

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 07-0083
)
D & H Pet Farms, Inc.,)
)
Respondent)
)

Decision

In this decision, I find that Respondent D & H Pet Farms, Inc. committed numerous violations of the Animal Welfare Act, 7 U.S.C. § 2131 et seq. I am imposing a civil penalty of \$10,000 and a license suspension of 3 months, with the provision that if certain corrective actions are undertaken by Respondent, portions of the civil penalty and the entire license suspension will be mitigated.

Procedural Background

On March 15, 2007, Kevin Shea, Acting Administrator of USDA’s Animal and Plant Health Inspection Service (APHIS), issued a complaint alleging that on seven different occasions between October 12, 2005 and January 25, 2007 Respondent had violated the Animal Welfare Act and its regulations. The complaint sought civil penalties, the issuance of an order that Respondent cease and desist from committing future violations, and suspension or revocation of Respondent’s license under the Act. Respondent filed a timely answer denying that it willfully had violated any of the regulations under the Act.

I conducted an oral hearing in Tampa, Florida on December 4, 2007. Complainant was represented at the hearing by Frank Martin, Jr., Esq., and Heather M. Pichelman, Esq. Respondent appeared pro se, with co-owner Susan A. Tippie acting as spokesperson. Complainant called three witnesses, while Ms. Tippie was the only witness for Respondent. I received into evidence Complainant's exhibits CX-1 through CX-97, and Respondent's exhibits RX 1 through RX 82.

Complainant filed a brief on February 7, 2008, and Respondent filed its brief on April 2, 2008.

Statutory and Regulatory Background

The Animal Welfare Act includes among its purposes "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." 7 U.S.C. § 2131(1). The Act also provides for the Secretary to license dealers of regulated animals, and gives the secretary the authority to issue regulations. The Secretary can deny a license if a dealer does not demonstrate that its facilities comply with the Secretary's standards. 7 U.S.C. § 2133. Subpart B of 9 CFR Part 3 contains regulations specifying rules applicable to dealers raising hamsters and guinea pigs for use as pets. Failure to comply with these regulations may lead to suspension or loss of a dealer's license, and the imposition of civil penalties in the amount of up to \$3,750 per violation.

Factual Background

D & H Pet Farms is a Florida corporation located in Plant City, Florida. D & H is a licensed dealer under the Animal Welfare Act, and breeds and sells regulated animals—guinea pigs and hamsters—for use as pets. CX 1-CX3. The facility is run by Susin A. Tippie and her husband, Gaynor L. Tippie. Ms. Tippie had served as manager of D & H from 1998 until she

purchased the facility with her husband in January 2003. Tr. 150. She testified that there had been numerous pre-existing violations that the previous owner did not want to correct. Id. The facility was over 35 years old at the time of the hearing, and is a family run enterprise with between ten and seventeen employees. Tr. 160-162. Ms. Tippie indicated that due to the age of the building housing the regulated animals and the high cost of coming fully into compliance with the regulations, that some aspects of the regulations would never be fully complied with, but that at the same time they were taking care of the regulated animals as well as they could.

Carol Porter, an animal care inspector for APHIS, testified with respect to seven inspections of Respondent that she conducted between November 2005 and January 2007. She had conducted approximately 600 inspections by the date of the hearing, including 12 involving Respondent, four of which occurred after the time period that is the subject of this decision. She characterized the Respondent as “chronically noncompliant.” Tr. 22-25. However, she also testified as to the many corrections Respondent made after violations were cited, and of their attempts to take corrective action with respect to other violations. E.g., Tr. 77-79, 88, 92-93.

