

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 05-0006
)
Richard Mielke, an individual;)
Kaye Mielke, an individual; and)
Mielke's Peke Patch, an)
unincorporated association,)
) **Decision and Order as to**
Respondents) **Richard Mielke and Kaye Mielke**

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on December 2, 2004. Complainant instituted the proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133 (2004)) [hereinafter the Regulations]; the standards issued under the Animal Welfare Act (9 C.F.R. §§ 3.1-3.142) [hereinafter the 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: (1) on June 5, 2004, Richard Mielke and Kaye Mielke [hereinafter Respondents] operated as dealers, as defined in the Animal Welfare Act and the Regulations, without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (2004)); and (2) on or about June 5, 2004, Respondents knowingly failed to obey a cease and desist order made by the Secretary of Agriculture under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) (Compl. ¶¶ 4-9).

The Hearing Clerk served Respondent Kaye Mielke with the Complaint, the Rules of Practice, and a service letter on December 10, 2004.¹ The Hearing Clerk served Respondent Richard Mielke with the Complaint, the Rules of Practice, and a service letter on December 11, 2004.² Respondents failed to file answers to the Complaint within 20 days after service as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On January 14, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Decision and Order as to Richard Mielke and Kaye Mielke [hereinafter Motion for Default Decision] and a proposed Decision and Order as to Richard Mielke and Kaye Mielke By Reason of

¹United States Postal Service Domestic Return Receipt for Article Number 7003 2260 0005 5721 3489.

²United States Postal Service Track and Confirm for Article Number 7003 2260 0005 5721 3472.

Admission of Facts [hereinafter Proposed Default Decision]. The Hearing Clerk served Respondents with Complainant's Motion for Default Decision and Complainant's Proposed Default Decision on January 24, 2005.³ Respondents failed to file objections to Complainant's Motion for Default Decision and Complainant's Proposed Default Decision within 20 days after service as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On May 10, 2005, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] issued a Decision and Order as to Richard Mielke and Kaye Mielke By Reason of Default [hereinafter Initial Decision]: (1) concluding Respondents willfully violated section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (2004)) as alleged in the Complaint; (2) concluding Respondents knowingly failed to obey a cease and desist order made by the Secretary of Agriculture under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) as alleged in the Complaint; (3) ordering Respondents to cease and desist from violating the Animal Welfare Act, the Regulations, and the Standards; (4) assessing Respondents, jointly and severally, a \$5,875 civil penalty; (5) assessing Respondent Richard Mielke a \$500 civil penalty; and (6) assessing Respondent Kaye Mielke a \$3,000 civil penalty (Initial Decision at 5-8).

³United States Postal Service Domestic Return Receipts for Article Number 7003 2260 0005 5721 3694 and Article Number 7003 2260 0005 5721 3700.

On June 30, 2005, Complainant appealed the ALJ's Initial Decision to the Judicial Officer. On July 18, 2005, Respondents filed a response to Complainant's appeal petition. On July 25, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision as to Respondent Richard Mielke and Respondent Kaye Mielke.

Based upon a careful review of the record, I agree with the ALJ's Initial Decision, except that I disagree with the amount of the civil penalty assessed by the ALJ. Therefore, I adopt the ALJ's Initial Decision as the final Decision and Order as to Richard Mielke and Kaye Mielke, with exceptions. Additional conclusions by the Judicial Officer follow the ALJ's conclusions of law, as restated.

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[.]

§ 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.

§ 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.

7 U.S.C. §§ 2131, 2132(f), 2134, 2149(a)-(c), 2151.

28 U.S.C.:

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

....

PART VI—PARTICULAR PROCEEDINGS

....

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

....

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

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

FINDINGS AND PURPOSE

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

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

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

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

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

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

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

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

DEFINITIONS

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

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

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

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

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

COST-OF-LIVING ADJUSTMENTS OF CIVIL
MONETARY PENALTIES

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

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

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

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

ANNUAL REPORT

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

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

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

....

PART 3—DEBT MANAGEMENT

....

SUBPART E—ADJUSTED CIVIL MONETARY PENALTIES

§ 3.91 Adjusted civil monetary penalties.

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

(b) *Penalties—*

....

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

....

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

7 C.F.R. § 3.91(a), (b)(2)(v).

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

**CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE,
DEPARTMENT OF AGRICULTURE**

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

....

