

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	AWA Docket No. 03-0023
)	
JOHN F. CUNEO, JR., an individual;)	
THE HAWTHORN CORPORATION,)	
an Illinois corporation; THOMAS M.)	
THOMPSON, an individual; JAMES G.)	
ZAJICEK, an individual; JOHN N.)	
CAUDILL, III, an individual; JOHN N.)	
CAUDILL, JR., an individual;)	
WALKER BROTHER'S CIRCUS, INC., a)	
Florida corporation, and DAVID A.)	
CREECH, an individual,)	
)	
Respondents)	

Decision as to James G. Zajicek

In this decision, I find that Respondent James G. Zajicek: (1) was entitled to exhibit elephants under the license of the owners of the elephants and did not need to obtain a separate exhibitor's license in his own name, (2) did not overwork or otherwise mishandle the elephant Joy on June 26, 2001, and (3) did not abuse the elephant Ronnie on June 26, 2001. Accordingly, I dismiss all of Complainant's counts against Mr. Zajicek.

Procedural Background

This case was initiated by the filing of a complaint on April 11, 2003, by the Acting Administrator of the Animal and Plant Health Inspection Service (APHIS), charging two corporations and five individuals, including Respondent James G. Zajicek, with numerous willful violations of the Animal Welfare Act, 7 U.S.C. § 2131 et seq.

Respondent Thompson and Complainant agreed to a Consent Decision and Order which was approved by Administrative Law Judge Jill S. Clifton on May 15, 2003, while the remaining Respondents filed timely answers to the complaint. On July 16, 2003, Chief Administrative Law Judge James W. Hunt reassigned the case to me. On September 5, 2003 Complainant filed a Motion to Amend Complaint, which I granted, over the opposition of several Respondents, on December 23, 2003. The amended complaint added an additional Respondent, David Creech, upon whom service has never been effectuated, and who has not participated in these proceedings, and added additional allegations against some of the other Respondents. The amended complaint did not contain any additional allegations against Respondent Zajicek. The remaining Respondents, including Zajicek, filed timely Answers to the Amended Complaint.

Numerous prehearing motions were filed and briefed by the parties. On February 23, 2004, I denied motions to take depositions, to Compel Compliance with Disclosure Order, and to Compel Production of Exculpatory Evidence. I also issued subpoenas on behalf of both Complainant and Respondents. The parties also filed a number of in limine motions, and Complainant filed a Motion to Quash Subpoenas.

Shortly before the hearing was to commence, I was notified that Complainant had reached settlement with all remaining parties except for Mr. Zajicek, and the parties orally notified me that the hearing would only need to be conducted with respect to the allegations against Mr. Zajicek. On March 12, 2004, I signed a Consent Decision and Order as to Respondents John F. Cuneo, Jr. and The Hawthorn Corporation, and on March 29, 2004, I signed a Consent Decision and Order as to Respondents John N. Caudill, III, John N. Caudill, Jr., and Walker Brother's Circus, Inc.

On March 8, 9, 10 and 11, 2004, I conducted a hearing in Washington, D.C. in this matter. I heard further testimony, including remote audio-visual testimony of one witness, on March 25. After an assortment of delays, the hearing was finally concluded on October 28, 2004. Complainant was represented by Bernadette Juarez and Colleen Carroll, and Respondent was represented by Derek Shaffer and Vincent Colatriano.

Findings of Fact

1. On June 26, 2001, Complainant inspected the Sterling and Reid Circus, which at that time was performing at a fairground in Marne, Michigan. CX 16¹, ZRX 18, CX 109, Tr. 76-77. The inspection was conducted by a team consisting of three USDA employees, Dr. Denise Sofranko, Joseph Kovach, and Thomas Rippy. Tr. 87-88. They were accompanied by a Michigan Department of Agriculture inspector, Al Rodriquez. Id. The inspection was part of a multi-day inspection of circuses where elephants owned by the Hawthorn Corporation were being exhibited. Tr. 340-341.

2. James Zajicek, the trainer who exhibited Hawthorn's elephants at the Sterling & Reid circus on June 26, 2001, did not have a license, issued under the authority of the Animal Welfare Act, to exhibit elephants. Tr. 503. In fact, even though he has been around elephants throughout his adult life, and has been exhibiting elephants as a performer for years, he has never had a license to exhibit elephants. Tr. 487, 503, ZRX 9. He said he has been inspected many times over the years by USDA, and has never been told that he needed his own license, nor has he ever been cited for failure to have a license. Tr. 503-506. There is no factual dispute that Mr. Zajicek did

¹ Complainant's exhibits are designated by "CX"; Respondent's exhibits are designated by "ZRX"; and Transcript references are designated by "Tr." The record citations are not exhaustive, i.e., where a fact is mentioned numerous times in the record, I did not cite each and every instance.

not have a license on the date of the inspection, or any other time he was performing elephants, nor is there any dispute that Hawthorn, the owner of the elephants, did in fact have a license to exhibit. Tr. 506, ZRX 11-15.

3. It is apparent that the contract between Zajicek and Hawthorn had aspects that could be used to justify his status as either an independent contractor or an employee. The characterization of Mr. Zajicek's relationship with Hawthorn is the subject of some dispute, with Complainant contending that Zajicek was an independent contractor, and Zajicek contending that he was an employee. As I discuss later, a resolution of this issue is not necessary.

Thus John Cuneo, owner and president of Hawthorn, in an affidavit taken a month and a half after the inspection, specifically categorizes Zajicek as an independent contractor, who "trains, cares for, handles, transports and exhibits the 4 Asian elephants owned by the Hawthorn Corporation." CX 20, p. 2. The contract itself referred to Zajicek as an "independent performing artist," income and social security taxes were not withheld from his paycheck, his income was reported by Hawthorn on Internal Revenue Service Form 1099 and was characterized as "Nonemployee compensation," and he was allowed to keep a percentage of money he collected for giving elephant rides without that money being reported to the IRS by Hawthorn. CX 105, CX 106 at p. 10, Tr. 656-657. There were numerous clauses in the contract dealing with its voidability and transferability. CX 105 at p. 28. Complainant concedes that a "bona fide employee" may operate under its employer's license. Comp. Br. at p. 5.

Although Respondent contends that he need not have an exhibitor's license whether he is found to be an independent contractor or an employee, he argues that his

relationship with Hawthorn meets many of the accepted indicia of employee-employer relationships. Respondent's Brief at pp. 16-18. Thus, he points out that he had four years of back-to-back contracts with Hawthorn, that he received a paid vacation, that all his appearances were in shows scheduled by Hawthorn, that the contract made it clear that Hawthorn had the right to control the manner and means of the performance, that Hawthorn owned the four elephants Respondent was performing, etc. Id., Tr. 496-499.

4. During the afternoon of June 26, Mr. Zajicek used his ankus to prevent Ronnie from striking Joy with her trunk. The impact on Ronnie's trunk was such that a small wound resulted, but attempts by the inspection team to photograph the wound were unsuccessful.

