

**UNITED STATES DEPARTMENT OF AGRICULTURE**  
**BEFORE THE SECRETARY OF AGRICULTURE**

In re: ) AWA Docket No. 05-0005  
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Marilyn Shepherd, )  
 )  
Respondent )

**Decision**

In this decision, I find that Respondent Marilyn Shepherd willfully violated the Animal Welfare Act (the “Act”) on at least 165 occasions by operating as a dealer without obtaining the required license from the Administrator of the Animal Plant and Health Inspection Service (APHIS). I am imposing a civil penalty of \$25,000 and a permanent disqualification from receiving a dealer’s license, and am issuing a cease and desist order against future violations.

**Procedural Background**

Following an investigation, a complaint was issued by Kevin Shea, Administrator of APHIS on November 23, 2004, alleging that Respondent Marilyn Shepherd was operating in violation of the Animal Welfare Act by selling at least 165 dogs on at least 26 occasions, without the required dealer’s license, between April and December 2002. The complaint alleges that these transactions were “in commerce” and as such were subject to the licensing requirements of the Act. The complaint sought civil penalties,

issuance of a cease and desist order from future violations, and permanent disqualification from obtaining licensing under the Act.

Respondent filed a timely answer to the complaint denying that she was a “dealer” under the Act, and denying that any violations took place. Respondent requested an oral hearing on the allegations.

On May 2, 2006, I conducted an oral hearing in this matter in Springfield, Missouri. Robert A. Ertman, Esq., represented Complainant, and Ronnie Williams, Ms. Shepherd’s spouse, represented Respondent. Complainant called four witnesses (including one, Sandra Rottinghous, who testified by telephone) and introduced exhibits CX 1 through CX 7. Respondent called one witness, Dr. Jerome Schmidt, and introduced exhibits RX 2, 3 and 4 into evidence. Both parties filed initial and reply briefs by July 12 and August 2, respectively.

### **Factual Background**

There are few, if any, pertinent facts in dispute in this matter. Respondent Marilyn Shepherd owns and operates a kennel in Ava, Missouri. CX 3, CX 4, CX 7, Answer. At the time the alleged violations were committed, the kennel did not have a license issued under the Animal Welfare Act, but was licensed by the State of Missouri. Respondent has previously been licensed under the Act, but in two previous enforcement actions initiated by APHIS, the license had been suspended.

APHIS investigators determined that on at least 26 occasions during calendar year 2002, Marilyn Shepherd sold a total of at least 165 dogs to NVK Kennels, a licensed dealer located in Seneca, Kansas and owned by Sandra Rottinghous. CX 1, CX 3. The dogs in question were picked up by Deborah Hubbard, a buyer-driver for NVK who lives

in Sparta, Missouri. CX 2, CX 4, CX 7. Ms. Hubbard considered herself an employee of NVK, and her job was “to contact dog breeders and book puppies for purchase for NVK Kennels.” CX 7, p. 1. When she first contacted Marilyn Shepherd to inquire about the availability of dogs for purchase, she explained to Respondent that she was employed by NVK and that NVK would be the purchaser of the puppies. CX 7, p. 1. When Respondent found out that Ms. Hubbard lived in Kansas but was soon planning to move to Missouri, Respondent told her to call back when she moved and that Respondent would then begin selling her puppies. CX 7, p. 2.

Soon after Ms. Hubbard moved she begin dealing with Respondent who would contact her by email or otherwise when she had puppies she wanted to sell. CX 7, p. 2. She picked up the puppies at Respondent’s kennel in the NVK Kennel van. CX 2, CX 7. Ms. Hubbard accepted physical custody and signed for the puppies, but never paid Respondent for them. CX 7. Rather, all payments for the puppies would be made by NVK Kennels. CX 1, CX 7. However, on picking up the puppies, Ms. Hubbard would then have them checked out by a veterinarian so they could get health certificates before transporting the puppies across the state border to Kansas and NVK. Tr. 21. When obtaining the health certificate the owner of the puppies was either listed as NVK or Ms. Hubbard. Tr. 21.

Daniel Hutchings, a senior investigator for APHIS, testified that Respondent confirmed to him that she had around 200 dogs in her kennel. CX 4. Respondent further acknowledged that she sold all of the 165 puppies at issue to Ms. Hubbard, even though she also confirmed that the checks paying for the puppies all came from NVK Kennels. CX 4, p. 1.

Dr. Jerome Schmidt, an experienced veterinarian, testified that in his auction business, dogs belong to the new owner at the moment the dogs are sold, notwithstanding the fact that they have yet to be paid for. Tr. 64-65. This apparently follows the policy of the American Kennel Club.

