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UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:

SIDNEY JAY YOST, an individual; and
AMAZING ANIMAL PRODUCTIONS, INC.,
a California corporation,

Respondents.

AWA Docket No. 12-0294
AWA Docket No. 12-0295

ORDER AFFIRMING IN PART AND DENYING IN PART EXCEPTIONS ON APPEAL

Appearances:

Collen A. Carroll, Esq. with the Office of the General Counsel, United States Department of Agriculture, for the Complainant ("APHIS"); and

James D. White, Esq. for the Respondents ("Yost" or "individual Respondent" and "AAP, Inc." or "Corporate Respondent").

On Appeal to the Judicial Officer, Bobbie J. McCartney

Relevant Procedural History

On March 16, 2012, the Animal and Plant Health Inspection Service ("APHIS" or "Complainant") filed a complaint alleging that between March 2008 and August 2010, Sidney Jay Yost ("Yost") and Amazing Animal Productions, Inc. ("AAP" or together with Yost, collectively referred to as "Respondents") committed multiple violations of the Animal Welfare Act (7 U.S.C. §§ 2131 *et seq.*) ("AWA" or "Act") and the regulations codified at 9 C.F.R. Part 1, *et seq.* ("Regulations"). On May 16, 2012, Respondents filed an answer denying each of the twenty-two allegations in the Complaint.

On June 20, 2013, Complainant moved for summary judgment, and on October 21, 2013, Respondents filed an opposition thereto. On May 8, 2014, United States Administrative Law Judge Jill S. Clifton ("ALJ") issued a Ruling on Summary Judgment granting the Complainant's

motion in part and denying it in part. Specifically, the ALJ granted summary judgment with respect to the violation of 9 C.F.R. § 2.131(b)(1), as alleged in the Corrected Complaint[1] at paragraph 12.[2]

On December 16, 2014, Complainant filed a second motion for summary judgment, and on December 23, 2014, Respondents filed an opposition thereto. On December 24, 2014, the ALJ issued a "Ruling on APHIS's Second Motion for Summary Judgment," granting the motion in part and denying it in part. The ALJ upheld her previous ruling on summary judgment, concluding that Yost committed one willful violation of 9 C.F.R. § 2.131(b)(1). The ALJ also found that Complainant's proposed findings of fact in paragraphs 1-3, 5, 6, 8, 9, and 12-21 of the Complaint were proven. However, the ALJ determined that there was "too little agreement" between the

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[1] On October 27, 2014 and then again on November 19, 2014, Complainant filed a Notice of Correction of Complaint, seeking to correct five erroneous citations to subsections of the handling Regulations in paragraphs 7, 9, 12, 16, and 20 of the Complaint. On December 16, 2014, the ALJ issued a "Ruling Accepting Corrections."

[2] Paragraph 12 of the Corrected Complaint provides that Respondents failed to comply with the Regulation concerning "handling of animals," specifically 9 C.F.R. §§ 2.131(b)(l), (c)(l), on April 4, 2009, at the Grand Bear Lodge in Utica, Illinois. APHIS' allegations are contained in paragraph 12 of the Complaint, as corrected (Notice of Correction of Complaint filed October 27, 2014 & Ruling Accepting Corrections filed December 16, 2014). Respondents acknowledged responsibility for the violation but provided an explanation of the event in Respondents' Submission filed October 19, 2016, pp. 21-22.

parties regarding two proposed findings of fact contained within paragraphs 7[3] and 10[4] of the Complaint. *See* Ruling on APHIS's Second Motion for Summary Judgment at 3-4.

On July 14, 2015, Respondents filed "Respondents' Stipulations as to Facts," in which, among other things, Respondents acknowledged that they had committed violations under the AWA, stipulated to the definition of the term "willful" as defined by the ALJ, and stipulated to the revocation of Yost's AWA license. Respondents also stipulated to the entry of an order in this proceeding directing that they shall cease and desist from violating the Act and the Regulations and standards issued thereunder. *See* Respondents' Stipulations as to Facts at 2-6.

