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UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 15-0080

In re:

TIMOTHY L. STARK, an individual,

Respondent.

DECISION AND ORDER DENYING AND GRANTING SUMMARY JUDGMENT

I. INTRODUCTION

The instant matter was initiated by an Order to Show Cause why Timothy L. Stark's ("Respondent") exhibitor's license under the Animal Welfare Act, 7 U.S.C. §§2131 et seq. ("AWA" or "the Act") should not be terminated ("Show Cause Order"). The Show Cause Order[1] was filed by the Administrator of the Animal and Plant Health Inspection Service of the United States Department of Agriculture ("APHIS"; "USDA") with the Hearing Clerk for USDA's Office of Administrative Law Judges ("OALJ").

This matter is ripe for adjudication and this Decision and Order[2] is based upon the documentary evidence and arguments of the parties, 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 either USDA or Respondent, thereby mooting the need for a hearing in this matter.

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[1] Pursuant to the Rules of Practice Governing Formal Adjudications Before the Secretary, an Order to Show Cause filed by the USDA is tantamount to a complaint.

[2] In this Decision and Order, documents submitted by USDA shall be denoted as "CX-#" and documents submitted by Respondent shall be denoted as "RX-letter".

III. PROCEDURAL HISTORY

On February 25, 2016, counsel for APHIS filed with the Hearing Clerk for the Office of Administrative Law Judges (OALJ) ("Hearing Clerk") an Order to Show Cause Why Respondent's Animal Welfare Act License Should Not Be Terminated. On March 23, 2015, Respondent filed an Answer and motion for a hearing. On March 25, 2015, Respondent filed a motion to dismiss the Show Cause Order. On April 15, 2015, USDA filed an objection to Respondent's motion. By Order issued April 21, 2015, I dismissed the motion.

On April 16, 2015, I held a telephone conference with counsel for the parties, during which I was informed that each party anticipated filing motions for summary judgment. On June 3, 2015, USDA filed a motion for summary judgment. On July 28, 2015, Respondent filed a motion for summary judgment together with supporting documents.

On October 6, 2015, additional counsel for Respondent entered an appearance. Original counsel did not withdraw, and therefore all pleadings, Orders, and other documents shall be served on both counsel.

All documents are hereby admitted to the record.

IV. LEGAL STANDARDS

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. 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, 1198 WL 247700 (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, 2001 WL 1006180 (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, 1993 WL 325496 (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, 1988 WL 79269 (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 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. 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 contendre* (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).

V. POSITION OF THE PARTIES

USDA contends that because Respondent pled guilty on August 17, 2007, of violating the Endangered Species Act, 16 U.S.C. §§ 1538(a)(1)(E); 1540(b)(1) by knowingly, intentionally and unlawfully in 2004, selling, receiving, transporting and shipping in interstate commerce an ocelot, which is listed among those species identified as

endangered in a list of species published at 50 C.F.R. § 17.11(h), Respondent's AWA license should be terminated.

Respondent does not deny the factual underpinnings of the matter, but maintains that at the time of the illegal sale of the ocelot, he held AWA Class B Dealer License number 32-B-0175. In 2006, Respondent applied for an exhibitor's license, and USDA issued him license. The conviction did not involve a violation that occurred during the period when Respondent's Exhibitor license 32-C-0204 on November 27, 2007, was in effect, although the conviction was entered shortly before that license was issued by APHIS. Therefore, Respondent maintains, any action by USDA should have affected the license in effect at the time of illegal sale.

Respondent further maintains that the conviction did not relate to a law or regulation pertaining to animal cruelty and occurred years ago, and that APHIS did not make a timely determination that he was unfit to be licensed due to the illegal sale of the ocelot. APHIS has repeatedly renewed his license after first issuing it in 2007.

VI. DISCUSSION

The fact that in August, 2007, Respondent entered into a guilty plea that led to his conviction for selling a protected animal in interstate commerce in violation of the Endangered Species Act is undisputed, and admitted by Respondent. CX-2; RX-B. It is also undisputed that the Administrator of APHIS has authority to terminate a license to a licensee who is found to have violated a law pertaining to the transportation and ownership of animals where "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)(6).

Considering the evidence in a light most favorable to Respondent, I find that USDA has not demonstrated that Respondent's AWA license should be terminated. The evidence fails to establish that the Administrator of APHIS determined that the issuance of a license to Respondent would be contrary to the purposes of the Act. In fact, APHIS has renewed Respondent's AWA license following his conviction, most recently in November, 2014.[3] RX-A. There has been no allegation made, and no evidence presented, that Respondent failed to report his conviction, and I accord substantial weight to Respondent's declaration that the animal was not harmed in any way. See, Affidavit, at ¶ 9, RX-B.

The evidence also fails to support USDA's allegation that Respondent "...has been found to have harmed the animals in his custody..." Show Cause Order, at ¶ 4. Respondent's guilty plea clearly limits his violation of the Endangered Species Act in October, 2004, to one count in which Respondent agreed that he "did knowingly, intentionally and unlawfully receive, transport, and ship in interstate commerce an endangered species, namely, an ocelot he sold to an individual from Texas in the course of commercial activity..." CX-2, at ¶ 1. In addition, samples of inspections of Respondent's facility conducted by APHIS over several years did not disclose that animals were harmed by Respondent. RX-C.

Since APHIS has issued an AWA license to Respondent many times in years following his conviction for conduct occurring in 2004, and since the Show Cause Order rests solely upon that action, I find that it would be arbitrary and capricious for APHIS to now terminate Respondent's license for conduct occurring more than ten years in the past, with no additional evidence impugning Respondent's fitness to hold an AWA license.

USDA has failed to carry the burden of proof in this matter. Accordingly, I find it appropriate to DENY USDA's motion for summary judgment. By denying Complainant's

[3] Neither party presented evidence regarding whether APHIS renewed Respondent's license in 2015.

motion for summary judgment, I have tacitly granted Respondent's motion for summary judgment in his favor.

VII. FINDINGS OF FACT

1. Respondent Timothy L. Stark is an individual with a mailing address in Indiana.
2. Respondent is an exhibitor, as that term is defined in the Act and Regulations and since November, 2007, has held a Class C Exhibitor license under the AWA, #32-C-0204.
3. In October 2004, Respondent transferred possession of an ocelot to an individual in Texas, while holding a Class B license under the AWA.
4. An ocelot is an animal that is listed as protected by the Endangered Species Act.
5. Respondent's sale and transfer of the ocelot constituted commercial interstate activity prohibited by the Endangered Species Act.
6. In August, 2007, Respondent pled guilty to that offense and was convicted of violating the Endangered Species Act.
7. Despite his conviction, APHIS has routinely renewed Respondent's valid license under the AWA.
8. The instant action to terminate Respondent's AWA license rests solely on his conviction for an offense that occurred more than ten years ago.
9. There is no evidence that Respondent's actions harmed the ocelot that was transferred, or any other animal.

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. The denial of summary judgment to Complainant USDA is appropriate, as USDA has failed to establish how Respondent could be determined unfit to hold an AWA license for an old conviction, which did not prevent APHIS from repeatedly thereafter issuing him the license which USDA seeks to terminate.

ORDER

USDA has failed to establish that Respondent is unfit to hold an AWA license for a conviction pertaining to the transfer of an animal protected by the Endangered Species Act more than ten years ago. APHIS shall issue Respondent's AWA Exhibitor's license, if it has been timely submitted for renewal and if all fees have been paid.

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 11th day of January, 2016, in Washington, D.C.

Janice K. Bullard
Administrative Law Judge