During the October 12, 2005 inspection, Inspector Porter observed a variety of violations. In her Inspection Report (CX 5) she cited Respondent for repeat noncompliances in the areas of veterinary care, storage of supplies, construction of interior surfaces and sanitation¹. The veterinary care citation was triggered by the finding of a guinea pig that was quite sickly; the storage of supplies citation was triggered by an open bag of food which had split open and spilled onto the floor, and leaking brake fluid from a tractor near the stacked bags of animal feed. In addition, the citation indicated that paint was peeling away from the floors in the main

¹ The record contains two prior Consent Decisions where Respondent admitted committing certain violations and agreed to pay a civil penalty and to comply with the regulations in the future. CX 97 was issued by Judge Dorothea Baker in July 2001 and was signed on behalf of Respondent by former owner Chris A. Vorderburg. CX 4 was issued by Judge Victor Palmer in May 2005 and was signed by Ms. Tippie.

building, preventing the floors from being impervious to moisture and preventing proper cleaning and sanitation of the floors. Finally, the report cited numerous problems with pest control.

During the February 13, 2006 inspection, Inspector Porter found approximately 200-250 dead hamsters in buckets in the main building, many of which were cannibalized (apparently hamsters tend to devour their first litters). The inspection took place on a Monday and employees told the inspector the practice of the facility was only to check water bottles over the weekend and that the buckets where the hamsters reside did not get checked. Inspector Porter stated in her Inspection Report (CX 17) that the facility needed to have daily observations of the animals, and that the failure to check for dead and dying hamsters, and the high number of dead found during the inspection, were evidence of a lack of veterinary care. The inspector also documented a number of holes in various parts of the facility, the use of soiled bedding, a repeat failure to comply with the regulation concerning impervious surfaces (the paint was peeling off the floors), a violation of the feeding guidelines as evidenced by wet and moldy food pellets, a variety of sanitation violations, and an inadequate pest control program.

At the next inspection, on April 5, 2006, Inspector Porter again observed peeling paint on the floors, and an ineffective pest control program, with numerous stray cats “wandering in and around the facility.” CX 41.

At the June 21, 2006 inspection, Inspector Porter again cited Respondent for the peeling paint on the floors, and for pest control issues (particularly rodents², house flies and roaches), as well as for having an open bag of feed, and for oats spilled on the feed room floor. CX 43.

Inspector Porter returned again on November 14, 2006, and cited Respondent for additional violations. CX 51. She found two guinea pigs that appeared to be sick or injured and

² Other than the guinea pigs and hamsters, which are themselves rodents.

concluded that this meant that animals should be observed more frequently. She also once again cited Respondents for failing to have floors impervious to moisture as evidenced by the paint peeling away from the concrete, for an inadequate pest control program as evidenced by cobwebs, fruit flies and rodent droppings, and for not providing food consistent with the regulations since numerous hamster enclosures contained wet and moldy food. She also observed black mold on the inside of numerous water bottles in the main hamster building. She also observed that buckets containing hamsters were being stacked one inside another which she felt could cause crushing, impaired ventilation, or restricted movement of the hamsters.

On December 19, 2006, Inspector Porter observed a disoriented guinea pig and determined once again that there was insufficient frequency of observation of animals and inadequate veterinary care. CX 72. Once again she observed pest control violations, including substantial rodent droppings, cobwebs, and living and dead rodents, and once again she observed that the floors in the main building had areas where the paint had peeled away from the concrete, rendering it not impervious to moisture. She also observed mold growing on the inside of numerous water bottles, the stacking of occupied hamster cages, and out of place tubes of antibiotic ointment and suntan lotion.

The final inspection that is the subject of this hearing occurred on January 25, 2007. Inspector Porter once again observed peeling paint on the floor of the main building, wet and moldy hamster food, and rodent droppings and a large concentration of fruit flies. CX 90.

Inspector Porter testified that with respect to many of the violations Respondent took prompt corrective action, including frequently repainting the floor, which everyone seems to recognize was rather a futile gesture. She also indicated that whenever she discovered a hole in the ceiling, the ceiling was repaired by the time of her next inspection. Tr. 88. With respect to

the high number of dead hamsters during the February 2006 inspection, Inspector Porter indicated that even though she had been told by Ms. Tippie that hamsters frequently eat their first litters, she believed that the mortality rate was still unusually high. Tr. 86-88. She also had observed workers sanitizing the water bottles, and believes the situation with respect to that violation had improved considerably, but she was still finding problems. Tr. 104-106.

