

**FRED HODGINS, JANICE HODGINS, HODGINS KENNELS, INC. v.
UNITED STATES DEPARTMENT OF AGRICULTURE.
No. 97-3899.
Filed Nov. 20, 2000.**

(Cite as 238 F.3d 421, 2000 WL 1785733 (6th Cir. 2000)).

**Animal welfare – Willful – Substantial evidence – Fourth Amendment – Search – Adequacy of
complaint – Notice – Fifth Amendment.**

The Hodgins sought judicial review of an order by the Judicial Officer assessing the Hodgins a \$13,500 civil penalty and suspending the Hodgins' Animal Welfare Act (AWA) license for violations of the AWA and the regulations and standards issued under the AWA. The United States Court of Appeals for the Sixth Circuit vacated the Judicial Officer's decision and remanded the proceeding to the Judicial Officer for further proceedings. The Court reversed the Judicial Officer's decision that the Hodgins' violations were willful and held that a number of the violations found by the Judicial Officer were not supported by substantial evidence. Further, the Court held that the violations which were supported by substantial evidence were minor warranting at most a small civil penalty. The Court rejected the Hodgins' contention that repeated warrantless inspections by APHIS inspectors violated the Fourth Amendment prohibition against unreasonable searches. The Court also rejected the Hodgins' contention that they were denied the right to cross-examine one of the USDA witnesses. The Court found that, while the complaint filed in the administrative proceeding could have been drafted more clearly, it provided the Hodgins sufficient notice of the matters of fact and law asserted as required by the due process clause of the Fifth Amendment and 5 U.S.C. § 554(b)(3).

**United States Court of Appeals
Sixth Circuit**

Before: **NELSON, MOORE**, and **CLAY**, Circuit Judges.

DAVID A. NELSON, Circuit Judge.

Fred and Janice Hodgins own and operate Hodgins Kennels, a business that sells animals (mostly dogs and cats) to research facilities. Hodgins Kennels is subject to the Animal Welfare Act, 7 U.S.C. §§ 2131-2159, to the regulations adopted thereunder, see 9 C.F.R. §§ 1.1-3.142, and to supervisory inspections by the Animal and Plant Health Inspection Service (APHIS), an arm of the United States Department of Agriculture.

On March 22, 1995, following a series of inspections that allegedly uncovered numerous infractions of the law at Hodgins Kennels, APHIS initiated an administrative disciplinary proceeding. On May 31, 1996, following lengthy hearings, an administrative law judge issued an initial decision and order imposing a \$16,000 fine on Fred and Janice Hodgins and ordering them to cease all violations of the Animal Welfare Act and its regulations. An administrative appeal followed.

In due course a judicial officer of the Agriculture Department issued an opinion that reversed a few of the ALJ's findings but largely adopted the initial decision and

order. *In re Hodgins*, 56 Agric. Dec. 1242, 1997 WL 392606 (U.S.D.A. July 11, 1997). The judicial officer assessed a fine of \$13,500, suspended the Hodgins' license under the Animal Welfare Act for 14 days, and ordered that the license be reinstated only if APHIS declared itself satisfied that no violations continued to exist. The judicial officer stayed his decision pending review by this court. *In re Hodgins*, 56 Agric. Dec. 1372, 1997 WL 577544 (U.S.D.A. Aug. 11, 1997).

The Hodgins have filed a petition for review, and the matter has been briefed and argued. For the reasons set forth below, we shall grant the petition and vacate the challenged decision. The suspension of the license was clearly improper, in our judgment, and we conclude that most, if not all, of the fine was improper as well.

I

Congress enacted the Animal Welfare Act with three purposes in mind:
“(1) to insure that animals intended for use in research facilities or for exhibition purposes or for use as pets are provided humane care and treatment;

“(2) to assure the humane treatment of animals during transportation in commerce; and

“(3) to protect the owners of animals from the theft of their animals by preventing the sale or use of animals which have been stolen.” 7 U.S.C. § 2131 (1994).

The United States Department of Agriculture is authorized to “promulgate humane standards and recordkeeping requirements governing the purchase, handling, or sale of animals . . . by dealers, research facilities, and exhibitors,” 7 U.S.C. § 2142 (1994), and dealers are prohibited from selling animals to research facilities without first having obtained a license from the Secretary of Agriculture. 7 U.S.C. § 2134 (1994). The Secretary has promulgated extensive regulations governing the operations of animal dealers. 9 C.F.R. §§ 1.1 - 3.142.

For purposes of the Animal Welfare Act, a “dealer” is defined broadly as

“any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog or other animal whether alive or dead (including unborn animals, organs, limbs, blood, serum, or other parts) for research, teaching testing, experimentation, exhibition, or for use as a pet This term does not include: A retail pet store . . . unless such store sells any animals to a research facility” 9 C.F.R. § 1.1.

