

UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

AWA Docket No. 05-0019

In re: JEROME SCHMIDT, D/B/A
TOP OF THE OZARK AUCTION

Respondent

DECISION AND ORDER

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant] instituted this disciplinary proceeding by filing a Complaint on June 22, 2005 under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) [hereinafter the Act] and the Regulations and Standards [hereinafter Regulations and Standards] promulgated thereunder. (9 C.F.R. §§ 1.1 *et seq.*). The Complaint alleges that Jerome Schmidt, an individual doing business as Top of the Ozark Auction [hereinafter Respondent] willfully violated the Regulations and Standards. Complaint, ¶¶ II-XI.

The Respondent answered, denying the factual allegations contained in the Complaint and indicating that the facility has been found by many repeat consignors and buyers to be “an ideal venue for finding, replacing, and dispersing breeding stock. (Answer, pp 1-6).

An oral hearing was held on December 6, 2005 in Springfield, Missouri. The Complainant was represented by Frank Martin, Jr., Esquire, Office of the General Counsel, United States Department of Agriculture, Washington, D.C. The Respondent,

not represented by counsel, participated *pro se*, assisted by his wife, Karen Schmidt. The record in this case consists of the pleadings filed by the parties, the testimony of the four witnesses called by the Complainant, the thirteen witnesses, including the Respondent called by the Respondent and the 28 exhibits which were admitted during the course of the hearing.¹ Both parties have submitted post-hearing briefs in support of their respective positions.

The Respondent, Jerome A. Schmidt, is a veterinarian who has held a USDA license as a Class B Dealer since 1997.² Tr. 210, 290. The violations alleged in the Complaint are based upon ten inspections, all conducted by Sandra Meek, a USDA Inspector, at the Respondent's Top of the Ozark Auction facility where he conducts dog auctions which are open to both dealers and to the general public. Auctions at the facility are conducted only six or seven times per year, exclusive of full dispersal sales. Tr. 212. The auctions are conducted in a multi-purpose structural steel building. Half of the building contains cages for holding the dogs that are being sold³ and is used for storage of items including hay. The other half contains the auction stand and the area for sale attendees, with the auction stand adjacent to the cage area situated so that the cage area is to the auctioneer's back. Tr. 213. Although the cage area contains approximately 400 steel and wire cages, no more than 240 are used for any particular sale. Tr. 212. The number of dogs sold at the facility increased from 890 in 2000, 1219 in 2001 to a high of 1342 in 2002, with the numbers sold in 2003 and 2004 only slightly less than the number for 2002. Similarly, the gross dollar amount generated from commissions and fees on the

¹ Complainant's Exhibits 1-16 and 37-48 were admitted.

² CX 1-CX 5 are copies of the Respondent's applications for annual renewals of his license for 2001 through 2005. CX 6 is a copy of the Respondent's current license which bears an expiration date of March 24, 2006.

³ Dogs are received at the facility and delivered to the purchasers on the day of the sale. Sales commence around 11:00 AM and are completed before 5:00 PM the same day.

sales increased from \$15,500 in 2000 to \$44,149 in 2004.⁴ Although the Answer which was filed denied all of the allegations contained in the Complaint, at the hearing, the Respondent conceded that some of the violations cited by the USDA Inspector were valid,⁵ denigrated the severity of the majority of the violations written up and emphatically disputed the balance. Tr. 300-302.

Implicitly embedded in his defense to the alleged violations is a strongly held and emotionally charged belief that the Respondent, those associated with him (including his wife⁶), and those employing his services as a veterinarian are being singled out as targets of harassment and increased scrutiny and inspection by USDA Inspectors. Dr. Schmidt's involvement with another Respondent was previously noted by Administrative Law Judge Dorothea A. Baker in *In re Marilyn Shepard, d/b/a Cedarcrest Kennel*, 61 Agric. Dec 478 (2002). In that case, there was indication in the record that "a superior to these inspectors [testifying in the case] indicated that he wanted to get the Respondent and to make an example of her." *Id* at 484. In giving great weight to the testimony of Dr. Schmidt whom she described as "an extremely qualified and reliable witness" (*Id* at 487) whose testimony differed significantly from that given by the inspectors, Judge Baker concluded "The evidence seems clear that the inspectors⁷ were, for whatever reason, going out of their way to find violations." *Id* at 487. The disproportionately high frequency of inspections of the Respondent's facility which is operated on a part-time or

⁴ CX 1-CX 5.

⁵ The Respondent's position is explained in more detail in his brief where he explains that some of what was observed related to transport containers used by the consignors which would not be a violation attributable to his facility. Respondent's Brief, pages 21-22. Although included on the Inspection Report, the allegation concerning the transport containers was not included in the complaint.