On August 4, 2016, the ALJ issued "2016 Further Instructions," in which she stated, in part:

> 1. More than a year ago the parties through counsel discussed with me during telephone conferences the remaining details required for me to finalize a decision on the written record. There is no agreement regarding the amount, if any, of civil penalties (money) to be imposed as part of the remedy (sanction). There is no agreement regarding whether Respondents' use of a cane while handling the monkey Rowdy or the lion Romeo or the use of a "pig stick" with the tigers constituted physical abuse. Nevertheless, taking testimony will not be required so long as Declarations or Affidavits provide additional evidence, so that I may proceed with a decision on the written record rather than proceed to an oral hearing.

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[3] Paragraph 7 of the Corrected Complaint provides: "On or about September 2008, November 3, 2008, and December 18, 2008, at Devore Heights, California, and on January 10, 2009, at Los Angeles, California, respondents failed to handle animals as carefully as possible in a manner that would not cause physical pain, stress, or discomfort, and failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of the animals and the public, in willful violation of the Regulations, and specifically, respondents allowed the public to have direct contact with, *inter alia,* exotic felids, wolves, and nonhuman primates. 9 C.F.R. §§ 2.131(b)(l), (c)(l)."

[4] Paragraph 10 of the Complaint provides: "On or about March 13, 2009, in Colorado, respondents failed to handle animals as carefully as possible in a manner that would not cause physical pain, stress, or discomfort, in willful violation of the Regulations, and specifically, at a rest stop in Colorado, respondents walked a tiger, wolves and mountain lion on leashes. 9 C.F.R. § 2.131(b)(1)."

> 2. The remedies (sanctions) I will impose in a decision on the written record will include cease and desist orders and license revocation. APHIS [Complainant] asks for civil penalties in addition; the Respondents ask that no civil penalties be imposed. Of particular interest to me would be support for/objection to imposition of particular amounts of civil penalty, broken out separately for the various offenses or types of offenses before me.

2016 Further Instructions at 1-2.

In addition, in her 2016 Further Instructions, the ALJ set deadlines for the parties to file any additional documents for her consideration and informed the parties that she would finalize a decision on the written record. On September 13, 2016, Complainant filed "Complainant's Submission in Response to 2016 Further Instructions," and on October 18, 2016, Respondents filed "Respondents' Submission in Response to 2016 Further Instructions."

On December 14, 2017, the ALJ issued a "Decision and Order on the Written Record" ("Decision" or "IDO") in which she found multiple instances wherein Respondents violated the AWA and the Regulations as alleged in the Complaint. The ALJ ordered Yost's AWA license 93-C-0590 be revoked, assessed Respondents civil penalties in the amount of $30,000, and ordered Respondents to cease and desist from future violations. *See* Decision and Order on the Written Record at 18-19.[5]

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[5] The Decision and Order provides ". . . that for their violations of the Animal Welfare Act and the Regulations (including Standards) issued thereunder, the Respondents Sidney Jay Yost and Amazing Animal Productions, Inc. shall pay (joint and several obligation) civil penalties totaling **$30,000,** payable in equal monthly installments beginning by March 28 (Wed) 2018. I conclude there is good cause for five years, through March 27, 2023, to liquidate the debt. Payments may of course be made earlier than when due without penalty. The Respondents Sidney Jay Yost and Amazing Animal Productions, Inc. are ordered to **cease and desist** from violating the Animal Welfare Act and the Regulations (including Standards) issued thereunder. Animal Welfare Act license number 93-C-0590 is **revoked** (revocation is a permanent remedy), and the Respondents Sidney Jay Yost and Amazing Animal Productions, Inc. are permanently disqualified from having Animal Welfare Act licenses." Decision and Order on the Written Record at 2.

On January 16, 2018, Respondents appealed the ALJ's Decision to the Judicial Officer, alleging that: (1) the ALJ erred in issuing a decision on the record; (2) the ALJ erred in assessing $30,000 in civil penalties; and (3) the ALJ erred in failing to draw a distinction between "intentional conduct" and "careless conduct."

