

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 13-0281

In re:

CECELIA PINKSTON, an individual,

Petitioner.

DECISION AND ORDER GRANTING SUMMARY JUDGMENT

I. INTRODUCTION

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes (“the Rules”), set forth at 7 C.F.R. subpart H, apply to the adjudication of the instant matter. The case involves a petition for a hearing (“Petition”) filed by pro se petitioner Cecelia Pinkston (“Petitioner”) upon her objection to the United States Department of Agriculture’s (“USDA”; “Respondent”) denial of her application for an exhibitor’s license under the Animal Welfare Act, 7 U.S.C. §§2131 et seq. (“AWA” or “the Act”). The AWA vests USDA with the authority to regulate the transportation, purchase, sale, housing, care, handling and treatment of animals subject to the Act.

Pursuant to the AWA, persons who sell and transport regulated animals, or who use animals for research or exhibition, must obtain a license or registration issued by the Secretary of the USDA. 7 U.S.C. §2133. Further, the Act authorizes USDA to promulgate appropriate regulations, rules, and orders to promote the purposes of the AWA. 7. U.S.C. §2151. The Act and regulations fall within the enforcement authority of the Animal Plant Health Inspection Service (“APHIS”), an agency of USDA. APHIS is the agency tasked to issue licenses under the AWA.

This matter is ripe for adjudication, and this Decision and Order¹ is based upon the documentary evidence, as I have determined that summary judgment is an appropriate method for disposition of this case.

II. ISSUE

The primary issue in controversy is whether, considering the record, summary judgment may be entered in favor of USDA and Petitioner's request for a hearing should be dismissed.

III. PROCEDURAL HISTORY

On June 26, 2013, Petitioner filed with the Hearing Clerk for the Office of Administrative Law Judges (OALJ) ("Hearing Clerk") a request for a hearing regarding the denial by APHIS of her application for a license under the AWA. PX-1. On November 25, 2013, counsel for APHIS moved for summary judgment and filed documentation in support of its position, identified as "RX-1 through RX-7". Petitioner did not submit any documentation in response to my Orders issued July 10, 2013 and October 31, 2013. Petitioner did not respond to APHIS' motion within the time permitted in accordance with 7 C.F.R. §1.143(d).

All documents are hereby admitted to the record.

IV. SUMMARY OF THE EVIDENCE

On April 3, 2013, Petitioner filed an application for a license under the AWA. RX-5. By letter dated May 13, 2013, APHIS denied the application on the grounds that Petitioner had entered a "no contest" plea to a charge of violating a municipal ordinance of Fremont, Ohio, prohibiting animal owners from allowing animals to run at large, and had given false statements to local law enforcement agents when she alleged that she had a valid AWA license. RX-6. Police reports, Petitioner's request for review, and local court documents substantiate that

¹ In this Decision and Order, documents submitted by Petitioner shall be denoted as "PX-#" and documents submitted by Respondent shall be denoted as "RX-#".

Petitioner had allowed her monkey to escape from her home. PX-1; RX-2; RX-4. The investigating officer reported that Petitioner claimed to have a valid AWA license for the monkey, but the document she showed him had expired. RX-2. Petitioner admitted that she had represented that she had a valid AWA license. PX-1. By letter issued September 2, 2010, APHIS informed Petitioner that her AWA license # 31-B-0149 had expired because she had failed to timely renew her license and had failed to timely pay licensing fees. RX-7.

V. LEGAL STANDARDS

An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or other materials show that there is no genuine issue as to any material fact. Veg-Mix, Inc. v. United States Dep't of Agric., 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations); Federal Rule of Civil Procedure 56(c). An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. Alder v. Wal-Mart Stores, Inc., 144 F.3d 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. Schwartz v. Brotherhood of Maintenance Way Employees, 264 F.3d 1181, 1183 (10th Cir. 2001).

The usual and primary purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. Celotex Corp. v. Catrett, 477, U. S. 317, 323-34 (1986). If the moving party properly supports its motion, the burden shifts to the non-moving party, who may not rest upon the mere allegation or denials of his pleading, but must set forth

specific facts showing that there is a genuine issue for trial. Muck v. United States, 3 F.3d 1378, 1380 (10th Cir. 1993). In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. Adler, 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. Conaway v. Smith, 853 F.2d 789, 793 (10th Cir. 1988). However, in reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, 477 U.S. 262 (1986).

The AWA authorizes the Secretary of USDA to “issue licenses . . .in a manner as he may prescribe” (7 U.S.C. §2133) and to “promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of [the Act]” (7 U.S.C. §2151).

Pursuant to 9 C.F.R. §2.11(a) A license shall not be issued to any applicant who:

(5) Is or would be operating in violation or circumvention of any federal, State or local laws; or (6) Has made any false or fraudulent statements or provided any false or fraudulent records to the department or other government agencies, or has pled *nolo contendere* (no contest) or has been found to have violated any Federal State or local laws or regulations pertaining to the transportation, ownership, neglect or welfare of animals or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act.

