

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) **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 June 22, 2005. 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 and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Administrator alleged that on April 22, 2001, October 14, 2001, November 4, 2001, March 17, 2002, October 13, 2002, March 23, 2003, November 2, 2003, March 21,

2004, June 6, 2004, and September 12, 2004, Jerome Schmidt, d/b/a Top of the Ozark Auction [hereinafter Dr. Schmidt], willfully violated the Regulations and Standards.¹ On July 18, 2005, Dr. Schmidt filed an answer denying the material allegations of the Complaint.

On December 6, 2005, Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] conducted a hearing in Springfield, Missouri. Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture, Washington, DC, represented the Administrator. Dr. Schmidt appeared pro se, assisted by his wife, Karen Schmidt. The Administrator called four witnesses; Dr. Schmidt called 12 witnesses, including himself; and the ALJ admitted 28 exhibits into evidence, all of which were introduced by the Administrator.

On February 10, 2006, after the Administrator and Dr. Schmidt filed post-hearing briefs, the ALJ filed a Decision and Order [hereinafter Initial Decision] dismissing the Complaint and directing the Administrator “to take appropriate corrective action to insure that published Departmental policy and procedures as expressed in the *Federal Register* and the Animal Care Resource Guide, Dealer Inspection Guide are followed by APHIS personnel in future inspections.”²

¹Compl. ¶¶ II-XI.

²Initial Decision at 11.

On April 11, 2006, the Administrator appealed to the Judicial Officer.³ On May 19, 2006, Dr. Schmidt filed a response to the Administrator's appeal petition.⁴ On May 22, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful review of the record, I disagree with the ALJ's February 10, 2006, Initial Decision. Therefore, I reverse the ALJ's Initial Decision. The Administrator's exhibits are designated by "CX." Transcript references are designated by "Tr."

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

³Complainant's Appeal of the ALJ's Decision and Order, and Brief in Support Thereof [hereinafter Appeal Petition].

⁴Respondent's Response to Complainant's Appeal of Administrative Law Judge's Decision and Order.

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[.]

§ 2146. Administration and enforcement by Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale subject to

section 2142 of this title, has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale. The Secretary shall inspect each research facility at least once each year and, in the case of deficiencies or deviations from the standards promulgated under this chapter, shall conduct such follow-up inspections as may be necessary until all deficiencies or deviations from such standards are corrected. The Secretary shall promulgate such rules and regulations as he deems necessary to permit inspectors to confiscate or destroy in a humane manner any animal found to be suffering as a result of a failure to comply with any provision of this chapter or any regulation or standard issued thereunder if (1) such animal is held by a dealer, (2) such animal is held by an exhibitor, (3) such animal is held by a research facility and is no longer required by such research facility to carry out the research, test, or experiment for which such animal has been utilized, (4) such animal is held by an operator of an auction sale, or (5) such animal is held by an intermediate handler or a carrier.

§ 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), 2146(a), 2149(a)-(c), 2151.

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

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§ 2.4 Non-interference with APHIS officials.

A licensee or applicant for an initial license shall not interfere with, threaten, abuse (including verbally abuse), or harass any APHIS official in the course of carrying out his or her duties.

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SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

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

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SUBPART I—MISCELLANEOUS

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§ 2.126 Access and inspection of records and property.

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

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

(b) The use of a room, table, or other facilities necessary for the proper examination of the records and inspection of the property or animals must be extended to APHIS officials by the dealer, exhibitor, intermediate handler or carrier, and a responsible adult shall be made available to accompany APHIS officials during the inspection process.

PART 3—STANDARDS

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

FACILITIES AND OPERATING STANDARDS

§ 3.1 Housing facilities, general.

(a) *Structure*; construction. Housing facilities for dogs and cats must be designed and constructed so that they are structurally sound. They must be kept in good repair, and they must protect the animals from injury, contain the animals securely, and restrict other animals from entering.

.....

(c) *Surfaces*—(1) *General requirements*. The surfaces of housing facilities—including houses, dens, and other furniture-type fixtures and objects within the facility—must be constructed in a manner and made of

materials that allow them to be readily cleaned and sanitized, or removed or replaced when worn or soiled. Interior surfaces and any surfaces that come in contact with dogs or cats must:

(i) Be free of excessive rust that prevents the required cleaning and sanitization, or that affects the structural strength of the surface; and

(ii) Be free of jagged edges or sharp points that might injure the animals.

(2) *Maintenance and replacement of surfaces.* All surfaces must be maintained on a regular basis. Surfaces of housing facilities—including houses, dens, and other furniture-type fixtures and objects within the facility—that cannot be readily cleaned and sanitized, must be replaced when worn or soiled.

(3) *Cleaning.* Hard surfaces with which the dogs or cats come in contact must be spot-cleaned daily and sanitized in accordance with § 3.11(b) of this subpart to prevent accumulation of excreta and reduce disease hazards. Floors made of dirt, absorbent bedding, sand, gravel, grass, or other similar material must be raked or spot-cleaned with sufficient frequency to ensure all animals the freedom to avoid contact with excreta. Contaminated material must be replaced whenever this raking and spot-cleaning is not sufficient to prevent or eliminate odors, insects, pests, or vermin infestation. All other surfaces of housing facilities must be cleaned and sanitized when necessary to satisfy generally accepted husbandry standards and practices. Sanitization may be done using any of the methods provided in § 3.11(b)(3) for primary enclosures.

(d) *Water and electric power.* The housing facility must have reliable electric power adequate for heating, cooling, ventilation, and lighting, and for carrying out other husbandry requirements in accordance with the regulations in this subpart. The housing facility must provide adequate running potable water for the dogs' and cats' drinking needs, for cleaning, and for carrying out other husbandry requirements.

...

(f) *Drainage and waste disposal.* Housing facility operators must provide for regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks. Housing facilities must be equipped with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and animals stay dry. Disposal and drainage systems must minimize vermin and pest infestation, insects, odors, and disease hazards. All drains must be properly constructed, installed, and

maintained. If closed drainage systems are used, they must be equipped with traps and prevent the backflow of gases and the backup of sewage onto the floor. If the facility uses sump or settlement ponds, or other similar systems for drainage and animal waste disposal, the system must be located far enough away from the animal area of the housing facility to prevent odors, diseases, pests, and vermin infestation. Standing puddles of water in animal enclosures must be drained or mopped up so that the animals stay dry. Trash containers in housing facilities and in food storage and food preparation areas must be leakproof and must have tightly fitted lids on them at all times. Dead animals, animal parts, and animal waste must not be kept in food storage or food preparation areas, food freezers, food refrigerators, or animal areas.

§ 3.6 Primary enclosures.

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

(a) *General requirements*. . . .

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

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

. . . .

(iii) Contain the dogs and cats securely;

. . . .

(xi) Provide sufficient space to allow each dog and cat to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner; and

(xii) Primary enclosures constructed on or after February 20, 1998 and floors replaced on or after that date, must comply with the requirements in this paragraph (a)(2). On or after January 21, 2000, all primary enclosures must be in compliance with the requirements in this paragraph (a)(2). If the suspended floor of a primary enclosure is constructed of metal strands, the strands must either be greater than $\frac{1}{8}$ of an inch in diameter (9 gauge) or coated with a material such as plastic or fiberglass. The suspended floor of any primary enclosure must be strong enough so that the floor does not sag or bend between the structural supports.

ANIMAL AND HUSBANDRY STANDARDS

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

(a) *Cleaning of primary enclosures.* Excreta and food waste must be removed from primary enclosures daily, and from under primary enclosures as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent soiling of the dogs or cats contained in the primary enclosures, and to reduce disease hazards, insects, pests and odors. When steam or water is used to clean the primary enclosure, whether by hosing, flushing, or other methods, dogs and cats must be removed, unless the enclosure is large enough to ensure the animals would not be harmed, wetted, or distressed in the process. Standing water must be removed from the primary enclosure and animals in other primary enclosures must be protected from being contaminated with water and other wastes during the cleaning. The pans under primary enclosures with grill-type floors and the ground areas under raised runs with mesh or slatted floors must be cleaned as often as necessary to prevent accumulation of feces and food waste and to reduce disease hazards pests, insects and odors.

.....

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

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

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TRANSPORTATION STANDARDS

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§ 3.14 Primary enclosures used to transport live dogs and cats.

Any person subject to the Animal Welfare regulations (9 CFR parts 1, 2, and 3) must not transport or deliver for transport in commerce a dog or cat unless the following requirements are met:

(a) *Construction of primary enclosures.* The dog or cat must be contained in a primary enclosure such as a compartment, transport cage, carton, or crate. Primary enclosures used to transport dogs and cats must be constructed so that:

.....

(9) The primary enclosure has a solid, leak-proof bottom or a removable, leak-proof collection tray under a slatted or mesh floor that prevents seepage of waste products, such as excreta and body fluids, outside of the enclosure. If a slatted or mesh floor is used in the enclosure, it must be designed and constructed so that the animal cannot put any part of its body between the slats or through the holes in the mesh. Unless the dogs and cats are on raised slatted floors or raised floors made of mesh, the primary enclosure must contain enough previously unused litter to absorb and cover excreta. The litter must be of a suitably absorbent material that is safe and nontoxic to the dogs and cats.

.....

(e) *Space and placement.* (1) Primary enclosures used to transport live dogs and cats must be large enough to ensure that each animal contained in the primary enclosure has enough space to turn about normally while standing, to stand and sit erect, and to lie in a natural position.

9 C.F.R. §§ 1.1; 2.4, .100(a), .126; 3.1(a), (c)-(d), (f), .6(a)(2)(i), (iii), (xi), (xii), .11(a), (c)-(d), .14(a)(9), (e)(1).

DECISION

Discussion

Introduction

Dr. Schmidt is a veterinarian who has held an Animal Welfare Act dealer's license since 1997.⁵ Dr. Schmidt does business as Top of the Ozark Auction. Dr. Schmidt's address is 6740 Highway F, Hartsville, Missouri 65667.⁶ Dr. Schmidt conducts dog auctions, which are open to dog dealers and the general public, in a multi-purpose steel building.⁷ Approximately half of the building contains cages for holding the dogs that are being auctioned and is also used for storage. The other half of the building has an auction stand and an area for auction attendees.⁸

Dr. Schmidt conducts approximately six or seven auctions each year, exclusive of full dispersal sales.⁹ Dr. Schmidt auctioned 890 dogs in 2000; 1,219 dogs in 2001; 1,342 dogs in 2002; 1,214 dogs in 2003; and 1,325 dogs in 2004.¹⁰ Dr. Schmidt earned

⁵Tr. 209-10, 290.

⁶CX 1-CX 5.

⁷Tr. 212.

⁸Tr. 213-14.

⁹Tr. 212.

¹⁰CX 1-CX 5.

commissions and fees of \$15,500 in 2000; \$22,520 in 2001; \$20,130 in 2002; \$24,423 in 2003; and \$44,149 in 2004.¹¹

In accordance with the Animal Welfare Act, the United States Department of Agriculture conducted approximately 15 to 20 inspections of Dr. Schmidt's facility during the period from 1997 through November 2005.¹² The Administrator alleged that Dr. Schmidt committed 39 violations of the Regulations and Standards during the period April 22, 2001, through September 12, 2004.¹³ The Administrator's allegations that Dr. Schmidt violated the Regulations and Standards are based upon 10 inspections conducted by Sandra K. Meek, an experienced United States Department of Agriculture inspector, who inspected Dr. Schmidt's facility and found violations of the Regulations and Standards on April 22, 2001, October 14, 2001, November 4, 2001, March 17, 2002, October 13, 2002, March 23, 2003, November 2, 2003, March 21, 2004, June 6, 2004, and September 12, 2004.¹⁴ The Administrator withdrew two of the allegations during the December 6, 2005, hearing.¹⁵ The Administrator did not request findings with respect to

¹¹CX 1-CX 5.

¹²Tr. 290-91.

¹³Compl. ¶¶ II-XI.

¹⁴CX 7-CX 16, CX 37-CX 48; Tr. 12-75.

¹⁵The Administrator withdrew the allegation that, on November 4, 2001, Dr. Schmidt housed dogs in enclosures that had bare wire strand floors in violation of section 3.6(a)(2)(xii) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(xii)) (Compl. (continued...))

a third allegation.¹⁶ Thus, 36 of the 39 violations of the Regulations and Standards alleged in the Complaint are at issue.¹⁷

¹⁵(...continued)

¶ IV(A)(4)) and the allegation that, on November 2, 2003, Dr. Schmidt failed to hold dogs obtained from an individual for 5 days in violation of section 2.101(a) of the Regulations and Standards (9 C.F.R. § 2.101(a)) (Compl. ¶ VIII(A)(2)) (Tr. 62).