### **Discussion**

The Animal Welfare Act regulates “animals and activities” that “are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof.” 7 U.S.C. § 2131. The Act requires that dealers, including those who “sell or offer to sell or transport or offer for transportation, in commerce . . . for use as a pet any animal . . . unless and until such dealer . . . shall have obtained a license from the Secretary and such license shall not have been suspended or revoked.” 7 U.S.C. § 2134.

It is undisputed that Respondent did not have a license during the period that the violations were alleged to have occurred. Respondent’s primary contention is that she did not need a license, as she was not engaged in interstate commerce, nor was she involved “in commerce” within the meaning of the statute. Respondent contends that because she delivered the dogs in question to Deborah Hubbard, NVK’s employee, within the state of Missouri, that she could not be found to be engaged in commerce, even though it is undisputed that Respondent and Ms. Hubbard were both aware that the dogs were clearly intended to be taken to NVK’s Kansas location. Complainant contends, with ample support, that the sale of these 165 dogs was in commerce, and that Respondent’s sale of these dogs without a dealer’s license was a violation of the Act.

Two prior cases involving Complainant and Respondent are particularly relevant to this discussion. In In re Marilyn Shepherd, 57 Agric. Dec. 242 (1998), Respondent

had been licensed as a dealer, but the license expired when APHIS refused to re-license her. *Id.*, at 257. Finding a number of violations, the Judicial Officer imposed a civil penalty and a cease and desist order against Respondent. Additionally, he suspended her dealer's license for seven days, stating that if she was not licensed at the time of the decision, then she would be disqualified from obtaining her license for 7 days and the disqualification period would continue until the \$2000 civil penalty was paid. There is evidence that the civil penalty was eventually paid (Respondent attached a copy of a check to her reply brief indicating that \$2202.09 dollars was paid to the U.S. Treasury on October 4, 1999<sup>1</sup>) but there is no evidence that Respondent applied for or received a new dealer's license pursuant to the Act.

After a subsequent inspection of Respondent's kennel, she was cited for a number of regulatory violations, as well as for operating without the required dealer's license. In that matter, *In re Marilyn Shepherd*, 61 Agric. Dec. 478 (2002), Judge Dorothea Baker, while finding in favor of Ms. Shepherd on the regulatory counts, ruled that she was in violation of the licensing requirement. "The fact that all of the puppies were bred, born and sold in the State of Missouri and that while Respondent had title, the puppies did not leave Missouri but were sold to an individual within the State of Missouri who subsequently sold over State lines, and who paid for the puppies from a Missouri bank, does not preclude the jurisdiction of the Secretary of Agriculture." 61 Agric. Dec. at 482. There is no indication that this decision was ever appealed, nor that the civil penalty assessed by Judge Baker was ever paid by Respondent.

If anything, the facts in the instant case are even more compelling in favor of Complainant. Ms. Hubbard made it extremely clear that she was not buying the puppies

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<sup>1</sup> Presumably the additional \$202.09 was late fees, interest and/or penalties.

in her own right, and that she was only an employee of NVK. Further, the checks in payment for the puppies were all issued by NVK, while in the prior matter the checks were apparently drawn on a Missouri bank and initially the dogs were sold to someone in Missouri. There is no question in this case that Respondent knew that the dogs were being sold to and delivered to an entity in Kansas.

Judge Baker also cited an opinion of the Attorney General of the United States' Office of Legal Counsel, issued in response to a request for an opinion from the Secretary of Agriculture. In that opinion, 3 Op. O.L.C. 326 (August 22, 1979), the Department of Justice's Office of Legal Counsel stated that the Animal Welfare Act even applied to "purely intrastate activities" as long as these activities "affect such [interstate] commerce." By expanding the definition of "commerce" to include "trade, traffic, transportation, or other commerce—(2) which affects trade, traffic transportation and commerce," 7 U.S.C. § 2131(c), Congress determined "that certain specified activities have a sufficient effect on commerce among the States to require regulation, even if they take place entirely within one State." *Id.*, at 327. Thus, the actions of Respondent in selling dogs to NVK via Ms. Hubbard without a dealer's license would be a violation of the Act even if the transactions did take place solely in Missouri. The evidence overwhelmingly shows that the true purchaser was located in Kansas, and that the arrangements of having the dogs picked up in Missouri and "sold" to Ms. Hubbard (even though she was unequivocally acting on behalf of NVK) were little more than a cynical attempt to bypass the requirements of the Animal Welfare Act.

