UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	AWA Docket No. D-05-0002
Suncoast Primate	)	
Sanctuary Foundation ,	)	
Inc., a Florida corporation,	)	
	)	
Petitioner	)	

Ruling and Order Granting Motion for Order to Issue Exhibitor's License

In this ruling, I grant the motion of Petitioner Suncoast Primate Sanctuary Foundation, Inc. to order Respondent Animal Plant and Health Inspection Service (APHIS) to issue Petitioner an exhibitor's license under the Animal Welfare Act.

Background and Previous Rulings

The Animal Welfare Act provides that the "Secretary shall issue licenses to dealers and exhibitors upon application therefore." 7 U.S.C. § 2133. Regulations issued under the Act provide that the Secretary may deny initial license applications for a variety of reasons, including that the applicant has "had a license revoked or whose license is suspended." 9 C.F.R. §2.11(a). In 1989, the regulations were amended so that an "applicant whose license application has been denied may request a hearing in accordance with the applicable rules of practice for the purpose of showing why the application for license should not be denied." 9 CFR § 2.11(b). However, not until May

5, 2005 were the Rules of Practice amended to include license denials as among the proceedings to be heard by USDA's Office of Administrative Law Judges.[1]

This case involves the first hearing request challenging a license denial by APHIS since the May 2005 amendments. Following an August 17, 2004 license denial, Suncoast Primate requested a hearing, and I conducted a hearing in Tampa, Florida on November 15, 2005.

On June 7, 2006 I issued a decision where I remanded this matter to APHIS. In this decision I found, among other things, that the denial of the application for a license was proper because there was not enough information in the record to establish that Suncoast Primate was a different entity than the entity whose license had been revoked several years earlier. I further held that APHIS had a duty to properly and fully investigate and document the basis for denying a license, and that they did not do so in this case. Therefore, rather than issuing a final order affirming APHIS's denial of Suncoast's application, I remanded the matter to APHIS to conduct a full investigation, with specific timelines for each party to perform certain actions.[2]

Respondent did not comply with my directions on remand, but instead, without requesting a stay, waited until June 26, 2006 to file a Motion for Reconsideration. Suncoast filed a response opposing the Motion for Reconsideration, along with a separate

[1] 70 Fed. Reg. 24935 (May 12, 2005).

[2] "This matter is remanded to APHIS. Within 30 days from the issuance of this decision and order, APHIS shall inform Petitioner exactly what information they require in order to make a full determination as to whether Petitioner is a different entity from Anna Mae Noell d/b/a The Chimp Farm. Within 60 days from the date of this decision and order, Petitioner shall supply all requested information, and the parties may agree to any site visits as necessary. Within 90 days from the date of this decision and order, APHIS shall either grant Petitioner an exhibitor's license or affirm its denial with a sufficient explanation of its criteria for determining that Petitioner is the same entity. I will retain jurisdiction over this matter, and if the license is denied on remand, I will grant expedited consideration to Petitioner's request for supplemental briefing, or hearing, as appropriate."

motion informing me that Respondent had failed to comply with my June 7 order, and requesting that I issue it an exhibitor's license. While I denied the Motion for Reconsideration on July 28, 2006, I also denied Suncoast Primate's request for immediate license issuance. Instead, I slightly modified the timelines that I had established in my June 7 order, so that APHIS would have to make its final decision to grant or deny the license, after a full investigation, within 80 days from July 28, 2006 (which would have been not later than October 16, 2006).

On September 7, 2006 Petitioner filed a Motion for Order to Issue License. Petitioner contended that since 90 days had passed since my original order, and since I had stated in that order that APHIS must decide whether to grant or deny Petitioner's request for a license within 90 days, that the license should be granted.[3] Petitioner also filed a "Notice of Precedent" citing another matter where APHIS apparently issued an exhibitor's license to the son of an individual, after the father (who had lost his exhibitor's license) transferred the business to his son.

Respondent filed a Response on September 25, 2006. In the Response, Respondent contended that my June 7 decision fully disposed of this case. Respondent further asserted that an administrative law judge has no authority to order APHIS to issue an exhibitor's license, and that if a judge finds that license denial was improper, the judge cannot determine "whether the agency should or should not issue a license."

In a Supplemental Response filed on September 27, 2006, Respondent stated that a judge has no authority to order the agency to conduct an investigation, i.e., if the judge determines that an agency did not conduct a proper investigation to justify its

[3] Even though the date for APHIS resolution on remand was moved back to October 16, 2006, that date has passed as well.

conclusions, however unsupported these conclusions may be, and however inadequate the conduct of the agency investigation, a judge is powerless to impose a remedy. Further, Respondent stated that a judge has no authority to tell the agency how to conduct an investigation, or to direct an agency to tell an applicant what information would be needed to satisfy the agency that a license is merited.