¹⁶The Administrator did not request findings with respect to the allegation that, on October 13, 2002, Dr. Schmidt's primary enclosures for dogs did not provide sufficient space to allow each dog to stand or sit in a comfortable position in violation of section 3.6(a)(2)(xi) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(xi)) (Compl. ¶ VI(A)(3)) (Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof).

¹⁷The following 36 willful violations alleged by the Administrator are at issue in this proceeding: (1) on April 22, 2001, Dr. Schmidt failed to remove excreta from primary enclosures to prevent soiling of the animals, as required by section 3.11(a) of the Regulations and Standards (9 C.F.R. § 3.11(a)) (Compl. ¶ II(A)); (2)-(3) on October 14, 2001, and November 4, 2001, Dr. Schmidt failed to provide housing facilities that were structurally sound and in good repair, as required by section 3.1(a) of the Regulations and Standards (9 C.F.R. § 3.1(a)) (Compl. ¶¶ III(A)(1), IV(A)(1)); (4)-(7) on October 14, 2001, November 4, 2001, June 6, 2004, and September 12, 2004, Dr. Schmidt failed to ensure that primary surfaces coming in contact with animals were free of jagged edges or sharp points, as required by section 3.1(c)(1)(ii) of the Regulations and Standards (9 C.F.R. § 3.1(c)(1)(ii)) (Compl. ¶¶ III(A)(2), IV(A)(2), X(A)(3), XI(A)(1)); (8)-(9) on October 14, 2001, and November 4, 2001, Dr. Schmidt failed to provide a waste disposal system that would keep animals free from contamination and allow them to stay clean and dry, as required by section 3.1(f) of the Regulations and Standards (9 C.F.R. § 3.1(f)) (Compl. ¶¶ III(A)(3), IV(A)(3)); (10)-(12) on October 14, 2001, November 4, 2001, and March 17, 2002, Dr. Schmidt failed to keep housing facilities clean and in good repair to facilitate husbandry practices, as required by section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)) (Compl. ¶¶ III(A)(5), IV(A)(5), V(A)(4)); (13)-(14) on March 17, 2002, and October 13, 2002, Dr. Schmidt failed to provide primary enclosures for dogs that were 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, as required by section 3.6(a)(2)(i) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(i)) (Compl. ¶¶ V(A)(1), VI(A)(1)); (15)-(16) on March 17, 2002, and October 13, 2002,

(continued...)

¹⁷(...continued)

Dr. Schmidt failed to provide primary enclosures for dogs that contained the dogs securely, as required by section 3.6(a)(2)(iii) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(iii)) (Compl. ¶¶ V(A)(2), VI(A)(2)); (17) on March 17, 2002, Dr. Schmidt failed to provide primary enclosures that had sufficient space to allow each dog to stand or sit in a comfortable position, as required by section 3.6(a)(2)(xi) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(xi)) (Compl. ¶ V(A)(3)); (18) on March 23, 2003, Dr. Schmidt failed to spot-clean and sanitize hard surfaces with which dogs came in contact, as required by section 3.1(c)(3) of the Regulations and Standards (9 C.F.R. § 3.1(c)(3)) (Compl. ¶ VII(A)(1)); (19)-(21) on March 23, 2003, March 21, 2004, and June 6, 2004, Dr. Schmidt failed to provide an effective program for the control of insects and rodents, as required by section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)) (Compl. ¶¶ VII(A)(2), IX(A)(3), X(A)(6)); (22)-(23) on November 2, 2003, and June 6, 2004, Dr. Schmidt violated section 2.4 of the Regulations and Standards (9 C.F.R. § 2.4) by interfering with Animal and Plant Health Inspection Service officials while they were carrying out their duties (Compl. ¶¶ VIII(A)(1), X(A)(1)); (24) on November 2, 2003, Dr. Schmidt violated section 2.126(a)(4) of the Regulations and Standards (9 C.F.R. § 2.126(a)(4)) by refusing to allow Animal and Plant Health Inspection Service officials access to animals for the purpose of photographing them (Compl. ¶ VIII(A)(3)); (25)-(28) on November 2, 2003, March 21, 2004, June 6, 2004, and September 12, 2004, Dr. Schmidt failed to maintain housing facilities so as to keep them free of trash, as required by section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)) (Compl. ¶¶ VIII(A)(4), IX(A)(2), X(A)(5), XI(A)(2)); (29)-(30) on November 2, 2003, and September 12, 2004, Dr. Schmidt housed dogs in enclosures without suitable absorbent material to absorb and cover excreta, as required by section 3.14(a)(9) of the Regulations and Standards (9 C.F.R. § 3.14(a)(9)) (Compl. ¶¶ VIII(A)(5), XI(A)(3)); (31)-(32) on November 2, 2003, and March 21, 2004, Dr. Schmidt failed to provide enclosures large enough to ensure each animal had sufficient space to stand and sit erect, as required by section 3.14(e)(1) of the Regulations and Standards (9 C.F.R. § 3.14(e)(1)) (Compl. ¶¶ VIII(A)(6), IX(A)(4)); (33)-(34) on March 21, 2004, and June 6, 2004, Dr. Schmidt failed to provide sufficient lighting to conduct an inspection of the animals and facilities, as required by section 3.1(d) of the Regulations and Standards (9 C.F.R. § 3.1(d)) (Compl. ¶¶ IX(A)(1), X(A)(4)); (35) on June 6, 2004, Dr. Schmidt violated section 2.126(a)(4) of the Regulations and Standards (9 C.F.R. § 2.126(a)(4)) by refusing to allow Animal and Plant Health Inspection Service officials access to animals for the purpose of inspection (Compl. ¶ X(A)(2)); and (36) on October 14, 2001, Dr. Schmidt housed dogs in enclosures that had bare wire strand floors, as prohibited by section 3.6(a)(2)(xii) of the

(continued...)

The Administrator seeks an order assessing Dr. Schmidt a \$15,000 civil penalty and requiring Dr. Schmidt to cease and desist from violating the Animal Welfare Act and the Regulations and Standards.¹⁸ As the proponent of an order, the Administrator has the burden of proof in this proceeding¹⁹ and the standard of proof by which the burden of persuasion is met in an administrative proceeding conducted under the Animal Welfare Act is preponderance of the evidence.²⁰

¹⁷(...continued)

Regulations and Standards (9 C.F.R. § 3.6(a)(2)(xii)) (Compl. ¶ III(A)(4)).

¹⁸Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof at 8-9.

¹⁹5 U.S.C. § 556(d).

²⁰*Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981); *In re The Int'l Siberian Tiger Found.* (Decision as to The International Siberian Tiger Foundation, Diana Cziraky, The Siberian Tiger Foundation, and Tiger Lady), 61 Agric. Dec. 53, 79 n.3 (2002); *In re Reginald Dwight Parr* (Order Denying Respondent's Pet. for Recons.), 59 Agric. Dec. 629, 643-44 n.8 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re James E. Stephens*, 58 Agric. Dec. 149, 151 (1999); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1107-08 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (*per curiam*), *printed in* 59 Agric. Dec. 533 (2000); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1052 (1998); *In re Richard Lawson*, 57 Agric. Dec. 980, 1015 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 272 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 223 n.4 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 72 n.3 (1998), *aff'd*, 189 F.3d 473 (9th Cir. 1999) (Table) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 58 Agric. Dec. 742 (1999); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1455-56 n.7 (1997), *aff'd*, 173 F.3d 422 (Table) (3d Cir. 1998), *printed in* 57 Agric. Dec. 869 (1998); *In re David M. Zimmerman*, 56 Agric.

(continued...)

The Administrator's Evidence of Dr. Schmidt's Violations

Sandra Meek testified she inspected Dr. Schmidt's facility on April 22, 2001, October 14, 2001, November 4, 2001, March 17, 2002, October 13, 2002, March 23, 2003, November 2, 2003, March 21, 2004, June 6, 2004, and September 12, 2004, and, on each occasion, found violations of the Regulations and Standards.²¹ Ms. Meek's testimony included a description of each of the violations which she found and her assessment of the seriousness of each of those violations.²² Ms. Meek documented each inspection of Dr. Schmidt's facility at the time of the inspection with an inspection report,

²⁰(...continued)

Dec. 433, 461 (1997), *aff'd*, 156 F.3d 1227 (3d Cir. 1998) (Table), *printed in* 57 Agric. Dec. 46 (1998); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 169 n.4 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 85 (1999); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 109 n.3 (1996); *In re Otto Berosini*, 54 Agric. Dec. 886, 912 (1995); *In re Micheal McCall*, 52 Agric. Dec. 986, 1010 (1993); *In re Ronnie Faircloth*, 52 Agric. Dec. 171, 175 (1993), *appeal dismissed*, 16 F.3d 409, 1994 WL 32793 (4th Cir. 1994), *printed in* 53 Agric. Dec. 78 (1994); *In re Craig Lesser*, 52 Agric. Dec. 155, 166 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066-67 (1992), *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 Terry Lee Harrison*, 51 Agric. Dec. 234, 238 (1992); *In re Gus White, III*, 49 Agric. Dec. 123, 153 (1990); *In re E. Lee Cox*, 49 Agric. Dec. 115, 121 (1990), *aff'd*, 925 F.2d 1102 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502 U.S. 860 (1991); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1283-84 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 553 (1988); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135, 146-47 (1986); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840, 1848 n.2 (1985), *appeal dismissed*, 786 F.2d 1168 (8th Cir.) (Table), *cert. denied*, 476 U.S. 1108 (1986).

²¹Tr. 12-75.

²²Tr. 12-75.

which contains a detailed description of each of Dr. Schmidt's violations and a reference to the section of the Regulations and Standards which Ms. Meek found Dr. Schmidt violated.²³ The ALJ admitted each of these 10 inspection reports into evidence. Jan R. Feldman, another experienced United States Department of Agriculture inspector, assisted Ms. Meek during five of the 10 inspections at issue in this proceeding: namely, the November 4, 2001, March 17, 2002, March 23, 2003, November 2, 2003, and June 6, 2004, inspections of Dr. Schmidt's facility.²⁴ Ms. Feldman testified that, based on her observations at Dr. Schmidt's facility, she agreed with all of the violations cited by Ms. Meek on the November 4, 2001, March 17, 2002, March 23, 2003, November 2, 2003, and June 6, 2004, inspection reports.²⁵ Moreover, Ms. Meek took photographs of some of Dr. Schmidt's violations during two of the 10 inspections at issue: namely, the March 21, 2004, and June 6, 2004, inspections of Dr. Schmidt's facility.²⁶ The photographs confirm violations cited by Ms. Meek on the March 21, 2004, and the June 6, 2004, inspection reports. The Administrator also introduced evidence that, during the November 2, 2003, and the June 6, 2004, inspections of Dr. Schmidt's facility,

²³CX 7-CX 16.

²⁴Tr. 77-79.

²⁵Tr. 79.

²⁶CX 37-CX 48.

Dr. Schmidt interfered with Ms. Meek while she was carrying out her duties at Dr. Schmidt's facility.²⁷

The Administrator introduced relevant, reliable, credible, and probative evidence of 34 of the 36 alleged violations of the Regulations and Standards that are at issue. I do not find the evidence introduced by the Administrator supports a finding that Dr. Schmidt violated section 3.1(d) of the Regulations and Standards (9 C.F.R. § 3.1(d)) on March 21, 2004, and June 6, 2004. The Administrator alleged that, on March 21, 2004, and June 6, 2004, Dr. Schmidt failed to provide sufficient lighting to conduct an inspection of the animals and facilities in violation of section 3.1(d) of the Regulations and Standards (9 C.F.R. § 3.1(d)).²⁸ Section 3.1(d) of the Regulations and Standards (9 C.F.R. § 3.1(d)) does not require dealers to provide sufficient lighting to conduct inspections of animals and facilities. Instead, section 3.1(d) of the Regulations and Standards (9 C.F.R. § 3.1(d)) provides that housing facilities for dogs and cats must have reliable electric power adequate for heating, cooling, ventilation, and lighting and for carrying out other husbandry requirements in accordance with sections 3.1 through 3.19 of the Regulations and Standards (9 C.F.R. §§ 3.1-.19). The Administrator did not introduce any evidence regarding the reliability or adequacy of Dr. Schmidt's electric power; therefore, I dismiss paragraphs IX(A)(1) and X(A)(4) of the Complaint. I limit my discussion of

²⁷CX 13, CX 15; Tr. 36-37, 40-41.