On February 9, 2018, Respondents filed "Respondents' Request for Corrections to the Decision and Order on the Written Record" seeking a reduction of civil penalties in consideration of their suggested corrections. On February 13, 2018, Complainant filed its response to Respondents' Petition for Appeal, and on February 14, 2018, Complainant filed its response to Respondents' request for corrections.

Summary of Position of the Parties

I. Assessment of Civil Penalties

On appeal, Respondents argue that the assessment of civil penalties in the amount of $30,000 was excessive, arbitrary, and capricious. Specifically, Respondents challenge the ALJ's decision to adopt Complainant's suggested assessment of civil penalties, arguing that Complainant failed to comply with the ALJ's orders when it did not justify each suggested amount to each specific violation of AWA and its Regulations.[6] Therefore, Respondents further argue that Complainant should be *estopped* from asserting any amount for civil penalties higher than $2,800 as set forth by Yost in their response to the ALJ's 2016 Further Instructions.

Furthermore, Respondents allege that Yost was a sole proprietor and, as such, the ALJ's Decision incorrectly categorizes Yost's business as "small to medium" sized. To that extent,

[6] The ALJ instructed the parties that of particular interest would be "support for/objection to" the imposition of particular amounts of civil penalty, broken out separately for the various offenses or types of offenses. *See* 2016 Further Instructions at 2.

Respondents argue that this categorization is a material error because the statue allows the ALJ to consider the size of the business in assessing a penalty under AWA.

Respondents also contend that with respect to the handling of a young lion during a "Tonight Show" taping event, the Decision fails to properly apply the applicable Regulation to the facts as found by the ALJ. Yost further contends that the ALJ's interpretation requiring "distance *and* barriers" is contrary to the plain reading of the regulation. Accordingly, Yost asserts that the ALJ erred in assessing a civil penalty in connection with this incident. In addition, Respondents assert that the ALJ's conclusion that "too many situations where the use of a wooden cane and the threat of the use of it were too commonplace" is not "warranted by the facts." Respondents argue that the evidence on record shows that the use of a wooden cane was in connection with preparing for and executing the proper and reasonable use of a cane as a protective device in an emergency situation. Yost counters and argues that the assessment of a civil penalty under these facts is arbitrary and capricious.

In its response, Complainant maintains that the assessed civil penalties are within the statutory parameters and well below the maximum of $10,000 assessable per violation, per day, per respondent. Complainant does not take issue with the ALJ's adoption of the assessed civil penalties. Furthermore, Complainant asserts that Respondents provide no support for their contention and states that while the agency's recommendations are not controlling, they are entitled to weight. Complainant also maintains that the ALJ did not require the parties to submit a breakdown of proposed civil penalties but simply stated that doing so would be "of particular interest" to her. Moreover, Complainant affirms that neither the Act, the Regulations, nor the Rules of Practice require or prohibit a per allegation breakdown of proposed sanctions.

II. Issuing a Decision and Order on the Written Record

Respondents contend the ALJ erred in issuing a decision on the written record, arguing that there were "still ongoing questions of major significance for judicial determination." Specifically, Respondents argue that there was an ongoing question of "willfulness" and a question of "physical abuse" and denies any "willful" intent to do any harm and violate any statue or regulation. Respondents further argue that by issuing a decision on the written record, the ALJ denied Yost's constitutional rights of due process and fair trial.

Complainant asserts that Respondents failed to previously raise objection to the ALJ's determination to issue a decision on the record. Complainant also asserts that a disposition by summary judgement or a decision on the record is permissible in these proceedings and argues that Respondents did not provide any support for Yost's constitutional claims. Furthermore, Complainant contends that the ALJ's issuance of a decision on the record was not a deprivation of Respondents' rights given that there were no substantive factual issues still in dispute.