The parties' descriptions of the events of June 26 coincide in many areas, but in several critical aspects the accounts of the events of that day are so different as to be astounding. In particular, the two principle witnesses, Dr. Denise Sofranko for the Complainant, and Mr. Zajicek, gave accounts concerning the pivotal animal abuse issue that in many respects were utterly inconsistent.

The USDA inspection team arrived at the fairgrounds in Marne in the afternoon of June 26th, at approximately 3 p.m. Tr. 77. The weather was sunny, hot and humid, with an afternoon temperature of approximately 90 degrees. Id. The June 26 inspection, and the inspection they were planning to conduct the next day at a different circus also utilizing Hawthorn elephants, was prompted by public complaints by animal rights organizations of elephant abuse against Hawthorn. Tr. 95-96. The State inspector was focusing on horses, while the three USDA inspectors were primarily concerned with the elephants. Tr. 89. When they first arrived at the fairgrounds, the team observed that four

elephants were in an enclosure, and that one of the elephants, identified as Joy, was saddled to give rides. Tr. 78. The elephants usually gave rides during intermission, as well as before or after the show, and Joy gave some rides during the June 26 intermission. Tr. 81.

The team then entered the performance area. Tr. 78-79. Even though the afternoon show was not very well attended, and there were plenty of seats available fairly close to the performance area, the team elected to sit in the higher rows of the audience so as to get a better view of the proceedings. Tr. 374. Since they were seated apart from the audience, and were wearing khaki inspector uniforms, they were easily discernible as USDA inspectors to Mr. Zajicek. Tr. 551-552. The circus ring was about forty feet in diameter. Tr. 540. Investigator Rippy estimated that they were elevated about five to six feet above the circus ring, and that they were seated about 50-60 feet from the ring. Tr. 107, 113.

The elephant performance took place during the second half of the show. The show had 18 performing acts with one intermission, which lasted about 20 minutes. Tr. 531-533. The elephant performance took place after intermission and lasted about eight minutes according to Zajicek (Rippy testified that he thought the act was 20 minutes long, but that it may have been only lasted 10 minutes. Tr. 103-104). Tr. 532. The act involved four elephants—Ronnie, Joy, Jackie and Gypsy (all female), and they were led through their routine by Mr. Zajicek, who was assisted by two helpers. Tr. 541. Dr. Sofranko testified that during the performance she saw Mr. Zajicek strike one of the elephants with his ankus, although she was unable to identify which one. Tr. 201. An ankus, also known as a bull hook, is a tool used by trainers and handlers to guide or cue

elephants, and consists of a sharp spike and a hook on a short pole. ZRX 8, Tr. 521-525. Dr. Sofranko was unable to state how far back Zajicek's arm was raised before striking the blow, but stated that he did not do it gently. Tr. 380-381. No one else in the inspection team saw Mr. Zajicek strike an elephant during the course of the performance, although Mr. Rippy testified that Dr. Sofranko remarked to him that one of the elephants had been "hooked²," even though all were watching the elephant performance and were specifically there to investigate allegations of elephant abuse. Tr. 78-79, 125, 204. No videotape was made of the performance.³ However, Mr. Rippy did not see Mr. Zajicek do anything during the elephant act that he would consider a possible violation of the Act. Tr. 126. There was apparently no discernible audience reaction. In addition, both Dr. Sofranko and Rippy testified that they saw one of Zajicek's assistants—Mark Pierson—"rake" an elephant's back, although they never identified which elephant and never subsequently inspected the backs of any of the four elephants. Tr. 79-80, 202. Mr. Zajicek testified that he never struck an elephant during the course of this performance. Tr. 541.

Subsequent to the show, the USDA team continued their inspection. Dr. Sofranko testified that she introduced herself to Zajicek at the elephant enclosure, asked him questions about foot care, equipment, etc., and then informed him that she had seen him hit an elephant with his ankus. Tr. 202. She said he pointed out the hook wound on Ronnie's trunk, and that he stated he hit her **during the performance** because she was showing aggression towards another elephant—Joy. Tr. 201-202. She stated that once

² I.e., struck with the pointed hook of the ankus.

³ Mr. Rippy testified that his camera was capable of taking fifteen to thirty seconds of video, but that he did not do so. Tr. 163. Apparently, at the inspection conducted at another circus the next day, the group inspection team did have access to a video camera. Tr. 162-164. With the resources APHIS devoted to this investigation, it is more than a little puzzling why there was no attempt to videotape the performance.

she told him she was going to write him up for a violation for striking Ronnie, Mr. Zajicek became quite upset. Tr. 205.

Zajicek's account of the post-performance events differs. He stated that the inspection team approached him about 10 minutes after the show ended and that Dr. Sofranko asked to see his paperwork, which he showed her, along with the foot tools, the feed storage area, etc., and then she asked to have the elephants brought to her. Tr. 553-556. He stated that he was in the corral but that she decided to stay outside the corral. Tr. 556. When he brought Joy over, he stated that Ronnie tried to hit Joy with her trunk and that he quickly reacted by using his ankus to grab Ronnie's trunk and prevent her from taking a shot at Joy. Tr. 557-558. Then he testified that he brought Ronnie over to where Dr. Sofranko was standing, and on his own pointed out that there was a mark on Ronnie's trunk where she had been struck by the ankus. Id. When she told him that constituted abuse, and that she would write it up as a noncompliance, he became very upset. Tr. 560.

There is no disagreement that Dr. Sofranko did not ask to see any of the other elephants close up, including an elephant that she and Rippy thought was "raked" across the back by one of the people who assisted Zajicek in his performance. Likewise, there is no dispute that Sofranko asked Rippy to photographically document the injury to Ronnie, that Zajicek brought Ronnie to an area where Rippy could photograph the trunk, and that Rippy took a number of digital photographs of Ronnie's trunk, from a fairly close distance ("more than 10 feet," Tr. 143), using a zoom lens. Tr. 141-147. No witness was able to testify that the photographs showed any discernible mark on Ronnie's trunk that would have been caused by an ankus, and my examination of the photographs

indicates that they reveal nothing that appears to be an injury to Ronnie's trunk. Tr. 156, ZRX 37, pp. 25-28.

Whichever account is correct, there is no dispute that as a result of the use of his ankus, Mr. Zajicek caused a wound to appear on Ronnie's trunk, and that Complainant's efforts to photograph the wound did not result in any picture actually depicting a wound. Dr. Sofranko described the wound as open and oval in shape, that there was some blood and oozing, and that the epidermis was punctured. Tr. 205. Mr. Zajicek described the wound as more like a pin prick, about one-fourth of an inch in diameter, and with a little blood. Tr. 524. Mr. Rippy testified that he saw a mark, and in his affidavit indicated the mark was approximately $\frac{3}{4}$ by $\frac{1}{4}$ inch with a "bright red area in the center," ZRX 18, p. 2, but that it was not visible if Ronnie's trunk was flexing the wrong way. Tr. 159.