I directed the Hearing Clerk's office to ask Petitioner whether they wanted to file a reply, since several of the issues raised by Respondent had never been mentioned during the prior course of the proceeding. Petitioner filed a reply on October 3, 2006 disputing the contention that a judge has no authority to issue a license. Petitioner said that without a judge having this type of authority, the hearing process would be "meaningless" and that my interim approval of APHIS's denial of the license was, in essence, a tentative remedy to be revisited upon the completion of a proper investigation. Petitioner argued that under the Administrative Procedure Act a judge does have the authority to order the issuance of a license and, since Respondent had not complied with the terms of my order indicating what information they needed, the appropriate remedy at this point was to direct APHIS to issue an exhibitor's license to Suncoast Primate.

I conclude that (1) my initial decision of June 7, remanding the matter to APHIS for further investigation did not constitute a final order; (2) I have the authority, if not the duty, to ensure that reviewable agency decisions are based on a proper record; (3) I have the authority to order APHIS to issue an exhibitor's license; and (4) immediate issuance of an exhibitor's license to Suncoast Primate is the proper remedy in this matter.

1. My initial decision remanding this matter to APHIS for further investigation did not constitute a final order. While I sustained the APHIS decision

not to grant a license, I made it abundantly clear that I viewed this ruling as something other than a final decision in this matter. Indeed, I took great pains to point out the inadequacies of the APHIS investigation, along with the likewise inadequate attempts on behalf of Suncoast Primate to provide information necessary for APHIS to make its decision on the basis of a full and complete investigation. The sentence in my opening paragraph that "I remand the case to APHIS to conduct a complete investigation as to whether Petitioner qualifies as a licensee under the Act" is not consistent with Respondent's contention that the decision was final.

Further, I stated that "The best way to assure a proper decision in this matter is to remand the matter to the Agency with instructions to both parties to assure the development of a more complete record, with a final decision based on that complete record." Decision, p. 12. Similarly, I stated that I was unable to make certain factual findings as to ownership of the land and the animals that would be necessary to making a final decision. Decision, p. 15. Finally, rather than stating that I was issuing a decision that would become final in the absence of an appeal, I stated that "This matter is remanded to APHIS." Decision, p. 16. These statements, combined with the repeated, specific language in my decision that APHIS was required to conduct a complete and proper investigation, are not consistent with Respondent's contentions as to finality.

If there was any doubt in Respondent's mind as to the finality of the decision, it could have raised the issue in the Motion for Reconsideration. Instead, Respondent chose to not comply with the specific deadlines I imposed.

2. I have both the authority and the duty to ensure that reviewable agency decisions are based on a proper record. While the rules do not specifically state that a

judge can or cannot issue orders directing that an agency's investigation supporting a license denial be conducted properly and completely, such authority is at least implicit in both the Rules of Practice and in the Administrative Procedure Act.

Given that this is the first case litigated since the adoption of rules which provided administrative adjudication availability for an applicant whose license was denied by APHIS, there is no particular precedent within the agency as to what an administrative law judge, or for that matter, the Judicial Officer acting on behalf of the Secretary, must do when he or she is confronted with an utterly inadequate investigation resulting in the denial of an application. The matter is particularly compelling in this case where APHIS sent out investigators who did not demonstrate that they had a clear idea of what they were looking for, and where there is a dearth of guidelines concerning what an investigator needs to be looking for to establish a basis for granting or denying an application. APHIS has issued inspector guidelines for "Compliance Inspections" under the Act[4], so that a party being inspected or investigated at least has some sort of idea of what the Agency is looking for, and there is guidance on what is necessary to comply with regulations. Here, there is not only nothing in terms of guidance, but the deciding official, Dr. Goldentyer, specifically testified under oath that if she was aware that ownership of the animals had been transferred to a different entity, which Petitioner contended at the hearing, then she might have decided otherwise on the license application. In a first impression case such as this, an administrative law judge must do more than stand by and allow agency decision making that is subject to administrative adjudication stand or fall on the basis of an inadequately developed record. Accordingly, I reject Respondent's contention that I did not have the authority to remand the case to

[4] http://www.aphis.usda.gov/lpa/pubs/fsheet_faq_notice/fs_awinspect.html.

APHIS for a further and more thorough investigation, including the authority to require APHIS to indicate to Petitioner what type of information was necessary for APHIS to make its decision[5].

