

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)	

Decision

In this decision, I sustain the determination of the United States Department of Agriculture Animal and Plant Health Inspection Service (APHIS) to deny the application of Suncoast Primate Sanctuary Foundation, Inc. for a license to exhibit animals under the Animal Welfare Act. However, I remand the case to APHIS to conduct a complete investigation as to whether Petitioner qualifies as a licensee under the Act.

Procedural History

On June 30, 2004, Petitioner Suncoast Primate Sanctuary Foundation, Inc. (Petitioner), located at 4600 Alternate 19, Palm Harbor, Florida, applied to Respondent U.S. Department of Agriculture, APHIS, for a new exhibitor's license to operate an "animal sanctuary and educational facility" and a zoo. PX 1, RX 14.¹ The application was signed by Christy Holley, the Petitioner's president. On July 12, 2004, Dr. Elizabeth Goldentyer, Regional Director of APHIS's Eastern Region, wrote Ms. Holley that "prior to processing the application" APHIS would be "evaluating the application" to determine its relationship to the earlier permanent revocation of the license of The Chimp Farm. PX

¹ PX refers to Petitioner's exhibits. RX refers to Respondent's exhibits. Tr. refers to the transcript page.

3, RX 16. Following an inspection/investigation visit to the premises of Petitioner, the application was denied by letter of August 17, 2004. PX 5, RX 20. Petitioner filed a Request for Hearing dated September 7, 2004. PX 6.

The matter was docketed with the Hearing Clerk in May 2005.² A hearing was conducted in Tampa, Florida on November 15, 2005. Thomas J. Dandar, Esq., represented Petitioner, and Colleen A. Carroll, Esq., represented Respondent. Both parties filed briefs with proposed findings of fact and conclusions of law.

Pertinent Facts

APHIS's denial of Petitioner's license application was principally based on APHIS's determination that Petitioner was essentially the same entity that had its license revoked by APHIS in an earlier proceeding. The licensing regulations bar issuance of a license to an applicant whose license has been previously revoked.

The prior license revocation.

In August 1998, APHIS served a complaint on Anna Mae Noell and The Chimp Farm, Inc., alleging numerous serious violations of the Animal Welfare Act and the regulations thereunder. RX 1, p. 2. Although the license was issued to Anna Mae Noell d/b/a The Chimp Farm, Inc., RX 29, the complaint named both Ms. Noell and The Chimp Farm as co-respondents. Neither Anna Mae Noell nor The Chimp Farm filed a timely answer to the complaint or a response to a motion for a default decision. RX 1.

Administrative Law Judge Bernstein issued a default decision which, among other

² The delay between the filing of the Request for Hearing and the docketing by the Hearing Clerk was due to the absence of regulations concerning the conduct of proceedings to appeal license denials under the Animal Welfare Act. The scope of the Rules of Practice was amended on May 5, 2005 to include license denial appeals, and this matter was docketed shortly thereafter.

sanctions, revoked their license.³ They appealed to the Judicial Officer, who held that the age (Ms. Noell was in her mid-80's), ill-health and hospitalization of Ms. Noell was not a basis for setting aside the default decision. RX 1, p. 22. The Judicial Officer also denied a request on behalf of The Chimp Farm to reconsider his earlier decision, since that request was filed well beyond the time such requests were required to be filed, and since it raised an issue, concerning whether proper service was effectuated on The Chimp Farm, for the first time. RX 2. Finally, the U.S. Court of Appeals dismissed a petition for review filed on behalf of both parties, ruling that it was without jurisdiction because, once again, the parties filed their petition months after the Judicial Officer's decisions. RX 31.

The June 30, 2004 application

Respondent informed Petitioner in a letter dated July 12, 2004, that its application would be evaluated to determine whether issuance of a new license would violate the Decision and Order which permanently revoked the USDA license of The Chimp Farm⁴. PX 3, RX 16. Respondent indicated that an APHIS investigator would "be evaluating the corporate structure of the Suncoast Primate Sanctuary Foundation Inc., the ownership of the animals, property and enclosures, the funding of the operation and the management of the facility and employees." Id. A letter from Christy Holley on behalf of Petitioner, dated July 16, 2004, apparently mailed before receipt of the letter from Respondent, stated that they "would like to set up an appointment for an inspection as soon as possible." PX 4.