Discussion and Findings

The record establishes that Respondents stipulated to the material facts alleged in the Complaint, including to the violations under AWA and its Regulations. Furthermore, Respondents stipulated to the definition of "willful" as defined by the ALJ in her Decision. *See* Respondents' Stipulations as to Facts at 2-6. Therefore, disposition by summary judgment or a decision on the record was permissible. *See Knaust*, 73 Agric. Dec. 92, 98-99 (U.S.D.A. 2014); *Pine Lake Enterprises, Inc.*, 69 Agric. Dec. 157, 162-63 (U.S.D.A. 2010); *Bauck*, 68 Agric. Dec. 853, 858-59 (U.S.D.A. 2009), *appeal dismissed*, No. 10-1138 (8th Cir. Feb. 24, 2010); *Animals of Montana, Inc.*, 68 Agric. Dec. 92, 104 (U.S.D.A. 2009). *See also Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment

under the Rules of Practice and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations). Accordingly, Respondents' appeal of the ALJ's Decision to the Judicial Officer regarding contentions that the ALJ erred in issuing a decision on the record and that the ALJ erred in failing to draw a distinction between "intentional conduct" and "careless conduct" is DENIED.

The ALJ's "Decision and Order on the Written Record" issued on December 14, 2017, in which she found multiple instances wherein Respondents violated the AWA and the Regulations as alleged in the Complaint, is fully supported by the record and is hereby affirmed and adopted as to all findings of fact and conclusions of law contained therein ***except*** with regard to the civil money penalty.

Regarding the issue of the $30,000 civil money penalty, Complainant correctly maintains that the assessed civil penalties are within the statutory parameters and well below the maximum of $10,000, assessable per violation, per day, per respondent.

7 U.S.C. § 2149 provides:

> 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 $10,000 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.

7 U.S.C. § 2149.

However, just because a proposed civil money penalty ***may*** be assessed does not mean that it ***should*** be assessed. Indeed, in determining the amount of civil penalties to be imposed for violations under the AWA, the Secretary ***shall*** give due consideration to the appropriateness of the penalty with respect to: (1) the size of the business of the person involved; (2) the gravity of the

violation; (3) the person's good faith; and (4) the history of previous violations. *See* 7 U.S.C. § 2149(b).

The record establishes that while Respondents stipulated to the material facts alleged in the Complaint – including to the violations under AWA and its Regulations, and to the definition of "willful" as defined by the ALJ in her Decision[7] – Respondents have raised significant concerns regarding the appropriateness of the $30,000 assessment of civil penalties in this case.

Based on the forgoing, I find that the record as currently developed is insufficient to support a civil money penalty assessment of $30,000.[8] As discussed more fully herein above, the ALJ's "Decision and Order on the Written Record" ("IDO") issued on December 14, 2017, in which she found multiple instances wherein Respondents violated the AWA and the Regulations as alleged in the Complaint, is fully supported by the record and is affirmed and adopted as to all findings of fact and conclusions of law contained therein ***except*** with regard to the civil money penalty. To provide clarity to the parties on the impact of this ruling regarding specific exceptions, I make the following findings.

Complainant requested that the IDO be adopted as the final decision of the Secretary of Agriculture in this proceeding, with the following modifications: (1) that Respondents operate a moderately-sized business and there is no evidence of good faith (IDO ¶ 11); (2) that the ALJ's

[7] *See* Respondents' Stipulations as to Facts at 2-6.

[8] *See* Decision and Order on the Written Record at 11. For this Decision and Order, for which I have heard no testimony, I apply four factors enumerated in 7 U.S.C. § 2149(b) as follows: The Respondents had a small to moderately sized business; the violations that resulted in injury to a two-year-old child and euthanization of Nova, the dog/wolf hybrid, were grave; I presume the Respondents acted in good faith; and I have not taken into account any history of previous violations, if any there be. I conclude the maximum civil penalty is $3,750 for each violation, except for violations alleged in paragraph 22 of the Complaint, for which the maximum civil penalty is $10,000 [$3,750 through May 6, 2010; $10,000 beginning May 7, 2010]. 28 U.S.C. § 2461 note; 7 C.F.R. § 3.91 (b)(2)(ii).

statement in IDO ⁋ 11 that "the maximum civil penalty is $3,750 for each violation" be corrected; (3) that the second-to-last and third-to-last sentences in IDO ⁋ 13 be deleted; (4) that the second-to-last sentences in IDO ⁋⁋ 15, 17, 18, 24 and 28 be deleted; (5) that IDO ⁋ 16 be corrected to reflect that Complainant did not amend paragraph 8 of the Complaint, and any later citation to subsection (b)(1) – instead of subsection (b)(2) – was a typographical error, as is apparent from the text; and (6) that any order assessing a civil penalty provide that the civil penalty be made payable within sixty days after service on Respondents of the final decision in this case.