²⁸Compl. ¶¶ IX(A)(1), X(A)(4).

Dr. Schmidt's rebuttal evidence to the 34 alleged violations of the Regulations and Standards supported by the relevant, reliable, credible, and probative evidence introduced by the Administrator.

Dr. Schmidt's Rebuttal Evidence

Dr. Schmidt called 12 witnesses to rebut the evidence introduced by the Administrator. John Randal McCray, an electrician who attended an auction at Dr. Schmidt's facility on February 17, 2001, testified he did not know if he was present at Dr. Schmidt's facility on any of the dates of the inspections that are the subject of the instant proceeding, and he had no knowledge of the condition of Dr. Schmidt's facility on the dates of those inspections.²⁹

Rae Sanborn, an owner of a dog kennel licensed by the State of Missouri, who attended auctions at Dr. Schmidt's facility, testified he was not at Dr. Schmidt's facility during the April 22, 2001, October 14, 2001, November 4, 2001, March 17, 2002, or October 13, 2002, inspections; he was not certain whether he was at Dr. Schmidt's facility during the March 23, 2003, or September 12, 2004, inspections; he believed he was at Dr. Schmidt's facility during the March 21, 2004, and June 6, 2004, inspections; and he was certain he was at Dr. Schmidt's facility during the November 2, 2003, inspection.³⁰ Mr. Sanborn testified, when he was at Dr. Schmidt's facility, he did not accompany the

²⁹Tr. 93-94.

³⁰Tr. 118-22.

United States Department of Agriculture inspectors during their inspections of Dr. Schmidt's facility and had no knowledge of the violations of the Regulations and Standards relating to the condition of Dr. Schmidt's facility.³¹

Mr. Sanborn testified he witnessed an exchange between Dr. Schmidt and a United States Department of Agriculture inspector during the November 2, 2003, inspection which gave rise to the Administrator's allegations that, on November 2, 2003, Dr. Schmidt interfered with Animal and Plant Health Inspection Service officials in the course of carrying out their duties and refused to allow Animal and Plant Health Inspection Service officials access to animals for the purpose of photographing them.³² Mr. Sanborn testified that Dr. Schmidt did not interfere with the inspector while she was carrying out her duties under the Animal Welfare Act.³³

Mark Anthony Landers, an Animal Welfare Act licensee, testified he was not certain what dates he was at Dr. Schmidt's facility, but he may have been at Dr. Schmidt's facility during the April 22, 2001, inspection. Mr. Landers stated, even if he had been at Dr. Schmidt's facility on April 22, 2001, he had no knowledge of the violation of the Regulations and Standards Dr. Schmidt is alleged to have committed on

³¹Tr. 118-22.

³²Compl. ¶¶ VIII(A)(1), VIII(A)(3).

³³Tr. 114.

April 22, 2001, and he could not testify as to whether Dr. Schmidt committed the violation or not.³⁴

Margie S. White, an independent pet carrier and one of Dr. Schmidt's employees, testified she was at Dr. Schmidt's facility during each of the inspections that are the subject of this proceeding, except the April 22, 2001, inspection.³⁵ Ms. White stated she has been employed in the office at Dr. Schmidt's facility, she never accompanied the United States Department of Agriculture inspectors on any of their inspections of Dr. Schmidt's facility, and she could not testify regarding the violations of the Regulations and Standards found by the inspectors.³⁶

Barbara McCoy, an Animal Welfare Act licensee, stated she was at Dr. Schmidt's facility during each of the inspections that are the subject of this proceeding, but she did not accompany the United States Department of Agriculture inspectors during the inspections and she could not testify regarding the violations of the Regulations and Standards relating to the condition of Dr. Schmidt's facility.³⁷

With respect to the Administrator's allegations that Dr. Schmidt interfered with Animal and Plant Health Inspection Service officials in the course of carrying out their

³⁴Tr. 131-32.

³⁵Tr. 145.

³⁶Tr. 146-47.

³⁷Tr. 158-59.

duties on November 2, 2003, and June 6, 2004,³⁸ Ms. McCoy testified that on November 2, 2003, “there was some commotion in the back, and [Dr. Schmidt] went back there to talk to somebody”³⁹ and that on June 6, 2004, Dr. Schmidt told the Animal and Plant Health Inspection Service inspector “[y]ou can’t take pictures in here”⁴⁰ and “[you do not] have a right to be there . . . without [my] knowledge.”⁴¹ Ms. McCoy testified Dr. Schmidt did not know he was speaking to an Animal and Plant Health Inspection Service inspector when he told the inspector not to take pictures and, when Dr. Schmidt realized who was taking pictures, he told the Animal and Plant Health Inspection Service inspector she could finish her inspection.⁴²

Jessica Lea Ann Vandergrift, one of Dr. Schmidt’s employees, testified she was at Dr. Schmidt’s facility during each of the inspections that are at issue in this proceeding; however, Ms. Vandergrift testified she did not accompany the United States Department of Agriculture inspectors during any of their inspections and had no knowledge of the inspectors’ findings relating to the condition of Dr. Schmidt’s facility.⁴³ Ms. Vandergrift testified she did not remember the November 2, 2003, incident giving rise to the

³⁸ Compl. ¶¶ VIII(A)(1), VIII(A)(3), X(A)(1), X(A)(2).

³⁹ Tr. 153.

⁴⁰ Tr. 154.

⁴¹ Tr. 156.

⁴² Tr. 155-56.

⁴³ Tr. 171.

Administrator's allegations that Dr. Schmidt interfered with Animal and Plant Health Inspection Service officials carrying out their duties,⁴⁴ but she did remember a June 6, 2004, incident during which Dr. Schmidt attempted to confiscate a camera.

Ms. Vandergrift testified Dr. Schmidt does not allow cameras or video, audio, or recording devices in his facility. Ms. Vandergrift added that, in her opinion, Dr. Schmidt did not know an Animal and Plant Health Inspection Service inspector was the person taking pictures of his facility and Dr. Schmidt's statement that no cameras or audio, video, or recording devices are allowed in his facility did not apply to United States Department of Agriculture inspectors.⁴⁵

Katherine M. Peaker, an inspector for the American Kennel Club, testified she was at Dr. Schmidt's facility during the November 2, 2003, inspection and most likely at Dr. Schmidt's facility during the March 21, 2004, June 6, 2004, and September 12, 2004, inspections. Ms. Peaker testified she did not accompany the United States Department of Agriculture inspectors on the inspections of Dr. Schmidt's facility and could not comment on the inspectors' findings regarding the condition of Dr. Schmidt's facility.⁴⁶ Ms. Peaker testified she remembered a November 2, 2003, incident giving rise to the Administrator's allegations that Dr. Schmidt interfered with Animal and Plant Health Inspection Service

⁴⁴Compl. ¶¶ VIII(A)(1), VIII(A)(3).

⁴⁵Tr. 167-69.

⁴⁶Tr. 185-86.

officials carrying out their duties,⁴⁷ but she did not observe any interaction between Dr. Schmidt and the Animal and Plant Health Inspection Service inspector.⁴⁸

Anette Turner, an inspector for the American Kennel Club, testified she was at Dr. Schmidt's facility as late as March 23, 2003, but she did not remember the dates she was at Dr. Schmidt's facility. Ms. Turner saw United States Department of Agriculture inspectors at Dr. Schmidt's facility on occasion, but did not accompany them during the inspections and had no reason to question the United States Department of Agriculture inspectors' findings.⁴⁹

Ronnie Lee Williams, a security guard employed by Dr. Schmidt, testified he began working at Dr. Schmidt's facility in September 2004.⁵⁰ Mr. Williams was employed at Dr. Schmidt's facility during the September 12, 2004, inspection of Dr. Schmidt's facility and accompanied Ms. Meek during her September 12, 2004, inspection of Dr. Schmidt's facility;⁵¹ however, Mr. Williams did not testify regarding the condition of Dr. Schmidt's facility during the September 12, 2004, inspection or any other inspection that is the subject of this proceeding.

⁴⁷Compl. ¶¶ VIII(A)(1), VIII(A)(3).

⁴⁸Tr. 181-82.

⁴⁹Tr. 188, 194-95.

⁵⁰Tr. 199, 203-04.

⁵¹CX 16 at 2.

Clifford Lansdown testified he was at Dr. Schmidt's facility on November 2, 2003, and June 6, 2004. Mr. Lansdown did not testify regarding the condition of Dr. Schmidt's facility, but, instead, limited his testimony to the Administrator's allegations that, on November 2, 2003, and June 6, 2004, Dr. Schmidt interfered with Animal and Plant Health Inspection Service officials carrying out their duties.⁵² Mr. Lansdown testified he did not remember the November 2, 2003, incident; however, with respect to the June 6, 2004, incident, Mr. Lansdown testified Dr. Schmidt, in response to a United States Department of Agriculture inspector taking photographs, stated that "no one's to be taking pictures."⁵³ However, Mr. Lansdown also heard Dr. Schmidt state that the United States Department of Agriculture inspectors could finish their inspection.⁵⁴

Jerry Eber, a veterinarian employed by the Missouri Department of Agriculture as supervisor of the Missouri kennel inspection program, testified he was at Dr. Schmidt's facility sometime during 2003. Dr. Eber did not indicate that he was at Dr. Schmidt's facility during the inspections at issue in this proceeding or that he knew of the condition of Dr. Schmidt's facility on the dates of the inspections.⁵⁵

⁵²Compl. ¶¶ VIII(A)(1), VIII(A)(3), X(A)(1), X(A)(2).

⁵³Tr. 207.

⁵⁴Tr. 207.

⁵⁵Tr. 243-48.

Dr. Schmidt testified he was at his facility during each of the 10 inspections at issue in this proceeding; however, he did not accompany the United States Department of Agriculture inspectors on any of the 10 inspections.⁵⁶ Dr. Schmidt testified he received the inspection reports for each of the 10 inspections that are the subject of the instant proceeding in the mail between 5 and 8 days after the United States Department of Agriculture conducted the inspection. After receipt of each inspection report, Dr. Schmidt examined his facility to identify the violations cited on the inspection report.⁵⁷ Dr. Schmidt testified that he agrees with some of the violations cited on the inspection reports and disagrees with some of the violations cited on the inspection reports.⁵⁸ Dr. Schmidt did not identify the violations which he believes he committed but did identify some of the violations with which he disagreed. However, Dr. Schmidt did not specifically address each of the alleged violations, and I find much of Dr. Schmidt's testimony was not relevant to the instant proceeding.⁵⁹

⁵⁶The April 22, 2001, inspection report (CX 7) indicates Dr. Schmidt accompanied Sandra Meek during the inspection; however, I conclude, based on Dr. Schmidt's and Ms. Meek's testimony, Dr. Schmidt did not accompany Ms. Meek during the April 22, 2001, inspection (Tr. 14-15, 49, 296).

⁵⁷Tr. 227, 300.

⁵⁸Tr. 300-02.

⁵⁹In this regard, I generally agree with the ALJ's assessment of Dr. Schmidt's testimony: "Dr. Schmidt . . . you've given me a long narration of your problems with USDA instead of addressing the issues which are before me." (Tr. 302.)

Dr. Schmidt addressed the Administrator's allegations that on March 23, 2003, Dr. Schmidt failed to spot-clean and sanitize hard surfaces with which dogs came in contact in violation of section 3.1(c)(3) of the Regulations and Standards (9 C.F.R. § 3.1(c)(3)) and failed to provide an effective program for the control of insects and rodents in violation of section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)).⁶⁰ The March 23, 2003, inspection report states Dr. Schmidt had eight ground enclosures, containing a total of 13 adult dogs, topped with various types of sheet metal on which was an accumulation of dirt and rodent droppings, indicating a lack of an effective program for the control of rodents.⁶¹ Dr. Schmidt testified he sprays the sheet metal with a non-toxic chemical that mice will not walk on.⁶² Dr. Schmidt's testimony that he sprays the sheet metal in question with a chemical does not rebut the evidence that there was an accumulation of dirt and rodent droppings on the sheet metal. Based on the condition of the sheet metal and Dr. Schmidt's testimony, I find Dr. Schmidt had a program for the control of rodents, but that program was not effective. Therefore, I conclude Dr. Schmidt's testimony is not sufficient to rebut the Administrator's specific, detailed evidence of Dr. Schmidt's violations of sections 3.1(c)(3) and 3.11(d) of the Regulations and Standards (9 C.F.R. §§ 3.1(c)(3), .11(d)) on March 23, 2003.