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 A—LICENSING

§ 2.1 Requirements and application.

(a)(1) Any person operating or desiring to operate as a dealer, exhibitor, or operator of an auction sale, except persons who are exempt from the licensing requirements under paragraph (a)(3) of this section, must have a valid license. A person must be 18 years of age or older to obtain a license. A person seeking a license shall apply on a form which will be furnished by the AC Regional Director in the State in which that person operates or intends to operate. The applicant shall provide the information requested on the application form, including a valid mailing address through which the licensee or applicant can be reached at all times, and a valid premises address where animals, animal facilities, equipment, and records may be inspected for compliance. The applicant shall file the completed application form with the AC Regional Director.

9 C.F.R. §§ 1.1; 2.1(a)(1) (2004).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS RESTATED)

Statement of the Case

Respondents failed to file answers to the Complaint within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides the failure to file an answer within the time provided in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer or the admission by the answer of all the material allegations of fact

contained in the complaint, constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint that relate to Respondents are adopted as findings of fact. This Decision and Order as to Richard Mielke and Kaye Mielke is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Richard Mielke is an individual whose mailing address is 4799 Tyrone Road, Houston, Missouri 65483. At all times material to this proceeding, Respondent Richard Mielke was operating as a dealer without an Animal Welfare Act license.
2. Respondent Kaye Mielke is an individual whose mailing address is 4799 Tyrone Road, Houston, Missouri 65483. At all times material to this proceeding, Respondent Kaye Mielke was operating as a dealer without an Animal Welfare Act license.
3. Respondent Richard Mielke and Respondent Kaye Mielke were respondents in *In re Richard Mielke*, 62 Agric. Dec. 726 (2003) (Consent Decision) in which:
 - (a) they were found to have committed at least 21 violations of the Animal Welfare Act, the Regulations, and the Standards; (b) their Animal Welfare Act license was revoked;
 - (c) they were jointly and severally assessed a civil penalty of \$6,875, of which \$5,875, was held in abeyance provided they complied with the Animal Welfare Act and the Regulations during an 18-month “probation period”; and (d) they were ordered to cease

and desist from future violations of the Animal Welfare Act, the Regulations, and the Standards.

4. On June 5, 2004, Respondent Richard Mielke operated as a dealer as defined in the Animal Welfare Act and the Regulations, without an Animal Welfare Act license. Specifically, Respondent Richard Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Phyllis Fish (Animal Welfare Act license number 73-A-1594) of Duncan, Oklahoma. The sale of each dog constitutes a separate violation.

5. On June 5, 2004, Respondent Kaye Mielke operated as a dealer as defined in the Animal Welfare Act and the Regulations, without an Animal Welfare Act license. Specifically, Respondent Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Hazel Gilpin (Animal Welfare Act license number 73-A-1979) of Big Cabin, Oklahoma. The sale of each dog constitutes a separate violation.

6. On June 5, 2004, Respondent Kaye Mielke operated as a dealer as defined in the Animal Welfare Act and the Regulations, without an Animal Welfare Act license. Specifically, Respondent Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Michel Lasiter (Animal Welfare Act license number 43-A-4044) of Pierce City, Missouri. The sale of each dog constitutes a separate violation.

7. On June 5, 2004, Respondent Kaye Mielke operated as a dealer as defined in the Animal Welfare Act and the Regulations, without an Animal Welfare Act license.

Specifically, Respondent Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Glenn Manning (Animal Welfare Act license number 42-A-0775) of Waukon, Iowa. The sale of each dog constitutes a separate violation.

8. On June 5, 2004, Respondent Kaye Mielke operated as a dealer as defined in the Animal Welfare Act and the Regulations, without an Animal Welfare Act license. Specifically, Respondent Kaye Mielke sold three female Pekingese, in commerce, through Southwest Auction Service to Steve Lewis (Animal Welfare Act license number 31-B-0113) of Newark. The sale of each dog constitutes a separate violation.

9. On or about June 5, 2004, Respondents knowingly failed to obey a December 3, 2003, cease and desist order made by the Secretary of Agriculture under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) in *In re Richard Mielke*, 62 Agric. Dec. 726 (2003) (Consent Decision).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. On June 5, 2004, Respondent Richard Mielke operated as a dealer as defined in the Animal Welfare Act and the Regulations, without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (2004)). Specifically, Respondent Richard Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Phyllis Fish (Animal Welfare Act license number 73-A-1594) of

Duncan, Oklahoma. The sale of each dog constitutes a separate violation (7 U.S.C. § 2149).

