UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	AWA Docket No. 06-0006
	)	
	)	
Daniel J. Hill and	)	
Montrose Orchards, Inc.	)	
	)	
Respondents	)	
	)	

Decision

In this decision I find that Respondents, Daniel J. Hill and Montrose Orchard, Inc., were required to obtain an exhibitor's license from the U. S. Department of Agriculture even though many of the animals being exhibited were ultimately used for food.

Procedural Background

On January 13, 2006, Kevin Shea, Administrator of the Animal and Plant Health Inspection Service (APHIS) of the United States Department of Agriculture, issued a Complaint against Respondents, Daniel J. Hill and Montrose Orchard, Inc., for operating as exhibitors under the Animal Welfare Act without obtaining the requisite license. Respondents filed a joint Answer contesting the allegations of the Complaint, principally stating that they were entitled to a "farm exemption" since all the animals they were charged with exhibiting were farm animals.

I conducted a prehearing conference via telephone on July 25, 2006, and scheduled a hearing in Flint, Michigan on December 6, 2006. At the hearing,

Complainant was represented by Sharlene Deskins, Esq., and Respondent Daniel Hill represented himself and Montrose Orchards, Inc., pro se. Complainant called two witnesses and introduced seven exhibits, while Daniel Hill testified on behalf of Respondents, and introduced three exhibits. Briefs on behalf of Complainant and Respondents were filed on January 26, 2007.

Statutory and Regulatory Background

The Animal Welfare Act, 7 U.S.C. § 2131 et seq., (the "Act") includes among its objectives "to insure that animals intended for use . . . for exhibition purposes . . . are provided real humane care and treatment." 7 U.S.C. § 2131 (1). In order to be subject to the Act, the animals must be either in or substantially affect interstate commerce.

The Act defines "animal" for coverage purposes to include any "warmblooded animal." However, that same definition, at § 2131(g), excludes "(3) other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber." Meanwhile, an "exhibitor" is defined in the Act as a person who exhibits "any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary . . ." § 2132(h). Section 2134 prohibits exhibition of animals without a valid license issued by the Secretary.

The regulations at 9 C.F.R. Parts 1-4 generally mirror the statute with respect to these definitions. However, APHIS has issued several documents and policies interpreting, to some degree, several of the concepts that are at issue in this hearing. Thus, Program Aid 1117, Licensing and Registration Under the Animal Welfare Act,

Guidelines for Dealers, Exhibitors, Transporters, and Researchers (May 2002), RX 4[1], states at page 7 that "Normal farm-type operations that raise, or buy and sell, animals only for food and fiber . . . are exempt . . ." from the licensing requirement. Additionally, Policy # 26 issued by APHIS in November 1998 and found on their web site, states:

> Farm animals, such as domestic cattle, horses, sheep, swine, and goats that are used for traditional, production agricultural purposes are exempt from coverage by the AWA. Traditional production agricultural purposes includes use as food and fiber, for improvement of animal nutrition, breeding, management, or production efficiency, or for improvement of the quality of food or fiber.

Facts

Montrose Orchards, Inc. is a closely-held family corporation whose president is Daniel J. Hill. Tr. 127-128. The main crops at Montrose Orchards, which is located in Montrose, Michigan, are blueberries and apples, as well as asparagus, pumpkins and Christmas trees. Tr. 131. Several crops are offered to the public on a pick-your-own basis, while everything grown on the premises is also offered for sale at a "gift shop" on the premises. Tr. 131. Respondents operate a cider press where apples are processed into cider. Tr. 137-138. Everything grown on the premises is sold directly to the public. Tr. 131.

There are several pens located prominently at Montrose Orchards, which have displayed, at varying times, a pig, a cow, several English fallow deer, Barbados sheep and goats. E.g., Tr. 12-13, CX 3. At various times, there have been signs at the entrance to the property directing the public to the animals, and there have been signs on the pens identifying the animals. CX 3, p. 1. The pens are fairly large and are not typical of the pens used for animals being raised for slaughter. Tr. 53-56. There are machines on the

[1] Throughout this decision, "Tr." refers to the transcript, "CX" refers to Complainant's exhibits, and "RX" refers to Respondents' exhibits.

premises that are designed to allow visitors to the premises to purchase food to feed the animals in the pens. Tr. 31, 148. There is also a hand washing station so that people can wash up after contacting the animals. Tr. 31. Montrose Orchards is listed in the Michigan Directory of Farm Markets as having animals on the premises. Tr. 14-15.

Respondents do not charge an admission fee to enter on their premises or to view the animals that are displayed. However, school groups are occasionally given tours of the facility, particularly the cider press, and they do pay a fee. Tr. 138.