While many aspects of the testimony of Dr. Sofranko and Mr. Zajicek are irreconcilable, there are many pertinent points of agreement. Both agree that sometime on the afternoon of June 26, Mr. Zajicek used his ankus on Ronnie, and that there was some sort of wound that resulted from the ankus contacting Ronnie's trunk, that Dr. Sofranko told him she was going to write him up, that he became upset and tried to convince her otherwise. While Mr. Zajicek states that the cause of this ankus usage was to separate Ronnie and Joy in the corral, and Dr. Sofranko contends that the wound was caused during the performance, Complainant does not dispute Zajicek's statements that he had to use the ankus to curb aggressive behavior of Ronnie towards Joy.

5. Joy gave rides during the course of the inspection on June 26th. There is no evidence that would demonstrate that Joy did not have rest periods between

performances in the elephant act, and in giving rides, that were not at least equal to the time she was performing.

With respect to the issue of whether Joy was overworked by not receiving adequate rest periods between performances, there is no dispute that Joy gave rides on June 26th, and that she also was one of the four elephants that performed two shows on that date. Mr. Rippy testified that he saw Joy giving rides before the show, and during intermission, and that when the USDA party was leaving the fairgrounds at approximately 7:30 p.m., Joy was giving rides. Tr. 98-99. He couldn't speak to the number of rides Joy gave, stating that it might have been less than ten rides. Tr. 101-102. Several of the photographs taken by Mr. Rippy show that Joy was giving rides to different children. CX 22. However, neither the pictures nor the testimony of Complainant's witnesses specify for how long Joy was giving rides, and how long the intervals were between rides. Tr. 166. In fact, several of the photographs in CX22 showed Joy standing around idle, or chewing on what appears to be a substantial mouthful of hay. Dr. Sofranko contended that Joy was basically working continuously the entire afternoon because she was either giving rides, was ready to give rides or was performing, and that even when an elephant is wearing a headdress between rides, they are in a work mode. Tr. 230-232. Complainant adduced no evidence which would show that Joy did or did not receive rest periods between her rides and her circus performances, nor was there any testimony demonstrating that Joy exhibited any signs of fatigue. Even if Complainant's observations were correct in their entirety, it appears that Joy could not have worked more than 15 or 20 minutes before the first show, then would have had a rest period during the entire first half of the show, then would have worked another 15 or

20 minutes during the intermission, followed by a wait of over half an hour before the elephant act actually performed, and that another 20 minutes would have passed before she again began to give rides.

Mr. Zajicek agreed that Joy was giving rides during the 26th. Tr. 533-538. He stated that there was a very light crowd that day, that Joy gave about 15 rides before the show (with each rider being considered a “ride” and the average number of riders being three or four children, this would amount to three or four trips for Joy), and that Joy gave about the same number of rides during a ten to twenty minute period during intermission. Id. His records indicate that 112 rides were given that day. ZRX 36. He further testified that Joy enjoyed giving rides, that she was not tired out during these sessions, that the weight Joy carried was minimal given her size, that veterinarians told him that rides were good exercise for the elephants, and that no one at USDA had mentioned any concerns to him during the post-inspection interview that Joy was being overworked on that day. Tr. 538-539.

6. Even though it is normal practice for USDA to give a copy of their inspection report at the conclusion of the inspection, no such report was provided to Mr. Zajicek, even though Mr. Zajicek testified that he demanded such a report.⁴

When Dr. Sofranko submitted her inspection report to the Agency on July 6, 2001, the only reference to any violation allegedly committed by Mr. Zajicek was for the hooking incident with respect to Ronnie. CX 15. Nor was there any mention of Joy’s workload by Mr. Rippy in his after-the-fact inspection report. Tr. 112, ZRX 18. It is undisputed that no USDA official notified Mr. Zajicek that they had a concern about whether Joy

⁴ It is interesting to note that Mr. Kovach, one of the inspection team, did give a copy of his brief inspection report to Mr. James Crawford, the circus manager, indicating that no non-compliant items were noted. CX 109.

was overworked—there is no evidence that any question was ever raised during or in the weeks after the inspection about this concern. Yet the inspectors are duty bound to notify the inspected party of possible violations so that appropriate, timely corrective action may be taken.⁵

Likewise, no USDA inspector indicated either in person, or in their inspection reports, that Mr. Zajicek needed an exhibitor’s license in his own right. There was no dispute that Mr. Zajicek had been inspected many times—85-100 in his estimation—without it even being hinted at that he needed an exhibitor’s license in his own right, as long as he was operating under a license of the owner of the elephants. James Crawford, a former longtime employee of Sterling and Reid who was circus manager at the time of the inspection, estimated that he knew of forty elephant handlers who were not owners of the elephants they handled, and had never heard of one being told they needed to get a license. He stated that he had never heard of this issue even being raised before this particular case. Tr. 975-978.

Statutory and Regulatory Background

One of the principle objectives of the Animal Welfare Act, 7 U.S.C. § 2131 et seq. (“the Act”) is “(1) to insure that animals intended for use . . . for exhibition purposes . . . are provided humane care and treatment.” In furtherance of this goal, the Act provides that “The Secretary shall issue licenses to . . . exhibitors upon application therefore,” 7 U.S.C. § 2133, “Provided, That no such license shall be issued until the

⁵ “If the inspector observes that the facility is not in full compliance with the AWA requirements, he or she will explain to the owner or manager all deficiencies noted during the inspection. The inspector will then give the owner a deadline for correcting these deficiencies.” ZRX-3, *Compliance Inspections*, January 2002 (from APHIS web site). See, also, ZRX 4, Tech Note, Animal Care, October 2000.

dealer or exhibitor shall have demonstrated that his facilities comply with the standards promulgated by the Secretary,” and that a valid license is required to exhibit animals regulated by the Act, 7 U.S.C. § 2134. The Act defines “exhibitor” as “any person . . . exhibiting any animals . . . to the public for compensation, as determined by the Secretary, and such term includes carnivals, circuses, and zoos.” 7 U.S.C. § 2132. The definition of “exhibitor” in the regulations promulgated by the Secretary at 9 C.F.R. § 1.1 is essentially the same as the statutory language, except that it modifies and expands the definition to include “animal acts.”

The Secretary has promulgated detailed regulations on the proper handling of animals:

§2.131 Handling of animals.

- (a)(1) Handling of all animals shall be done as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.
- (2)(i) Physical abuse shall not be used to train, work, or otherwise handle animals.
- (ii) Deprivation of food or water shall not be used to train, work, or otherwise handle animals; *Provided, however,* That the short-term withholding of food or water from animals by exhibitors is allowed by these regulations as long as each of the animals affected receives its full dietary and nutrition requirements each day.
- (b)(1) During public exhibition, any animal must be handled so there is minimal risk of harm to the animal and to the public, with sufficient distance and/or barriers between the animal and the general viewing public so as to assure the safety of animals and the public.
- (2) Performing animals shall be allowed a rest period between performances at least equal to the time for one performance.
- (3) Young or immature animals shall not be exposed to rough or excessive public handling or exhibited for periods of time which would be detrimental to their health or well-being.