3. On June 5, 2004, Respondent Kaye Mielke operated as a dealer as defined in the Animal Welfare Act and the Regulations, without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (2004)). Specifically, Respondent Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Hazel Gilpin (Animal Welfare Act license number 73-A-1979) of Big Cabin, Oklahoma. The sale of each dog constitutes a separate violation (7 U.S.C. § 2149).

4. On June 5, 2004, Respondent Kaye Mielke operated as a dealer as defined in the Animal Welfare Act and the Regulations, without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (2004)). Specifically, Respondent Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to Michel Lasiter (Animal Welfare Act license number 43-A-4044) of Pierce City, Missouri. The sale of each dog constitutes a separate violation (7 U.S.C. § 2149).

5. On June 5, 2004, Respondent Kaye Mielke operated as a dealer as defined in the Animal Welfare Act and the Regulations, without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (2004)). Specifically, Respondent Kaye Mielke sold one male Pekingese, in commerce, through Southwest Auction Service to

Glenn Manning (Animal Welfare Act license number 42-A-0775) of Waukon, Iowa. The sale of each dog constitutes a separate violation (7 U.S.C. § 2149).

6. On June 5, 2004, Respondent Kaye Mielke operated as a dealer as defined in the Animal Welfare Act and the Regulations, without an Animal Welfare Act license, in willful violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (2004)). Specifically, Respondent Kaye Mielke sold three female Pekingese, in commerce, through Southwest Auction Service to Steve Lewis (Animal Welfare Act license number 31-B-0113) of Newark. The sale of each dog constitutes a separate violation (7 U.S.C. § 2149).

7. On or about June 5, 2004, Respondents knowingly failed to obey the cease and desist order made by the Secretary of Agriculture under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) in *In re Richard Mielke*, 62 Agric. Dec. 726 (2003) (Consent Decision). Pursuant to section 19(b) of the Animal Welfare Act, any person who knowingly fails to obey a cease and desist order shall be subject to a civil penalty of \$1,650 for each offense, and each day during which such failure continues shall be deemed a separate offense (7 U.S.C. § 2149(b); 7 C.F.R. § 3.91(b)(2)(v)).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Complainant raises one issue in Complainant's Appeal Petition. Complainant contends the amounts of the civil penalties assessed by the ALJ are not sufficient given the seriousness of Respondents' violations of the Animal Welfare Act and the Regulations and the seriousness of Respondents' knowing failures to obey the Secretary

of Agriculture's December 3, 2003, cease and desist order. Complainant urges that I assess Respondents, jointly and severally, a \$2,750 civil penalty for each of seven violations of the Animal Welfare Act and the Regulations and a \$1,650 civil penalty for each of seven failures to obey the Secretary of Agriculture's December 3, 2003, cease and desist order. (Complainant's Appeal Pet. at 2-6.)

The ALJ found the civil penalties requested by Complainant are not justified under the circumstances in this proceeding and assessed Respondent Richard Mielke a \$500 civil penalty for his violation of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (2004)) and assessed Respondent Kaye Mielke a \$3,000 civil penalty for her six violations of section 4 of the Animal Welfare Act (7 U.S.C. § 2134) and section 2.1(a)(1) of the Regulations (9 C.F.R. § 2.1(a)(1) (2004)). In addition, the ALJ imposed no civil penalties for Respondents' failures to obey the Secretary of Agriculture's December 3, 2003, cease and desist order. (Initial Decision at 7-8.)

I disagree with the amounts of the civil penalties assessed by the ALJ and the amount of the civil penalty Complainant urges that I assess Respondents jointly and severally.

When determining the amount of a civil penalty to be assessed for violations of the Animal Welfare Act, the Regulations, and the Standards, the Secretary of Agriculture is

required to give due consideration to the size of the business of the person involved, the gravity of the violations, the person's good faith, and the history of previous violations.⁴

The failure to obtain an Animal Welfare Act license before operating as a dealer is a serious violation because enforcement of the Animal Welfare Act, the Regulations, and the Standards depends upon the identification of persons operating as dealers as defined by the Animal Welfare Act and the Regulations. Respondents' failure to obtain the required Animal Welfare Act license thwarted the Secretary of Agriculture's ability to carry out the purposes of the Animal Welfare Act. Respondents have a history of previous violations of the Animal Welfare Act, the Regulations, and the Standards.⁵ Moreover, Respondents' knowing failure to obey the Secretary of Agriculture's December 3, 2003, cease and desist order reveals a disregard for, and unwillingness to abide by, the requirements of the Animal Welfare Act and the Regulations. Thus, I conclude Respondents lacked good faith. Complainant concedes Respondents have a small-sized business.