Respondents raise most of the animals contained in their pens for food. Mr. Hill testified that the pig, the cow, the goats, and even the fallow deer are destined for the slaughterhouse, the freezer and the dinner table. Tr. 118-119. He brought to the hearing, but fortunately did not offer as an exhibit, what he stated was deer sausage and even identified which of the English fallow deer was the source of the sausage. Tr. 99-100.

Employees of APHIS first inspected Montrose Orchards in September, 2003, after observing Montrose's listing in the aforementioned Michigan Directory of Farm Markets. Tr. 11. The first inspection was conducted by Dr. Kurt Hammel, a veterinary medical officer. He observed the farm animals on display and asked to speak to the person in charge. Tr. 12-14. Upon meeting Mr. Hill, he advised him that the animals were on display and that therefore he needed an exhibitor's license under the Act. Tr. 14. The following month, Dr. Hammel returned to Montrose Orchard, observed much the same situation, and again advised a representative of the facility (not Mr. Hill) that they needed a license. Tr. 15-17.

On December 1, 2003, Dr. Hammel again returned to Montrose Orchard, this time accompanied by his supervisor Dr. Kirsten and Thomas Rippy, a senior investigator for

APHIS. Tr. 17-18, 61. They presented Mr. Hill with what Dr. Hammel described as "an official notice of violation," Tr. 20, and Dr. Kirsten advised him of the need to come into compliance.

Another inspection occurred on June 16, 2004. Tr. 20. Dr. Hammel completed a search form, CX 2, which was also signed by Mr. Hill. During this inspection, Dr. Hammel took a number of photographs, CX 3, documenting that a clearly marked sign pointed the way to the animals (CX 3, p. 1), that the animal pens were visible from the parking lot (CX 3, p. 2), that there was a hand washing station proximate to the animal pens (CX 3, p. 4), and that the animals on display on the date of that inspection included at least four Barbados sheep (CX 3, p. 5), a pig (CX 3, p. 6), a cow (CX 3, p. 8), at least three goats (CX 3, pp. 7 and 9), and at least three English fallow deer (CX 3, p. 10). Once again, he advised Mr. Hill of the need to have an exhibitor's license issued by APHIS. Tr. 29-30.

Dr. Hammel and Mr. Rippy revisited Montrose Orchards on May 16, 2005. Tr. 30-31, 62-63. Animals were still on display to the public. Tr. 31. Dr. Hammel observed an animal feeding station where the public could deposit coins and buy food to feed to the animals. Tr. 31. Subsequent inspections occurred in September 2005, May 2006 and August 2006, with the only change being that at the last visit the sign directing visitors to the animals was no longer evident. Tr. 33-38. APHIS also visited the Montrose Orchards in March and April 2006, but the facility was not open to the public at that time. Tr. 34-35.

Throughout the course of these inspections, Mr. Hill consistently maintained that it was lawful for Montrose Orchards to display the animals without an exhibitor's license

because he fell under several exemptions under the Animal Welfare Act. Tr. 76-77, 114-117, CX 4, CX 5. He persistently inquired of the APHIS personnel who inspected Montrose Orchards as to whether there was an official interpretation of the Act or the regulations which supported their contention that he needed an exhibitor's license. He went so far as to inquire of the Office of Administrative Law Judges (OALJ) as to whether there was any case law in which there was a ruling which would indicate whether he and Montrose Orchards were entitled to an exemption from the exhibitor's license requirement. RX 1, RX 2. He was told by OALJ Attorney James Hurt (who he refers to as Judge Hurt) that OALJ decides live cases and does not give advisory opinions. Mr. Hurt referred Mr. Hill to the APHIS web site which apparently did not have a written interpretation that suited his situation. Mr. Hill maintained at the hearing, and again in his brief, that if there is an official written interpretation of the Act and regulations that indicates he is not entitled to an exemption, he would seek an exhibitor's license.

Prior to and throughout the hearing, Mr. Hill contended that the exemption he was covered under was the exemption at 9 C.F.R. § 2.1 (ii), which excludes from the licensing provisions

> Any person who sells or negotiates the sale or purchase of any animal except wild or exotic animals, dogs, or cats, and who derives no more than $500 gross income from the sale of such animals to a research facility, an exhibitor, a dealer, or a pet store during any calendar year and is not otherwise required to obtain a license.

In their Answer and at the hearing, Respondents also contended they were entitled to a "farm animal" exemption, i.e., all the animals that were displayed in pens at Montrose Orchard were being raised for food. Respondents contend that they were

"hobby farmers" in that they raised very limited numbers of animals for their own consumption.

Discussion

After careful review of the facts and the applicable law, I conclude that Respondents did operate as an exhibitor under the Animal Welfare Act. I find that Respondents' operations were in interstate commerce or at least affected commerce, and that the display of animals as part of an inducement to visit a commercial operation constituted the charging of compensation. I find that the exemption for those who make less than $500 from animal operations applies to dealers, and is inapplicable to Respondents. I find that while the animals on display at Montrose Orchards were ultimately raised for food, the fact that they were on display for extended periods of time still requires an exhibitor's license. Finally, I impose a civil penalty of $1,000 against Respondents jointly.

