

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 10-0194
)
Vanishing Species Wildlife, Inc.,)
a Florida not-for-profit corporation;))
and Barbara Hartman-Harrod and)
Jeffrey Harrod, individuals,)
)
Respondents) **Decision and Order**

PROCEDURAL HISTORY

On March 30, 2010, Gregory L. Parham, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], instituted this adjudicatory proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-2.133) [hereinafter the Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice], by filing an “Order to Show Cause as to Why Animal Welfare License 58-C-0660 Should Not Be Terminated” [hereinafter Order to Show Cause]. The Administrator alleges Vanishing Species Wildlife, Inc., Barbara Hartman-Harrod, and

Jeffrey Harrod failed to comply with a Consent Decision and Order entered by Chief Administrative Law Judge Peter M. Davenport [hereinafter the Chief ALJ] in another adjudicatory proceeding instituted under the Animal Welfare Act, *In re Jeffrey Harrod* (Consent Decision), ___ Agric. Dec. ___ (Feb. 4, 2009) (AWA Docket No. 08-0136).

Specifically, the Administrator alleges Vanishing Species Wildlife, Inc., Ms. Hartman-Harrod, and Mr. Harrod agreed to sell, donate, or otherwise place the big cats housed at their facility by July 31, 2009, and, as of the date of the filing of the Order to Show Cause, had not done so, in violation of *In re Jeffrey Harrod* (Consent Decision), ___ Agric. Dec. ___ (Feb. 4, 2009). On May 19, 2010, Vanishing Species Wildlife, Inc., Ms. Hartman-Harrod, and Mr. Harrod filed an Answer admitting they had not complied with the Consent Decision and Order; however, they asserted they had made continual good faith efforts to find humane placement for the big cats still housed at their facility.

On June 23, 2010, the Administrator filed “APHIS’s Motion for Summary Judgment” [hereinafter Motion for Summary Judgment] seeking termination of Animal Welfare Act license number 58-C-0660 held by Vanishing Species Wildlife, Inc., and disqualification of Vanishing Species Wildlife, Inc., Ms. Hartman-Harrod, and Mr. Harrod from obtaining an Animal Welfare Act license for a period of no less than 2 years. On August 2, 2010, Vanishing Species Wildlife, Inc., Ms. Hartman-Harrod, and Mr. Harrod filed a response to the Motion for Summary Judgment contending genuine

issues of material fact remain to be resolved and urging the Chief ALJ to deny the Administrator's Motion for Summary Judgment.

On August 5, 2010, the Chief ALJ filed a Decision and Order: (1) finding no genuine issues of material fact remain to be resolved as Vanishing Species Wildlife, Inc., Ms. Hartman-Harrod, and Mr. Harrod had admitted that they had not complied with *In re Jeffrey Harrod* (Consent Decision), ___ Agric. Dec. ___ (Feb. 4, 2009); (2) granting the Administrator's Motion for Summary Judgment; (3) terminating Vanishing Species Wildlife, Inc.'s Animal Welfare Act license; and (4) disqualifying Vanishing Species Wildlife, Inc., Ms. Barbara Hartman-Harrod, and Mr. Harrod from becoming licensed under the Animal Welfare Act for a period of 2 years. On September 7, 2010, Vanishing Species Wildlife, Inc., Ms. Hartman-Harrod, and Mr. Harrod filed "Initial Brief of Appellant" [hereinafter Appeal Petition] in which they appealed the Chief ALJ's Decision and Order to the Judicial Officer. On October 14, 2010, the Administrator filed a response to the Appeal Petition. On October 18, 2010, the Hearing Clerk transmitted the record to me for consideration and decision. Based upon a careful consideration of the record, I affirm the Chief ALJ's Decision and Order.

DECISION

Discussion

The Animal Welfare Act provides that the Secretary of Agriculture shall issue licenses to dealers and exhibitors upon application in such form and manner as the

Secretary may prescribe (7 U.S.C. § 2133). The power to require and to issue licenses under the Animal Welfare Act includes the power to terminate licenses and to disqualify persons from becoming licensed.¹ The Regulations specify certain bases for denying an initial application for an Animal Welfare Act license (9 C.F.R. § 2.11) and further provide that an Animal Welfare Act license, which has been issued, may be terminated for any reason that an initial license application may be denied (9 C.F.R. § 2.12). The Regulations provide that an initial application for an Animal Welfare Act license will be denied if the applicant is unfit to be licensed and the Administrator determines that the issuance of the Animal Welfare Act license would be contrary to the purposes of the Animal Welfare Act, as follows:

§ 2.11 Denial of initial license application.