Complainant's request that IDO ⁋ 16 be corrected to reflect that Complainant did not amend paragraph 8 of the Complaint, and any later citation to subsection (b)(1) – instead of subsection (b)(2) – was a typographical error, as is apparent from the text, is GRANTED; however, Complainant's remaining requests for modification of the IDO are DENIED without prejudice in as much as the issue of the appropriateness of the civil money penalty remains in dispute.

Respondents also request that the IDO be modified in a number of specific ways, most of which also pertain to the issue of the appropriateness of the civil money penalty; however, the following modifications of the IDO are supported by the record and are hereby adopted: (1) in the first paragraph on the first page (page 1, ⁋ 1) of "The ALJ's Decision" (under the subsection headed "Decision Summary"), insert the following sentence after the first sentence: "The Respondent Sidney Jay Yost had a class "C" Exhibitors license under the Animal Welfare Act (license # 93-C-0590) from 1993 until August 2014, at which point Mr. Yost elected not to renew his USDA AWA license."; (2) in paragraph thirteen on the seventh page (page 7, ⁋ 13) of "The ALJ's Decision" (regarding a taping of an episode of the "Tonight Show"), to correspond more accurately with the applicable provision in the Complaint and in the relevant Regulation, the addition of "/or"

after the word "and," so the phrase in the sixth line one seventh page would then read: ". . . but the Regulation specifies distance *and/or* barriers, . . ." (emphasis added); and (3) as to the twenty-fourth paragraph on the sixteenth page (page 16, ¶ 24) of "The ALJ's Decision," in the course of the telephone conference on December 20, 2017, all sides concurred that the phrase "suffices for these noncompliances" should be added at the end of the last sentence. Respondents' remaining requests for modification of the IDO pertain to the issue of the appropriateness of the civil money penalty and are DENIED without prejudice in as much as the issue of the appropriateness of the civil money penalty remains in dispute.

Because the issue of the appropriateness of the civil money penalty remains in dispute, the parties are instructed to submit cross-motions for summary judgment limited to the issue of the civil money penalty, supported by affidavits and other documents as may be necessary and appropriate to support proposed findings of fact and conclusions of law on this issue, which specifically address the four factors set forth in 7 U.S.C. § 2149(b).

ORDER

The ALJ's "Decision and Order on the Written Record" issued on December 14, 2017, in which the ALJ found multiple instances wherein Respondents violated the AWA and the Regulations as alleged in the Complaint, is fully supported by the record and is hereby affirmed and adopted as to all findings of fact and conclusions of law contained therein ***except*** with regard to the civil money penalty. Accordingly, Respondents Sidney Jay Yost and Amazing Animal Productions, Inc. are ordered to **cease and desist** from violating the Animal Welfare Act and the Regulations (including Standards) issued thereunder; Animal Welfare Act license number 93-C-0590 is **revoked** (revocation is a permanent remedy); and the Respondents Sidney Jay Yost and

Amazing Animal Productions, Inc. are permanently disqualified from having Animal Welfare Act licenses." *See* Decision and Order on the Written Record at 18-19.

IT IS FURTEHRED ORDERED that within thirty (30) days of the date of this Order, the parties shall file cross-motions for summary judgment with the Hearing Clerk's Office, supported by affidavits and other documents as may be necessary and appropriate to support proposed findings of fact and conclusions of law on this issue, which must specifically address the assessment of civil penalties pursuant to the considerations set forth in 7 U.S.C. § 2149(b). The parties will be provided an opportunity for oral argument regarding the submissions.

IT IS FURTHERED ORDERED that copies of this Order shall be served by the Hearing Clerk upon each of the parties in each of the dockets identified herein above.

Done at Washington, D.C.
this 13th day of December 2018

Bobbie J. McCartney
Judicial Officer

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