states that licensing requirements must be voluntary to be constitutional. While I do not have the authority to declare an Act of Congress unconstitutional, it is clear that no one forced Ms. Shepherd to enter the business of selling dogs. Congress specifically required those who engage in this business to obtain a license. I find no valid constitutional challenge here.

Ms. Shepherd also contends, citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), that warrantless inspections are unconstitutional. In *Barlow's*, the Supreme Court of the United States did not outlaw, but rather established guidelines for the conduct of civil administrative warrantless inspections and for the issuance of civil administrative search warrants. Furthermore, courts have found the Animal Welfare "Act's inspection program provides a constitutionally adequate substitute for a search warrant." *Lesser v. Espy*, 34 F.3d 1301, 1308 (7th Cir. 1994). More important, however, the Complaint was

not brought because of an inspection of Ms. Shepherd's facilities. While Ms. Shepherd was interviewed at her residence, which was at the kennel site, there was no inspection undertaken. Thus, there is no basis for this constitutional challenge.

Findings of Fact

1. Marilyn Shepherd is a breeder and dealer of dogs who operates a kennel in Ava, Missouri.
2. Although Ms. Shepherd previously held an Animal Welfare Act license, Ms. Shepherd was not licensed during calendar year 2002.
3. During the period April 10, 2002, through December 18, 2002, Ms. Shepherd, on 26 occasions, sold a total of 165 puppies to NVK Kennels, located in Seneca, Kansas.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction over this matter.
2. Each of the transactions referenced in Finding of Fact number 3 was, at the least, in commerce, and Ms. Shepherd was required by section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1 of the Regulations (9 C.F.R. § 2.1) to have a valid Animal Welfare Act license.
3. Ms. Shepherd willfully violated the Animal Welfare Act and the Regulations by operating as a dealer without an Animal Welfare Act license (7 U.S.C. §

2134; 9 C.F.R. § 2.1). Each of the 165 transactions referenced in Finding of Fact number 3 constitutes a separate violation of the Animal Welfare Act and the Regulations.

Appropriate Sanctions

The Administrator has requested that, due to the seriousness of Marilyn Shepherd's violations, I issue a cease and desist order, assess a \$50,000 civil penalty, and permanently disqualify Ms. Shepherd from obtaining an Animal Welfare Act license. The Chief ALJ reduced the civil penalty amount to \$25,000. Neither the Administrator nor the Chief ALJ indicates how he determined the amount of the civil penalty.

The Animal Welfare Act authorizes the Secretary of Agriculture to suspend or revoke Animal Welfare Act licenses, assess civil penalties, and issue cease and desist orders, as follows:

§ 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 . . . 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 . . . 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. . . . 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. . . . 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.

7 U.S.C. § 2149(a)-(b). Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, effective September 2, 1997, 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 by increasing the maximum civil penalty from \$2,500 to \$2,750 (7 C.F.R. § 3.91(b)(2)(v) (2005)). Subsequently, 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 occurring after June 23, 2005, by increasing the maximum civil penalty from \$2,500 to \$3,750 (7 C.F.R. § 3.91(b)(2)(ii) (2006)). None of Marilyn Shepherd's violations of the Animal Welfare Act and the Regulations occurred after June 23, 2005; therefore, the maximum civil that may be assessed against Ms. Shepherd for each violation of the Animal Welfare Act and the Regulations is \$2,750.

Ms. Shepherd apparently feels free to ignore the prior imposition of civil sanctions and to continue doing business without an Animal Welfare Act license. Refusing to comply with a lawful final order such as that issued by Administrative Law Judge Baker is unacceptable, to say the least. Such actions on Ms. Shepherd's part influence my decision regarding the appropriate sanction.

The evidence indicates Marilyn Shepherd's kennel is not small. Shortly after the time of the violations at issue in this proceeding, Ms. Shepherd maintained 150 female dogs and 50 male dogs (CX 5). Looking at the other statutory factors, including the gravity of Ms. Shepherd's violations, Ms. Shepherd's lack of good faith, and Ms. Shepherd's history of violations, I find a \$52,000 civil penalty would satisfy the Animal Welfare Act's requirements. Ms. Shepherd committed the 165 violations on 26 occasions. Weighing all the factors to be considered, I conclude a civil penalty of \$2,000 for each of those 26 occasions is appropriate.