⁶ The Respondent's wife, Karen Schmidt, is the respondent in a separate proceeding. AWA Docket No. 03-0024 currently pending before Chief Administrative Law Judge Marc Hillson.

⁷ Inspector Jan Feldman, one of the inspectors criticized by Judge Baker, appeared as a witness and testified against Dr. Schmidt in this action. She was present at five of the ten inspections (November 4, 2001, March 17, 2002, March 23, 2003, November 2, 2003 and June 6, 2004). CX 9, CX 10, CX 12, CX 13 and CX 15.

infrequent basis,⁸ the timing of findings of non-compliance beginning after his presence at one of the inspections and later participation in the *Shephard* case; the fact that violations were written for conditions which appear to have existed since the facility opened without being raised in prior or in subsequent inspections; the clear departures from published Agency policy, inspection protocols, and procedures; the inconsequential and subjective nature of some of the violations advanced in this proceeding; and the failure to corroborate more serious charges with objective evidence when the means to do so were obviously available all lend significant credence to his belief that he has been singled out for questionable treatment.

A total of 39 violations were alleged to have been observed during the course of the ten inspections conducted by Ms. Meek. Complaint ¶¶ II-XI. Of these, the Complainant withdrew two of the violations at the hearing and did not request findings for a third. Tr. 62; Complaint ¶¶ IV A.4, VI A.3, and VIII A.2. The remaining 36 alleged violations fall into the general categories of housing standards, structural soundness, soundness and security of the enclosures, house keeping and sanitation, trash on the premises, sufficiency of the lighting, the adequacy of the Respondent's insect and

⁸ Dr. Gibbens testified that a risk-based inspection system is used to inspect licensed facilities, with the number of inspections based upon the expectation of finding non-compliance. Tr. 82. Despite this testimony, the first of the inspections finding non-compliance followed an inspection only one month prior in which no violations were noted. Four inspections were conducted in 2001 (March 18, 2001 [no violations], April 22, 2001, October 14, 2001 and November 4, 2001), two in 2002 (March 21, 2002 and October 13, 2002), three in 2003 (March 23, 2003, June 1, 2003 [no violations], and November 2, 2003) and three in 2004 (March 21, 2004, June 6, 2004 and September 12, 2004). The inspection on June 1, 2003 was conducted by Inspectors Meek and Jerry West. Tr. 74. The facility was also visited on September 17, 2004; however, no violations were reported on that occasion. (The photographs marked CX 17-36 were taken on that date, but were not admitted.) As the facility was only operated six or seven times a year, the facility was inspected more than 50% of the time it operated in 2001 and nearly that percentage in both 2003 and 2004. While facilities with chronic violations are targeted for inspection more frequently than other facilities as part of a risk-based inspection system, it would appear unlikely that any full-time facility has been inspected with anywhere near this percentage of days that it was operated.

rodent control program, and most seriously, interference and refusal of access to the USDA Inspector.⁹

The Act authorizes the Secretary of Agriculture to promulgate the standards and other requirements governing the humane handling, housing, care, treatment, and transportation of certain animals by dealers, research facilities, exhibitors, carriers and intermediate handlers. The Secretary has delegated the responsibility of enforcing the Act to the Administrator of the Animal and Plant Health Inspection Service (APHIS). The regulations established under the Act are contained in Title 9 of the Code of federal Regulations (9 C.F.R. Chapter 1, Subchapter A, Parts 1, 2, and 3).

The following extract from the *Federal Register* sets forth an explanation of the Agency philosophy and position on inspections:

Enforcement of the AWA [Animal Welfare Act] is based upon random, unannounced inspections to determine compliance. In addition, APHIS uses a risk-based assessment to determine minimum inspection frequency. After inspection, all licensees are given an appropriate amount of time to correct any problems and become compliant. This cooperative system has been more effective than enforcement actions for each citation. *Federal Register*, Vol. 69, No. 134, Wednesday, July 14, 2004 at page 42094.

The above extract prefaced a regulatory change to 9 C.F.R. 2.126(b) which added a provision that a responsible adult must be made available to accompany officials during the inspection process. Prior to July 14, 2004, there was no such requirement.¹⁰ One of the comments to the proposed change suggested that APHIS inspectors should inspect the property unaccompanied if no responsible adult were present. In responding to the comments, the following Agency position was clearly and unambiguously enunciated:

⁹ Although interference with an inspector is generally considered sufficiently serious to warrant suspension or revocation of a dealer's license, Dr. Gibbens, the USDA sanction witness was of the opinion that a civil penalty would be sufficient.

¹⁰ CX 1-CX 5 indicate in Box 3 of the Application for License-License Renewal that the Respondent was the sole individual authorized to conduct business. Beginning in September of 2004, Dr. Schmidt designated Ronnie Lee Williams, an individual employed as a security guard, to accompany any inspectors. Tr. 197-202.