(a) A license will not be issued to any applicant who:

....

(6) Has made any false or fraudulent statements or provided any false or fraudulent records to the Department or other government agencies, or has pled *nolo contendere* (no contest) or has been found to have violated any Federal, State, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals, or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act.

9 C.F.R. § 2.11(a)(6).

¹*In re Animals of Montana, Inc.*, __ Agric. Dec. __, slip op. at 4 (Mar. 10, 2009); *In re Amarillo Wildlife Refuge, Inc.*, __ Agric. Dec. __, slip op. at 6 (Jan. 6, 2009); *In re Loreon Vigne*, 67 Agric. Dec. 1060, 1062 (2008); *In re Mary Bradshaw*, 50 Agric. Dec. 499, 507 (1991).

The purposes of the Animal Welfare Act are set forth in a congressional statement of policy, as follows:

§ 2131. Congressional statement of policy

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;

(2) to assure the humane treatment of animals during transportation in commerce; and

(3) to protect 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.

7 U.S.C. § 2131.

Dr. Elizabeth J. Goldentyer, Eastern Regional Director, Animal Care, Animal and Plant Health Inspection Service, stated Vanishing Species Wildlife, Inc., Ms. Hartman-Harrod, and Mr. Harrod had ignored the terms of the Consent Decision and Order issued in *In re Jeffrey Harrod* (Consent Decision), ___ Agric. Dec. ___ (Feb. 4, 2009), for the purpose of ensuring humane treatment of animals. Dr. Goldentyer further stated Vanishing Species Wildlife, Inc., Ms. Hartman-Harrod, and Mr. Harrod had

repeatedly refused to allow Animal and Plant Health Inspection Service inspectors to inspect their facility, animals, and records, as required by the Animal Welfare Act and the Regulations (Order to Show Cause Attach. 4, 6, 9-10). *See* Goldentyer Decl. attached to the Order to Show Cause. The Administrator determined that Vanishing Species Wildlife, Inc., Ms. Hartman-Harrold, and Mr. Harrod are unfit to be licensed and that issuance of an Animal Welfare Act license to Vanishing Species Wildlife, Inc., Ms. Hartman-Harrold, or Mr. Harrod would be contrary to the purposes of the Animal Welfare Act (Order to Show Cause ¶¶ 3, 39-40; Motion for Summary Judgment at 8, 10-12). Even were the unsuccessful attempts to inspect Vanishing Species Wildlife, Inc., Ms. Hartman-Harrold, and Mr. Harrod's facility, animals, and records overlooked or not considered, it remains undisputed that Vanishing Species Wildlife, Inc., Ms. Hartman-Harrold, and Mr. Harrod have failed to comply with the terms of the Consent Decision and Order. The record amply demonstrates that the deadline to dispose of the big cats set forth in the Consent Decision and Order has expired. It is also clear that Vanishing Species Wildlife, Inc., Ms. Hartman-Harrold, and Mr. Harrod never sought an extension of the deadline prior to the July 31, 2009, expiration.

Accordingly, based upon the record before me, I conclude Vanishing Species Wildlife, Inc., Ms. Hartman-Harrold, and Mr. Harrod are unfit to be licensed under the Animal Welfare Act and the Administrator's determination that allowing Vanishing

Species Wildlife, Inc., Ms. Hartman-Harrold, or Mr. Harrod to hold an Animal Welfare Act license is contrary to the purposes of the Animal Welfare Act, is reasonable.

Findings of Fact

1. Vanishing Species Wildlife, Inc., is a Florida not-for-profit corporation. Vanishing Species Wildlife, Inc.'s mailing address is in Sunrise, Florida.
2. Ms. Hartman-Harrold is an individual who resides in Florida and is a director of Vanishing Species Wildlife, Inc.
3. Mr. Harrod is an individual who resides in Florida and is a director of Vanishing Species Wildlife, Inc.
4. Both Ms. Hartman-Harrold and Mr. Harrod have done business as Vanishing Species Wildlife, Inc.
5. Vanishing Species Wildlife, Inc., Ms. Hartman-Harrold, and Mr. Harrod, at all times material to the instant proceeding, were operating as "exhibitors" as that term is defined in the Animal Welfare Act and the Regulations. Animal Welfare Act license number 58-C-0660 is issued to "VANISHING SPECIES WILDLIFE, INC."
6. Vanishing Species Wildlife, Inc., Ms. Hartman-Harrold, and Mr. Harrod's facility, in which their animals are housed, is located in Davie, Florida.
7. On June 5, 2008, the Administrator filed a complaint alleging Vanishing Species Wildlife, Inc., Ms. Hartman-Harrold, and Mr. Harrod had willfully violated the

Animal Welfare Act and the Regulations. *In re Jeffrey Harrod* (Consent Decision), ___ Agric. Dec. ___ (Feb. 4, 2009) (Order to Show Cause Attach. 1).