In addition, I issue an order directing Ms. Shepherd to cease and desist from violating the Animal Welfare Act and the Regulations. Finally, in light of Ms. Shepherd's repeated violations of the Animal Welfare Act and Ms. Shepherd's disregard for the Animal Welfare Act, I agree with the Administrator that Ms. Shepherd should be permanently disqualified from being licensed under the Animal Welfare Act.

Marilyn Shepherd's Appeal Petition

On October 10, 2006, Ms. Shepherd filed a Request for Judicial Review of the Chief ALJ's Initial Decision. I treat this request as an appeal to the Judicial Officer. Ms. Shepherd's request identifies what she sees as errors in the Chief ALJ's Initial Decision. Ms. Shepherd fails to articulate an understanding of the legal basis for the Chief ALJ's Initial Decision, and she does not present a clear discussion of the issues she raises.

First and foremost, I have no authority to judge the constitutionality of the Animal Welfare Act. *Califano v. Sanders*, 430 U.S. 99, 109 (1977); *Robinson v. United States*, 718 F.2d 336, 338 (10th Cir. 1983). Therefore, Ms. Shepherd's questioning of the constitutionality of the Animal Welfare Act falls on legally deaf ears. However, I note that others who have challenged the constitutionality of all or parts of the Animal Welfare Act have been united in their failure to convince any court to strike down any provision of the Animal Welfare Act on constitutional grounds. *See, Lesser v. Espy*, 34 F.3d 1301, 1308 (7th Cir. 1994) (“[w]e are also convinced that the [Animal Welfare] Act’s inspection program provides a constitutionally adequate substitute for a warrant”); *Haviland v. Butz*, 543 F.2d 169, 177 (D.C. Cir. 1976) (referring to the Animal Welfare Act, the court said “[w]e perceive nothing in the Constitution outlawing this commendable effort to demonstrate America’s humanity to lesser creatures” (internal quote marks omitted)).

Furthermore, Ms. Shepherd's discussions regarding her two previous cases has no relevance to this case. *In re Marilyn Shepard*, 61 Agric. Dec. 478 (2002); *In re Marilyn Shepard*, 57 Agric. Dec. 242 (1998). While the Chief ALJ briefly described the two previous proceedings in which Ms. Shepherd was found to have violated the Animal Welfare Act, his reliance on these cases is limited to a showing that Ms. Shepherd knew the sale of puppies "to an individual within the State of Missouri who subsequently sold over State lines, and who paid for the puppies from a Missouri bank," required a license under the Animal Welfare Act (Initial Decision at 5 quoting *In re Marilyn Shepard*, 61 Agric. Dec. at 482). Ms. Shepherd's efforts to demonstrate bias on the part of Animal and Plant Health Inspection Service inspectors is futile. I have examined the decisions in the two previous cases and believe Ms. Shepherd's characterization of them is somewhat overstated; however, even if accurate and she could demonstrate inspector bias, it is not relevant to my decision as there was no inspection of her kennel in the current case and the Complaint contains no allegation based on an inspection of Ms. Shepherd's facility.

With those points aside, the only issue in this case is whether Ms. Shepherd was required to have an Animal Welfare Act license. Then, if the answer to that question is yes, did she have an Animal Welfare Act license. Ms. Shepherd argues, because she lives in Missouri and she delivered the puppies to Ms. Hubbard in Missouri, the Animal Welfare Act does not apply. Ms. Shepherd's argument fails.

Section 4 of the Animal Welfare Act provides:

§ 2134. Valid license for dealers and exhibitors required

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

7 U.S.C. § 2134.

Ms. Shepherd sold and offered to sell animals to another dealer – NVK Kennels (CX 1, CX 3-CX 4, CX 7). If these transactions were “in commerce,” then Ms. Shepherd would be required to have an Animal Welfare Act license. The Animal Welfare Act defines the word “commerce,” as follows:

§ 2132 Definitions

When used in this chapter—

. . . .

(c) The term “commerce” means trade, traffic, transportation, or other commerce—

(1) between a place in a State and any place outside of such State, or between points within the same State but through any place outside thereof, or within any territory, possession, or the District of Columbia; [or]

(2) which affects trade, traffic, transportation, or other commerce described in paragraph (1).