9 C.F.R. §2.11(a)(5) and (6).

Pursuant to 9 C.F.R. § 2.5, Duration of license and termination of license, an AWA license shall be valid unless “the license has expired or been terminated”. 9 C.F.R. §2.5(a)(3).

Further:

Any person who is licensed must file an application for a license renewal and an annual report form. . . and pay the required annual license fee. The required annual license fee must be received in the appropriate Animal Care regional office on or before the expiration date of the license of the license will expire and automatically terminate...

9 C.F.R. §2.5(b).

Fremont, Ohio Municipal Ordinance, Chapter 505, Animals and Fowl, provides in pertinent part:

505.01 DOGS AND OTHER ANIMALS RUNNING AT LARGE.

(a) No person being the owner or having charge of cattle, sheep, geese, ducks, turkeys, chickens or other fowl or animals shall permit them to run at large upon any public place, or upon any unenclosed lands, or upon the premises of another. (ORC 955.22)

(b) No person being the owner of or having charge of any dog or cat, whether wearing a registration tag or not, shall permit such dog or cat on the premises of another or upon any public place unless such dog or cat is properly on leash. (Ord. 80-2096. Passed 8-7-80.)

(c) The running at large of any such animal in or upon any of the places mentioned in this section is prima-facie evidence that it is running at large in violation of this section. (ORC 951.02)

(d) Whoever violates this section is guilty of a minor misdemeanor.

VI. DISCUSSION

The facts are not disputed. Petitioner admittedly failed to secure her animal and it escaped from her home. She entered a plea of no contest to a charge of violating a local ordinance regarding failing to secure animals. Also, Petitioner did not have a valid AWA license at the time, as she had allowed it to expire in 2010. Petitioner had failed to pay the appropriate license fee and had failed to submit a completed renewal form. Petitioner tacitly acknowledged that she did not have a valid AWA license by submitting an application for a new license in April, 2013. Petitioner admitted that she had told the Officer that she held a valid AWA license. Accordingly, by asserting that she had a valid license in statements to the investigating officer, it is clear that Petitioner made false statements as contemplated 9 C.F.R. §2.11(a)(6).

The circumstances establish that APHIS appropriately denied Petitioner's application for an AWA license, pursuant to 9 C.F.R. 2.11(a)(6).

VII. FINDINGS OF FACT

1. Petitioner Cecelia Pinkston is an individual whose mailing address is in Fremont, Ohio 43420.
2. Fremont, Ohio Municipal Ordinance section 505.01 prohibits an owner of animals from permitting them "to run at large upon any public place, or upon any unenclosed lands, or upon the premises of another." RX-2 (Fremont Muni.Ord. § 505.01)(O.R.C. 955-22).
3. On June 9, 2011, Petitioner's monkey escaped from her home and engaged in activity that required the intervention of local police. PX-1; RX-2.
4. Petitioner held Animal Welfare Act license #31-B-0149 until it expired on August 27, 2010 for failure to renew. RX-7.
5. On June 9, 2011, Petitioner did not possess a valid Animal Welfare Act license when she told Sergeant Anthony S. Emrich, Fremont Police Department, that she did possess a valid Animal Welfare Act license. PX-1; RX-2.
6. On June 22, 2011, Petitioner entered a "no contest" plea and was found guilty of a violation of section 505.01A, of Fremont, Ohio Municipal Ordinances. O.R.C. 955-22. RX-4; PX-1.

VIII. CONCLUSIONS OF LAW

1. The Secretary, USDA, has jurisdiction in this matter.
2. The material facts involved in this matter are not in dispute and the entry of summary judgment in favor of Respondent is appropriate.
3. Petitioner's Animal Welfare license # 31-B-0149 expired on August 27, 2010 for failure to renew and was no longer valid pursuant to 9 C.F.R. §§ 2.5(a)(3); 2.5(b).

4. Petitioner made false statements to a law enforcement officer, which is one basis for disqualifying her for a license under the AWA pursuant to 9 C.F.R. §2.11(a)(6).
5. Petitioner pled no contest to a violation pertaining to her ownership of an animal, which is another basis for disqualifying her for a license under the AWA pursuant to 9 C.F.R. §2.11(a)(6).
6. APHIS' May 13, 2013, denial of a license to Petitioner pursuant to 9 C.F.R. §2.11(a)(6), promotes the remedial nature of the AWA.

ORDER

Petitioner is hereby disqualified from obtaining an AWA license.

Petitioner's request for a hearing is hereby DISMISSED, with prejudice.

This Decision and Order shall be effective 35 days after this decision is served upon the Petitioner unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk.

So Ordered this 27th day of January, 2014 in Washington, D.C.

Janice K. Bullard
Administrative Law Judge