There are three sub-categories of animal dealers: Class A,¹ Class B, and Class C.² Most relevant to this case, Class B dealers are defined as those who meet “the definition of a ‘dealer’ (§ 1.1), and whose business includes the purchase and/or resale of any animal.” 9 C.F.R. § 1.1. Class B dealers thus include those who buy animals and sell them to research facilities.

The Hodgins have operated Hodgins Kennels since 1960, and Hodgins Kennels, Inc., has held a Class B dealer license since 1966, the year the Animal Welfare Act was enacted. As a licensee under the Animal Welfare Act, Hodgins Kennels is required to submit to inspections “at least once each year,” and more often if “follow-up inspections” are necessary to check up on “deficiencies or deviations from the standards.” 7 U.S.C. § 2146(a) (1994). As required by 9 C.F.R. § 2.2, APHIS provides Hodgins Kennels with a copy of all applicable regulations and standards at the time of each application for an annual license renewal.

The business of Hodgins Kennels entails obtaining small animals (mostly dogs and cats, but occasionally goats, pigs, sheep, rabbits, and calves) from local animal shelters. The animals, not having been adopted, would otherwise be euthanized. After a waiting period of approximately six weeks to monitor health and provide any necessary veterinary treatment, Hodgins Kennels sells the animals to research facilities. The research facilities demand healthy animals and return any unhealthy animals to Hodgins for a refund or replacement. In testimony before the ALJ, Mr. Hodgins explained that it is in his interest to ensure that all his animals are healthy when sold – and in point of fact, he said, his animals are virtually never rejected by research facilities for poor health. In 1994 Hodgins Kennels sold an average of 92 animals per week to research facilities, and had to euthanize an average of six animals per week because they were too ill to be used for research.

From November of 1993 to November of 1994 (the time most relevant to this case), Hodgins Kennels had two locations: a facility on Lange Road in Howell, Michigan, and a facility on Judd Road in Fowlerville, Michigan. (The latter facility was closed in February of 1995.)

Two veterinarians have provided care for the animals at Hodgins Kennels during the past 30 years or so: Dr. Kenneth Johnson and Dr. Henry Vaupel. Dr. Johnson testified that he had been in veterinary practice for some 25 years at the time of the alleged Hodgins violations, and that he had served as a representative of the Michigan Veterinary Medical Association. Dr. Vaupel had been in veterinary practice for around 23 years, and he was an associate clinical professor of veterinary medicine at Michigan State University. Both veterinarians were and are highly

¹Class A dealers are those who deal only in animals “bred and raised on the premises.” 9 C.F.R. § 1.1.

²Class C dealers are those “whose business involves the showing or displaying of animals to the public.” 9 C.F.R. § 1.1.

qualified practitioners.

Mr. Hodgins testified that the attending veterinarian normally conducts a “walk-through” of the kennels once a week; Dr. Johnson confirmed that his visits were usually on a weekly basis. An APHIS inspector testified that of the 100 facilities he has inspected, no other animal dealer had its attending veterinarian visit as often as Hodgins Kennels did.

Carl Lalonde, an animal care inspector with APHIS, inspected Hodgins Kennels in January of 1993. He found the kennels in compliance with the Animal Welfare Act and the regulations thereunder, except for an alleged failure to keep 18 cats for the required holding period. This matter was referred to Dr. Joseph Walker, the head of the APHIS Northeast Sector, and in November of 1993 Dr. Walker directed a senior APHIS investigator named Thomas Rippy to investigate further. Mr. Rippy found that a “couple of cats” had been disposed of before the requisite holding period. He also testified that the matter had been “largely corrected.” The alleged violation was not pursued any further and was not included in the APHIS complaint that underlies the case before us here.

The complaint is based on a series of inspections that took place from November of 1993 to November of 1994. On Nov. 16, 1993, Dr. Lisa Dellar (who had inspected Hodgins Kennels since 1988) and a Mr. Kovach conducted an inspection in which they cited 23 alleged violations relating to housekeeping, veterinary care, recordkeeping, identification of animals, and cleaning. (The details of these and the other citations will be discussed later in this opinion.). According to testimony by Tammi Longhi, a daughter and employee of Fred and Janice Hodgins,³ Dr. Dellar exhibited a changed attitude at the time of this inspection. According to Ms. Longhi, Dr. Dellar had become “not as friendly,” she “wasn’t very talkative,” she was “just very short,” she “didn’t really explain a lot what she was doing.”

A second inspection took place on Jan. 18, 1994, a day on which the temperature approached a record-breaking 16 to 20 degrees below zero. Dr. Dellar and Mr. Kovach were joined this time by a third inspector, Dr. Norma Jean Harlan. Mr. Kovach testified that it was not “normal” to have three inspectors and that this was the only time he had ever seen three inspectors at one location. There was conflicting testimony as to how it came about that there were three inspectors on this occasion, rather than the customary one or two.