(4) Drugs, such as tranquilizers, shall not be used to facilitate, allow, or provide for public handling of the animals.

(c)(1) Animals shall be exhibited only for periods of time and under conditions consistent with their good health and well-being.

(2) A responsible, knowledgeable, and readily identifiable employee or attendant must be present at all times during periods of public contact.

(3) During public exhibition, dangerous animals such as lions, tigers, wolves, bears, or elephants must be under the direct control and supervision of a knowledgeable and experienced animal handler.

(4) If public feeding of animals is allowed, the food must be provided by the animal facility and shall be appropriate to the type of animal and its nutritional needs and diet.

(d) When climatic conditions present a threat to an animal's health or well-being, appropriate measures must be taken to alleviate the impact of those conditions. An animal may never be subjected to any combination of temperature, humidity, and time that is detrimental to the animal's health or well-being, taking into consideration such factors as the animal's age, species, breed, overall health status, and acclimation.

The Act provides for the assessment of substantial penalties against violators, including civil penalties of up to \$2,500 per violation, and license suspension or revocation.

a) If the Secretary has reason to believe that any person licensed as . . . a[n] exhibitor . . . has violated or is violating any provision of this chapter, or any of the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

(b) Any . . . exhibitor . . . 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 \$2,500 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. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

7 U.S.C. § 2149.

Conclusions of Law and Discussion

Complainant has failed to meet its burden of proof with respect to any of the allegations that Mr. Zajicek violated the Animal Welfare Act.

1. There is no requirement that Zajicek obtain an exhibitor's license in his own name. Complainant has cited no case law or regulation that would allow it to expand upon or modify, without notice, its long-standing practice of not requiring a mere elephant handler or trainer to obtain a license. Complainant's contention that Zajicek must get a license is inconsistent with its previous practices, and seems to have been crafted for the first time in the prosecution of this case. Further, it would be impracticable for an individual who neither owns the elephants being exhibited nor is responsible for the facilities that are covered by the statute to qualify as a licensee. Finally, the nature of the employment relationship between Mr. Zajicek and Hawthorn is not material to my determination, as even if he is an independent contractor, I find that he still would not be required to get a license.

When an enforcement agency has a long-standing, widely understood interpretation and implementation of a statutory provision, it has some obligation, if it is

going to change that interpretation, to provide notice to those individuals or entities affected by the statute or regulation. Both Zajicek and Crawford testified that USDA had inspected them many times over the years, and that they were always under the impression, since they did not have licenses under their own names, that it was proper to exhibit under the license of the entity that owned the elephants and was in charge of the facilities where the elephants were exhibited. I find it of some significance that none of the people involved in the inspection indicated to Mr. Zajicek during the inspection that they had any concern that he did not have his own exhibitor's license, and that it was not mentioned in any of the relevant inspection reports. Dr. Sofranko testified on cross-examination that the "license number that fit the situation was . . . the license number of the facility that owns the elephants." Tr. 355. Thus, the inspectors appeared quite content to utilize the Hawthorn license number on the appropriate line in their reports. It appears that the first time Mr. Zajicek ever received notice that the Agency believed he should have had his own license was in the complaint issued nearly two years after the inspection.

While Complainant correctly states in its brief that the Act broadly defines "an exhibitor" as "any person . . . exhibiting any animals," (Comp. Br. At 2), this does not answer the question of whether multiple parties in the chain of exhibition, i.e., the circus owner, the animal owner, the animal trainer (if different from the person directing the performance itself) and the individual who performs with the elephants need to obtain their own exhibitor's license. The Act, and the regulations, makes it clear that any animal act, including one that is part of a circus, requires an exhibitor's license. Neither the Act, nor the regulations, nor any published policy issued by Complainant, specifically

addresses the issue of whether multiple vertically-integrated entities need a license, or whether an individual who does not own the exhibited animals or the animal care or training facilities is qualified or even entitled to obtain a license. While a rule, or even a published policy, would be entitled to deference, no document indicating an established policy one way or the other is in this record, and no such documents were submitted in response to the subpoena duces tecum I issued at Respondent's request. Thus, there is no opportunity for me to accord the Secretary's policy the type of deference that would be required under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The application materials that must be filled out to receive an exhibitor's license would also seem to counter Complainant's contention that Zajicek should have his own license. The application asks for the name of the owner of the animals, and requires "your veterinarian" to complete a form. ZRX 29⁶. There is nothing in this record indicating that Mr. Zajicek employed a veterinarian. The USDA published pamphlet "Licensing and Registration Under the Animal Welfare Act," ZRX 30, states that "Any owner exhibiting animals doing tricks or shows must be licensed. This includes each person owning animals performing in circuses." ZRX 30 at p. 11. Thus, the Agency's own guidance, which was in effect at the time of the June 26, 2001 inspection, and had been issued nine years earlier, appears to impose the licensing requirement on the owner of the elephants. There is no dispute that the owner of the four elephants in this case—The Hawthorn Corporation—was licensed. There is not even a suggestion in the guidance, nor in the application materials, that an individual who does not own the

⁶ I allowed ZRX 29 into evidence as an official record or document (along with ZRX 27 and 28), and I took official notice of ZRX 30. Tr. 915-916.

elephants, or manage the premises where the elephants are housed, or is not the person who hires the veterinarian who cares for the elephants, would be the person responsible for getting the license.

I make no finding as to whether Mr. Zajicek was an independent contractor or a bona fide employee of Hawthorn, as I find that any such distinction is not material to my determination that Mr. Zajicek was not required to get his own license to exhibit the elephants, as long as he was exhibiting under the license of the owner of the elephants. While Mr. Zajicek's employment status with Hawthorn on June 26, 2001 bore the earmarks of both employee and independent contractor,⁷ there is nothing in this record, including the Agency's own guidance documents and application, which would legitimize distinguishing between an individual who was an independent contractor and one who was an employee. While Complainant is correct that a "bona fide employee of a licensed exhibitor is not required to obtain his or her own license to exhibit animals," Comp. Br., p. 5, it does not logically follow that an individual who is in an independent contractor relationship with a licensed exhibitor must obtain his or her own license to exhibit animals.