³ Since The Chimp Farm, Inc. was never licensed in its own right, there is some question as to whether USDA can revoke a license that it never granted in the first place. However, the Secretary's action in this case was affirmed by the Court of Appeals and is final and non-reviewable.

⁴ The letter did not mention Anna Mae Noell, even though the revoked license was in her name.

Rather than schedule an appointment to assist in obtaining the information Respondent indicated it would need to make a determination, Respondent instead sent, unannounced, two employees to Petitioner's premises on July 29, 2004. The team consisted of Greg Gaj, a field veterinarian and supervisor with APHIS's Animal Care Branch, Tr. 199, and Michael Nottingham, an experienced investigator in APHIS's Investigative and Enforcement Services. Tr. 224. Gaj stated that he would not normally go on such an investigation, since he was a supervisor, but that the "normal" person who would have gone "would have been potentially biased one way or the other." Tr. 215. He stated that he was basically an observer, while Nottingham was the lead investigator. Tr. 220.

The facility was closed to the public when they arrived, but there were a number of people on the property. Tr. 218-219, 225. Nottingham asked to speak to the owner or the person in charge and an individual told them that would be Debbie Fletcher⁵. Tr. 205, 226. RX 17, 18. Gaj indicated they were told to wait outside while the worker went inside the office to find Fletcher, and that while waiting 15 to 30 minutes they noticed a sign in the window indicating that Fletcher was manager of the facility. RX 17, Tr. 201. When they were allowed into the office, she told them that she did not have time to answer their questions as she was busy working with a number of 16 year old volunteers, and she told them to wait outside until one of the Petitioner's board members arrived on the premises to talk with them. Id. Approximately 45-60 minutes later, Leslie Smout, a CPA (since retired) and Christie Holley arrived. RX 17, Tr. 202. Nottingham questioned them briefly. Smout told him that he did not think that the animals had ever been formally transferred from the Chimp Farm to the Sanctuary, but that they should talk to

⁵ Since her marriage to Jon Cobb in 2000 she has also been known as Deborah Fletcher Cobb.

the Petitioner's attorney to be certain. Tr. 209, 286, RX 17, 18. Smout and Holley told the investigators that they would not give a statement without their attorney present, that their attorney was on vacation, and that the attorney would contact them when they got back from vacation. Tr. 203, 226-227, RX 17, 18. Gaj indicated that when he went to get his camera at the close of the meeting, the sign in the window indicating Fletcher was the manager was no longer there. Tr. 204, RX 17.

There was no evidence of any further contact between the parties before Respondent made its final determination denying the application for a license. Gaj indicated that other than the statement he prepared following the July 29 visit, he did no followup and had no further contact with Petitioner. Tr. 222. Nottingham likewise indicated that he was never contacted by Petitioner's attorney or anyone else on behalf of Petitioner subsequent to July 29. Tr. 227.

On August 17, 2004, Dr. Elizabeth Goldentyer, Regional Director of APHIS's Eastern Region, issued a letter rejecting Petitioner's application for a license. PX 5, RX 20. The denial was premised on the prohibition in the licensing regulations, at 9 CFR 2.11(a)(3), which states "A license will not be issued to any applicant who . . . (3) has had a license revoked . . . as set forth in §2.10," and on the prohibition in section 2.10 against issuing a license to any person whose license has been revoked "in his or her own name or in any other manner; nor will any partnership, firm, corporation or other legal entity in which any such person has a substantial interest, financial or otherwise, be licensed." Dr. Goldentyer apparently concluded that the applicants for the 2004 license were essentially the same parties subject to the 1999 revocation of the license of Anna Mae Noell and The Chimp Farm—finding that the Chimp Farm continued to house animals at

the same principal address and “the precise premises” where the Chimp Farm houses its animals were where Suncoast intended to exhibit its animals. Goldentyer also noted that “at least one of the Chimp Farm’s directors is the president of Suncoast, and that the counsel for Chimp Farm is the registered agent for Suncoast.” She concluded that issuing the new license to Suncoast Primate Sanctuary Foundation “would be tantamount to issuing a license to” the same entity whose license had earlier been revoked, in contravention of the regulations.