⁶⁰Compl. ¶ VII.

⁶¹CX 12.

⁶²Tr. 234-35.

Dr. Schmidt also addressed four of the six allegations that he violated the Regulations and Standards on November 2, 2003. The Administrator alleged that on November 2, 2003, Dr. Schmidt interfered with Animal and Plant Health Inspection Service officials in the course of carrying out their duties and refused to allow those Animal and Plant Health Inspection Service officials access to the animals for the purpose of photographing them in violation of sections 2.4 and 2.126(a)(4) of the Regulations and Standards (9 C.F.R. §§ 2.4, .126(a)(4)).⁶³ The November 2, 2003, inspection report states Dr. Schmidt refused to allow Sandra Meek to take a photograph of a Mastiff.⁶⁴ Dr. Schmidt testified he did not refuse to allow Ms. Meek to take a photograph of the Mastiff in question. Dr. Schmidt explained that Ms. Meek's request to take a picture of the Mastiff was contingent upon his auctioning the Mastiff and he did not auction the Mastiff.⁶⁵ Katherine Peaker testified she did not observe any interaction between Dr. Schmidt and the United States Department of Agriculture inspector, but she confirmed Dr. Schmidt's assertion that he did not auction the Mastiff in question.⁶⁶ Mr. Sanborn testified, during the November 2, 2003, auction, he witnessed the exchange between Dr. Schmidt and a United States Department of Agriculture inspector and

⁶³CX ¶¶ VIII(A)(1), VIII(A)(3).

⁶⁴CX 13 at 1.

⁶⁵Tr. 235-39.

⁶⁶Tr. 182.

observed that Dr. Schmidt did not interfere with the inspector while she was carrying out her duties.⁶⁷ After reviewing the Administrator's evidence and Dr. Schmidt's rebuttal evidence, I find the Administrator failed to prove by a preponderance of the evidence that Dr. Schmidt violated sections 2.4 and 2.126(a)(4) of the Regulations and Standards (9 C.F.R. §§ 2.4, .126(a)(4)), on November 2, 2003; therefore, I dismiss paragraphs VIII(A)(1) and VIII(A)(3) of the Complaint.

The Administrator alleged that on November 2, 2003, Dr. Schmidt failed to maintain housing facilities so as to keep them free of trash in violation of section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)).⁶⁸ The November 2, 2003, inspection report states Dr. Schmidt's premises contained trash on or adjacent to enclosures containing dogs, as follows: (1) a Coca Cola can on top of a wire raised enclosure containing two adult dogs; (2) a Dr. Pepper can on top of a ground enclosure containing one adult dog; (3) a coffee cup on top of a raised wire enclosure containing two adult dogs; (4) a discarded water bottle on top of a raised wire enclosure containing one adult dog; and (5) an accumulation of discarded materials, including a candy package, a Mountain Dew can, and a water bottle on top of a roll of wire in contact with a raised wire enclosure containing two adult dogs.⁶⁹ Dr. Schmidt admitted that his premises did

⁶⁷Tr. 114.

⁶⁸CX ¶ VIII(A)(4).

⁶⁹CX 13 at 2.

contain trash but testified that the purpose for the United States Department of Agriculture inspector's citing him for this violation was retaliation.⁷⁰ Even if I were to find the United States Department of Agriculture inspector cited Dr. Schmidt for the purpose of retaliation (which I do not so find), I would not dismiss the alleged violation. The purpose for the United States Department of Agriculture inspector's citation of Dr. Schmidt's violation of section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)) does not negate the fact that the violation occurred. I find Dr. Schmidt's testimony merely confirms that he violated section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)); therefore, I conclude Dr. Schmidt's testimony is not sufficient to rebut the Administrator's specific, detailed evidence of Dr. Schmidt's violation of section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)) on November 2, 2003.

The Administrator alleged that on November 2, 2003, Dr. Schmidt failed to provide enclosures large enough to ensure each animal had space to stand and sit erect in violation of section 3.14(e)(1) of the Regulations and Standards (9 C.F.R. § 3.14(e)(1)). The November 2, 2003, inspection report states Dr. Schmidt housed six dogs in primary enclosures that were too small to allow the animals to stand, sit, or lie in a natural position.⁷¹ Dr. Schmidt testified that one of these dogs (an adult male Pug) was in the

⁷⁰Tr. 239-41.

⁷¹CX 13 at 3.

owner's transport cage when observed by Ms. Meek.⁷² Even if I were to find that Dr. Schmidt was not responsible for the November 2, 2003, violation of section 3.14(e)(1) of the Regulations and Standards (9 C.F.R. § 3.14(e)(1)) with respect to the adult male Pug, I would not find that Dr. Schmidt's testimony rebuts the Administrator's evidence of Dr. Schmidt's violation of section 3.14(e)(1) of the Regulations and Standards (9 C.F.R. § 3.14(e)(1)) as it relates to the other five dogs.

Further, Dr. Schmidt addressed the Administrator's allegation that on March 21, 2004, he (Dr. Schmidt) failed to provide an effective program for the control of insects and rodents in violation of section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)).⁷³ The March 21, 2004, inspection report states an accumulation of spider webs, a bird nest, bird droppings, and flying insect nests indicate a lack of an effective program for the control of insects, external parasites, and pests.⁷⁴ The Administrator introduced pictures of spider webs found during the March 21, 2004, inspection.⁷⁵ Dr. Schmidt testified that the spider webs were not located in the animal holding area and stated, as support for this contention, that Ms. Meek could not answer Dr. Schmidt's questions

⁷²Tr. 294-96.

⁷³CX ¶ IX(A)(3).

⁷⁴CX 14 at 2-3.

⁷⁵CX 37-CX 39.

regarding the location of the spider webs depicted in CX 37.⁷⁶ However, the record reveals that Ms. Meek did answer Dr. Schmidt's questions regarding the location of the spider webs in CX 37,⁷⁷ each picture of the spider webs identified during the March 21, 2004, inspection contains a description of the location of the spider webs which indicates the spider webs were located in the animal holding area,⁷⁸ and one of the pictures depicting the spider webs depicts a cage containing a dog.⁷⁹ Therefore, I conclude Dr. Schmidt's testimony is not sufficient to rebut the Administrator's specific, detailed evidence of Dr. Schmidt's violation of section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)) on March 21, 2004.

The Administrator alleged that on March 21, 2004, Dr. Schmidt failed to provide enclosures large enough to ensure that each animal had space to stand and sit erect in violation of section 3.14(e)(1) of the Regulations and Standards (9 C.F.R. § 3.14(e)(1)).⁸⁰ The March 21, 2004, inspection report states one enclosure in the animal holding area contained an adult Min Pin that was not able to stand erect with its head in a normal

⁷⁶Tr. 262.

⁷⁷Tr. 71.

⁷⁸CX 37-CX 39.

⁷⁹CX 38.

⁸⁰CX ¶ IX(A)(4).

position.⁸¹ The Administrator also introduced a picture depicting an adult Min Pin in an enclosure too small to enable the dog to stand erect with its head in an upright position.⁸² Dr. Schmidt testified the picture is a “set-up” and “shows nothing” and the angle at which the photograph was taken merely causes the enclosure to appear to be too small to ensure that the dog had space to stand erect with its head in a normal position.⁸³ I find Dr. Schmidt’s testimony that the picture is a “set-up” mere speculation unsupported by any evidence. Moreover, I disagree with Dr. Schmidt’s testimony that the picture “shows nothing.” Instead, I find the picture shows an enclosure that is not large enough to enable a dog to stand erect with its head in a natural position. Therefore, I conclude Dr. Schmidt’s testimony is not sufficient to rebut the Administrator’s specific, detailed evidence of Dr. Schmidt’s violation of section 3.14(e)(1) of the Regulations and Standards (9 C.F.R. § 3.14(e)(1)) on March 21, 2004.

The Administrator alleged that on June 6, 2004, Dr. Schmidt interfered with Animal and Plant Health Inspection Service officials in the course of carrying out their duties and refused to allow those Animal and Plant Health Inspection Service inspectors access to the animals for the purpose of inspecting them in violation of sections 2.4 and

⁸¹CX 14 at 3.

⁸²CX 41.

⁸³Tr. 260-61.

2.126(a)(4) of the Regulations and Standards (9 C.F.R. §§ 2.4, .126(a)(4)).⁸⁴ The June 6, 2004, inspection report states Dr. Schmidt ordered a United States Department of Agriculture inspector not to take photographs, demanded that the United States Department of Agriculture inspector give him the camera she was using, and ordered the United States Department of Agriculture inspectors to leave the facility.⁸⁵ Dr. Schmidt explained he approached Ms. Meek after one of his employees reported that someone was taking pictures in the animal holding area, but, as soon as he determined that it was Ms. Meek taking pictures, he did not interfere with her duties.⁸⁶ Dr. Schmidt's explanation of the events surrounding his confrontation with Ms. Meek is generally consistent with Ms. McCoy's testimony⁸⁷ and Ms. Vandergrift's testimony.⁸⁸ After reviewing the Administrator's and Dr. Schmidt's evidence, I find the Administrator failed to prove by a preponderance of the evidence that Dr. Schmidt violated sections 2.4 and 2.126(a)(4) of the Regulations and Standards (9 C.F.R. §§ 2.4, .126(a)(4)), on June 6, 2004; therefore, I dismiss paragraphs X(A)(1) and X(A)(2) of the Complaint.

⁸⁴CX ¶¶ X(A)(1), X(A)(2).

⁸⁵CX 15 at 1-2.

⁸⁶Tr. 249-52, 259.

⁸⁷Tr. 155.

⁸⁸Tr. 167-69.

The Administrator alleged on June 6, 2004, primary surfaces coming in contact with animals were not free of jagged edges or sharp points in violation of section 3.1(c)(1) of the Regulations and Standards (9 C.F.R. § 3.1(c)(1)).⁸⁹ The June 6, 2004, inspection report states Dr. Schmidt had two ground enclosures that had several wire ties which had sharp ends protruding into the enclosures, each of which contained a dog.⁹⁰ The Administrator introduced a picture purportedly depicting a metal wire with sharp ends protruding into one of the enclosures.⁹¹ Ms. Meek testified, while “a little hard to see[,]” the picture depicts one of the wires with a sharp end protruding into an enclosure “down at the bottom.”⁹² Dr. Schmidt testified the picture depicts a pig ring “up to the top and off to the left, first row going down.”⁹³ Given Ms. Meek’s description of the location of the wire in question and Dr. Schmidt’s description of the location of the pig ring, I find Dr. Schmidt did not address the wire which formed part of the basis for the allegation that Dr. Schmidt’s violated section 3.1(c)(1) of the Regulations and Standards (9 C.F.R. § 3.1(c)(1)) on June 6, 2004. Therefore, I conclude Dr. Schmidt’s testimony is not sufficient to rebut the Administrator’s specific, detailed evidence of Dr. Schmidt’s

⁸⁹CX ¶ X(A)(3).

⁹⁰CX 15 at 4.

⁹¹CX 48.

⁹²Tr. 43.

⁹³Tr. 258.

violation of section 3.1(c)(1) of the Regulations and Standards (9 C.F.R. § 3.1(c)(1)) on June 6, 2004.

The Administrator alleged that on June 6, 2004, Dr. Schmidt failed to maintain housing facilities so as to keep them free of trash and failed to provide an effective program for the control of insects and rodents in violation of section 3.11(c) and (d) of the Regulations and Standards (9 C.F.R. § 3.11(c)-(d)).⁹⁴ The June 6, 2004, inspection report states Dr. Schmidt's animal holding area contained a dirty tarp next to 22 enclosures containing 17 adult dogs and 24 puppies; had spiders and spider webs on the walls, enclosures containing dogs, and the enclosure support framing; had flying insect nests on the north wall and on the enclosure support on the east wall; had an enclosure, which contained one animal, with dark dried matter on the front metal fencing panel; and had a vine growing in the framing of two adjoining enclosures housing two dogs. The inspection report states the number of spiders, the accumulation of spider webs, and the flying insect nests indicate a lack of an effective program for the control of insects and rodents.⁹⁵ The Administrator introduced four pictures to support the allegations that Dr. Schmidt violated section 3.11(c) and (d) of the Regulations and Standards (9 C.F.R. § 3.11(c)-(d)).⁹⁶ Dr. Schmidt admitted at least some of the spider webs and an insect nest

⁹⁴Compl. ¶¶ X(A)(5), X(A)(6).