We do not perform unaccompanied inspections for many reasons, including the safety of the inspector. *Id.* at 42095

Provisions contained in The Animal Care Resource Guide, Dealer Inspection Guide¹¹ (which predate the regulatory change) are consistent and reflect this philosophy:

Prior to conducting the actual inspection:

- contact the licensee or authorized representative
- introduce yourself in a professional manner
- state the purpose for the visit
- show your USDA badge and ID if requested
- if appropriate, provide a business card

The inspector must be accompanied by the licensee or the licensee's designated representative (who should be at least 18 years of age), when conducting the inspection. Animal Care Resource Guide, Dealer Inspection Guide, Section 6.1.1 (4/00).

The Guide also sets forth the procedures for the Exit Briefing:

EXIT BRIEFING The exit briefing is the time to summarize everything that occurred during the inspection.

Take as much time as necessary during this opportunity to:

- discuss the non-compliant items in detail with the licensee or the facility representative
- assess his/her understanding of the problem(s)
- discuss what he/she may do to correct the problem, if asked
- make sure that licensee/representative understands what is expected of him/her
- educate him/her about animal welfare and the AWA regulations and standards

The exit briefing includes, but is not limited to:

- presenting the licensee or facility representative with a copy of the inspection report
- reading the inspection report with the licensee/facility representative
- reviewing the details of the inspection report
- answering questions
- obtaining signatures

Animal Care Resource Guide, Dealer Inspection Guide, Section 6.2.1 (3/99).

¹¹ This publication is available on the USDA Website.

The testimony of Ms. Meek makes it clear that she understands how inspections are supposed to be conducted:

Q Ms. Meek, would you briefly describe for us how you go about conducting an inspection?

A. Initially, when we arrive on site at the facility, we contact the licensee or a designated representative. And it's my practice to go through the facility first after that initial contact, identifying any or all non-compliances with the licensee, suggesting corrective measures, and then follow up with a review of the required paperwork.

And at the end of this, we conclude with an exit interview ensuring that the licensee does understand that these are non compliant items. (Tr. 13).

While this misleading testimony might be reflective of how her inspections are normally conducted at other facilities, no effort was made during her direct examination to indicate that her inspection technique at the Respondent's facility was different than what she had described other than to indicate that she mailed the inspection reports to the Respondent rather than presenting him with a copy prior to her departure from the premises.¹² On cross-examination however, she acknowledged that she had notified the Respondent of her presence at the facility only twice, once when she visited the facility for the very first time when she was introduced by Jim Depew, another inspector and when she conducted an inspection accompanied by Dr. Sabala:

Q Did you ever introduce yourself when you came to my sale barn, ever?

A Yes, I have.

¹² No testimony was presented that an exit briefing was conducted for the inspection on September 12, 2004. CX 16 bears the notation "refused to sign".

Q When?

A During the inspection with Jim Depew, when Dr. Sabelli¹³ [phonetic] was with me during the last inspection that I was at your facility.

Q And you done - - Jim Depew introduced you when he came the first time.

A Correct. (Tr. 49-50).

Far from supporting the factual allegations contained in the Complaint, the record before me more clearly establishes that the inspections of the Respondent's facility were based upon some motivation or rationale other than the risk-based inspection system described by both Dr. Gibbens (Tr. 82) and contained in the previously cited portion of the *Federal Register*. The disproportionately high number of inspections previously noted, the findings of non-compliance for structural components that had been inspected numerous times in the past as well as subsequent to the inspections in question here without violations being noted¹⁴ and the trivial, if not frivolous nature of the alleged violations for insufficient lighting,¹⁵ cobwebs¹⁶ and trash, including soda bottles and discarded food containers in a facility occupied by the general public during the course of

¹³ This appears to be Dr. David Sabala according to CX 16.

¹⁴ Fourteen violations are based upon structural requirements. Of these, four are written for cages with sharp or jagged edges (October 14, 2001, November 4, 2001, June 6, 2004 and September 12, 2004). Inspection of one of the cage panels reflected that what had been alleged as wire protruding into the cage was in fact nylon twine. (Tr. 200-202, 228-242, CX 48) CX 40 which does show a cage with broken wire (without any dog in the cage) but was not alleged as a violation. Two violations related to bare wire flooring (October 14, 2001 and November 4, 2001); however the later one was dropped. Ms. Meek's conclusory testimony failed to establish by competent means that the suspended wire flooring was smaller than 9 gauge. Three violations relate to the failure to have waste drains (April 22, 2001 [which alleged failure to remove excreta], October 14, 2001 and November 4, 2001). Waste drains are not necessary if there are catch pans filled with sufficient absorbent material to catch waste. Other structural violations allege rust and pitted surfaces on the support structures holding the cages. CX 42 shows an extremely sturdy support system with angle iron over the exposed edges of the wood. Even if the angle iron surface did have some rust, it would in no way affects the soundness of the structure. Other photographs which indicate the presence of rust appear to be of galvanized metal which is mildly oxidized.