Dr. Goldentyer informed Petitioner that it had a right to request a hearing within 20 days of receipt of the denial letter, and Petitioner filed its Request for Hearing by letter dated September 7, 2004. The case was docketed by the Hearing Clerk in May, 2005 after the Rules of Practice were amended to include appeals of license denials.

At the hearing, and again in the briefs, Respondent retreated on several of the grounds originally offered as the bases for denying the license application. Thus, Dr. Goldentyer agreed that the fact that Mr. Dandar was counsel for The Chimp Farm and the registered agent for Petitioner should not have been a factor in denying the application. Dr. Goldentyer also indicated that she was not relying on the regulation at 9 CFR 2.9, which bans the licensing of any person who was an officer of a licensee whose license has been revoked and who was responsible for or participated in the violation which resulted in the revocation. Tr. 162. Thus, the fact that one of the Chimp Farm’s directors—Christy Holley—was the president of Suncoast, would not seem to have any materiality as a basis for denying Suncoast’s application, even though it was cited as one of the reasons in the August 17, 2004 letter.

Discussion

This is the first case decided since the Rules of Procedure were amended to allow appeals of license denial decisions under the Animal Welfare Act. Accordingly, there is not a great deal in the way of Agency precedent to guide the review process. However, several matters are clear. First, the Secretary is required to issue an exhibitor's license to an applicant who meets certain standards. Secondly, the Secretary is prohibited from issuing a license to an applicant whose license has been revoked. Third, a license issued to Anna Noell d/b/a The Chimp Farm was revoked in a default action under the Animal Welfare Act. The question is whether Petitioners are in fact so closely related to the persons whose license was revoked as to be barred under the regulations from receiving a license.

It was reasonable for Dr. Goldentyer, as the deciding Agency official, to inquire as to whether Petitioner was the same entity as the entity whose license was revoked. The Chimp Farm had used the fictitious name of "Suncoast Primate Sanctuary" and "Suncoast Primate Sanctuary and Wildlife Rehabilitation Center" and in the very letterhead it had used during portions of the instant application process indicated it had been "Caring for Endangered Species and Other Animals since 1954." RX 6,13,14, 15, 30. Since Petitioner's legal name is Suncoast Primate Sanctuary Foundation Inc., and since The Chimp Farm had used the slogan about caring for endangered species and other animals since 1954 it was hardly unreasonable for Dr. Goldentyer to form a concern that the entities might be the same or at least related. The similarity in names almost seems designed to indicate that the entities are related, if not identical, and when the similarity in addresses is factored in, it is difficult to conclude other than Dr. Goldentyer was acting

properly in deciding to further investigate. Likewise, the appearance of both Christy Holley's name as a director of The Chimp Farm and president of Suncoast Primate Sanctuary Foundation, and Deborah Fletcher's name as a director and registered agent of The Chimp Farm, while her husband Jon Cobb was listed as an officer on the application for license of Suncoast Primate Sanctuary Foundation would at least give rise for Dr. Goldentyer to inquire as to whether the entities were related.

While I agree with APHIS that they were justified in inquiring into the relationship between Petitioner and Anna Mae Noell d/b/a the Chimp Farm, that does not in itself answer the question of whether APHIS was justified in concluding that the license should be denied. I have serious concerns as to whether the investigation conducted was sufficient to allow Dr. Goldentyer to adequately justify her conclusions regarding Petitioner. The information that Dr. Goldentyer indicated that she was interested in pursuing was the type of information that would require the exchange of documentation, the interview of principals, inspection of property, etc. While it might also involve the unannounced inspection of premises to assure compliance with certain aspects of animal care provisions of the regulations, Dr. Goldentyer was clearly most interested in the aspects of the investigation which would show the scope of the relationship between The Chimp Farm and Petitioner.