The Jan. 18, 1994, inspection disclosed 22 alleged violations of the Animal Welfare Act and its regulations. Mr. Kovach took photographs to support the allegations.

The third relevant inspection was conducted on March 1, 1994, by Dr. Dellar and Dr. Harlan. Dr. Dellar took photographs, and 18 alleged violations were

³Ms. Longhi played a prominent role in the proceeding that led to our opinion in *Longhi v. APHIS*, 165 F.3d 1057 (6th Cir. 1999).

reported.

The fourth inspection was conducted a month later, on April 5, 1994. On this occasion Dr. Dellar and Dr. Harlan were accompanied by Mr. Rippy, who took photographs. This inspection turned up 15 alleged violations. Mr. Rippy testified that Ms. Longhi was quite upset throughout the inspection; she thought having three inspectors was harassment.

The fifth inspection was conducted on May 10, 1994, by Drs. Dellar and Harlan, along with Mr. Rippy. The latter who again took photographs. Hodgins Kennels was cited for 10 more violations.

The sixth inspection was conducted on June 23, 1994, by Drs. Dellar and Harlan and Mr. Rippy. The Hodgins and Ms. Longhi were again upset by what they perceived as harassment. The inspection cited the kennels for 12 more violations.

The seventh inspection was conducted on September 13, 1994, by Dr. Dellar and Harlan, this time accompanied by a Don Castner (Mr. Rippy was unavailable) who took photographs. Fifteen alleged violations were cited.

The eighth and final inspection relevant to this suit was conducted on November 22, 1994, by Dr. Dellar and Dr. Peter Kirsten. This time the alleged violations totaled nine.

Dr. Joseph Walker, the APHIS head for the Northeast Sector, directed Dr. Dellar's superior, Dr. Ellen Magid, to accompany Dr. Dellar on an inspection to "be sure that what we were doing was true and correct" and to "judge what was happening at the facility." Dr. Magid inspected Hodgins Kennels in May of 1995, and she reported to Dr. Walker "that Hodgins Kennels was fairly close to coming into compliance" and that she "thought that with a little effort that they would be in compliance with our regulations."

II

The Hodgins assert nine grounds for relief, some of which will be combined here for purposes of analysis. First, the Hodgins argue that the repeated inspections violated their rights under the Fourth Amendment. Second, they argue that the findings of violations are not supported by substantial evidence. Third, they argue that as to each alleged violation the USDA failed to provide written warnings and a chance to demonstrate compliance as required by 5 U.S.C. § 558(c), or alternatively, that the judicial officer erred in finding the violations willful. Fourth, they argue that their due process rights were violated by the agency's alleged refusal to specify the claims being asserted, the ALJ's refusal to let the Hodgins call Dr. Walker as a witness or present a tape of his statements, the ALJ's refusal to allow detailed cross-examination of the APHIS veterinarians who reported the violations, and the refusal to allow evidence of undue influence on the part of animal rights activists.

A. The Fourth Amendment

The Hodgins contend that the repeated searches by APHIS inspectors violated the Fourth Amendment prohibition against “unreasonable” searches. As the Supreme Court has recognized, this prohibition applies with respect to commercial premises, see *See v. City of Seattle*, 387 U.S. 541, 543 (1967), and provides a measure of protection against administrative inspections that are intended to enforce regulatory statutes. *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 312-13 (1978).

Under what has come to be called the Colonnade-Biswell doctrine (a name derived from *Colonnade Corp. v. United States*, 397 U.S. 72 (1970) and *United States v. Biswell*, 406 U.S. 311 (1972)), the presence of a “long tradition of close government supervision” in “closely regulated” industries results in a “reduced expectation of privacy.” *New York v. Burger*, 482 U.S. 691, 701, 702 (1987). The warrant and probable-cause requirements that must normally be met to satisfy the dictates of the Fourth Amendment “have lessened application in this context.” *Id.* at 702. Thus, “where the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment.” *Id.*

It seems clear enough that the research animal business qualifies as one that is closely regulated. See *Benigni v. Maas*, No. 93-2134, 1993 U.S. App. LEXIS 31629, at *6 (8th Cir. 1993). Even in a closely-regulated industry, however, the government does not have an automatic free pass to search private premises. A warrantless inspection must still satisfy three criteria: “First, there must be a ‘substantial’ government interest that informs the regulatory scheme pursuant to which the inspection is made.” *Burger*, 482 U.S. at 702. Second, the warrantless inspections “must be ‘necessary to further [the] regulatory scheme.’” *Id.* (quoting *Donovan v. Dewey*, 452 U.S. 594, 600 (1981)). Third, “‘the statute’s inspection program, in terms of the certainty and regularity of its application, [must] provide a constitutionally adequate substitute for a warrant.’ * * * In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.” *Id.* (quoting *Donovan*, 452 U.S. at 600). “In addition, in defining how a statute limits the discretion of the inspectors, . . . it must be ‘carefully limited in time, place, and scope.’” *Id.* (quoting *United States v. Biswell*, 406 U.S. at 315).