The commerce requirements of the Animal Welfare Act have always been liberally interpreted. Here, Respondents operate a business that they advertise locally. They accept credit cards as a form of payment for purchases. Tr. 132-133. While they often get animals for free, they occasionally buy and sell animals at auction. They are listed in the Michigan Directory of Farm Markets, are mentioned in numerous websites as a place to purchase a variety of products, and are in the process of developing their own website.

Congress indicated that it wanted to extend the application of the Act to broadly cover any activity that "affects" commerce, rather than require the activity actually be in interstate commerce. While the use of credit cards, the internet, etc., arguably meets the

"in commerce" test, the Office of Legal Counsel has concluded "that the Animal Welfare Act applies to activities that take place entirely within one State, as well as to those that involve traffic across State lines." 3 U.S. Op. Off. Legal Counsel 326 (1979). See, In re Marilyn Shepherd, Agric. Dec. , slip op. p. 6 (August 31, 2006).

Respondents also contend that since they charge no admission to view the animals on display, they do not meet the prerequisite for being an exhibitor that compensation be charged. Even where no compensation is charged to view animals displayed at a commercial facility, the Judicial Officer has held that the use of displayed animals to attract customers to a facility is sufficient to meet the compensation requirement, even though no money changes hands in exchange for the right to view the animals. Thus, in In re. Lloyd A. Good, Jr., 49 Agric. Dec. 156, the Judicial Officer affirmed the administrative law judge's finding that the display of a dolphin at a resort was for the purpose of attracting visitors to the resort. "Although it is true that no fee, as such, is charged for viewing the dolphin's performance, the exhibition is maintained with the expectation of economic benefit to the resort. The dolphin act is an unitemized service which the resort provides to its patrons as well as an advertised attraction to draw patrons to the resort's premises." Id., at 163. Moreover, by providing food dispensing machines for the purpose of selling food to patrons to feed to the animals, and by receiving admission fees for student tours of his facilities (although the fees seem to be more associated with the overall operation of the facility, particularly the cider press), some indirect compensation from the display of the animals is generated. It is not unreasonable to assume that the business model of Montrose Orchards is such that the viewing of the animals on display is indeed an attempt to differentiate Montrose from other similar

operations, and as such the analysis in Good, that the animals are displayed in this manner with the intention of providing an economic benefit to Montrose Orchards, is applicable.

Respondents have contended that they fall into the exemption for those who make less than $500 annually from the sale of their animals. However, this exemption, found at 7 U.S.C. § 2132 (f) does not on its face seem to apply to Respondents' operations. Mr. Hill was told by APHIS personnel that this exemption applied to "hobby breeders"—"small-scale breeders with gross sales under $500 per year." RX 4, p. 11. However, there was no evidence that Respondents were breeders who sold their animals' offspring to others. With the exception of the English fallow deer, which he apparently bred for his own use, there is no evidence of any breeding going on at Montrose Orchards whatsoever. Respondents' reliance on this exemption is misplaced.

Respondents also rely on the exemption for animals that are raised for food and fiber. There is no dispute that Respondents do, in fact, raise many or most of the animals they display for eventual use as food. The Act does seem to exempt on its face "farm animals . . . used or intended for use as food." Complainant contends that the primary intention with respect to these animals was not for use as food, but as animals to be exhibited. If the animals were raised only for use as food, it is reasonable to assume that large pens, openly visible to the public, signs directing the public to the animals and identifying the animals, machines that sell food for the public to purchase and feed the animals, hand washing stations for the use of the public after visiting the animals, and the listing in the Michigan Directory of Montrose Orchards as a facility where animals are displayed, would not be evident.

It appears that the Respondents' animals serve two purposes—they are being exhibited first and used for food later. Indeed, APHIS seems to recognize this multi-purpose possibility in its introduction to RX 4[2], where it states that this exemption applies to "Normal farm-type operations that raise, or buy and sell, animals only for food and fiber." Id., at p. 7, (emphasis added). The fact that the animals are being utilized for multiple purposes, one of which is exempt, and one of which requires a license, does not negate the requirement that a license be obtained for the use that requires a license. This is not a new concept. Two cases cited by Complainant, In re Ronnie Faircloth et al, 52 Agric. Dec. 171 (1993), and In re. Terry and Lee Harrison, 51 Agric. Dec. 234 (1992), in essence hold that the fact that an animal is used for an exempted purpose, such as a pet, does not mean that its owner is excused from the exhibitor's license requirement for its other purpose. Otherwise, any owner of a wild animal that it exhibits, even where admission is charged, could contend that the majority of the time the wild animal acts as the owner's pet, and is thus exempt from the license requirement. Such a result would be manifestly inconsistent with the Act. Here, the displayed animals are unquestionably one of the means that Respondents use to draw customers to Montrose Orchards and for that type of usage an exhibitor's license is required.