The investigation team did not have a great deal of experience in this particular type of investigation. Inspector Gaj testified that he was at the inspection because of a potential bias that the normal investigator had, Tr. 215, that he was there in a secondary role to the more experienced Inspector Nottingham, to whom he deferred, and that he considered himself an observer while Nottingham asked the questions. Tr. 220. Their

specific assignment was “to investigate whether or not the Suncoast Primate Sanctuary was a legitimate legal entity separate from the Chimp Farm.” Tr. 216. They did not intend to look at any animals that day. Tr. 218. No advance notice of the inspection was given, Gaj believing that was Nottingham’s “personal preference.” Tr. 221. During the time Nottingham was talking to Smout and Holley, Gaj received a phone call from one of his inspectors and, rather than continuing to participate in the inspection, temporarily left the inspection to handle the phone call. Tr. 202-203.

Michael Nottingham, the lead investigator for APHIS, had no previous experience in investigating applications for Animal Welfare Act licenses. Tr. 275. He had very little independent recollection of the events that transpired on the date of his visit to Suncoast, relying heavily on the inspection report that he prepared. Rx 18, 18a. When it became evident that the individuals who he talked with at the inspection were not able to provide him with the information he desired, he never followed up with any of the people he met that day, or any of the people that were identified on the application, or with the attorney who he was told was going to get back to him. He never indicated exactly what information he was looking for which would allow him to make recommendations to Dr. Goldentyer as to the unresolved issues regarding the Suncoast application. It was not until the day before the hearing that he picked up deeds from the county clerk which indicated the ownership and the location of the property on which Suncoast was located, and who owned the property, and he also provided business summary reports generated from Lexis Nexis for the Chimp Farm and Suncoast Primate Sanctuary. Obviously, these documents could not have been relied on by Dr. Goldentyer in her decision making, nor were they ever interpreted by any witness.

Testimony from other witnesses did little to clarify the most pertinent matters at issue. One of the least pertinent issues discussed was who greeted the inspectors. Both Gaj and Nottingham indicated that an individual identifying himself as George McCoy let them on the property and indicated that the person in charge was Debbie Fletcher, Tr. 218, 273, RX 17, 18, but Debbie Fletcher stated that McCoy was not on the premises that day, that she knew where he was and that it could not have been him. Tr. 337-338. Since both inspectors confirmed that the individual did identify himself as McCoy and since Ms. Fletcher provided no evidence as to where McCoy was or to who it was who let them in, and since it does not matter anyway, I see no reason to doubt the word of the inspectors as to this point. Similarly, I have no basis to believe the inspectors were other than truthful regarding the sign that indicated Ms. Fletcher was the manager of the facility, even if the sign was left over from the days when the facility was operating as The Chimp Farm. Ms. Cobb, as Ms. Fletcher is now called since her marriage to Jon Cobb, was not the most forthcoming of witnesses, to say the least, and her demeanor was quite defensive throughout her testimony. She even disputed whether an office or even a building containing an office even existed on the premises, Tr. 331-335, even where one of Petitioner's witnesses, Debora Geehring, described herself as the office coordinator, and her place of work as the office. Tr. 35. She also continually indicated that she had virtually no role in managing The Chimp Farm, even where the license renewals for that entity repeatedly listed her as manager, and when she signed a number of documents at the behest of her grandmother, Ms. Noell. E.g., RX 33, 34.

Leslie Smout, a certified public accountant who had retired the July prior to the hearing, essentially confirmed the testimony of the APHIS inspectors. He indicated that

he had initially been affiliated with the chimp farm as a donor through his own foundation, and that he had helped them with their taxes and in securing 501(c)(3) status. He stated that he arrived at the premises about an hour after the inspectors and that he said that to the best of his knowledge, The Chimp Farm still owned the animals but that the inspectors should talk to the attorney to be sure. Tr. 286. He testified that he would not have stated that Ms. Cobb owned the animals as they would have been owned by the not-for-profit corporation. Tr. 287.