As to the first criterion, the substantial governmental interest served by the Animal Welfare Act is to prevent the abuse of research animals and to protect against interstate schemes to steal pets for sale to research facilities. Other courts have found this to be a substantial interest for purposes of the Colonnade-Biswell doctrine, see, e.g., *Benigni v. Maas*, No. 93-2134, 1993 U.S. App. LEXIS 31629,

at *6 (8th Cir. 1993), and we agree with that determination.

The second criterion – the necessity for warrantless inspections – may be more difficult to satisfy. To meet this criterion the agency must show a need for “surprise.” Cf. *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 316-17 (1978). The Supreme Court has found such necessity in cases involving automobile junkyards, see *New York v. Burger*, 482 U.S. 691 (1987), and firearms dealers, see *United States v. Biswell*, 406 U.S. 311 (1972). Because stolen autos can be processed through a junkyard very quickly, it is important for junkyard inspections to be unannounced – “surprise is crucial if the regulatory scheme aimed at remedying this major social problem is to function at all.” *Burger*, 482 U.S. at 710; cf. *United States v. Branson*, 21 F.3d 113, 117 (6th Cir. 1994) (finding a similar necessity for inspecting used auto parts dealers); *United States v. Dominguez-Prieto*, 923 F.2d 464, 468-69 (6th Cir. 1991) (finding a similar necessity for inspecting motor carriers). In *Biswell* the Court contrasted the case before it (involving interstate trafficking in illegal firearms) with an earlier case where surprise was determined to be unnecessary:

“In *See v. City of Seattle*, 387 U.S. 541 (1967), the mission of the inspection system was to discover and correct violations of the building code, conditions that were relatively difficult to conceal or to correct in a short time. Periodic inspection sufficed, and inspection warrants could be required and privacy given a measure of protection with little if any threat to the effectiveness of the inspection system there at issue. We expressly refrained in that case from questioning a warrantless regulatory search such as that authorized by § 923 of the Gun Control Act. Here, if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential. In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible.” *Biswell*, 406 U.S. at 316.

In *Marshall v. Barlow’s, Inc.*, 436 U.S. 307 (1978), the Court rejected an argument that the Secretary of Labor had the authority to conduct warrantless searches of any business subject to the Occupational Safety and Health Act. The Court reasoned as follows:

“The Secretary submits that warrantless inspections are essential to the proper enforcement of OSHA because they afford the opportunity to inspect without prior notice and hence to preserve the advantages of surprise. While the dangerous conditions outlawed by the Act include structural defects that cannot be quickly hidden or remedied, the Act also regulates a myriad of safety details that may be amenable to speedy alteration or disguise. The

risk is that during the interval between an inspector's initial request to search a plant and his procuring a warrant following the owner's refusal of permission, violations of this latter type could be corrected and thus escape the inspector's notice. To the suggestion that warrants may be issued ex parte and executed without delay and without prior notice, thereby preserving the element of surprise, the Secretary expresses concern for the administrative strain that would be experienced by the inspection system, and by the courts, should ex parte warrants issued in advance become standard practice.

"We are unconvinced, however, that requiring warrants to inspect will impose serious burdens on the inspection system or the courts, will prevent inspections necessary to enforce the statute, or will make them less effective. In the first place, the great majority of businessmen can be expected in normal course to consent to inspection without warrant; the Secretary has not brought to this Court's attention any widespread pattern of refusal. In those cases where an owner does insist on a warrant, the Secretary argues that inspection efficiency will be impeded by the advance notice and delay. . . . [It is not] immediately apparent why the advantages of surprise would be lost if, after being refused entry, procedures were available for the Secretary to seek an ex parte warrant and to reappear at the premises without further notice to the establishment being inspected." *Id.* at 316-20 (footnotes omitted); see also *McLaughlin v. Kings Island*, 849 F.2d 990 (6th Cir. 1988) (disallowing warrantless searches by OSHA).

The above cases suggest that for warrantless searches to be justifiable under a regulatory scheme, the object of the search must be something that can be quickly hidden, moved, disguised, or altered beyond recognition, so that only a surprise inspection could be expected to catch the violations. On the other hand, if a regulation is similar to a building code (as in *See v. Seattle*), where violations will be harder to conceal, the need for surprise will be less pressing, and warrantless searches will more likely be unconstitutional.

The purposes served by the Animal Welfare Act are such as to present a need for surprise inspections. Stolen animals, for example, like stolen cars, can be moved or disposed of quickly. Dirty cages could be cleaned, improperly-treated animals euthanized or hidden, and records falsified in short order should a search be announced ahead of time. The inspections undertaken pursuant to the Animal Welfare Act thus seem to meet the second of the *Burger* criteria.