7 U.S.C. § 2132(c). Ms. Shepherd interprets the word “commerce” very narrowly. She argues, in essence, that because title to the puppies transferred while the dogs were still in Missouri and she did not personally transport the puppies to Kansas, then her transactions were not “in commerce.” Such a view ignores the second part of the definition which

includes any transaction “which affects trade, traffic, transportation, or other commerce described in paragraph (1).” Determining what transactions are in “commerce” and what transactions fall outside the definition consumes considerable portions of the commerce clause jurisprudence. Even so, there is no simple answer. However, certain points are not in dispute. “[E]ven if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce.” *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

Numerous United States statutes regulating intrastate economic activity have been upheld by the courts. The basis for such holdings has been that the regulated economic activity substantially affects interstate commerce. *United States v. Lopez*, 514 U.S. 549, 559-60 (1995). Examples of such legislation include, the regulation of intrastate coal mining, *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*, 452 U.S. 264, 276-80 (1981); the regulation of restaurants utilizing substantial interstate supplies, *Katzenbach v. McClung*, 379 U.S. 294, 299-301 (1964); the regulation of inns and hotels catering to interstate guests *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-53 (1964); and the regulation of the production and consumption of homegrown wheat, *Wickard v. Filburn*, 317 U.S. 111 (1942). Commerce clause jurisprudence makes the point clear “[w]here economic activity substantially affects interstate commerce,

legislation regulating that activity will be sustained.” *United States v. Lopez*, 514 U.S. 549, 560 (1995).

Ms. Shepherd sold 165 puppies on 26 occasions. Her claim that she sold them to Deborah Hubbard is without merit. Ms. Shepherd acknowledges that she received payment for the puppies from NVK Kennels (CX 4). Furthermore, Ms. Hubbard explained to Ms. Shepherd how NVK Kennels purchased puppies.

I told Marilyn Shepherd I was employed by NVK Kennels Seneca Kansas and I explained to her I booked and transported puppies to NVK Kennels for their purchase. I told her I would not purchase her puppies but NVK Kennels would be the buyer of puppies. I told Marilyn Shepherd I would book the puppies to NVK Kennels for their purchase and transport the puppies from her kennel to NVK Kennels in Kansas and NVK Kennels would send Marilyn Shepherd a check as payment for the puppies they purchased from her. Marilyn Shepherd told me she understood this method of selling puppies.

CX 7. I conclude Ms. Shepherd knew the 165 puppies she alleges were sold to Deborah Hubbard were sold to NVK Kennels, Seneca, Kansas. Ms. Shepherd’s actions indicate these transactions were in “commerce” as that word is defined in the Animal Welfare Act. I find the sale of the 165 puppies was trade “between a place in a State [Ava, Missouri,] and any place outside of such State [Seneca, Kansas].” However, even if I were to find these transactions to be between Ms. Shepherd and Ms. Hubbard, I would still find the transactions in commerce because, at the very least, the transactions “affect trade” described in 7 U.S.C. § 2132(c)(1), thus bringing the transactions under the second paragraph of the definition of the word “commerce.” 7 U.S.C. § 2132(c)(2).

Because the transactions in question were in “commerce,” Ms. Shepherd was required to have a license under the Animal Welfare Act. 7 U.S.C. § 2134. However, Ms. Shepherd failed to obtain an Animal Welfare Act license; therefore, she violated the Animal Welfare Act and the Regulations.

For the foregoing reasons, the following Order is issued.

ORDER

1. Marilyn Shepherd, her agents and employees, successor and assigns, directly or 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 operating as a dealer as defined in the Animal Welfare Act and Regulations without being licensed as required.

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

2. Marilyn Shepherd is assessed a \$52,000 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the Treasurer of the United States and shall be sent to counsel for the Administrator at the following address:

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

Payment of the civil penalty shall be sent to Robert A. Ertman within 60 days after service of this Order on Marilyn Shepherd. Marilyn Shepherd shall state on the certified check or money order that payment is in reference to AWA Docket No. 05-0005.

3. Marilyn Shepherd is permanently disqualified from becoming licensed under the Animal Welfare Act effective on the 60th day after service of this Order on Marilyn Shepherd.

RIGHT TO JUDICIAL REVIEW

Marilyn Shepherd 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. §§ 2341-2350. 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. Ms. Shepherd must seek judicial review within 60 days after entry of the Order in this Decision and Order.¹ The date of entry of the Order in this Decision and Order is November 29, 2007.

Done at Washington, DC

November 29, 2007

William G. Jenson
Judicial Officer

¹7 U.S.C. § 2149(c).