Dr. Elizabeth Goldentyer, a veterinarian who is Eastern Regional Director for APHIS, testified as Complainant's sanctions witness. She classified the case against Respondent as a "serious" one, pointing out that Complainant viewed Respondent as a "chronic" non-complier, with two previous Consent Decisions that were not fully complied with. Tr. 129-132. She testified that many animals were impacted by Respondent's continued non-compliance.³ Id. Accordingly, she recommended that I impose a \$10,000 civil penalty, issue a cease and desist order, and suspend Respondent's dealer's license for three years. Tr. 134. Dr. Goldentyer testified that APHIS factored in the size of Respondent's business, the seriousness of the violations, Respondent's good faith (or lack thereof) and history of compliance.

Ms. Tippie testified that the facility was already old when she purchased it and that the previous owner had not been willing to commit to repairs. Tr. 150. She described several unfortunate personal circumstances, including the need to have surgery, being involved in an automobile accident and being "out of it" for the year after the car accident due to medications, and insisted that she was trying to be compliant, and that her actions, or inactions, would not substantiate a finding of "willful." Tr. 150-155.

There was little dispute as to the existence of the allegations regarding impervious surfaces and pest control. With respect to the floors, Respondent testified that it was impossible

³ Inspector Porter had indicated that at the time of the November 2006 inspection, Respondent's inventory included 6975 hamsters and 109 guinea pigs, as well as over 1000 non-regulated gerbils. CX51.

to repair the floors without essentially tearing down the facility. Ms. Tippie stated that by repeatedly bleaching the floors—they use between 150 and 350 gallons of bleach per month, that the floors would be as clean as if they were impervious to moisture. Tr. 189-191, RX 75. She cited a letter from a veterinarian, who was not available to testify, as support that bleaching would suffice, and that painting the floors would not matter as long as the floors were vigorously scrubbed on a regular basis. Tr. 174-179, RX 71. However, Dr. Goldentyer testified on rebuttal that it would be impossible to disinfect a facility with peeling paint over concrete, and that bleach will not do the job. Tr. 250. Dr. Goldentyer emphasized that the regulations were minimum standards for all dealers regardless of location. Id.

Respondent also submitted a large number of receipts, dated both before and after the dates of the inspections at issue, indicating that Respondent had been involved in an ongoing effort to comply with the regulations. Besides the receipts for bleach, Respondent submitted evidence of expenditures for paint, rodent doors, a water pump with chlorination system, water bottles, and other materials used for repairs. RX 72, 73, 75, 78.

Respondent also submitted an unsigned study conducted by Dr. William White, a recognized expert in husbandry and health who consulted with Respondent at APHIS's request as a courtesy to APHIS⁴. RX 77, Tr. 251. While the report is quite detailed, it contains little that is pertinent to my findings, other than recognizing that small animals occasionally do escape from their cages. It also illustrates APHIS going out of its way to help Respondent's facility attempt to come into compliance.

Discussion

Many of the violations alleged by Complainant have been admitted by Respondent, except that Respondent denies that any of the violations were willful. Tr. 231-232. However,

⁴ Although the study was unsigned, the provenance of this report was ultimately undisputed.

although Respondent provided a number of definitions of “willful” that would tend to support their claim, RX 82, the governing law defining “willful” as it applies in cases under the Animal Welfare Act supports Complainant’s interpretation that the proven violations of the Act were in fact “willful.” As Complainant points out in its brief, the Judicial Officer has long construed “willful” to mean the violator "(1) intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements." In re Arab Stock Yard, Inc., 37 Agric. Dec. 292 (1978), aff'd sub nom. Arab Stock Yard v. United States, 582 F. 2d 39 (5th Cir. 1978).