Dr. David Scott, a trustee of the Anna Mae Noell Trust, testified that the only assets of the trust were land, and that the trust was created to serve “as a steward for animals.” Tr. 290. He indicated that his involvement with the trust ceased before the formation of Petitioner, but that it was his understanding that there were two different deeds covering the land occupied by the Petitioner, one of which was owned by the entity that formerly was The Chimp Farm and the other that was owned by the Anna Mae Noell Trust. Tr. 292-293. He also testified that none of the structures on the property are owned by the Trust, but to be certain as to which entity owned what property he would have to check with James Martin, the attorney for the Trust, who was not present at the hearing. In essence, there remains a lack of certainty as to who owns or controls the land on which the Petitioner’s facilities are located.

As I indicated earlier, this appeal is the first of its kind under the Animal Welfare Act. As such, it should be decided on a fully-developed record. Instead, I have before me a record that does not even include the very information that the decision-maker indicated she would be gathering to facilitate her decision. Thus, while I agree that there is not sufficient evidence to support the granting of a license to Petitioner, based on the

readily apparent similarities in name, management and location between Petitioner and the entity whose license was revoked in the earlier proceeding, I find that neither party met its duty under the Act or the regulations to assure that the record in this matter was complete. Based on this inadequate record, it would have been improper for the Secretary to issue Petitioner an exhibitor's license, but at the same time, it would be improper to permanently deny such a license without the record being more fully developed. If the animals have been properly transferred from the entity which had its license revoked, and is under the care of an independent entity, and is being independently operated, it may be proper, as Dr. Goldentyer implied in her testimony, to issue Petitioner an exhibitor's license. However, no records were provided to APHIS during the pendency of the application process which would have indicated that animals were transferred to Petitioner.⁶ The best way to assure a proper final 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.

Findings of Fact

1. On June 30, 2004, Suncoast Primate Sanctuary Foundation, Inc. (Petitioner) applied for an exhibitor's license pursuant to the Animal Welfare Act. The application indicated Petitioner was a corporation with an address as 4600 Alternate 19, Palm Harbor, Florida. The corporate officers identified in the license application were Christie Holley, Jon Cobb and Nancy Nagel. PX1, RX 14.

⁶ A document purporting to assign all The Chimp Farm's interests in animals and other matters to Petitioner was attached to Petitioner's Reply Brief. It was the first documentation submitted, to my knowledge, which would support the statements made at the hearing that there was some transfer of interest prior to the application process.

2. In January 1999, the USDA Judicial Officer issued a decision affirming a Default Decision issued by Administrative Law Judge Bernstein against Anna Mae Noell and The Chimp Farm for violations of the Animal Welfare Act. In that decision, the license of Ms. Noell and The Chimp Farm was revoked (although The Chimp Farm never had a license in its own right). The Chimp Farm's address was 4612 Alternate 19 South, Palm Harbor, Florida 34683. RX 1.

3. Both The Chimp Farm and Petitioner had the same listed telephone number.

4. On September 25, 2000, after the issuance of the Default Decision referenced in Finding 2, The Chimp Farm filed a fictitious name statement in which it listed "Suncoast Primate Sanctuary and Wildlife Rehabilitation Center" as a name under which it does business. RX 13.

5. Christy Holley was listed both as a director of The Chimp Farm and President of Petitioner.

6. Deborah Fletcher is the granddaughter of the late Anna Mae Noell. Tr. 305, 314, RX 34. Since her marriage to Jon Cobb, she is also known as Deborah Fletcher Cobb. Tr. 332. She had a significant role in assisting her grandmother in managing The Chimp Farm, and was listed on various documents as manager of that facility. E.g., RX 34. Her husband, Jon Cobb, is listed as a director of Petitioner. PX 1, RX 14. She lives on the premises of Petitioner, and testified that she runs community outreach and ministries programs at Petitioner's facilities. Tr. 298-299.