As for the third criterion, the owners of animal dealerships licensed under the Animal Welfare Act are certainly put on notice that their premises will be subject to inspection "at least once each year" and that there may be "follow-up inspections" if violations are found. 7 U.S.C. § 2146(a) (1994). The Secretary of

the Department of Agriculture is authorized to “make such investigations or inspections as he deems necessary,” and “at all reasonable times” is allowed to have “access to the places of business and the facilities, animals, and those records required to be kept. . . .” *Id.* Moreover, the USDA regulations limit the time, place, and scope of the inspections as follows:

“§ 2.126 Access and inspection of records and property.

“(a) Each dealer, exhibitor, intermediate handler, or carrier, shall, during business hours, allow APHIS officials:

- (1) To enter its place of business;
- (2) To examine records required to be kept by the Act and the regulations in this part;
- (3) To make copies of the records;
- (4) To inspect and photograph the facilities, property and animals, as the APHIS officials consider necessary to enforce the provisions of the Act, the regulations and the standards in this subchapter; and
- (5) To document, by the taking of photographs and other means, conditions and areas of noncompliance.

“(b) The use of a room, table, or other facilities necessary for the proper examination of the records and inspection of the property or animals shall be extended to APHIS officials by the dealer, exhibitor, intermediate handler or carrier.” 9 C.F.R. § 2.126 (2000); *cf. Burger*, 482 U.S. at 711 (noting with approval that the inspections authorized were limited to “regular and usual business hours”).

Since the inspections as authorized meet the three criteria laid down in *Burger*, we conclude that the regulatory authorization for warrantless searches is not, on its face, in violation of the Fourth Amendment. But this does not end our inquiry. The Hodgens go on to argue that the regulations were applied to them in a manner violative of the Fourth Amendment. In this connection they assert that the inspectors had “no reasonable basis for such frequent and lengthy inspections,” because the “violations at Petitioners’ kennel were no different in number and in character than would be expected at any facility of its size.” They cite a Seventh Circuit decision suggesting that a warrant may be required if “an individual begins to receive distinctive treatment without apparent justification (such as more

inspections than the regular schedule would indicate.” *Id.* at 13 (quoting *Lesser v. Espy*, 34 F.3d 1301, 1309 (7th Cir. 1994)).

The Animal Welfare Act, however, makes no exception for violations that are routine; rather, the statute provides that if there are “deficiencies or deviations from the standards,” then the Secretary “*shall* conduct such follow-up inspections as may be necessary until all deficiencies or deviations from such standards are corrected.” 7 U.S.C. § 2146(a) (1994) (emphasis added). The first relevant inspection, that of November 16, 1993, found 23 alleged violations of the USDA regulations; therefore, the Department was required (as far as it knew at the time) to conduct follow-up inspections.⁴

Even if the Fourth Amendment forbade administrative searches such as those visited upon the Hodgins, the “good faith” exception would likely apply. The Supreme Court has held “that the Fourth Amendment exclusionary rule does not apply to evidence obtained by police who acted in objectively reasonable reliance upon a statute authorizing warrantless administrative searches, even if the statute is subsequently found to be an unconstitutional violation of the Fourth Amendment.” *United States v. Bell*, Nos. 93-5933, 93-5952, 1994 U.S. App. LEXIS 17359, at *19 (6th Cir. 1994) (citing *Illinois v. Krull*, 480 U.S. 340, 349-53 (1987)). This “good faith exception” would presumably apply to the evidence collected by the Agriculture Department inspectors in this case, because at the time of the searches the inspectors had no reason to think that they were violating the Fourth Amendment.

B. The Violations

We review administrative decisions of the sort at issue here to determine if the findings on which they are based are supported by “substantial evidence.” 5 U.S.C. § 706(2)(E). “Substantial evidence” is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987). We shall begin this part of our analysis by considering the judicial officer’s decision to reverse a portion of the initial decision and order in which the ALJ found that the offenses were not committed willfully.

1. Willfulness and 5 U.S.C. § 558(c)

The Administrative Procedure Act says that unless a violation is an act of

⁴The Hodgins cite testimony by Mr. Rippy suggesting that some of the violations cited were so minor that they might not have been cited at other facilities. Mr. Rippy, however, did not participate in inspecting Hodgins Kennels until April 5, 1994, the fourth inspection relevant to this case. Mr. Rippy’s testimony is thus not strictly relevant to the repetition issue.