With respect to the repeated citations for failing to provide impervious surfaces as evidenced by the peeling paint on the floor of the main building, Respondent concedes the facts of the violation, but contends that their practice of bleaching and scrubbing the floor provides equivalent sanitation and cleanliness to meeting the specific requirements of the regulation. They also contend that compliance with this regulation would result in substantial expense and possible temporary closing of the facility. I am persuaded by the testimony of Dr. Goldentyer that the actions of Respondent do not comply with the regulation. There is no provision in this regulation for an exemption for older facilities or because the cost of compliance would be excessive. It is clear to me Respondent considers this aspect of compliance as impossible and is proceeding as if it had an exemption to complying with this particular regulation. However, compliance is mandatory if Respondent wants to keep its license, and the fact that Respondent’s building is old and it would be costly to comply is not grounds for allowing the violation to continue. Respondent must modify its facilities or lose its license. Complainant has demonstrated that Respondent has violated 9 CFR § 3.26(d), which requires that “interior building surfaces of indoor housing facilities shall be constructed and maintained so that they are

substantially impervious to moisture and may be readily sanitized” on each of the seven occasions cited in the complaint.

Each of the seven inspections also resulted in a citation for violation of various aspects of the pest control regulations. Respondents were cited under § 3.31(b) and (c) for the presence of rat and mice droppings, and general pest infestation (CX 5), as well as spiders, fruit flies and cobwebs (CX 17), large numbers of feral cats (CX 41), excessive numbers of houseflies and large concentration of roaches (CX 43), etc. There was no dispute that these situations occurred, but Respondent offered evidence, substantially concurred with by Complainant, that they have been making continual efforts in this area, including hiring a professional pest control company, and that the surrounding environment made pest control extremely difficult. However, compliance was not achieved and Complainant has demonstrated that Respondent violated 9 CFR§ 3.31 on each of the seven inspections.

With regards to the contentions that on several occasions Respondent failed to provide adequate veterinary care, I find that APHIS’s case is not quite so cut and dried. With respect to the February 13, 2006⁵ inspection where Inspector Porter discovered approximately 200-250 dead hamsters, Complainant has established that, in the absence of specific evidence that such a high mortality count is normal in the business, Respondent was not providing adequate veterinary care, in that there was a lack of daily observations as to animal health and well being. While Ms. Tippie testified as to the propensity of adults to devour their first litters, the evidence indicates that in many cases there were dead adults in the buckets with still living young hamsters. CX 17, p. 1. The fact that this inspection occurred on a Monday, and that daily

⁵ The Inspection Report is signed and dated on February 14 but indicates that the inspection took place on February 13.

observations were not performed over the weekend, support APHIS's contention that daily observations were not conducted. APHIS has met its burden of proof with respect to this count.

However, I do not find sufficient evidence to support the existence of violations of the adequate veterinary care standard on the October 12, 2005, November 14, 2006 or December 19, 2006 inspections. The fact that there was one sickly guinea pig on October 12, two on November 14 and one on December 19 does not in itself establish that there was an inadequacy of veterinary care, or that there were insufficient observations of animals under the care of Respondent. Complainant put on no evidence which would indicate how the presence of a sick guinea pig at the time of the inspection was the result of inadequate care, particularly considering the large number of guinea pigs at the facility. The fact that a guinea pig was blind in one eye is not evidence of inadequate care, nor does the fact that a guinea pig was unwilling or unable to move presume a violation, absent testimony about the cause and duration of the condition.

There were also several instances where animals were observed with food pellets that were wet or moldy, as well as several occasions where water bottles were observed with black mold on the inside. While Ms. Tippie indicated that hamsters like to moisten their food, there was little in the way of evidence to corroborate this fact, nor would it be consistent with the finding of Inspector Porter that many of the pellets she saw were moldy. With respect to the black mold on the inside of the water bottles, Respondent has taken substantial steps to correct this problem, including the purchase of a water pump with chlorination system, and establishing a regular program of cleaning water bottles, the fact that the violations were corrected does not nullify the existence of the violations, although it may be a factor in any sanctions imposed.