8. On February 4, 2009, the Chief ALJ entered a Consent Decision and Order signed by Vanishing Species Wildlife, Inc., Ms. Hartman-Harrod, and Mr. Harrod. *In re Jeffrey Harrod* (Consent Decision), ___ Agric. Dec. ___ (Feb. 4, 2009) (Order to Show Cause Attach. 2).

9. Vanishing Species Wildlife, Inc., Ms. Hartman-Harrod, and Mr. Harrod have failed to comply with the Consent Decision and Order issued in *In re Jeffrey Harrod* (Consent Decision), ___ Agric. Dec. ___ (Feb. 4, 2009), by failing to sell, donate, or otherwise place all juvenile and adult big cats housed at their facility no later than July 31, 2009.

10. Animal and Plant Health Inspection Service inspectors sought unsuccessfully on a number of occasions to inspect Vanishing Species Wildlife, Inc., Ms. Hartman-Harrod, and Mr. Harrod's facility, animals, and records; however, Vanishing Species Wildlife, Inc., Ms. Hartman-Harrod, and Mr. Harrod were unavailable for the inspections (Order to Show Cause Attach. 4, 6, 9-10).

11. The Administrator has determined that Vanishing Species Wildlife, Inc., Ms. Hartman-Harrod, and Mr. Harrod are unfit to be licensed and that allowing Vanishing Species Wildlife, Inc., Ms. Hartman-Harrod, or Mr. Harrod to hold an Animal Welfare Act license would be contrary to the purposes of the Animal Welfare Act.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. The findings of the Administrator that Vanishing Species Wildlife, Inc., Ms. Hartman-Harrod, and Mr. Harrod are unfit to be licensed and that allowing Vanishing Species Wildlife, Inc., Ms. Hartman-Harrod, or Mr. Harrod to hold an Animal Welfare Act license would be contrary to the purposes of the Animal Welfare Act are warranted for the failure of Vanishing Species Wildlife, Inc., Ms. Hartman-Harrod, and Mr. Harrod to comply with the Consent Decision and Order entered in *In re Jeffrey Harrod* (Consent Decision), __ Agric. Dec. ____ (Feb. 4, 2009).

Vanishing Species Wildlife, Inc., Ms. Hartman-Harrod, and Mr. Harrod's Appeal Petition

Vanishing Species Wildlife, Inc., Ms. Hartman-Harrod, and Mr. Harrod raise two issues in their Appeal Petition. First, Vanishing Species Wildlife, Inc., Ms. Hartman-Harrod, and Mr. Harrod contend the Chief ALJ erroneously “failed to even address whether or not a genuine issue of material fact exists” (Appeal Pet. at 3-4).

The Chief ALJ specifically addressed and rejected Vanishing Species Wildlife, Inc., Ms. Hartman-Harrod, and Mr. Harrod’s argument that genuine issues of fact are in dispute, as follows:

The Respondents have responded [to the Administrator’s Motion for Summary Judgment], suggesting that there are genuine issues of fact in dispute, including whether the Respondents were in substantial compliance with the terms of the Consent Decision; whether any failure was willful;

and whether any technical failures nevertheless demonstrated good faith on the parts of the Respondents. The Respondents deny that their failure to permanently reduce the number of Animal Welfare Act regulated animals ...by selling, donating, or otherwise placing any juvenile and adult big cats...was willful, but rather was based upon humane considerations and the difficulty of placing cats with the age and health needs that the remaining animals have.

As I will find that the Answer of the Respondents does admit noncompliance as to the requirement to permanently reduce the number of big cats and that willfulness need not be shown in order to enforce the terms and provisions of a Consent Decision, I will find there are no issues of genuine fact at issue and will grant the Motion for Summary Judgment.

Chief ALJ's Decision and Order at 2. Based upon the plain language of the Chief ALJ's Decision and Order, I reject Vanishing Species Wildlife, Inc., Ms. Hartman-Harrod, and Mr. Harrod's contention that the Chief ALJ erroneously failed to address whether or not a genuine issue of material fact exists.