“willfulness,” or poses a risk to “public health, interest, or safety,”⁵ a license may be suspended “only if, before the institution of agency proceedings therefor, the licensee has been given (1) notice by the agency in writing of the facts or conduct which may warrant the action; and (2) opportunity to demonstrate or achieve compliance with all lawful requirements.” 5 U.S.C. § 558(c)(1994). The Department of Agriculture’s own procedural regulations require that unless there is willfulness, the “Administrator, in an effort to effect an amicable or informal settlement of the matter, shall give written notice to the person involved of the facts or conduct concerned and shall afford such person an opportunity, within a reasonable time fixed by the Administrator, to demonstrate or achieve compliance with the applicable requirements of the statute, or the regulation, standard, instruction or order promulgated thereunder.” 7 C.F.R. § 1.133(b).

The statute and the regulations are thus intended to encourage non-judicial resolution of disputes by giving a non-willful violator both a written warning and a chance to mend his ways. Such a violator’s license may not be suspended unless these conditions are met.

Here the ALJ, in his initial decision, declined to find that any of the violations was willful; in the ALJ’s words, it was “not shown that the violations were committed intentionally, deliberately or in careless disregard of the Act.” The judicial officer decided otherwise, concluding that all of the Hodgins’ violations were willful because (a) the actions were intentional and (b) some of the violations were observed again at later inspections. *In re Hodgins*, 1997 392606 at *67.

The judicial officer misapplied the Sixth Circuit’s standard for willfulness. Under our standard the term “willful” applies only to an “action knowingly taken by one subject to the statutory provisions in disregard of the action’s legality. . . .” *Volpe Vito, Inc. v. USDA*, No. 97-3603, 1999 WL 16562, at *2 (6th Cir. Jan. 7, 1999).⁶ Actions taken in reckless disregard of statutory provisions may also be “willful.” See *United States v. Illinois Cent. Ry.*, 303 U.S. 239, 242-43 (1938) (one

⁵The phrase “public health, interest, or safety” in 5 U.S.C. § 558(c)(2) is rarely invoked in license suspension cases. As one court put it, this exception is “directed to unusual, emergency, situations,” *Air North America v. Department of Transportation*, 937 F.2d 1427, 1437 (9th Cir. 1991), of which an example might be pilots’ licenses. See, e.g., *Greenwood v. Federal Aviation Administration*, 28 F.3d 971 (9th Cir. 1994). Accordingly, we proceed with the assumption that none of the conditions at Hodgins Kennels presented any danger to the public health, and that the willfulness exception to 5 U.S.C. § 558(c)(2) will be most pertinent.

⁶Some circuits use an even more stringent test. The Tenth Circuit, for example, specifically disagrees with the “careless disregard” concept of willfulness, defining the term instead as “an intentional misdeed or such gross neglect of a known duty as to be the equivalent thereof.” *Murphy v. Drug Enforcement Administration*, No. 96-9507, 1997 WL 196603, at *5 (10th Cir. 1997); see also *Hutto Stockyard, Inc. v. United States Dep’t of Agriculture*, 903 F.2d 299, 304 (4th Cir. 1990).

who “intentionally disregards the statute or is plainly indifferent to its requirements” acts willfully) (quotation omitted); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961) (one who “acts with careless disregard of statutory requirements” acts willfully); see also *Volpe Vito, Inc. v. USDA*, No. 97-3603, 1999 WL 16562, at *2 (6th Cir. Jan. 7, 1999) (animal park’s proffered mitigation does “not make its actions less deliberate, intentional, or reckless). See generally *JACOB A. STEIN et al.*, ADMINISTRATIVE LAW § 41.06[3] (2000) (stating the generally accepted test for willful behavior under the Administrative Procedure Act is whether an action “was committed intentionally” or “was done in disregard of lawful requirements” and also noting that “gross neglect of a known duty will also constitute willfulness”).

The judicial officer penalized the Hodgins for several violations that were immediately corrected at the time of inspection. In this connection the judicial officer stated:

“This Department’s policy is that the subsequent correction of a condition not in compliance with the Act or the regulations or standards issued under the Act has no bearing on the fact that a violation has occurred. . . . While corrections are to be encouraged and may be taken into account when determining the sanction to be imposed, even the immediate correction of a violation does not operate to eliminate the fact that a violation occurred and does not provide a basis for the dismissal of the alleged violation.” *In re Hodgins*, 1997 WL 392606, at *22 (quoting *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996)).

This statement of the law is difficult to reconcile with the Administrative Procedure Act, which provides that a license can be suspended for a non-willful violation *only* if the violator is given written notice *and* an “opportunity to demonstrate or achieve compliance with all lawful requirements.” 5 U.S.C. § 558(c). The opportunity to demonstrate or achieve compliance would be meaningless if a violation that was immediately corrected could be punished just as if it had never been corrected at all.

The proper rule, we believe, is this: Unless it is shown with respect to a specific violation either (a) that the violation was the product of knowing disregard of the action’s legality or (b) that the alleged violator was given a written warning and a chance to demonstrate or achieve compliance, the violation cannot justify a license suspension or similar penalty. This is a principle to which we shall have occasion to turn repeatedly in the discussion that follows.