Complainant has asked that a civil penalty of $4,000 be imposed against Respondents. After reviewing all the evidence, including Respondents' repeated efforts to obtain a written interpretation of their status under the Act, I conclude that a penalty of $1,000 is warranted. While Respondents were repeatedly advised that they were in violation of the Act by their failure to obtain an exhibitor's license, the fact is that Mr.

[2] Program Aid 1117, Licensing and Registration Under the Animal Welfare Act, Guidelines for Dealers, Exhibitors, Transporters, and Researchers.

Hill repeatedly contended that he was exempted from the Act, and repeatedly requested APHIS to show him something in writing that would back up their interpretation. While there is no requirement that APHIS provide a written interpretation to anyone who asks for one, it is easy to see how the language of the Act and regulations could cause someone in Respondents' position to question the oral interpretation offered by the APHIS inspectors. The Agency frequently responds to such inquiries in writing.[3]

Neither the statute nor the regulations make it clear that when an animal is being used for both an exempt purpose and a covered purpose, the covered purpose must be complied with. The "clarification" provided in Policy #26 sheds no light on the situation, and even muddies the waters. Upon viewing Mr. Hill's demeanor at the hearing, I am convinced that he was not a scofflaw or an individual who was trying to squirm out of a statutory requirement, but simply wanted the Agency to show him in writing why he was not subject to one of the Act's exemptions. I am obviously not finding that the Agency has a duty to respond to such an inquiry, but I am treating it as a factor in terms of evaluating the good faith of the Respondents in trying to comply with the law. The Act requires, 7 U.S.C. § 2149 (b), that I consider the violator's size of business, the gravity of the violation, good faith and history of previous violations. In so doing, I conclude that $1000 is an appropriate penalty.

Findings of Fact

1. Respondent Montrose Orchards, Inc. is a family owned Michigan corporation located in Montrose, Michigan. Respondent Daniel J. Hill is the president of Montrose Orchards.

[3] See, e.g., Administrative Law Judge Palmer's decision in In re Marvin D. Horne, Agric. Dec. (Dec. 8, 2006).

2. Respondents operate a business which offers the public an opportunity to purchase apples, blueberries, Christmas trees, asparagus, pumpkins and other products. Most products are sold in the Orchard's gift shop, and some products are also offered to the public on a self-pick basis.

3. Respondents display to the public a number of animals including, at various times, a pig, a cow, English fallow deer, Barbados sheep and goats. These animals were displayed in large pens. There were signs directing the public to these pens. There were signs on some of the pens identifying the animal(s) inside. There were food dispensing machines where members of the public could insert some money and buy food to feed the animals, and a hand washing station near the pens available for public use.

4. In a series of inspections occurring between September 2003 and August 2006, APHIS inspectors consistently indicated to Respondents that an exhibitor's license was required to display the above-mentioned animals. Just as consistently, Respondent Hill insisted that the display of animals was exempt from the exhibitor's license requirement.

5. Respondent Hill made numerous inquiries to USDA requesting a written statement that his display of animals required an exhibitor's license. He did not receive the requested statement.

6. Most of the animals displayed by Respondents are used for food.

Conclusions of Law

1. Between September 2003 and August 2006, Respondents were exhibitors under the Animal Welfare Act. As such, Respondents were required to obtain an exhibitor's license to display the animals on their premises to the public.

2. Upon consideration of the factors enumerated in the Animal Welfare Act, I assess a civil penalty of $1,000 jointly and severally against Respondents.

Order

1. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from engaging in any activity for which a license is required under the Animal Welfare Act including but not limited to the exhibition of animals.

2. Respondents are jointly and severally assessed a civil penalty of $1,000, which shall be paid by a certified check or money order with the notation "AWA Dkt. No. 06-0006" on the front of the check or money order made payable to the Treasurer of United States and shall be sent to:

Sharlene Deskins
Office of the General Counsel Marketing Division
United States Department of Agriculture, Mail Stop 1417
1400 Independence Ave., S.W.
Washington, D.C. 20250-1417

The Respondents cannot apply for or obtain a license under the Act until the civil penalty imposed in this order is paid in full.

The provisions of this order shall become effective on the first day after this decision becomes final. Unless appealed pursuant to the Rules of Practice at 7 C.F.R. § 1.145(a), this decision becomes final without further proceedings 35 days after service as provided in the Rules of Practice, 7 C.F.R. 1.142(c)(4).

Copies of this decision shall be served upon the parties.

Done at Washington, D.C.
this 18th day of April, 2007.

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MARC R. HILLSON
Chief Administrative Law Judge