7. When Petitioner was formed on February 21, 2003, it listed its business and mailing address as 4612 Alt U.S. Hwy 19, Palm Harbor, Florida 34683. RX 5. This was the same address as the entity whose license was revoked. RX 1, p. 4. On April 19,

2004, after an exchange of correspondence with APHIS where APHIS had expressed its concern that Petitioner was the same entity that had its license revoked in the earlier proceeding, RX 4, Petitioner filed a change of address with the Florida Secretary of State, indicating its principal place of business and mailing address were now both 4600 Alt US Hwy 19. RX 19, p. 2.

8. After receiving Petitioner's application, Dr. Goldentyer wrote Petitioner on July 12, 2004, stating that "A USDA Animal Plant Health Inspection Service Investigator will be evaluating the corporate structure of the Suncoast Primate Sanctuary Foundation Inc., the ownership of the animals, property, and enclosures, the funding of the operation and the management of the facility and employees . . . Your cooperation in providing information and documentation will speed the process." RX 16.

9. There is no evidence that Petitioner was ever told what documentation would be needed or helpful for APHIS in its review of the application.

10. On July 29, 2004, APHIS employees Greg Gaj and Michael Nottingham made an unannounced visit to Petitioner's facilities. Neither was experienced in conducting an animal licensing investigation. Although the facility was not open to the public, they were met, and allowed into the facility, by an individual who identified himself as George McCoy. When they asked him if they could speak to the owner, he indicated that Ms. Fletcher was in charge. They noticed a sign outside of the office facility indicating Ms. Fletcher was the manager of the facility. Ms. Fletcher told them she was busy meeting with some students and that they would have to wait and meet with some board members who would be coming later.

11. After waiting outside 45 minutes to an hour, Christy Holley, the president of Petitioner, and Leslie Smout, a volunteer who served as Petitioner's CPA, arrived and briefly met with the inspectors. Mr. Smout indicated that, to the best of his knowledge, The Chimp Farm had never transferred ownership of its animals to Petitioner. Holley and Smout indicated that they would not give the investigators a statement without Petitioner's attorney present, that he was on vacation, and that they would have him contact them when he returned from vacation. Gaj and Nottingham terminated the visit. Gaj noted that the sign indicating that that Ms. Fletcher was manager was no longer in the window.

12. There is no evidence of any effort made by either Petitioner or APHIS to contact or otherwise provide evidence or request evidence on any aspect of this case prior to the hearing.

13. I am unable to make a factual finding as to whether the land that is occupied by Petitioner is under the control of Petitioner, The Anna Mae Noell Foundation, The Chimp Farm, or another entity.

14. I am not able to make a factual finding as to who owns the animals which would be exhibited if the application were granted.

15. I am not able to make a definitive finding as to what entity owns the structures in which the animals which would be exhibited are housed.

Conclusions of Law

1. APHIS is obligated to issue an exhibitor's license to an applicant if certain statutory and regulatory conditions are met.

2. APHIS is prohibited from issuing an exhibitor's license to an individual or entity whose license has previously been revoked for violating provisions of the Animal Welfare Act.

3. Anna Mae Noell d/b/a The Chimp Farm was the subject of an Animal Welfare Act proceeding resulting in the revocation of the license of Anna Mae Noell and The Chimp Farm.

4. Petitioner's location, management and operations are similar in many respects to the entity whose license was revoked. The actions of APHIS in scrutinizing Petitioner's application to determine whether they were in essence the same entity as The Chimp Farm were a legitimate and proper exercise of authority.

5. As the sole entity charged with granting or denying licenses under the Animal Welfare Act, Respondent has the duty to perform a full and complete investigation before denying a license. They did not do so here.

6. The applicant for a license has the obligation to provide all pertinent information to support its license request. After being notified on several instances that Respondent needed information on a number of matters, Petitioner fell short of its obligation to provide pertinent information, or even follow up with Respondent on exactly what information was required.

WHEREFORE, I order the following:

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.

Done at Washington, D.C.
this 7th day of June 2006

MARC R. HILLSON
Chief Administrative Law Judge