That the AKC considers dogs sold at the time and point of delivery does not help Respondent's case here. The dogs were clearly sold to NVK Kennels and Respondent

was well aware that they were going to be transported from Missouri to Kansas—in the NVK Kennels van—after issuance of a veterinary health certificate. According to the Office of Legal Counsel opinion, even if the sale of the dogs was completely within the State of Missouri, and the dogs never even subsequently crossed state lines, the sales would be subject to the jurisdiction of the Secretary of Agriculture. Under the facts of this case, where the transactions involved sales to an out of state company through their in-state agent/employee and were paid for after delivery directly by that out of state company, I find that not only was Respondent engaged in activities that were in commerce or affecting interstate commerce, but that she was directly engaged in interstate commerce.

Respondent mentions several constitutional claims in passing. Without citing any authority, Respondent states that licensing requirements must be voluntary to be constitutional. While I do not have the authority to declare an Act of Congress unconstitutional, it is clear that no one is forcing Respondent to enter the business of breeding and selling dogs. Congress specifically required those who engage in this business to obtain a license. I find no valid constitutional challenge here.

Respondent also contends, citing Marshall v. Barlow's, 436 U.S. 307 (1978), that warrantless inspections are unconstitutional. In Barlow's, the Supreme Court did not outlaw, but rather established guidelines for, civil administrative warrantless inspections, and for the obtaining of civil administrative search warrants. There is not even an inspection of Respondent's facility at issue here. This case was generated by investigative interviews of Ms. Rottinghaus, Ms. Hubbard and Ms. Shepherd and the review of documents generated by NVK Kennels. While Ms. Shepherd was interviewed

at her residence, which was at the kennel site, there was no inspection undertaken. Thus, there is no basis for this constitutional challenge.

### **Findings of Fact**

1. Respondent Marilyn Shepherd is a breeder and dealer of dogs who operates a kennel in Ava, Missouri.

2. Although Respondent previously held a dealer's license issued under the Animal Welfare Act, she was not licensed during calendar year 2002.

3. Between April 10, 2002 and December 18, 2002, Respondent on 26 occasions sold a total of 165 puppies to NVK Kennels, located in Seneca, Kansas.

### **Conclusions of Law**

1. The Secretary of Agriculture has jurisdiction over this matter.

2. Each of the transactions mentioned in Finding 3 was, at the least, "in commerce" and required Respondent to have a valid dealer's license under the Act.

3. Respondent violated the Act, by operating as a dealer without a license, in willful violation of 7 U.S.C. § 2134. Each of the 165 transactions constitutes a separate violation of the Act.

### **Appropriate Sanctions**

Complainant has requested that, due to the seriousness of these violations, I issue a cease and desist order, assess a civil penalty of \$50,000 and permanently disqualify Respondent from obtaining a dealer's license. As serious as these sanctions are, I am not convinced that they would accomplish the purposes intended, given that Respondent apparently feels free to blithely ignore the prior imposition of harsh civil sanctions, and continue doing business illegally.



As Respondent stated to Senior Investigator Daniel Hutchings, “she did not agree” with the ruling of Judge Baker “and would fight the Government on this issue again if the Government charged her with this violation.” CX 4, p. 2. Refusing to comply with a lawful final order such as that issued by Judge Baker is unacceptable, to say the least. While I can, and will, issue a more serious sanction, Complainant may need to take further action to assure that Respondent complies with my order.

Although I have heard no information regarding Respondent’s financial condition, her kennel is not small. It appears that shortly after the time of these violations, she maintained 150 female dogs and 50 male dogs. CX 5. Looking at the other statutory factors, including the gravity of the violations, her utter lack of good faith, and her history of violations, I believe a civil penalty of \$25,000 would satisfy the Act’s requirements. In addition, I am issuing a cease and desist order directing Respondent to stop violating the Animal Welfare Act. Finally, I agree that Respondent should be permanently disqualified from being licensed, given the repeated nature of the violations, and her apparent disregard for the law.

### **Order**

1. Respondent Marilyn Shepherd, her agents and employees, successor and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued thereunder, and in particular, shall cease and desist from operating as a dealer as defined in the Act and regulations without being licensed as required.

2. Respondent Marilyn Shepherd is assessed a civil penalty of \$25,000, which shall be paid by a certified check or money order made payable to the Treasurer of the United States and which will be sent to counsel for Complainant at the following address:

Robert A. Ertman, Esq.  
USDA/OGC/Marketing Division  
1400 Independence Avenue, S.W.  
Room 2343-South, Stop 1417  
Washington, D.C. 20250-1417

3. Respondent Marilyn Shepherd is permanently disqualified from becoming licensed under the Animal Welfare Act.

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 31st day of August, 2006

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