⁹⁵CX 15 at 4.

⁹⁶CX 44-CX 47.

were in his facility, but Dr. Schmidt testified that the spider webs and the insect nest posed no danger to the dogs. Dr. Schmidt's testimony regarding the risk that his violations of section 3.11(c) and (d) of the Regulations and Standards (9 C.F.R. § 3.11(c)-(d)) posed to dogs, does not rebut the Administrator's evidence that Dr. Schmidt violated section 3.11(c) and (d) of the Regulations and Standards (9 C.F.R. § 3.11(c)-(d)) on June 6, 2004. Therefore, I conclude Dr. Schmidt's testimony is not sufficient to rebut the Administrator's specific, detailed evidence of Dr. Schmidt's violations of section 3.11(c) and (d) of the Regulations and Standards (9 C.F.R. § 3.11(c)-(d)) on June 6, 2004.

In conclusion, I find the Administrator proved by a preponderance of the evidence that Dr. Schmidt committed 30 of the 39 violations alleged in the Complaint.

Findings of Fact

1. Dr. Schmidt is an individual doing business as Top of the Ozark Auction. Dr. Schmidt's address is 6740 Highway F, Hartsville, Missouri 65667.⁹⁷
2. At all times material to this proceeding, Dr. Schmidt operated as a *dealer*, as that term is defined in the Animal Welfare Act and the Regulations and Standards.⁹⁸
3. At all times material to this proceeding, Dr. Schmidt held Animal Welfare Act license number 43-B-0305.⁹⁹

⁹⁷CX 1-CX 5.

⁹⁸CX 1-CX 6; Tr. 290.

⁹⁹CX 1-CX 6.

4. Dr. Schmidt conducts approximately six or seven auctions each year, exclusive of full dispersal sales. Dr. Schmidt auctioned 890 dogs in 2000; 1,219 dogs in 2001; 1,342 dogs in 2002; 1,214 dogs in 2003; and 1,325 dogs in 2004. Dr. Schmidt earned commissions and fees of \$15,500 in 2000; \$22,520 in 2001; \$20,130 in 2002; \$24,423 in 2003; and \$44,149 in 2004.¹⁰⁰

5. The United States Department of Agriculture conducted approximately 15 to 20 inspections of Dr. Schmidt's facility during the period from 1997 through November 2005. Sandra K. Meek, an experienced United States Department of Agriculture inspector, inspected Dr. Schmidt's facility on April 22, 2001, October 14, 2001, November 4, 2001, March 17, 2002, October 13, 2002, March 23, 2003, November 2, 2003, March 21, 2004, June 6, 2004, and September 12, 2004. Jan R. Feldman, an experienced United States Department of Agriculture inspector, assisted Ms. Meek during the November 4, 2001, March 17, 2002, March 23, 2003, November 2, 2003, and June 6, 2004, inspections of Dr. Schmidt's facility.¹⁰¹

6. On April 22, 2001, Dr. Schmidt failed to remove excreta from primary enclosures to prevent soiling of animals. Specifically, Dr. Schmidt maintained stacked

¹⁰⁰CX 1-CX 5; Tr. 212.

¹⁰¹CX 7-CX 16, CX 37-CX 48; Tr. 12-79, 290-91.

cages and waste material from the upper cages ran down onto the animals in the lower cages, affecting 13 adult dogs.¹⁰² (9 C.F.R. §§ 2.100(a); 3.11(a).)

7. On October 14, 2001, Dr. Schmidt failed to provide housing facilities for dogs that were structurally sound and in good repair. Specifically, Dr. Schmidt housed three adult dogs in an enclosure that had a front panel that had detached from the bottom panel, and Dr. Schmidt housed one adult dog in an enclosure that had a right side panel that had detached from the bottom panel.¹⁰³ (9 C.F.R. §§ 2.100(a); 3.1(a).)

8. On October 14, 2001, Dr. Schmidt failed to provide housing facilities with interior surfaces that were free of jagged edges or sharp points that might injure animals. Specifically, Dr. Schmidt had 10 enclosures with broken wires that protruded into the enclosures which contained adult dogs.¹⁰⁴ (9 C.F.R. §§ 2.100(a); 3.1(c)(1)(ii).)

9. On October 14, 2001, Dr. Schmidt failed to provide a waste disposal system that would keep animals free from contamination and allow them to stay clean and dry. Specifically, Dr. Schmidt maintained stacked cages without a catch-basin and waste material from the upper enclosures ran down onto the animals in the lower enclosures, affecting 18 adult dogs.¹⁰⁵ (9 C.F.R. §§ 2.100(a); 3.1(f).)

¹⁰²CX 7; Tr. 17-18.

¹⁰³CX 8 at 1; Tr. 19-20.

¹⁰⁴CX 8 at 1; Tr. 20-21.

¹⁰⁵CX 8 at 1; Tr. 21-22.

10. On October 14, 2001, Dr. Schmidt housed dogs in enclosures that had bare wire strand floors. Specifically, Dr. Schmidt housed four adult dogs in two enclosures with bare wire strand floors.¹⁰⁶ (9 C.F.R. §§ 2.100(a); 3.6(a)(2)(xii).)

11. On October 14, 2001, Dr. Schmidt failed to keep housing facilities clean and in good repair to facilitate husbandry practices. Specifically, Dr. Schmidt's animal enclosures contained dirt and spider webs; Dr. Schmidt's animal holding area contained debris, such as soda bottles, a rubbing alcohol bottle, and a food receptacle; and 10 of Dr. Schmidt's cages had sheet metal, a metal ladder, and two fans piled on top of the cages.¹⁰⁷ (9 C.F.R. §§ 2.100(a); 3.11(c).)

12. On November 4, 2001, Dr. Schmidt failed to ensure that housing facilities were structurally sound and in good repair. Specifically, Dr. Schmidt had one ground enclosure with a panel top with 8-inch by 6-inch openings that allowed an adult dog to stick its head and front legs through the openings.¹⁰⁸ (9 C.F.R. §§ 2.100(a); 3.1(a).)

13. On November 4, 2001, Dr. Schmidt failed to ensure that primary surfaces coming in contact with animals were free of jagged edges or sharp points. Specifically,

¹⁰⁶CX 8 at 2; Tr. 22.

¹⁰⁷CX 8 at 2; Tr. 23.

¹⁰⁸CX 9 at 1; Tr. 26.

Dr. Schmidt had 15 enclosures with broken wires that protruded into the enclosures, affecting 25 adult dogs.¹⁰⁹ (9 C.F.R. §§ 2.100(a); 3.1(c)(1)(ii).)

14. On November 4, 2001, Dr. Schmidt failed to provide a waste disposal system that would keep animals free from contamination and allow them to stay clean and dry. Specifically, Dr. Schmidt maintained stacked cages with catch pans turned upside down and the waste from the upper cages ran down into the lower enclosures, affecting six puppies.¹¹⁰ (9 C.F.R. §§ 2.100(a); 3.1(f).)

15. On November 4, 2001, Dr. Schmidt failed to provide housing facilities that were clean and in good repair to facilitate husbandry practices. Specifically, Dr. Schmidt's animal holding area contained dirt, spider webs, and an empty wasp nest; and 10 of Dr. Schmidt's ground enclosures, containing 17 adult dogs, had a metal ladder, two fans, and large metal pans on top of the enclosures.¹¹¹ (9 C.F.R. §§ 2.100(a); 3.11(c).)

16. On March 17, 2002, Dr. Schmidt failed to provide primary enclosures for dogs that were 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. Specifically, Dr. Schmidt had three primary enclosures, each containing two adult dogs,

¹⁰⁹CX 9 at 1; Tr. 24-25.

¹¹⁰CX 9 at 1; Tr. 25-26.

¹¹¹CX 9 at 2; Tr. 27.

that had broken wires protruding into the enclosures.¹¹² (9 C.F.R. §§ 2.100(a);

3.6(a)(2)(i).)

17. On March 17, 2002, Dr. Schmidt failed to provide primary enclosures for dogs that contained the dogs securely. Specifically, Dr. Schmidt had one enclosure, containing two adult dogs, with a metal fence panel top with 4-inch by 6-inch openings that allowed the dogs to stick their heads through the openings.¹¹³ (9 C.F.R. §§ 2.100(a);

3.6(a)(2)(iii).)

18. On March 17, 2002, Dr. Schmidt failed to provide primary enclosures that had sufficient space to allow each dog to stand and sit in a comfortable position.

Specifically, Dr. Schmidt had one enclosure, containing two adult dogs, that did not provide enough space for the dogs to hold their heads upright.¹¹⁴ (9 C.F.R. §§ 2.100(a);

3.6(a)(2)(xi).)

19. On March 17, 2002, Dr. Schmidt failed to provide housing facilities that were clean and good repair to facilitate husbandry practices. Specifically, the walls of Dr. Schmidt's auction building directly adjacent to the animal enclosures had an accumulation of dirt, spider webs, and a few mud dauber nests; and six of Dr. Schmidt's ground enclosures, containing nine adult dogs, had a metal fence post, a metal ladder, a

¹¹²CX 10 at 1; Tr. 28-29.

¹¹³CX 10 at 1; Tr. 29-30.

¹¹⁴CX 10 at 1; Tr. 30.

fan, wooden planks, and large metal pans on top of the enclosures.¹¹⁵ (9 C.F.R. §§ 2.100(a); 3.11(c).)

20. On October 13, 2002, Dr. Schmidt failed to provide primary enclosures for dogs that were 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. Specifically, Dr. Schmidt had four primary enclosures, containing a total of nine dogs, that had wires protruding into the enclosures.¹¹⁶ (9 C.F.R. §§ 2.100(a); 3.6(a)(2)(i).)

21. On October 13, 2002, Dr. Schmidt failed to provide primary enclosures for dogs that contained the dogs securely. Specifically, Dr. Schmidt had a ground enclosure, containing one dog, with a metal fence panel across the top with a 6-inch by 8-inch opening that allowed the dog to put its head through the opening. Dr. Schmidt also had a ground enclosure, containing one dog, that had a front panel that the dog had opened approximately 4 inches and a top panel with a 4-inch by 8-inch opening through which the dog could extend its head.¹¹⁷ (9 C.F.R. §§ 2.100(a); 3.6(a)(2)(iii).)

22. On March 23, 2003, Dr. Schmidt failed to spot-clean and sanitize hard surfaces with which dogs came in contact. Specifically, Dr. Schmidt had eight ground

¹¹⁵CX 10 at 2; Tr. 31.

¹¹⁶CX 11 at 1; Tr. 33.

¹¹⁷CX 11 at 1; Tr. 34.

enclosures, containing a total of 13 adult dogs, topped with sheet metal on which was an accumulation of dirt and rodent droppings.¹¹⁸ (9 C.F.R. §§ 2.100(a); 3.1(c)(3).)

23. On March 23, 2003, Dr. Schmidt failed to provide an effective program for the control of insects and rodents. Specifically, Dr. Schmidt had eight ground enclosures topped with sheet metal on which was an accumulation of rodent droppings, indicating a lack of an effective program for the control of rodents.¹¹⁹ (9 C.F.R. §§ 2.100(a); 3.11(d).)

24. On November 2, 2003, Dr. Schmidt failed to maintain housing facilities so as to keep them free of trash. Specifically, Dr. Schmidt's premises contained trash on or adjacent to enclosures containing dogs, as follows: (1) a Coca Cola can on top of a wire raised enclosure containing two adult dogs; (2) a Dr. Pepper can on top of a ground enclosure containing one adult dog; (3) a coffee cup on top of a raised wire enclosure containing two adult dogs; (4) a discarded water bottle on top of a raised wire enclosure containing one adult dog; and (5) an accumulation of discarded materials, including a candy package, a Mountain Dew can, and a water bottle on top of a roll of wire in contact with a raised wire enclosure containing two adult dogs.¹²⁰ (9 C.F.R. §§ 2.100(a); 3.11(c).)