Thus, in *William Joseph Vergis*, 55 Agric. Dec. 148 (1996), the Judicial Officer held that "at the very least, APHIS exempts employees of licensees from having to be licensed under the Act if those employees only exhibit animals on behalf of their employers." Id., at 157. However, the Judicial Officer declined to hold that an independent contractor, working on behalf of "persons who were properly licensed under the Act," Id., required his own license, even where the Respondent (Vergis) was admittedly an independent contractor. The Judicial Officer appeared to find significant

⁷ See pages 3-4, supra

that Vergis was not “made aware of any distinction drawn by APHIS between independent contractors and employees of licensees.” *Id.* The Judicial Officer further stated that if “Respondent’s actions had been for himself or for a person who was not licensed under the Act, Respondent would be found to have engaged in business as an exhibitor without a license, in willful violation of [the Act].” *Id.* Since Zajicek was working, either as an independent contractor or an employee, for Hawthorn Corporation, and since Hawthorn was licensed, the *Vergis* case does not support Complainant’s contention that Zajicek needed his own license.

Complainant also cites *Cheryl Z. Ziemann*, 57 Agric. Dec. 976 (1998) as authority supporting its contention that Zajicek needed to obtain a license. However, in that case, the respondent never even appeared at the hearing, and all of the allegations of the complaint were accordingly deemed admitted under Rule of Procedure 141(e)(1). Additionally, that respondent was cited as a dealer, and had been specifically told, both by the USDA and by the person for whom she was negotiating the purchase of dogs, that she needed to obtain a license. The facts in that case stand in stark contrast to the instant case, where the USDA never told Mr. Zajicek that he needed his own license until the issuance of the Complaint, where USDA’s practice was not to require a performing artist to obtain a license when the owner of the animals did have a license, and where Hawthorn Corporation, the owner of the elephants and the holder of the license, believed that Mr. Zajicek was properly performing the elephants on its license.

Thus, there was no requirement in the statute, regulations, or long-time agency practice that would lead an individual in Mr. Zajicek’s shoes to believe he would need a license to exhibit elephants in order to work as a circus performer.

2. The preponderance of the evidence does not support a finding that Zajicek violated regulations governing the amount and duration of rest periods between performances. Complainant has offered little in the way of hard facts in support of its contention that the elephant Joy was not given sufficient rest periods between her performances on June 26, 2001. There was no continuous observation of Joy by USDA inspectors, and none of the inspectors even hinted to Mr. Zajicek or to each other that they had any concern that Joy might be overworked. Thomas Rippy, the inspector who apparently spent the most time observing Joy, expressed no concern to Mr. Zajicek or his colleagues concerning Joy being overworked, and admitted that if he had been concerned, he would have so stated in his affidavit. Tr. 112-113. Yet his affidavit likewise expressed no concern that Joy was overworked. ZRX 18.

Complainant's evidence simply doesn't add up. Zajicek's records indicated that Joy gave 112 rides, usually involving around 3 or 4 children at a time, on June 26.⁸ This equates to about thirty short trips lasting less than a minute or two each around the corral, over the course of seven or eight hours, although counting the loading and unloading of the riders, each ride was probably three minutes in duration. Tr. 706-707. Mr. Zajicek estimated Joy gave about 15 children rides before the first show, with three or four children riding at a time, and about the same number during the intermission of the afternoon show. With respect to the actual performance of Mr. Zajicek's act involving the four elephants, Mr. Zajicek estimated the act took approximately eight minutes, and occurred during the second half of the circus performance. While Mr. Rippy testified that the elephant performance during the second act may have lasted for twenty minutes, Tr.

⁸ Complainant contends that additional free rides were given. However, there is no evidence that any free rides were given by Mr. Zajicek or his coworkers on June 26.

103, he also admitted that it could have been less than ten minutes, as Mr. Zajicek indicated. Tr. 104.⁹ There is no evidence indicating that Joy gave rides, or was even available to give rides, from the time the circus shows started through the beginning of the intermission, nor is there any such evidence for the time periods between intermission and the elephants' actual eight to ten minute performance, nor was there any such evidence for the period of time between the conclusion of the elephant performance and the conclusion of the circus show itself, which period Zajicek estimated lasted seventeen to twenty minutes. Tr. 736. Thus, it is apparent that at the very least, Joy had a lengthy break between her pre-show rides and her intermission rides, again between intermission and the actual elephant performance, then again a break of more than double the length of the performance time between the performance and her post-show rides. Since the schedule was presumably the same regarding the day's second show, there is very little substance to the contention that Joy did not receive rest periods that were at least equal to the time she performed, let alone to the contention expressed in Complainant's Opening Brief that "respondent failed to provide Joy with a rest period." Br. at 18. In fact there is no evidence that Joy did not have rest periods well in excess of the minimum requirements between her limited elephant ride sessions and performances.

There is some question as to whether the limited number of rides provided by Joy even qualify as "performances" within the meaning of the regulations. Dr. Sofranko testified that Joy would be considered "working" if she was even "on-call" to give rides because she was not being allowed to be on "elephant time"—that is she was not free to do whatever she wanted within the normal bounds of being in captivity. Tr. 211-214.

⁹ An undated videotape taken by Linda Roberson, ZRX 31, which showed an earlier but similar version of the performance of Mr. Zajicek and the elephants, was approximately eight minutes long.

She testified that the failure to be granted sufficient rest periods could lead to physical and mental fatigue, frustration, depression and anger. Tr. 214. Mr. Zajicek, with a lifetime of experience handling elephants, testified that Joy actually enjoyed giving rides, and that he had been told by veterinarians that giving rides was good exercise for elephants, particularly because elephants in their natural habitat walked from 15 to 25 miles a day. Tr. 514, 538-539.

Photographs taken by Mr. Rippy depict Joy giving rides at various times during the June 26 inspection. CX 22. There is no documentation as to what time the various photographs were taken, so no conclusions can be drawn as to whether the ride-giving was continuous even as to the periods of time when Joy was available to give rides. Only two of the seven photographs in this exhibit show Joy even giving a ride--CX 22a showing one rider, and CX 22e showing what appear to be three riders. While Joy is saddled during all seven of these photographs, she is just standing around chewing hay in CX 22b and c. There are no photographs or observations that would support a finding that Joy was giving rides without a rest period for any length of time, let alone for the entire afternoon and evening.

While there is no specific case law cited by the parties as to whether activities such as elephant rides are considered “performances” in the context of the regulation, I am satisfied that these rides are “performances” and that they require that rest periods be granted as per the regulations. However, it would be absurd to require a rest period after each individual ride, and I am satisfied that the lengthy time that elapsed between Joy’s afternoon pre-show ride session and her intermission ride session, the period between the intermission and the circus performance, and the period between the end of the circus and

her post-performance ride session, were easily longer than the time period that Joy was actually giving rides. This finding is particularly easy to make in light of the glaringly inadequate proof of any facts to the contrary—no one was able to testify that Joy gave rides during these intervening periods which undisputedly exceed the periods that Joy was alleged to have been giving rides. It is unnecessary for me to rule as to whether the down times between rides in themselves constitute rest periods for Joy, or whether her merely being saddled, or wearing her “hat” constitutes a performance necessitating a rest period, because the times between the performance sessions, even with “performance” loosely defined to including the giving of rides, still results in rest periods in excess of performance periods for Joy.