Respondent was also cited in several instances for stacking hamster containers in a manner that could cause the hamsters to be crushed or to be exposed to the possibility of

suffocation. I am not persuaded that such temporary stacking, in the absence of any evidence that the containers actually did put physical pressure on the hamsters or that there was any sort of real danger of suffocation, establishes a violation. The cited regulation merely requires that primary enclosures be constructed so as to be structurally sound and maintained in good repair. In the absence of more specific evidence as to the likelihood of harm to the hamsters from such stacking, I find that Complainant has not met its burden of proof with respect to the stacking citations.

The various other violations, holes in the ceiling which were repaired, open bags of food, an aquarium being used as a litter box, contaminated bedding, etc., were generally all admitted and corrected, and none appeared to be serious or repetitive in nature.

In imposing appropriate sanctions, I must factor in a number of variables. One is the size of business. The regulated aspects of Respondent's business appear to have generated gross income of over \$386,000 in 2003, over \$420,000 in 2004, and over \$443,000 in 2005, as stated in Respondent's applications for renewal of their dealer's license. CX 1, CX 2, CX 3. In 2005, they sold over 211,000 animals, although that figure appears to include all animals they sold rather than just regulated animals.⁶ Ms. Tippie stressed that the dollar amounts just cited were for gross income, and that after paying ten to seventeen employees, and subtracting the costs of doing business, her income from the business was such that she made \$2,000 per month, and that Mr. Tippie only received \$700 every other week. Tr. 243-244. She stated that her employees made more money than she did. *Id.* Thus, while the business is fairly large from a sales point of view, it does not generate much in the way of income for its owners.

Another factor to be considered is the gravity of the violations. I am persuaded that the violations concerning the failure to render the floor in the main building impervious to moisture

⁶ Respondent raises and sells unregulated animals including gerbils, rats, mice, lizards and snakes. RX 77, p. 1.

so that adequate levels of sanitation and cleanliness could be achieved is a serious violation. Likewise, the continuing series of violations related to pest control also is quite serious. These two violations also call attention to another of the statutory penalty assessment factors—the history of previous violations. Each of these two violations was cited on seven separate occasions by Inspector Porter, while several of the other violations also occurred on multiple occasions. The fact that Respondent was aware of, and admitted, the continued existence of these violations establishes a history of violations to be factored into my sanctions decision.

Even though APHIS seeks a three year suspension of Respondent's license, Complainant has given me a strong impression that they would much rather see Respondent comply than go out of business. Complainant has continued to renew Respondent's license each year, and has gone out of its way to get expert advice for Respondent by asking Dr. William White to advise Respondent. Nevertheless, Complainant seeks a three year suspension of Respondent's dealer's license, which would clearly have the practical effect of putting Respondent out of the guinea pig and hamster business, and would likely result in the euthanization of all or a significant portion of Respondent's regulated animals. Complainant states that it would help seek to find a home for these animals in the event of a suspension, but can make no promises in that regard.

While any suspension of more than a few weeks will likely result in the demise of the regulated portion of Respondent's business, I find that a ninety day suspension is appropriate in this matter. A significant suspension is warranted because continued non-compliance with the regulatory requirements, combined with Respondent's insistence that the cost of compliance would be too high and that they should essentially be given an exemption due to the age of their facility, is simply not tenable.

I agree with Complainant that a significant civil penalty is also appropriate. While I did not find in favor of Complainant on every allegation, the fact of the continuing nature of several of the violations warrants severe sanctions. Given that I find that over 20 violations occurred, including a number of serious and repeat violations, and factoring in Respondent's size of business and Respondent's documented good faith attempts to comply, the \$10,000 penalty request by Complainant is quite reasonable.

Similarly, an order to cease and desist from committing additional violations and to correct the existing violations is reasonable under the circumstances of this case.