25. On November 2, 2003, Dr. Schmidt housed dogs in enclosures without suitable absorbent material to absorb and cover excreta. Specifically, Dr. Schmidt housed

¹¹⁸CX 12; Tr. 34.

¹¹⁹CX 12; Tr. 34-35.

¹²⁰CX 13 at 2; Tr. 36.

one adult Sheltie in a transport carrier and one adult Doberman in a ground enclosure without suitable absorbent material to absorb and cover excreta.¹²¹ (9 C.F.R. §§ 2.100(a); 3.14(a)(9).)

26. On November 2, 2003, Dr. Schmidt failed to provide enclosures large enough to ensure each animal had sufficient space to stand and sit erect and to lie in a natural position. Specifically, Dr. Schmidt housed at least five dogs in primary enclosures that were too small to enable the dogs to stand and sit erect and lie in a normal position.¹²² (9 C.F.R. §§ 2.100(a); 3.14(e)(1).)

27. On March 21, 2004, Dr. Schmidt failed to maintain housing facilities so as to keep them free of trash. Specifically, Dr. Schmidt's facility contained dirt on the tops of animal enclosures, spider webs on perimeter walls and enclosure support structures, flying insect nests, a bird nest, dead bugs, bird droppings, and a dirty tarp.¹²³ (9 C.F.R. §§ 2.100(a); 3.11(c).)

28. On March 21, 2004, Dr. Schmidt failed to provide an effective program for the control of insects and rodents. Specifically, an accumulation of spider webs, a bird

¹²¹CX 13 at 2-3; Tr. 36-37.

¹²²CX 13 at 3; Tr. 37.

¹²³CX 14 at 2.

nest, bird droppings, and flying insect nests indicated a lack of an effective program for the control of insects and rodents.¹²⁴ (9 C.F.R. §§ 2.100(a); 3.11(d).)

29. On March 21, 2004, Dr. Schmidt failed to provide enclosures large enough to ensure each animal had space to stand erect. Specifically, Dr. Schmidt housed one adult Min Pin in an enclosure that was too small to allow the dog to stand erect with its head in a normal position.¹²⁵ (9 C.F.R. §§ 2.100(a); 3.14(e)(1).)

30. On June 6, 2004, Dr. Schmidt failed to ensure that primary surfaces coming in contact with animals were free of jagged edges or sharp points. Specifically, Dr. Schmidt had two ground enclosures, each containing an animal, that had wire ties with sharp points protruding into the enclosures.¹²⁶ (9 C.F.R. §§ 2.100(a); 3.1(c)(1)(ii).)

31. On June 6, 2004, Dr. Schmidt failed to maintain housing facilities so as to keep them free of trash. Specifically, Dr. Schmidt's facility contained a dirty tarp, spiders, spider webs, dirt on the interior building wall surfaces and raised enclosure support framing, dark dried matter on the front metal fencing panel of a ground enclosure, and a vine growing in the framing of two adjoining enclosures.¹²⁷ (9 C.F.R. §§ 2.100(a); 3.11(c).)

¹²⁴CX 14 at 2, CX 37-CX 38; Tr. 38-39.

¹²⁵CX 14 at 3, CX 41; Tr. 38-39.

¹²⁶CX 15 at 4, CX 48; Tr. 41-42.

¹²⁷CX 15 at 4.

32. On June 6, 2004, Dr. Schmidt failed to provide an effective program for the control of insects and rodents. Specifically, an accumulation of spiders, spider webs, and flying insect nests indicated a lack of an effective program for the control of insects.¹²⁸ (9 C.F.R. §§ 2.100(a); 3.11(d).)

33. On September 12, 2004, Dr. Schmidt failed to ensure that primary surfaces coming in contact with animals were free of jagged edges or sharp points. Specifically, Dr. Schmidt had one ground enclosure, containing three animals, that contained triangular-shaped material with rough edges and one ground enclosure, containing one animal, that had sharp wires protruding into the enclosure.¹²⁹ (9 C.F.R. §§ 2.100(a); 3.1(c)(1)(ii).)

34. On September 12, 2004, Dr. Schmidt failed to maintain housing facilities so as to keep them free of trash. Specifically, Dr. Schmidt's facility contained an accumulation of metal and hay that was not associated with the husbandry of the animals, dirt, dead insects, insect nests, and spider webs.¹³⁰ (9 C.F.R. §§ 2.100(a); 3.11(c).)

35. On September 12, 2004, Dr. Schmidt housed dogs in enclosures without suitable absorbent material to absorb and cover excreta. Specifically, Dr. Schmidt housed

¹²⁸CX 15 at 4, CX 45-CX 47; Tr. 41-43.

¹²⁹CX 16 at 2; Tr. 43-44.

¹³⁰CX 16 at 1; Tr. 43-44.

one animal in an enclosure with no material to absorb and cover excreta.¹³¹ (9 C.F.R. §§ 2.100(a); 3.14(a)(9).)

Conclusions of Law

1. By reason of the Findings of Fact, Dr. Schmidt has willfully violated the Regulations and Standards as set forth in paragraphs 2 through 15 of these Conclusions of Law.

2. On April 22, 2001, Dr. Schmidt willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to remove excreta from primary enclosures to prevent soiling of animals, as required by section 3.11(a) of the Regulations and Standards (9 C.F.R. § 3.11(a)).

3. On October 14, 2001, and November 4, 2001, Dr. Schmidt willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide housing facilities that were structurally sound and in good repair, as required by section 3.1(a) of the Regulations and Standards (9 C.F.R. § 3.1(a)).

4. On October 14, 2001, November 4, 2001, June 6, 2004, and September 12, 2004, Dr. Schmidt willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to ensure that primary surfaces coming in contact with animals were free of jagged edges or sharp points that might injure the animals, as

¹³¹CX 16 at 2; Tr. 43-44.

required by section 3.1(c)(1)(ii) of the Regulations and Standards (9 C.F.R. § 3.1(c)(1)(ii)).

5. On October 14, 2001, and November 4, 2001, Dr. Schmidt willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide a waste disposal system that would keep animals free from contamination and allow the animals to stay clean and dry, as required by section 3.1(f) of the Regulations and Standards (9 C.F.R. § 3.1(f)).

6. On October 14, 2001, November 4, 2001, and March 17, 2002, Dr. Schmidt willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to keep housing facilities clean and in good repair to facilitate husbandry practices, as required by section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)).

7. On March 17, 2002, and October 13, 2002, Dr. Schmidt willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide primary enclosures for dogs that were 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, as required by section 3.6(a)(2)(i) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(i)).

8. On March 17, 2002, and October 13, 2002, Dr. Schmidt willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to

provide primary enclosures for dogs that contained the dogs securely, as required by section 3.6(a)(2)(iii) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(iii)).

9. On March 17, 2002, Dr. Schmidt willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide primary enclosures that had sufficient space to allow each dog to stand and sit in a comfortable position, as required by section 3.6(a)(2)(xi) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(xi)).

10. On March 23, 2003, Dr. Schmidt willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to spot-clean and sanitize hard surfaces with which dogs came in contact, as required by section 3.1(c)(3) of the Regulations and Standards (9 C.F.R. § 3.1(c)(3)).

11. On March 23, 2003, March 21, 2004, and June 6, 2004, Dr. Schmidt willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide an effective program for the control of insects and rodents, as required by section 3.11(d) of the Regulations and Standards (9 C.F.R. § 3.11(d)).

12. On November 2, 2003, March 21, 2004, June 6, 2004, and September 12, 2004, Dr. Schmidt willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to maintain housing facilities so as to keep them free of trash, as required by section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)).

13. On November 2, 2003, and September 12, 2004, Dr. Schmidt willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by housing dogs in enclosures without suitable absorbent material to absorb and cover excreta, as required by section 3.14(a)(9) of the Regulations and Standards (9 C.F.R. § 3.14(a)(9)).

14. On November 2, 2003, and March 21, 2004, Dr. Schmidt willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by failing to provide enclosures large enough to ensure each animal had sufficient space to stand and sit erect, as required by section 3.14(e)(1) of the Regulations and Standards (9 C.F.R. § 3.14(e)(1)).

15. On October 14, 2001, Dr. Schmidt willfully violated section 2.100(a) of the Regulations and Standards (9 C.F.R. § 2.100(a)) by housing dogs in enclosures which had bare wire strand floors, as prohibited by section 3.6(a)(2)(xii) of the Regulations and Standards (9 C.F.R. § 3.6(a)(2)(xii)).

Sanctions

The Animal Welfare Act requires, when considering the amount of a civil penalty, the Secretary of Agriculture to give due consideration to four factors: (1) the size of the business of the person involved in the violations; (2) the gravity of the violations; (3) the violator's good faith; and (4) the violator's history of previous violations.¹³²

¹³²7 U.S.C. § 2149(b).

Dr. Schmidt conducts approximately six or seven auctions each year, exclusive of full dispersal sales.¹³³ Dr. Schmidt auctioned 890 dogs in 2000; 1,219 dogs in 2001; 1,342 dogs in 2002; 1,214 dogs in 2003; and 1,325 dogs in 2004.¹³⁴ Dr. Schmidt earned commissions and fees of \$15,500 in 2000; \$22,520 in 2001; \$20,130 in 2002; \$24,423 in 2003; and \$44,149 in 2004.¹³⁵ Based on the number of dogs auctioned by Dr. Schmidt and the amount of the earned commissions and fees, I find Dr. Schmidt operates a large business.

I find one of Dr. Schmidt's violations minor,¹³⁶ but the remainder are significant violations that could have resulted in harm to the animals at his facility. Dr. Schmidt's ongoing pattern of violations over a period of more than 3 years 4 months establishes Dr. Schmidt's disregard for the requirements of the Regulations and Standards, Dr. Schmidt's "history of previous violations" for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)), and Dr. Schmidt's lack of good faith.

¹³³Tr. 212.

¹³⁴CX 1-CX 5.

¹³⁵CX 1-CX 5.

¹³⁶I find Dr. Schmidt's November 2, 2003, violation of section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)) minor. While I order Dr. Schmidt to cease and desist violations of section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)), I assess no civil penalty for Dr. Schmidt's November 2, 2003, violation of section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)).

The United States Department of Agriculture's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

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

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. However, the recommendations of administrative officials as to the sanction are not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.¹³⁷

¹³⁷*In re Alliance Airlines*, 64 Agric. Dec. 1595, 1608 (2005); *In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. 364, 390 (2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 787 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re Excel Corp.*, 62 Agric. Dec. 196, 234 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (2002); *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 F. App'x 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 F. App'x 706 (9th Cir. 2003); *In re Fred Hodgins*

(continued...)

The Administrator seeks assessment of a \$15,000 civil penalty against Dr. Schmidt and a cease and desist order.¹³⁸ However, the Administrator bases his recommendation on the Administrator's contention that Dr. Schmidt committed 36 violations of the Regulations and Standards and the Administrator's belief that the Animal Welfare Act authorizes a maximum civil penalty of \$3,750 for each of Dr. Schmidt's violations of the Regulations and Standards.¹³⁹ I find the Administrator proved by a preponderance of the evidence that Dr. Schmidt committed 30 violations of the Regulations and Standards and Dr. Schmidt could be assessed a maximum civil penalty of \$2,750 for each of his

¹³⁷(...continued)

(Decision and Order on Remand), 60 Agric. Dec. 73, 88 (2001), *aff'd*, 33 F. App'x 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. 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.* (Order Denying Pet. for Recons.), 56 Agric. Dec. 942, 953 (1997); *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).

¹³⁸Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof at 23.

¹³⁹*Id.*

30 violations of the Regulations and Standards.¹⁴⁰ Moreover, as discussed in this Decision and Order, *supra*, I do not assess a civil penalty for Dr. Schmidt's November 2, 2003, violation of section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)). After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the requirements of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)), the remedial purposes of the Animal Welfare Act, and the recommendations of the administrative officials, I conclude a cease and desist order and assessment of a \$6,800 civil penalty are appropriate and necessary to ensure Dr. Schmidt's compliance with the Regulations and Standards in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to fulfill the remedial purposes of the Animal Welfare Act.

¹⁴⁰Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than \$2,500 for each violation of the Animal Welfare Act and the Regulations and Standards. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, 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 and Standards by increasing the maximum civil penalty from \$2,500 to \$2,750 (7 C.F.R. § 3.91(b)(2)(v) (2005); 62 Fed. Reg. 40,924 (July 31, 1997)). 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 and Standards 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 Dr. Schmidt's violations of the Regulations and Standards occurred after June 23, 2005; therefore, I reject the Administrator's contention that the maximum civil that may be assessed against Dr. Schmidt for each violation of the Animal Welfare Act and the Regulations and Standards is \$3,750.