Complainant also contends that the transportation of Joy in the early morning hours of June 27 violates the regulation concerning rest between performances. This contention is particularly meritless, in that it would take an extremely novel and baseless interpretation of performance to even transform the transportation of animals between shows into a “performance” under the Act and the regulations. There is no evidence to indicate how many hours of rest Joy had after giving rides in the evening show and before she was transported, nor is there any evidence of how much rest she had after being transported. Thus, even if transportation of Joy was a “performance,” which it is not, there is no factual basis in this record that would demonstrate that Joy did not receive more than adequate rest before and after this “performance.”

Thus, Complainant has failed to show, by a preponderance of the evidence, that Mr. Zajicek’s handling of Joy during June 26, 2001, violated the regulations governing rest periods between performances.

3. Mr. Zajicek's handling of Ronnie and Joy did not violate the Act.

Respondent is charged with using physical abuse to train, work and handle Ronnie, and with exhibiting Joy under conditions inconsistent with her good health and well-being. Complainant failed to prove any of these allegations.

During the course of the hearing, I closely observed the demeanor of the witnesses, particularly as it became evident that the accounts of Mr. Zajicek and Dr. Sofranko had some startling differences. One overwhelming impression I received was that of Mr. Zajicek's love for elephants, and particularly the four elephants he was working with in June of 2001.¹⁰ He has worked with elephants his entire adult life, starting with basic husbandry work and working his way up to training and performing in the ring. He maintains a large collection of elephant books. Tr. 493-494. Elephants are like a family to him: "Believe me, these elephants are like my children, I don't have a wife, I don't have any kids, these are my children." Tr. 569. Indeed, he consistently referred to the four elephants as a parent would refer to a child, describing their different personalities, and interactions, and the actions he needed to take to keep behaviors between the elephants on a harmonious level. The overall demeanor of Mr. Zajicek was not consistent with that of an individual who abused elephants.

On the other hand, Dr. Sofranko also appeared to be a generally credible witness. Her observations of Mr. Zajicek using the ankus to strike an elephant during the performance appear to be candid and, although these observations were not made by anyone else in her party, she did contemporaneously state to Mr. Rippy that she saw Mr.

¹⁰ "I just like elephants, I love elephants, I love everything about them, I like to read about them, I like to see them on my time off, I go visit other people with elephants." Tr. 494.

Zajicek strike an elephant with his ankus. I have no reason to question that she believed she saw Mr. Zajicek use his ankus in the manner described.

That being said, I am still a little leery in fully accepting either account of the incident that resulted in the wound on Ronnie's trunk. That Zajicek would use his ankus to prevent Ronnie from taking a "cheap shot" at Joy in Dr. Sofranko's presence in the corral, and then, without any prompting, point out to her that his actions resulted in a citation inviting visible wound on Ronnie's trunk, is a bit difficult for me to imagine. Showing an inspector who is assessing whether violations of the Animal Welfare Act have been committed that one's actions, even if properly taken, resulted in an injury is not consistent with human nature. At the same time, the fact that no one accompanying Dr. Sofranko saw what she saw, even though they were all focused on the elephants' circus performance, makes it difficult to believe that a significant abusive action took place. Dr. Sofranko's testimony also had many internal inconsistencies concerning where she was, and where Mr. Zajicek was, when viewing Ronnie in the corral, and whether Mr. Zajicek "brought" Ronnie over to her, as she testified repeatedly, and then stated on rebuttal that Mr. Zajicek was not even in the corral when he "brought" Ronnie over. Certainly, it is difficult to reconcile Dr. Sofranko's initial testimony with her rebuttal testimony in this area.

With all that being said, it is clear, and generally undisputed, that either during the circus performance, or in the corral after the performance, Mr. Zajicek used his ankus to prevent Ronnie from taking a shot at Joy, and in so doing caused a wound to appear on Ronnie's trunk. The wound punctured Ronnie's skin, and there was evidence of some bleeding. The wound was fairly small by any definition, given that it was caused by the

point of the ankus. Mr. Rippy took photographs of Ronnie's trunk, using a digital camera and a zoom lens from a distance of in the vicinity of ten feet, but no wound was visible in any of the photographs he took.

Complainant contends that by using the ankus to separate Ronnie from Joy, Mr. Zajicek was using physical abuse to train, work and handle Ronnie. I find that Complainant has fallen far short of showing, by a preponderance of the evidence, that the ankus was in any way misused by Mr. Zajicek, and find that his use of the ankus was proper under the circumstances. Indeed, as Mr. Zajicek testified, the ankus is mostly used as a cue for elephants in their training and in their performances, as was evident in the videotape of an earlier performance that was admitted into evidence. Tr. 518-519, ZRX 31. Mr. Zajicek testified that he used a lightweight ankus, short and with a thin handle, and ZRX 8 was a representative sample of his ankus collection (although he indicated that it would not have been bent when he used it). Tr, 520-523. The point of the ankus is designed to be small, so that if it had to be suddenly used to separate two elephants, any penetration of the skin would be similar to a pinprick. It is also designed to be sharp. Tr. 522.

Complainant has not demonstrated that using an ankus to prevent one elephant from possibly harming another is a violation of the regulations or the Act. Given the size of the elephants and the size of the mark left by the ankus, it is apparent that no undue force was applied by Mr. Zajicek. Given that elephants are very social animals, and that they have separate personalities, it is not surprising that within a group of elephants there would be different degrees of shyness and dominance. Mr. Zajicek described elephants as like children that never grow up, and that they normally pick their own pecking order,

with one elephant usually becoming the leader. Tr. 511-514. He indicated that the other elephants liked to pick on Joy, and that part of his job was to constantly manage the relationships between the elephants. He is always assessing the moods of his elephants, and has to intervene in many different ways every day. Tr. 514. While Dr. Sofranko testified that Mr. Zajicek struck Ronnie, there is no refutation of his contention that he prevented a possible harmful action by Ronnie against Joy. If anything, it appears that the action taken by Mr. Zajicek was totally appropriate. It certainly would be a major stretch for me to find that the manner he used the ankus constituted some form of abuse or excessive force, where the mark was so small that close-up digital photographs failed to disclose it. Where the burden of proof is on Complainant, and the Complainant had all the tools to document the size of the wound, and was unable to do so, the benefit of the doubt must go to Mr. Zajicek. This is particularly the case given the gravity of the charges against Mr. Zajicek. While there is no place for animal abusers in circuses, the preponderance of the evidence emphatically supports a finding that Mr. Zajicek is not an animal abuser, but rather a conscientious trainer who took appropriate actions to prevent one elephant from harming another.