While penalties are payable and other sanctions normally take effect within 35 days after a decision is issued, I will stay the effective date of the civil money penalty and the license suspension for 60 days, with the proviso that if Respondent comes into full compliance with the regulations within the stay period, as determined by APHIS, the license suspension will not be implemented, and the civil penalty will be reduced to \$2,500.

Findings of Fact and Conclusions of Law

1. Respondent D & H Pet Farms, Inc. is a Florida corporation whose mailing address is 3103 S. Sapp Road, Plant City, Florida 33567.

2. During the time period material to this matter, Respondent has been licensed as a dealer under the Animal Welfare Act. Respondent raises and sells guinea pigs and hamsters, which are regulated animals under the Act, as well as several types of non-regulated animals.

3. Respondent has been operating for upwards of 35 years. Since 2003, Respondent has been owned by Susin and Gaynor Tippie. Ms. Tippie had been manager of the facility under its previous owner from 1998 until she and her husband purchased the facility.

4. On seven occasions between October 12, 2005 and January 25, 2007, Inspector Carol Porter inspected Respondent. At the conclusion of each of these seven inspections Inspector Porter issued an Inspection Report stating that Respondent had violated the regulations issued under the Act.

5. On each of the seven inspections, Respondent was in violation of the sanitation standards at 9 CFR §3.26 (d) in that the floor of the main building was not impervious to moisture, preventing proper cleaning and sanitation. On each of these occasions, peeling paint was observed on the floor.

6. On each of the seven inspections, Respondent was in violation of the pest control standards at 9 CFR §3.31 (b) and (c) in that numerous observations of rodents, animal waste, excessive fruit flies, and cobwebs were observed.

7. On February 13, 2006, there were between 200-250 dead hamsters in their containers. Many had been cannibalized. In some containers, there were live baby hamsters with dead adults; in other containers there were cannibalized newborns. This constitutes a violation of 9 CFR § 2.40 (a) (3) in that it indicated a lack of proper veterinary care, and in particular a lack of daily observation of all animals to assess their health and well-being.

8. The fact that Inspector Porter observed a single sickly guinea pig on her October 27, 2005 inspection, two sickly guinea pigs on November 14, 2006 and one disoriented guinea pig on December 19, 2006 does not constitute sufficient proof that the proper veterinary care and daily observation regulations were not complied with on those two occasions.

9. On February 14, 2006, November 14, 2006 and January 25, 2007, wet and moldy food pellets and a buildup of fruit flies were observed in numerous hamster enclosures. This

constitutes three violations of 9 CFR § 3.29(a) which requires that food should be free from contamination.

10. On November 14, 2006 and December 19, 2006 numerous water bottles had black mold growing inside. This constitutes two violations of 9 C.F.R. § 3.30.

11. On several occasions, containers with live hamsters were temporarily stacked for cleaning purposes. I find that Complainant did not meet its burden of proof to demonstrate such temporary stacking presented a risk of crushing or suffocation.

12. On various occasions, Respondent committed violations by having open food bags, contaminated bedding, and several holes in ceilings or walls.

13. Each of the violations committed by Respondent was “willful” as that term is used in the Animal Welfare Act and underlying regulations.

Order

1. Respondent is assessed a civil penalty of \$10,000.
2. Respondent’s dealer’s license is suspended for three months and continuing until Respondent demonstrates that it is in full compliance with the Act and the regulations issued thereunder.
3. Respondent is ordered to cease and desist from violating the Act and the regulations thereunder.
4. The effective date of the license suspension and civil penalty imposed by this Order is stayed for sixty days from the date this decision is served on Respondent. If Respondent demonstrates to Complainant within 60 days of the date this decision that it has come into full compliance with the Act and the regulations thereunder, particularly with respect to the

violations concerning impervious surfaces and pest control, then the civil penalty will be reduced to \$2,500 and the suspension order will be not be implemented.

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 26th day of November, 2008

Marc R. Hillson
MARC R. HILLSON
Chief Administrative Law Judge