The question of willfulness is one that must be addressed separately with respect to each specific violation. A blanket finding of willfulness, on the record before us, is simply not tenable. And because the judicial officer reversed the ALJ as to a determination of fact, we must “examine the record with greater care.” *Tel Data Corp. v. National Labor Relations Bd.*, 90 F.3d 1195, 1198 (6th Cir. 1996); see also

National Labor Relations Board v. Brown-Graves Lumber Co., 949 F.2d 194, 196-97 (6th Cir. 1991) (“The ‘substantialness’ of a Board conclusion may be diminished . . . when the administrative law judge has drawn different conclusions.”); *Litton Microwave Cooking Products Division v. National Labor Relations Bd.*, 868 F.2d 854, 857 (6th Cir. 1989) (“Although the board is free to find facts and to draw inferences different from those of the administrative law judge, a ‘reviewing court has an obligation to examine more carefully the evidence in cases where a conflict exists’”) (quoting *Pease Co. v. National Labor Relations Bd.*, 666 F.2d 1044, 1047-48 (6th Cir. 1981)).

2. The Reliability of the Inspection Reports

The Hodgins argue that the inspection reports are unreliable for several reasons.

First, they say, the reports should be disregarded because they were prepared for litigation purposes after Hodgins Kennels had been “chosen for selective enforcement.” In this connection they cite a Fifth Circuit case, *Young v. United States Dep’t of Agriculture*, 53 F.3d 728 (5th Cir. 1995), where the court disallowed certain reports prepared solely for litigation purposes. This circuit, however, has held that inspection reports are not *per se* excludable “if the inspection reports . . . were promptly prepared after all inspections, regardless whether violations were found or litigation was anticipated.” *Volpe Vito, Inc. v. United States Dep’t of Agriculture*, No. 97-3603, 1999 U.S. App. LEXIS 241, at *5 (6th Cir. 1999). Although there may well be reason to suspect selective prosecution here, we do not think that this alone makes the reports so inherently unreliable as to be excludable on that basis.

The Hodgins further maintain that the reports record only one side of the story. For example, the Hodgins point to testimony in which Dr. Dellar admits that her citations for inadequate veterinary care often failed to mention that the animals in question were in fact being treated with antibiotics at the time of the inspection. One-sidedness is not normally a basis for exclusion, but this is undoubtedly a factor to be considered as we analyze the substantiality of the evidence offered in support of specific findings of violations.

The Hodgins also argue that the reports are hearsay because, in many instances, the inspectors had no independent recollection of the facts being reported. Hodgins’ brief at 8. Even if these reports did not come within the past-recollection-recorded exception to the hearsay rule, however, they would still be generally admissible. The Administrative Procedure Act allows the admission of “any oral or documentary evidence.” 5 U.S.C. § 556(d). Based on this, we have held that “[p]rovided it is relevant and material, hearsay is admissible in administrative proceeding[s]” *Bobo v. United States Dep’t of Agriculture*, 52 F.3d 1406, 1414 (6th Cir. 1995) (quoting *Hoska v. United States Dep’t of the Army*, 677 F.2d 131, 138 (D.C. Cir. 1982)).

The Hodgins note many instances where the inspectors issued citations on the basis of standards higher than those set by the regulations. The list is too long to be presented here in full, and many of those instances will be discussed in the next section, but here are a few:

– Dr. Harlan’s statement that the regulations require cleaning *three times* per day if necessary, whereas the regulations specifically mandate daily cleaning only. See, e.g., 9 C.F.R. § 3.1(c)(3) (requiring that hard surfaces be spot-cleaned daily); 9 C.F.R. § 3.11(a) (requiring the cleaning of primary enclosures once daily).

– Citations for cobwebs (a few of which were found in corners of the ceiling and ventilation ducts) as violations of the requirement that premises “be kept clean and in good repair to protect the animals from injury.” 9 C.F.R. § 3.11(c).

– Repeated instances of issuing a citation for any animal showing any sign of illness, despite the fact that (as Dr. Harlan admitted in testimony) a facility with over 200 animals might see up to 20 or 30 animals with new symptoms *every day* just by chance. As Dr. Johnson testified in great detail, the kennels followed a protocol under which the Hodgins could treat sick or thin animals, except in serious situations, without summoning the veterinarian every day. The record leaves little room for doubt that more than a one-time visual observation of an ill dog ought to be necessary for inferring a violation of the requirement of adequate veterinary care under 9 C.F.R. § 2.40(a).

– Repeated mis-diagnoses of animals that were not sick at all, as discussed below.

– A statement by Inspector Rippey that the case against the Hodgins was a “test case,” and that, to his knowledge, “in other facilities the same things may not be cited as noncompliant. . . .”

The evidence seems clear that the inspectors were, for whatever reason, going out of their way to find violations. We shall keep these instances in mind as we examine the sufficiency-of-the-evidence question.