That there was some sort of traumatic¹¹ injury to Ronnie which resulted in a break in her skin, with some bleeding and oozing, does not, of itself, make the case for abuse. The need to intervene arose so quickly that Mr. Zajicek had no choice, in his mind, but to quickly apply the ankus to prevent Ronnie from whacking Joy with her

¹¹ Dr. Sofranko defined trauma as harm or damage to living tissue. Tr. 215.

trunk.¹² The regulatory requirement is not an absolute one of never even allowing a scratch on an animal, particularly where far more severe injuries might result. Rather, the operative language requires an animal to be handled “as carefully as possible in a way that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.” 9 C.F.R. §2.131(a)(1). I find that Mr. Zajicek acted as carefully and prudently as possible under the circumstances.

It should be noted that preventing harm to Joy was only part of the reason for Mr. Zajicek’s use of the ankus. He stated that he did not believe that Ronnie would actually cause injury to Joy, but was more concerned about Joy’s behavior if she was startled by Ronnie’s striking her. He was concerned that she might have harmed one of the people in the corral, including himself. If he or one of his coworkers were bumped into and knocked down by a startled elephant, serious injury could result. Tr. 520. Dr. Sofranko herself agreed that the use of the ankus—even if it broke the elephant’s skin—might be appropriate in such circumstances. Tr. 323-325. Clearly, whether the wound was generated in the corral or in the circus ring, there were people in the vicinity who could have been hurt by a startled elephant. Thus, Complainant’s theory of ankus usage would appear to support Mr. Zajicek’s actions.

Separating the elements of the violations alleged to have been committed by Mr. Zajicek, and charging him with causing trauma, physical harm and unnecessary

¹² Complainant suggests in its brief at pages 10-11 that Mr. Zajicek could have used voice commands or repositioned himself, could have hired additional elephant handlers, or could have removed Ronnie or Joy from the performance. However, Mr. Zajicek testified without refutation that he had no opportunity to issue voice commands or reposition himself, which he clearly would have preferred over using the ankus, because it was a situation requiring him to act virtually instantaneously. How hiring additional elephant handlers would have improved the situation, particularly where Mr. Zajicek was present anyway, is unknown, as there was no testimony in this area. Likewise, the suggestions about removing Ronnie or Joy from the herd are not supported by any expert testimony, and would appear to be inconsistent with proper handling of elephants in light of their well-documented social tendencies.

discomfort, appears to be little more than an effort to increase the potential penalty for what appears to be a single instance situation with the ankus. It appears that any trauma, harm or discomfort were attributable to the single use of the ankus, which I have already found to be appropriate under the circumstances.

My finding that use of the ankus to prevent Ronnie from striking Joy applies to the charge that Mr. Zajicek used “physical abuse” to train, work and handle Ronnie. As Dr. Sofranko stated, physical abuse is “unnecessary trauma, unnecessary damage, unnecessary pain, discomfort.” Tr. 260. Using an ankus to prevent Ronnie from striking Joy, and perhaps causing more harm to other elephants as well as the people in the area, was entirely necessary and appropriate, and the minimal damage to Ronnie’s trunk is a testimony to the skillful, and humane, use of the ankus by Mr. Zajicek.

With respect to Joy, who I have already found was not worked without adequate rest periods, Mr. Zajicek is also charged with exhibiting Joy “under conditions that were inconsistent with [her] good health and well-being,” in violation of 9 C.F.R. § 2.131(c)(1). This appears to be based on the belief that by allowing Joy, who was shy or timid and who tended to get picked on, to mingle with the other three elephants, Mr. Zajicek was exposing her to physical and mental harm. Complainant offers little argument in their brief for this proposition, the primary basis for which is the acknowledgement by Mr. Zajicek that the other elephants tended to pick on Joy, and that therefore these herd dynamics compromised Joy’s mental well-being. Comp. Br. at p. 20, footnote 103.

Dr. Sofranko, while trained in many aspects of elephant management, and with a specialty in investigating elephant matters for APHIS, Tr. 184-188, testified that Mr.

Zajicek recognized that Ronnie's aggression towards Joy was a problem, but never suggested or implied that a cure for the problem was to segregate Joy from the other three elephants. While Dr. Sofranko stated that she was not a knowledgeable and experienced animal handler, and stated that people who take care of elephants are the real experts in the field, Mr. Zajicek obviously has a lifetime of experience working with elephants. He clearly recognized that the other elephants picked on Joy, and affirmatively took measures to "give Joy the opportunity to protect herself when in the corral, by the way we configured the corral, by the way we did other things, so that Joy had an escape route, if you will, and over a period of time—not a month, not two weeks, but over working with these elephants for approximately three years . . . I could turn them all loose in the same corral." Tr. 513. It is clear that as a result of working with these elephants, Mr. Zajicek devoted considerable effort to accommodate their four different personalities. He "constantly" monitored the elephants to try to ascertain their moods on any given day, and frequently intervened to assure that interactions between elephants, and between elephants and humans, would remain as safe as possible. Tr. 513-518.

Given the undisputed evidence that elephants are social animals, and the utter lack of evidence concerning what Mr. Zajicek could have done to satisfy the regulation with regard to Joy's "good health and well-being," there is no basis, let alone a preponderance of the evidence, to support a violation finding here. None of Complainant's witnesses suggested that it was wrong for Joy to be allowed to associate with the other three elephants, while Mr. Zajicek gave convincing testimony that he was aware of the "pecking order" with his elephants and was taking constant measures to deal with the situation. His testimony on the group dynamics of elephants was consistent with

that of James Crawford, who agreed with Mr. Zajicek that “elephants are like children,” Tr. 970, and with author and trainer Alan Roocroft, who wrote of the “intensely social” aspects of inter-elephant relationships.¹³ ZRX 26 at 25. What Complainant appears to be suggesting is that rather than try to acknowledge what appear to be normal social relationships between elephants, and to take measures to improve these relationships to reduce the possibility of harm to the elephants and the people around them, that instead Mr. Zajicek should have isolated (and effectively severely punished) Joy because she was the shyest elephant of the four. If anything, this would be “a devastating deprivation.”

Id.

4. Respondent was not denied due process by the conduct of Complainant.

Although I have found for Respondent on all counts, Respondent’s counsels’ comments, particularly in Respondent’s Proposed Findings of Facts and Conclusions of Law, concerning the conduct of Complainant, need to be addressed. In particular, Respondent has alleged that throughout the course of the proceedings, by virtue of Complainant’s failures to comply with USDA rules, the frequent unwarranted objections during the course of cross-examination of Complainant’s witnesses, the failure to disclose potentially exculpatory evidence in a timely manner, the obdurate resistance to subpoenas duces tecum issued by me, and the possible destruction of evidence, Complainant had conducted itself in an obstructionist fashion. I found many aspects of Complainant’s conduct throughout this case to be troubling and of concern, but I believe that there was no denial of due process because, over time, Respondent was able to eventually receive

¹³ An excerpt of Mr. Roocroft’s book was admitted as ZRX 26.

all the evidence to which he was entitled, was able to call the government witnesses he requested, and was able to fully cross-examine the government witnesses.¹⁴

The inspection team certainly appeared to fail to comply with its own rules and guidelines when it failed to provide Mr. Zajicek with a copy of any inspection report at the close of the inspection. This could have been prejudicial because, other than being accused by Dr. Sofranko of abusing Ronnie, Mr. Zajicek was not made aware at any time during or after the inspections that he was also potentially liable for a licensing violation as well as for mistreatment of Joy by failing to provide her adequate rest periods. While Mr. Zajicek testified that Dr. Sofranko indicated that no report was provided due to some equipment malfunction problem, Tr. 565-565,¹⁵ there is no good reason in this record why inspections reports were not in any event submitted to Mr. Zajicek shortly after the inspection. No good reason was ever offered as to why Mr. Zajicek did not receive inspection reports, or why he was never advised, apparently until the filing of the complaint in this case, that he needed an exhibitor's license, or that his treatment of Joy was other than in compliance with the Act.