3. I have the authority to order APHIS to issue an exhibitor's license.

Respondent's contends that an administrative law judge has no authority to order APHIS to issue an exhibitor's license to a petitioner in a license denial case. Respondent is basically stating that the hearing provisions for license denials create an utterly meaningless process, unless the judge affirms the government's position that the license should be denied. APHIS asserts that the only authority of an administrative law judge in a license denial case is to "determine whether the agency's denial of an application for a license was proper, not whether the agency should or should not issue a license." Thus, if a judge finds that a license was improperly denied, the applicant is left with nothing more than they would have with a decision that was adverse to them. This would make the judge's opinion, and presumably that of the Judicial Officer, merely advisory--something inconsistent with the administrative adjudication process. A denied applicant would thus have been duped into participating in costly litigation for which there could be no conceivable benefit, even where a license was improperly denied. I refuse to believe that when the Agency amended the rules to allow appeals of license denials to be handled according to the rules of practice, that it was in fact establishing a procedure that was contemplated as disallowing the only relief that the petitioner would be requesting.

[5] APHIS does have a publication, "Licensing and Registration Under the Animal Welfare Act," http://www.aphis.usda.gov/ac/awlicreg/awlicreg.html, which provides general guidance as to who must apply for a license and an explanation of the process, but that document provides no guidance for a situation, such as exists here, for determining whether an applicant has a relationship with a previous violator that would bring 9 CFR §2.11(a)(3) into play.

This notion is also inconsistent with the fact that a decision of an administrative law judge, if not appealed to the Judicial Officer, becomes the decision of the Secretary. 7 C.F.R. § 1.142(c). The Administrative Procedure Act at 5 U.S.C. § 557(b) provides that the decision of the initial presiding officer—in this case myself—becomes the decision of the agency. Since the agency has the authority to grant or deny Petitioner's appeal of its license denial, and since the decision of the administrative law judge binds the agency unless it is overturned by the Judicial Officer, it follows that I have the authority to issue a decision directing APHIS to issue Petitioner an exhibitor's license.

My interpretation, and that of Petitioner, is further substantiated by the very language used by the agency in adopting the hearing process for license denials. Thus, the agency wrote that "an applicant whose license application has been denied may request a hearing, and that the license denial shall remain in effect until the final legal decision has been rendered." 69 Fed. Reg. 42094, July 14, 2004; 70 Fed. Reg. 24935, May 12, 2005. (emphasis supplied).[6] This provision plainly means that, as a result of the hearing process, the license denial can be reversed by the administrative law judge and/or the Judicial Officer.

I am also concerned with the amount of time that has elapsed between the institution of this proceeding and Respondent's raising the issue of the administrative law judge's authority to order the requested relief. Petitioner made it clear from the filing of its Request for Hearing on September 7, 2004, that it was seeking a reversal of the APHIS's license denial and requested, as one of its alternative remedies, that the "denial of the license should be reversed." Not until nearly two years elapsed, during which I

[6] Dr. Goldentyer used the same language in her letter of August 17, 2004. "The license denial will remain in effect until the final decision is rendered."

conducted an oral hearing, and received briefs from both parties, was the notion raised that I could not grant the relief Petitioner requested even if Petitioner prevailed at hearing. While the Rules did not require Respondent to file an answer to the Petition, the provisions of Rule 1.136(d), which require a Respondent in an enforcement case to admit or deny all allegations, including jurisdictional ones, are a strong indication that the Rules contemplate that issues of authority and jurisdiction are not to be raised for the first time many months after the conclusion of the hearing.

4. Immediate issuance of an exhibitor's license to Suncoast Primate is the proper remedy in this matter. I have already explained that I believe I have the clear authority to order APHIS to issue an exhibitor's license if I rule in Suncoast Primate's favor. At this point, APHIS has made it abundantly clear that they do not believe an administrative law judge has such authority, in spite of clear regulatory language to the contrary. It has chosen not to comply with my remand order, and has left Petitioner, who has invested much time and effort in this proceeding, with no place to turn.

My original order in this case was an attempt to develop a record, with specific deadlines, so that a final ruling could be issued on Petitioner's license application. Respondent has made it clear that they do not intend to comply with any aspect of my order. Under the terms of my order, Respondent was directed, within 90 days of June 7, 2006, to "either grant Petitioner an exhibitor's license or affirm its denial with a sufficient explanation of its criteria for determining that Petitioner is the same entity [as Anna Noell and The Chimp Farm, Inc.]." Subsequently, Respondent was directed to grant the license or affirm its denial with 80 days of July 28, 2006. Both the initial and amended deadlines have passed, and Respondent has neither granted the license nor explained its criteria for

denial. Accordingly, I direct that Respondent immediately issue an exhibitor's license to Petitioner Suncoast Primate Sanctuary Foundation, Inc.

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 27th day of October, 2006

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MARC R. HILLSON
Chief Administrative Law Judge