Second, Vanishing Species Wildlife, Inc., Ms. Hartman-Harrod, and Mr. Harrod contend their failure to comply with *In re Jeffrey Harrod* (Consent Decision), ___ Agric. Dec. ___ (Feb. 4, 2009), may have been due to "extraordinary circumstances" and, in that event, the Consent Decision and Order requiring removal of all big cats from their facility by July 31, 2009, should not be enforced. Vanishing Species Wildlife, Inc., Ms. Hartman-Harrod, and Mr. Harrod assert the existence or absence of "extraordinary circumstances" is a genuine issue of material fact. (Appeal Pet. at 5-6.)

Settlement agreements in United States Department of Agriculture adjudicatory administrative proceedings should be enforced in the absence of extraordinary

circumstances.² I have previously explained the “extraordinary circumstances” exception to the enforcement of consent decisions, as follows:

I agree with Complainant that the extraordinary circumstances exception is limited to an examination of circumstances under which the Consent Decision was entered. Moreover, the only circumstances under which the Consent Decision was entered that an [administrative law judge] may examine are circumstances that relate to the assent of the parties to the agreement that was subsequently entered as a Consent Decision. The [administrative law judge] may only vacate a Consent Decision if the [administrative law judge] finds that there was no genuine assent to the agreement that was entered as a Consent Decision because of factors such as fraud or duress. A change in circumstances subsequent to the entry of the Consent Decision does not provide a basis upon which an [administrative law judge] may vacate a Consent Decision.

While Rule 60(b) of the Federal Rules of Civil Procedure provides judges with discretion to dissolve and modify consent decrees based upon a change of circumstances that makes compliance with the consent decree inequitable, the Federal Rules of Civil Procedure are not applicable to this Department’s proceedings conducted under the Rules of Practice. Moreover, relief under Rule 60(b) of the Federal Rules of Civil Procedure is equitable in nature, and neither the [administrative law judges] nor the Judicial Officer can provide equitable relief under the Rules of Practice. *In re J. Reid Hoggan*, 35 Agric. Dec. 1812, 1817-19 (1976).

In re Far West Meats (Clarification of Ruling on Certified Question), 55 Agric. Dec.

1045, 1054-56 (1996) (footnotes omitted). *Vanishing Species Wildlife, Inc.*,

Ms. Hartman-Harrold, and *Mr. Harrold* do not assert their assent to the Consent Decision

²*In re Far West Meats* (Ruling on Certified Questions), 55 Agric. Dec. 1033, 1041 (1996); *In re Nebraska Beef Packers, Inc.*, 43 Agric. Dec. 1783, 1803-04 (1984); *In re King Meat Co.*, 40 Agric. Dec. 1468, 1510-11 (1981); *In re Mountainside Butter & Egg Co.* (Remand Order), 38 Agric. Dec. 789, 799-80 (1978); *In re Indiana Slaughtering Co.*, 35 Agric. Dec. 1822, 1826-27 (1976), *aff’d*, No. 76-3949 (E.D. Pa. Aug. 1, 1977).

and Order was not genuine. To the contrary, Vanishing Species Wildlife, Inc., Ms. Hartman-Harrood, and Mr. Harrod admit they agreed to (and did not comply with) the Consent Decision and Order, as follows:

21. The Respondents admit that they did sign and agree to the entry of the consent decision which called for them to permanently reduce the number of big cats and affirmatively state that they have, indeed, permanently reduced the number of big cats from thirteen to two and they are continuing the effort to find humane placement for the last three.

Answer ¶ 21. Based upon Vanishing Species Wildlife, Inc., Ms. Hartman-Harrood, and Mr. Harrod's admission, I conclude there is no genuine issue of fact regarding existence or absence of "extraordinary circumstances" warranting setting aside the Consent Decision and Order.

For the foregoing reasons, the following Order is issued.

ORDER

1. Vanishing Species Wildlife, Inc.'s Animal Welfare Act license number 58-C-0660 is terminated.
2. Vanishing Species Wildlife, Inc., Ms. Hartman-Harrood, and Mr. Harrod, any of their agents and assigns, and any business entity for which Vanishing Species Wildlife, Inc., Ms. Hartman-Harrood, or Mr. Harrod is an officer, agent, or representative or otherwise holds a substantial business interest are disqualified for 2 years from becoming licensed under the Animal Welfare Act or otherwise obtaining, holding, or

using an Animal Welfare Act license, directly or indirectly through any corporate or other device or person.

This Order shall become effective on the 60th day after service of this Order on Vanishing Species Wildlife, Inc., Ms. Hartman-Harrod, and Mr. Harrod.

Done at Washington, DC

November 3, 2010

William G. Jenson
Judicial Officer