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):

⁴7 U.S.C. § 2149(b).

⁵*In re Richard Mielke*, 62 Agric. Dec. 726 (2003) (Consent Decision).

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

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497. However, the recommendation of administrative officials as to the sanction is not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.⁶

⁶*In re Alliance Airlines*, 64 Agric. Dec. ____, slip op. at 17 (July 5, 2005); *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. ____, slip op. at 28 (June 29, 2005); *In re Dennis Hill*, 63 Agric. Dec. ____, slip op. at 74 (Oct. 8, 2004), *appeal docketed*, No. 05-1154 (7th Cir. Jan. 24, 2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 787 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re Excel Corp.*, 62 Agric. Dec. 196, 234 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (2002); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 762-63 (2001), *aff'd*, 342 F.3d 584 (6th Cir. 2003); *In re Karl Mitchell*, 60 Agric. Dec. 91, 130 (2001), *aff'd*, 42 Fed. Appx. 991 (9th Cir. 2002); *In re American Raisin Packers, Inc.*, 60 Agric. Dec. 165, 190 n.8 (2001), *aff'd*, 221 F. Supp.2d 1209 (E.D. Cal. 2002), *aff'd*, 66 Fed. Appx. 706 (9th Cir. 2003); *In re Fred Hodgins*, 60 Agric. Dec. 73, 88 (2001) (Decision and Order on Remand), *aff'd*, 33 Fed. Appx. 784 (6th Cir. 2002); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 626 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 226-27 (2000), *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 James E. Stephens*, 58 Agric. Dec.

(continued...)

Respondent Richard Mielke committed one violation of the Animal Welfare Act and the Regulations and knowingly failed to obey the Secretary of Agriculture's December 3, 2003, cease and desist order on one occasion. Respondent Richard Mielke could be assessed a maximum civil penalty of \$2,750 for his violation of the Animal Welfare Act and the Regulations and is subject to a civil penalty of \$1,650 for his knowing failure to obey the Secretary of Agriculture's December 3, 2003, cease and desist order.⁷ Respondent Kaye Mielke committed six violations of the Animal Welfare

⁶(...continued)

149, 182 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1604 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. 1498, 1514 (1998); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1141 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re Richard Lawson*, 57 Agric. Dec. 980, 1031-32 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

⁷Section 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 provides that any person who knowingly fails to obey a cease and desist order shall be subject to a civil penalty of \$1,500 for each offense. 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 by increasing the maximum civil penalty from \$2,500 to \$2,750 and adjusted the civil penalty assessed under section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) for each knowing failure to obey a cease and desist order by increasing the civil penalty from \$1,500 to \$1,650 (7 C.F.R. § 3.91(b)(2)(v)).

Act and the Regulations and knowingly failed to obey the Secretary of Agriculture's December 3, 2003, cease and desist order on six occasions. Respondent Kaye Mielke could be assessed a maximum civil penalty of \$16,500 for her six violations of the Animal Welfare Act and the Regulations and is subject to a civil penalty of \$9,900 for her knowing failures to obey the Secretary of Agriculture's December 3, 2003, cease and desist order.⁸

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, assessment of a \$3,000 civil penalty against Respondent Richard Mielke, and assessment of an \$18,000 civil penalty against Respondent Kaye Mielke are appropriate and necessary to ensure Respondents' compliance with the Animal Welfare Act and the Regulations in the future, to deter others from violating the Animal Welfare Act and the Regulations, and to fulfill the remedial purposes of the Animal Welfare Act.

Respondents' Response to Complainant's Appeal Petition

On July 18, 2005, Respondents filed a response to Complainant's Appeal Petition. Respondents admit violating the Secretary of Agriculture's December 3, 2003, cease and

⁸See note 7.

desist order. However, Respondents request a substantial reduction in the civil penalties assessed by the ALJ based on their inability to pay the civil penalties.

Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act, the Regulations, and the Standards, and a respondent's ability to pay the civil penalty is not one of those factors. Therefore, Respondents' inability to pay the civil penalties assessed is not a basis for reducing the civil penalties.⁹

⁹The Judicial Officer did give consideration to ability to pay when determining the amount of the civil penalty to assess under the Animal Welfare Act in *In re Gus White, III*, 49 Agric. Dec. 123, 152 (1990). The Judicial Officer subsequently held that consideration of ability to pay in *In re Gus White, III*, was inadvertent error and that ability to pay would not be considered in determining the amount of civil penalties assessed under the Animal Welfare Act in the future. See *In re J. Wayne Shaffer*, 60 Agric. Dec. 444, 475 (2001) (stating section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act, the Regulations, and the Standards, and a respondent's ability to pay the civil penalty is not one of those factors); *In re Nancy M. Kutz* (Decision as to Nancy M. Kutz), 58 Agric. Dec. 744, 757 (1999) (stating section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) sets forth factors that must be considered when determining the amount of the civil penalty to be assessed against a respondent for violations of the Animal Welfare Act, the Regulations, and the Standards, and a respondent's ability to pay the civil penalty is not one of those factors); *In re James E. Stephens*, 58 Agric. Dec. 149, 199 (1999) (stating the respondents' financial state is not relevant to the amount of the civil penalty assessed against the respondents for violations of the Animal Welfare Act, the Regulations, and the Standards); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1143 (1998) (stating a respondent's ability to pay a civil penalty is not considered in determining the amount of the civil penalty to be assessed), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1050 n.1 (1998) (stating the Judicial Officer has

(continued...)

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

ORDER

1. Respondents, their agents, employees, successors, 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 engaging in any activity for which an Animal Welfare Act license is required.

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

2. Respondent Richard Mielke is assessed a \$3,000 civil penalty. The civil penalty shall be paid in accordance with paragraph 5 of this Order.

⁹(...continued)

pointed out that when determining the amount of a civil penalty to be assessed under the Animal Welfare Act, consideration need not be given to a respondent's ability to pay the civil penalty); *In re James J. Everhart*, 56 Agric. Dec. 1401, 1416 (1997) (stating a respondent's inability to pay the civil penalty is not a consideration in determining civil penalties assessed under the Animal Welfare Act); *In re Mr. & Mrs. Stan Kopunec*, 52 Agric. Dec. 1016, 1023 (1993) (stating the ability to pay a civil penalty is not a relevant consideration in Animal Welfare Act cases); *In re Micheal McCall*, 52 Agric. Dec. 986, 1008 (1993) (stating the ability or inability to pay is not a criterion in Animal Welfare Act cases); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1071 (1992) (stating the Judicial Officer once gave consideration to the ability of respondents to pay a civil penalty, but that the Judicial Officer has removed the ability to pay as a criterion, since the Animal Welfare Act does not require it), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Jerome A. Johnson*, 51 Agric. Dec. 209, 216 (1992) (stating the holding in *In re Gus White, III*, 49 Agric. Dec. 123 (1990), as to consideration of ability to pay, was an inadvertent error; ability to pay is not a factor specified in the Animal Welfare Act and it will not be considered in determining future civil penalties under the Animal Welfare Act).

3. Respondent Kaye Mielke is assessed an \$18,000 civil penalty. The civil penalty shall be paid in accordance with paragraph 5 of this Order.

4. In conformity with the Consent Decision and Order entered December 3, 2003, *In re Richard Mielke*, 62 Agric. Dec. 726 (2003) (Consent Decision), Respondents are jointly and severally assessed the civil penalty of \$5,875. The civil penalty shall be paid in accordance with paragraph 5 of this Order.

5. The civil penalties assessed in paragraphs 2 through 4 of this Order shall be paid by certified checks or money orders made payable to the Treasurer of the United States and sent to:

Bernadette R. Juarez
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 penalties shall be sent to, and received by, Bernadette R. Juarez within 60 days after service of this Order on Respondents. Respondents shall state on the certified checks or money orders that payment is in reference to AWA Docket No. 05-0006.

RIGHT TO JUDICIAL REVIEW

Respondents have the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. Respondents must seek judicial review within 60 days after entry of this Order.¹⁰ The date of entry of this Order is July 29, 2005.

Done at Washington, DC

July 29, 2005

William G. Jenson
Judicial Officer

¹⁰7 U.S.C. § 2149(c).