¹⁵ Two of the alleged violations (March 21, 2004 and June 6, 2004) were for insufficient lighting to conduct the inspection. The light in the facility is adequate however to read the sales program (Tr. 105), inspect AKC microchip information and compare it with a print out (even by a woman with older and dimmer eyesight) (Tr. 144) and presumably for prospective purchasers to visually inspect the dogs in their cages. Moreover, the section cited (3.1(d)) requires only that the lighting be sufficient to carry out husbandry requirements.

an auction sale¹⁷ all raise significant questions as to the impartiality or fairness of the inspections conducted at the Respondent's facility. The 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 dispute the general conditions of non-compliance which are alleged and convey the positive impression that the Top of the Ozark Auction is a well run operation with high standards. The Respondent's witnesses included a number of dealers, breeders and employees who uniformly and without exception attested to Dr. Schmidt's exacting standards of cleanliness and his insistence on doing things correctly.¹⁸ Of significantly greater concern to me after hearing the evidence is the egregious and repeated failure of the inspector to follow Agency policy and well-defined APHIS inspection protocols and procedures in this case. It is abundantly clear that the inspections of the Respondent's facility were not based upon a risk-based assessment, the inspections did not conform to established Agency procedures, and the subjective nature of the inspector's findings are at best inconsistent with either prior or subsequent inspection reports or the preponderance of the evidence. Given these factors, it is difficult to place much, if any, reliance upon either of the two inspectors testifying in this case.

For the above reasons, the following Findings of Fact and Conclusions of Law will be entered.

FINDINGS OF FACT

¹⁶ Three such violations are alleged (March 23, 2004, March 21, 2004 and June 6, 2004). CX 37 reflects cobwebs on a rafter in the facility and CX 38 which is alleged to show spider webs in a support structure. The material contained in the photograph also resembles the absorbent material used in the facility. Dr. Schmidt's testimony which was not disputed that spiders pose no threat to the animals is credible. CX 45 and CX 46 also reflect spider webs in the support structure as opposed to the primary enclosure. CX 47 is a photo of a mud dauber nest identified by Dr. Schmidt as being in an area not available to the general public.

¹⁷ Four such violations are alleged (November 2, 2003, March 21, 2004, June 6, 2004 and September 12, 2004).

¹⁸ Tr. 99-102, 104-105, 128-130, 134-143, 150-153, 163-166, 179-187, 197-202 and 243. According to Jessica Lea Ann Vandergrift, Dr. Schmidt was an exacting taskmaster. Tr. 166.

1. As the inspection of the Respondent's facility on March 18, 2001 found no items in non-compliance, the subsequent frequent inspections of the Respondent's auction facility commencing on April 22, 2001 were inconsistent with and not based upon an objective risk based assessment.

2. The number and frequency of the inspections conducted at the Respondent's facility is grossly disproportionate to the total number of days that the facility operated.

3. None of the ten inspections upon which the Complaint in this action is based, with the possible exception of the one conducted on September 12, 2004, conform to the requirements of established and published Agency guidelines or policy.

4. The failure of the inspector to conduct an Exit Briefing as required by the published guidelines operated to significantly impede or defeat the intent of the cooperative compliance program described in the previously cited extract from the *Federal Register*.

5. The inspector's failure to follow Agency procedures was observed by the other USDA personnel on several occasions, including other inspectors as well as a Veterinary Medical Officer, without corrective action being taken by them to insure that proper procedures were followed.

6. The conduct of the inspector in this case, including the frequency of inspections, the improper, inappropriate, unsupported and/or in many cases subjective violations is questionable at best.

7. The inspector'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 the Respondent.

CONCLUSIONS OF LAW

1. The inspector's conduct and repeated failure to follow Agency procedures and guidance are egregious and so tainted the inspection results as to preclude their being used for the purposes of an enforcement action.

2. The factual allegations of the Complaint alleging non-compliance with the Regulations and Standards on the part of the Respondent were not supported by credible evidence.

ORDER

1. The Complaint against the Respondent is **DISMISSED**.

2. The Administrator, Animal and Plant Health Inspection Service is directed 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.

Copies of this Decision and Order shall be served upon counsel for the parties by the Hearing Clerk's Office.

Done at Washington, D.C.
February 10, 2005

PETER M. DAVENPORT
Administrative Law Judge

Copies to: Frank Martin, Jr., Esquire
Jerome A. Schmidt, D.V.M

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