With respect to the roadblocks to the cross-examination of witnesses by Mr. Zajicek's counsel, there is no question that counsel for Complainant made excessive and frequently meritless objections. There was a consistent pattern where objections were made to perfectly legitimate cross-examination, followed by discussion, followed by my ruling and directive to answer the question, followed by the witness asking for the question to be repeated. While this caused the hearing to drag on far longer than it should

¹⁴ Although there is little question that the excessive objections, and the long delay in complying with the subpoena duces tecum, significantly prolonged the hearing.

¹⁵ Although another of the inspectors, Mr. Kovach, did manage to give a copy of his inspection report to Mr. Crawford. CX 109.

have lasted, there was no prejudice to Mr. Zajicek, since eventually all of his legitimate cross-examination was allowed. I also note that the pattern of excessive objections did appear to gradually diminish over the course of the hearing, and I have no basis to believe that Complainant's tactics were deliberately obstructionist in this area.

With respect to the subpoenas, I had issued a subpoena duces tecum on behalf of one of the parties who settled on the eve of the hearing, for APHIS to produce its custodian of records and produce certain documents. Rather than file a motion to quash the subpoena, and rather than complying with the subpoena, Complainant announced near the start of the hearing that it believed the subpoena was no longer effective since it had been issued at the request of an entity that was no longer a party to the proceeding. Since the subpoena had requested information that was potentially pertinent to the defenses of many of the parties who were still in the case at the time of the request, I indicated that this "defense" was not particularly convincing, but I announced on March 11 that, rather than leaving an additional unresolved legal question, and given that the hearing was already scheduled to resume on March 25, I would issue a new subpoena if requested by Respondent. A new subpoena, issued solely at the request of Respondent, was delivered to and signed by me the next day.

On March 24, the day before the hearing was to reconvene, Complainant filed a motion to quash the subpoena, principally arguing that since the Rules of Procedure limited discovery, the only way for Respondent to receive the subpoenaed documents was through the FOIA process. Since the FOIA process could go on for many months, there was no practical opportunity for Respondent to receive the subpoenaed documents

during the course of the hearing. Complainant also raised issues, many of them valid, concerning the scope of the subpoena.

The rather severe limitations the Rules of Procedure impose on discovery are well established in the USDA case law. In fact, prior to the hearing in this case, I denied a motion filed by Mr. Zajicek to compel production of exculpatory evidence, and I likewise denied his motion for a continuance of the hearing pending his receipt of FOIA materials. However, as I believe I made clear in my bench ruling on March 25, the rules change for the actual trial. Thus, there is no limitation to my issuing a subpoena duces tecum requiring the Agency to produce its custodian of records, and to bring certain records to a hearing. I find it ironic that Complainant requested that I issue a similar subpoena requiring Hawthorn's custodian of records to appear at the hearing, and that the Hawthorn custodian appeared without objection, and brought the requested documents, even though Hawthorn was no longer a party to the proceeding. The rules authorizing me to issue subpoenas do not limit their issuance to non-USDA personnel, and do not state that where an FOIA request for information is pending, the same information can not be reached by subpoena. To allow the USDA to subpoena evidence and at the same time bar Respondent from utilizing the same process would be patently unfair and inconsistent with the Rules of Procedure, the Administrative Procedure Act, and due process generally.

Respondent subsequently prepared a subpoena which was substantially narrower in scope than the one I issued in March, and another motion to quash was filed by Complainant. I denied that motion on May 11. Copies of the photographs taken but not submitted into evidence by Complainant were finally turned over to Respondent on

July 9, 2004. The remaining documents submitted in response to the subpoena were produced on August 16-17.¹⁶

Unfortunately, it became evident during the **final** day of hearing on October 28, 2004, nearly six months after I denied the motion to quash the subpoena, that Complainant had in its possession a document that clearly was facially responsive to Respondent's request for documents. This document—a report by Mr. Kovach on his inspection of the Sterling & Reid circus for June 26—was submitted as part of the rebuttal case as CX 109, but should have been turned over in response to the subpoena. While the report does not mention Mr. Zajicek or his elephants, it clearly met the prerequisites in the subpoena concerning date, location, and circumstances. Dr. Sofranko specifically testified that Mr. Kovach was part of the team observing the circus act, and the subpoena pertinently requests “written observations or assessments of Mr. Zajicek, of any elephant handled or exhibited by Mr. Zajicek during the relevant time period, or of any facility at which Mr. Zajicek handled or exhibited an elephant during the relevant time period.” A written observation from one of Dr. Sofranko's inspection team that “No non-compliant items noted this inspection,” is clearly exculpatory vis-à-vis Mr. Zajicek and it should have been turned over in response to the subpoena. However, even though it would have been desirable to receive this information earlier, I find there is no lasting prejudice to Mr. Zajicek, as he could have requested an adjournment to call Mr. Kovach

¹⁶ Some of the submitted documents contained redactions. Unedited versions of a number of the subpoenaed documents were reviewed in camera. I found all the redactions to be appropriate. Additionally, Complainant initially declined to submit a privilege log to Respondent, which log was eventually produced, on my order, on October 5. Complainant had claimed that the privilege log was in itself privileged, but in the absence of any cited authority, and in recognition of the fact that common practice involves submission of the privilege log to the party who requested the documents, I directed that the log be produced.

as a witness if he desired. The document was admitted into evidence and the parties had the opportunity to argue its worth in their briefs, which they did to some extent.¹⁷

CONCLUSION AND ORDER

Complainant has failed to prove that Respondent James Zajicek committed any of the alleged violations of the Animal Welfare Act that were the subject of the complaint. Accordingly, I rule in favor of Respondent on all counts, and order that the case against him be dismissed.

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 17th day of August, 2005

MARC R. HILLSON
Chief Administrative Law Judge

¹⁷ Among several other similar matters mentioned by Respondent is the disappearance/destruction of Mr. Rippey's notes. While Mr. Rippey certainly appeared confused and a little embarrassed about his failure to locate his notes, and the subsequent discovery that they had been destroyed, I have no basis to make any conclusion that any abuse was committed in this area, by Mr. Rippey, his chain of command, or counsel.