The Administrator's Appeal Petition

The Administrator raises seven issues in his Appeal Petition. First, the Administrator asserts the ALJ erroneously dismissed the Complaint. The Administrator asserts the record establishes the Administrator proved by a preponderance of the evidence that Dr. Schmidt violated the Regulations and Standards, as alleged in the Complaint.¹⁴¹

The Administrator seeks an order assessing Dr. Schmidt a civil penalty and requiring Dr. Schmidt to cease and desist from violating the Animal Welfare Act and the Regulations and Standards.¹⁴² As the proponent of an order, the Administrator has the burden of proof in this proceeding¹⁴³ and the standard of proof by which the burden of persuasion is met in administrative proceedings conducted under the Animal Welfare Act is preponderance of the evidence.¹⁴⁴ As discussed in this Decision and Order, *supra*, I find the Administrator introduced relevant, reliable, credible, and probative evidence of 34 of the 36 alleged violations of the Regulations and Standards at issue in this proceeding and the Administrator proved 30 of these violations by a preponderance of the

¹⁴¹Administrator's Appeal Pet. at 2-5.

¹⁴²Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof at 8-9.

¹⁴³See note 19.

¹⁴⁴See note 20.

evidence. Therefore, I agree with the Administrator that the ALJ erroneously dismissed the Complaint.

Second, the Administrator contends the ALJ erroneously found Dr. Schmidt was the subject of selective enforcement.¹⁴⁵

The conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation;¹⁴⁶ 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.¹⁴⁷

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.¹⁴⁸ In order to prove a selective enforcement claim, Dr. Schmidt must show one

¹⁴⁵Administrator's Appeal Pet. at 5-8.

¹⁴⁶*Oyler v. Boles*, 368 U.S. 448, 456 (1962); *Snowden v. Hughes*, 321 U.S. 1, 8 (1944).

¹⁴⁷*Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 (6th Cir.), *cert. denied sub nom. Futernick v. Caterino*, 519 U.S. 928 (1996).

¹⁴⁸*United States v. Armstrong*, 517 U.S. 456, 465 (1996); *United States v.*

of two sets of circumstances. Dr. Schmidt must show: (1) membership in a protected group; (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.¹⁴⁹ 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.¹⁵⁰ Dr. Schmidt has not shown any of these circumstances.

Third, the Administrator contends the ALJ erroneously found Sandra Meek did not conduct the inspections of Dr. Schmidt's facility in accordance with Animal and Plant Health Inspection Service procedures and guidelines.¹⁵¹

¹⁴⁸(...continued)
Goodwin, 457 U.S. 368, 380 n.11 (1982).

¹⁴⁹*See Futernick v. Sumpter Township*, 78 F.3d 1051, 1056 n.7 (6th Cir.), *cert. denied sub nom. Futernick v. Caterino*, 519 U.S. 928 (1996).

¹⁵⁰*Id.*

¹⁵¹Administrator's Appeal Pet. at 8-12.

The ALJ found Sandra Meek conducted inspections of Dr. Schmidt’s facility more frequently than warranted under the Animal and Plant Health Inspection Service’s risk-based inspection system.¹⁵² Neither the Animal Welfare Act nor the Regulations and Standards limits the frequency with which the Secretary of Agriculture may conduct inspections. Section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) provides that the Secretary of Agriculture shall make such inspections as the Secretary deems necessary to determine whether any dealer subject to section 12 of the Animal Welfare Act (7 U.S.C. § 2142) has violated or is violating the Animal Welfare Act or the Regulations and Standards. Section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) also provides, in order to make such inspections, the Secretary of Agriculture shall have, at all reasonable times, access to the place of business, the facilities, and the animals of the dealer being inspected. Similarly, section 2.126(a) of the Regulations and Standards (9 C.F.R. § 2.126(a)) provides that each dealer shall, during business hours, allow Animal and Plant Health Inspection Service officials to enter the dealer’s place of business to inspect and photograph facilities, property, and animals and to document, by taking photographs and other means, the conditions and areas of noncompliance.

The ALJ based his conclusion that Sandra Meek inspected Dr. Schmidt’s facility too frequently on the following statement in the *Federal Register*: “APHIS uses a

¹⁵²Initial Decision at 4-9.

risk-based assessment to determine minimum inspection frequency.”¹⁵³ I reject the ALJ’s conclusion that the Animal and Plant Health Inspection Service’s risk-based inspection system to determine *minimum inspection frequency* in any way limits the maximum frequency with which the Secretary of Agriculture may inspect a dealer’s place of business, facilities, and animals or in any way limits the Secretary of Agriculture’s authority to inspect a dealer’s place of business, facilities, and animals at all reasonable times.

The ALJ also found Sandra Meek conducted her inspections of Dr. Schmidt’s facility without being accompanied by Dr. Schmidt or Dr. Schmidt’s designated representative, as required by the Animal and Plant Health Inspection Service’s risk-based inspection system. The record establishes Ms. Meek conducted the September 12, 2004, inspection accompanied by Dr. Schmidt’s designated representative, Ronnie Williams.¹⁵⁴ Ms. Meek conducted the remaining nine inspections unaccompanied by Dr. Schmidt or Dr. Schmidt’s designated representative.

Section 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

¹⁵³69 Fed. Reg. 42,094 (July 14, 2004).

¹⁵⁴CX 16 at 2.

inspection process.¹⁵⁵ During the only inspection that occurred after the effective date of this amendment, the September 12, 2004, inspection, Dr. Schmidt made Ronnie Williams available to accompany Ms. Meek during the inspection process.¹⁵⁶

The ALJ also found Sandra Meek failed to conduct post-inspection exit briefings with Dr. Schmidt or Dr. Schmidt's designated representative in violation of the *Animal Care Resource Guide, Dealer Inspection Guide*.¹⁵⁷ The *Animal Care Resource Guide, Dealer Inspection Guide* sets forth procedures for post-inspection exit briefings with the Animal Welfare Act licensee or the facility representative. Dr. Schmidt testified he learned of the results of the 10 inspections that are the subject of the instant proceeding when he received the inspection reports for the inspections in the mail between 5 and 8 days after the United States Department of Agriculture conducted the inspections.¹⁵⁸ Moreover, I find nothing in the record establishing that Ms. Meek conducted post-inspection exit briefings with Dr. Schmidt or Dr. Schmidt's designated representative. However, I do not find that Ms. Meek was required by the *Animal Care Resource Guide, Dealer Inspection Guide* to conduct post-inspection exit briefings with Dr. Schmidt or Dr. Schmidt's designated representative. The *Animal Care Resource*

¹⁵⁵69 Fed. Reg. 42,089, 42,102 (July 14, 2004).

¹⁵⁶CX 16 at 2.

¹⁵⁷Initial Decision at 6-7.

¹⁵⁸Tr. 227, 300.

Guide, Dealer Inspection Guide states that it is “a useful tool to improve the quality and uniformity of inspections, documentation, and enforcement of the Animal Care Program” and “[i]t does *not* add to, delete from, or change current regulatory requirements or standards – nor does it establish policy.”¹⁵⁹ Moreover, I find Ms. Meek’s failure to conduct post-inspection exit briefings with Dr. Schmidt or Dr. Schmidt’s designated representative has no bearing on whether Dr. Schmidt violated the Regulations and Standards, as alleged in the Complaint.

Fourth, the Administrator contends the ALJ erroneously concluded Sandra Meek’s “findings in the ten inspection reports ‘are exaggerated, biased and unsupported by sufficient credible objective evidence of such non-compliance as would warrant punitive action or imposition of a pecuniary penalty against [Dr. Schmidt]’” (Initial Decision at 13).¹⁶⁰

In the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their official duties.¹⁶¹ Animal and Plant Health Inspection

¹⁵⁹*Animal Care Resource Guide, Dealer Inspection Guide* at 1.2.1.

¹⁶⁰Administrator’s Appeal Petition at 13-15.

¹⁶¹*See 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 Foundation, Inc.*, 272 U.S. 1, (continued...)

¹⁶¹(...continued)

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); *Chaney v. United States*, 406 F.2d 809, 813 (5th Cir.) (stating the presumption that the local selective service board considered the appellant's request for reopening in accordance with 32 C.F.R. § 1625.2 is a strong presumption that is only overcome by clear and convincing evidence), *cert. denied*, 396 U.S. 867 (1969); *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); *Donaldson v. United States*, 264 F.2d 804, 807 (6th Cir. 1959) (stating the presumption of regularity supports official acts of public officers and in the absence of clear evidence to the contrary, courts presume they have properly discharged their duties); *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); *Reines v. Woods*, 192 F.2d 83, 85 (Emer. Ct. App. 1951) (stating the presumption of regularity, which attaches to official acts, can be overcome only by clear evidence to the contrary); *NLRB v. Bibb Mfg. Co.*, 188 F.2d 825, 827 (5th Cir. 1951) (holding duly appointed police officers are presumed to discharge their duties lawfully and that presumption may only be overcome by clear and convincing evidence); *Woods v. Tate*, 171 F.2d 511, 513 (5th Cir. 1948) (concluding an order of the Acting Rent Director, Office of Price Administration, is presumably valid and genuine in the absence of proof or testimony to the contrary); *Pasadena Research Laboratories, Inc. v. United States*, 169 F.2d 375, 381-82 (9th Cir.) (stating the presumption of regularity applies to methods used by government chemists and analysts and to the care and absence of tampering on the part of postal employees), *cert. denied*, 335 U.S. 853 (1948); *Laughlin v. Cummings*, 105 F.2d 71, 73 (D.C. Cir. 1939) (stating there is a strong presumption that public officers exercise their duties in accordance with law); *In re Frank Craig*, __ Agric. Dec. __, slip op. at 22-25 (Feb. 21, 2007) (stating the complainant is presumed to have instituted the proceeding to carry out the purposes of the Federal Meat Inspection Act and the Poultry Products Inspection Act and not to cover up slander, sexual harassment, bribery, and witness intimidation); *In re PMD Produce Brokerage Corp.* (Order Denying Pet. for Recons. and Pet. for New Hearing on Remand), 61 Agric. Dec. 389, 399 (2002) (stating an administrative law judge is presumed to have considered the record prior to the issuance of his or her decision); *In re Lamers Dairy, Inc.*, 60 Agric. Dec. 406, 435 (2001)

(continued...)

¹⁶¹(...continued)

(stating, in the absence of clear evidence to the contrary, administrative law judges are presumed to have adequately reviewed the record in a proceeding prior to the issuance of a decision in the proceeding), *aff'd*, No. 01-C-890 (E.D. Wis. Mar. 11, 2003), *aff'd*, 379 F.3d 466 (7th Cir. 2004), *cert. denied*, 544 U.S. 904 (2005); *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 Dwight L. Lane*, 59 Agric. Dec. 148, 177-78 (2000) (stating a United States Department of Agriculture hearing officer is presumed to have adequately reviewed the record and no inference is drawn from an erroneous decision that the hearing officer failed to properly discharge his official duty to review the record), *aff'd*, A2-00-84 (D.N.D. July 18, 2001), *aff'd*, 294 F.3d 1001 (8th Cir. 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 Agriculture are arbitrary, his actions are presumed to be valid); *In re Kim Bennett*, 55 Agric. Dec. 176, 210-11 (1996) (stating, instead of presuming United States Department of Agriculture attorneys and investigators warped the viewpoint of United States Department of Agriculture veterinary medical officers, the court should have presumed that training of United States Department of Agriculture veterinary medical officers was proper because there is a presumption of regularity with respect to official acts of public officers); *In re C.I. Ferrie*, 54 Agric. Dec. 1033, 1053 (1995) (stating use of United States Department of Agriculture employees in connection with a referendum on the continuance of the Dairy Promotion and Research Order does not taint the referendum process, even if petitioners show some United States Department of Agriculture employees would lose their jobs upon defeat of the Dairy Promotion and Research Order, because a presumption of regularity exists with respect to official acts of public officers); *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

(continued...)

Service 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.¹⁶² 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 Dr. Schmidt's facility.

Ms. Meek appears to have had no reason to record her findings in other than an impartial fashion, and I find nothing in the record indicating the 10 inspection reports are exaggerated or reflect bias.

¹⁶¹(...continued)

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 King Meat Co.*, 40 Agric. Dec. 1468, 1494 (1981) (stating there is a presumption of regularity with respect to the issuance of instructions as to grading methods and procedures by the Chief of the Meat Grading Branch, Food Safety and Quality Service, United States Department of Agriculture), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21); *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).

¹⁶²Tr. 12.

Moreover, I find the conditions at Dr. Schmidt's facility, 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.¹⁶³ Jan R. Feldman, another experienced United States Department of Agriculture inspector, assisted Ms. Meek during five of the 10 inspections at issue in this proceeding: namely, the November 4, 2001, March 17, 2002, March 23, 2003, November 2, 2003, and June 6, 2004, inspections.¹⁶⁴ Ms. Feldman testified that, based on her observations at Dr. Schmidt's facility, she agreed with all of the violations cited by Ms. Meek on the November 4, 2001, March 17, 2002, March 23, 2003, November 2, 2003, and June 6, 2004, inspection reports. Moreover, Ms. Meek took photographs of some of Dr. Schmidt's violations during two of the 10 inspections at issue in this proceeding: namely, the March 21, 2004, and June 6, 2004, inspections.¹⁶⁵ The photographs confirm violations cited by Ms. Meek on the inspection reports that relate to the March 21, 2004, and June 6, 2004, inspections. Further still, Dr. Schmidt testified that he agreed with some of the violations cited in the inspection reports.¹⁶⁶

¹⁶³Tr. 12-75.

¹⁶⁴Tr. 77-79.

¹⁶⁵CX 37-CX 48.

¹⁶⁶Tr. 300-02.

Fifth, the Administrator contends the ALJ's characterization of the nature and seriousness of Dr. Schmidt's violations of the Regulations and Standards is error.¹⁶⁷

The ALJ characterized some of the violations alleged in the Complaint as "inconsequential" and "subjective" in nature;¹⁶⁸ however, the ALJ does not identify which violations he found inconsequential and subjective.

The ALJ characterized the allegations that, on March 21, 2004, and June 6, 2004, Dr. Schmidt failed to provide sufficient lighting to conduct an inspection of the animals and facilities as trivial, if not frivolous.¹⁶⁹ For the reasons discussed in this Decision and Order, *supra*, I dismiss the allegations that Dr. Schmidt failed to provide sufficient lighting to conduct inspections of the animals and facilities on March 21, 2004, and June 6, 2004.¹⁷⁰

The ALJ also characterized the allegations that on March 21, 2004, March 23, 2004, and June 6, 2004, Dr. Schmidt had cobwebs in his facility as trivial, if not frivolous.¹⁷¹ As an initial matter, the Administrator did not allege that Dr. Schmidt violated the Regulations and Standards on March 23, 2004. Moreover, the Administrator

¹⁶⁷Administrator's Appeal Pet. at 15-19.

¹⁶⁸Initial Decision at 4.

¹⁶⁹Initial Decision at 8-9.

¹⁷⁰Compl. ¶¶ IX(A)(1), X(A)(4).

¹⁷¹Initial Decision at 8-9.

does not allege that Dr. Schmidt violated the Regulations and Standards on March 21, 2004, and June 6, 2004, merely because he had cobwebs in his facility. Instead, the evidence establishes that on March 21, 2004, Dr. Schmidt's facility contained dirt on the tops of animal enclosures, spider webs on perimeter walls and enclosure support structures, flying insect nests, a bird nest, dead bugs, bird droppings, and a dirty tarp¹⁷² and on June 6, 2004, Dr. Schmidt's facility contained a dirty tarp, spiders, spider webs, dirt on the interior building wall surfaces and raised enclosure support framing, dark dried matter on the front metal fencing panel of a ground enclosure, and a vine growing in the framing of two adjoining enclosures¹⁷³ in violation of section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)). Therefore, I disagree with the ALJ's characterization of Dr. Schmidt's March 21, 2004, and June 6, 2004, violations of section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)) as trivial, if not frivolous.

Further, the ALJ characterized the allegations that, on November 2, 2003, March 21, 2004, June 6, 2004, and September 12, 2004, Dr. Schmidt had trash in his facility as trivial, if not frivolous because, the ALJ concluded, the trash accumulated from the general public during the course of auction sales.¹⁷⁴ Based on the description of the trash found during the November 2, 2003, inspection of Dr. Schmidt's facility, I find the

¹⁷²CX 14 at 2.

¹⁷³CX 15 at 4.

¹⁷⁴Initial Decision at 8-9.

trash accumulated from the general public during the course of the November 2, 2003, auction sale.¹⁷⁵ I find this violation minor, and I assess no civil penalty for Dr. Schmidt's November 2, 2003, violation of section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)). As for Dr. Schmidt's March 21, 2004, June 6, 2004, and September 12, 2004, violations of section 3.11(c) of the Regulations and Standards (9 C.F.R. § 3.11(c)), the nature of the trash in Dr. Schmidt's facility indicates the trash was not merely minor amounts of trash left by auction patrons, as the ALJ concluded.¹⁷⁶

Sixth, the Administrator contends the ALJ erroneously found "[t]he testimony of numerous witnesses, including a veterinarian employed by the Missouri Department of Agriculture and two individuals associated with the American Kennel Club, all tend to

¹⁷⁵The November 2, 2003, inspection report states Dr. Schmidt's premises contained trash on or adjacent to enclosures containing dogs, as follows: (1) a Coca Cola can on top of a wire raised enclosure containing two adult dogs; (2) a Dr. Pepper can on top of a ground enclosure containing one adult dog; (3) a coffee cup on top of a raised wire enclosure containing two adult dogs; (4) a discarded water bottle on top of a raised wire enclosure containing one adult dog; and (5) an accumulation of discarded materials, including a candy package, a Mountain Dew can, and a water bottle on top of a roll of wire in contact with a raised wire enclosure containing two adult dogs (CX 13 at 2).

¹⁷⁶The March 21, 2004, inspection report states Dr. Schmidt's facility contained dirt on the tops of animal enclosures, spider webs on perimeter walls and enclosure support structures, flying insect nests, a bird nest, dead bugs, bird droppings, and a dirty tarp (CX 14 at 2). The June 6, 2004, inspection report states Dr. Schmidt's facility contained a dirty tarp, spiders, spider webs, dirt on the interior building wall surfaces and raised enclosure support framing, dark dried matter on the front metal fencing panel of a ground enclosure, and a vine growing in the framing of two adjoining enclosures (CX 15 at 3-4). The September 12, 2004, inspection report states Dr. Schmidt's facility contained an accumulation of metal and hay that was not associated with the husbandry of the animals, dirt, dead insects, insect nests, and spider webs (CX 16 at 1).

dispute the general conditions of non-compliance which are alleged” (Initial Decision at 9).¹⁷⁷

Dr. Schmidt called 12 witnesses to rebut the evidence introduced by the Administrator. Some of the witnesses could not testify with certainty that they were at Dr. Schmidt’s facility during the inspections at issue in this proceeding and 11 of the 12 witnesses did not accompany the United States Department of Agriculture inspectors during the inspections of Dr. Schmidt’s facility.¹⁷⁸ Moreover, except for Dr. Schmidt, none of the 12 witnesses addressed the alleged violations that relate to the conditions at Dr. Schmidt’s facility during the 10 inspections in question.¹⁷⁹ Jerry Eber, the veterinarian employed by the Missouri Department of Agriculture referred to by the ALJ, testified he was at Dr. Schmidt’s facility sometime during 2003. Dr. Eber did not indicate that he was at Dr. Schmidt’s facility during the inspections at issue in this proceeding or that he knew of the condition of Dr. Schmidt’s facility on the dates of the inspections.¹⁸⁰ Katherine M. Peaker, one of the individuals associated with the American Kennel Club referred to by the ALJ, testified she was at Dr. Schmidt’s facility during the November 2,

¹⁷⁷Administrator’s Appeal Pet. at 19-20.

¹⁷⁸Ronnie Williams accompanied Sandra Meek during the September 12, 2004, inspection of Dr. Schmidt’s facility.

¹⁷⁹Six of the witnesses testified with respect to Administrator’s allegations that Dr. Schmidt interfered with Animal and Plant Health Inspection Service officials while they were carrying out their duties.

¹⁸⁰Tr. 243-48.

2003, inspection and most likely at Dr. Schmidt's facility during the March 21, 2004, June 6, 2004, and September 12, 2004, inspections. Ms. Peaker testified she did not accompany the United States Department of Agriculture inspectors on the inspections of Dr. Schmidt's facility and could not comment on the inspectors' findings during those inspections.¹⁸¹ Anette Turner, the other individual associated with the American Kennel Club referred to by the ALJ, testified she was at Dr. Schmidt's facility as late as March 23, 2003, but she did not remember the dates she was at Dr. Schmidt's facility. Ms. Turner saw United States Department of Agriculture inspectors at Dr. Schmidt's facility on occasion, but did not accompany them during the inspections and had no reason to question the United States Department of Agriculture inspectors' findings.¹⁸²

Therefore, I reject the ALJ's finding that the testimony of numerous witnesses, including a veterinarian employed by the Missouri Department of Agriculture and two individuals associated with the American Kennel Club, tend to dispute the general conditions of Dr. Schmidt's facility alleged in the Complaint.

Seventh, the Administrator contends the ALJ did not have authority to direct him (the Administrator) to take corrective action in future inspections.¹⁸³

¹⁸¹Tr. 185-86.

¹⁸²Tr. 188, 194-95.

¹⁸³Administrator's Appeal Pet. at 20-22.

The ALJ directed the Administrator “to take appropriate corrective action to insure that published Departmental policy and procedures as expressed in the *Federal Register* and the Animal Care Resource Guide, Dealer Inspection Guide are followed by APHIS personnel in future inspections.”¹⁸⁴

Neither the Administrative Procedure Act nor the Rules of Practice authorizes the ALJ to order the Administrator to take corrective action in future inspections under the Animal Welfare Act. Under the Administrative Procedure Act, an administrative law judge has two principal functions: (1) to preside at the taking of evidence and (2) to issue an initial decision.¹⁸⁵ The administrative law judge’s role in an administrative proceeding is to consider the evidence and the filings and issue an initial decision. The powers conferred on an administrative law judge are listed in the Administrative Procedure Act,¹⁸⁶ and I find no provision conferring authority on an administrative law judge to order an agency employee to take action unrelated to the proceeding before the administrative law judge. Similarly, the Rules of Practice identifies the powers conferred on an administrative law judge,¹⁸⁷ and I find no provision conferring authority on an

¹⁸⁴Initial Decision at 11.

¹⁸⁵5 U.S.C. §§ 556 and 557.

¹⁸⁶5 U.S.C. § 556(c).

¹⁸⁷7 C.F.R. § 1.144(c).

administrative law judge to order an agency employee to take action unrelated to the proceeding before the administrative law judge.

Moreover, the authority of administrative law judges employed by the United States Department of Agriculture is limited to that authority delegated by the Secretary of Agriculture, and a review of that delegation of authority reveals that the Secretary of Agriculture has not delegated United States Department of Agriculture administrative law judges any authority to direct the Administrator to take corrective action in future inspections conducted under the Animal Welfare Act.¹⁸⁸

Finally, a review of the Animal Welfare Act and the Regulations and Standards reveals that neither the Animal Welfare Act nor the Regulations and Standards confers authority on administrative law judges to direct the Administrator to take corrective action with respect to inspections conducted under the Animal Welfare Act.

Based on my review of the Administrative Procedure Act, the Rules of Practice, the Secretary of Agriculture's delegations of authority to administrative law judges, the Animal Welfare Act, and the Regulations and Standards, I find the ALJ exceeded his authority by ordering the Administrator to take corrective action with respect to future inspections conducted under the Animal Welfare Act. Therefore, I do not adopt the ALJ's order directing the Administrator to take corrective action with respect to future inspections conducted under the Animal Welfare Act.

¹⁸⁸7 C.F.R. § 2.27(a)(1).

For the foregoing reasons, the following Order should be 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 Decision and Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of the Order in this Decision and Order. Dr. Schmidt must seek judicial review within 60 days after entry of the Order in this Decision and Order.¹⁸⁹ The date of entry of the Order in this Decision and Order is March 26, 2007.

Done at Washington, DC

March 26, 2007

William G. Jenson
Judicial Officer

¹⁸⁹7 U.S.C. § 2149(c).