3. Adequate veterinary care

The Hodgins were charged with failure “to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and [failure] to provide veterinary care to animals in need of care in willful violation of section 2.40 of the Regulations (9 C.F.R. § 2.40).”⁷ *In re Hodgins*, 1997 WL 392606, at *13. The judicial officer

⁷This provision states:

“§ 2.40 Attending veterinarian and adequate veterinary care (dealers and exhibitors).

“(a) Each dealer or exhibitor shall have an attending veterinarian who shall provide adequate

found that such violations had occurred on Nov. 16, 1993, and January 18, March 1, April 5, May 10, June 23, September 13, and November 22, 1994. *Id.* at *17. The specifics are as follows:

November 16, 1993 – On this date the inspectors described a cat with “both eyes stuck shut with copious ocular discharge;” the cat should have been euthanized five days earlier, according to the inspector. *Id.* at *14. The inspectors also claimed that “[m]any sick animals were not reported nor [sic] being treated.” *Id.* at *13.

January 18, 1994 – On this date the inspectors found an “extremely thin” dog whose nasal discharge had allegedly not been treated. *Id.* at *13. Mr. Kovach’s report stated that “[m]any, many dogs were noted to be unresponsive and shaking

veterinary care to its animals in compliance with this section.

(1) Each dealer and exhibitor shall employ an attending veterinarian under formal arrangements. In the case of a part-time attending veterinarian or consultant arrangements, the formal arrangements shall include a written program of veterinary care and regularly scheduled visits to the premises of the dealer or exhibitor; and

(2) Each dealer and exhibitor shall assure that the attending veterinarian has appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.

“(b) Each dealer or exhibitor shall establish and maintain programs of adequate veterinary care that include:

(1) The availability of appropriate facilities, personnel, equipment, and services to comply with the provisions of this subchapter;

(2) The use of appropriate methods to prevent, control, diagnose, and treat diseases and injuries, and the availability of emergency, weekend, and holiday care;

(3) Daily observation of all animals to assess their health and well-being; *Provided, however,* That daily observation of animals may be accomplished by someone other than the attending veterinarian; and *Provided, further,* That a mechanism of direct and frequent communication is required so that timely and accurate information on problems of animal health, behavior, and well-being is conveyed to the attending veterinarian;

(4) Adequate guidance to personnel involved in the care and use of animals regarding handling, immobilization, anesthesia, analgesia, tranquilization, and euthanasia; and

(5) Adequate pre-procedural and post-procedural care in accordance with established veterinary medical and nursing procedures.”

with cold. These dogs need to be supported with additional heat and isolation from healthy dogs.” *Id.* at *14.⁸

March 1, 1994 – On this date the inspectors noted four “extremely thin” dogs that allegedly needed to “be isolated, feed intake monitored and supplied with higher caloric density type of feed.” *Id.* at *13. Dr. Dellar further testified that any thin dog requires a veterinarian’s exam to determine the cause of the thinness. *Id.* She noted that the “thin dogs most commonly were cited because of inadequate veterinary care in that they were group housed with other dogs, [and] their feed intake could not be monitored.” *Id.* The judicial officer agreed, finding that the “record does not show that thin dogs were promptly segregated while they were being monitored.” *Id.* However, both of the attending veterinarians, Drs. Johnson and Vaupel, testified that it is not unusual for dogs arriving from pounds and shelters to be thin; that thinness is not a disease that necessarily requires a veterinary examination; and that standard veterinary practice is to observe thin animals to see if they are eating properly and gaining weight before doing a more thorough medical examination. Ms. Longhi further testified that these dogs were often taken out of their pens to monitor their food intake and prevent inordinate competition for food.

April 5, 1994 – On this date a dog was found coughing, shaking, and having difficulty breathing. Dr. Dellar thought that the treatment – tetracycline – was insufficient, and that the dog needed “further supportive care and other treatment if he’s going to recover well or quickly.” *Id.* at *14.

June 23, 1994 – On this date inspectors observed a dog that was “unresponsive, dehydrated, weak, coughing, and had a ‘copious nasal discharge which had soiled his front legs.’” *Id.* at *14. Dr. Dellar wrote in the inspection report that the dog should have been “separated, given fluids and additional supportive care.” *Id.*

May 10, 1994 – On this date the inspectors observed a dog with a bloody discharge that had not been detected as being abnormal, noting that “[m]any dogs/cats were found with unnoticed, untreated or inadequately treated conditions.” *Id.* at *13.

September 13, 1994, and November 22, 1994 – The judicial officer found a violation of 9 C.F.R. § 2.40 for these dates, without specifying any basis for his holding or making any findings of fact. Without some explanation, we cannot

⁸On January 18, 1994, the inspectors also found a cat that had been treated with amoxicillin since December 28, 1993 – the inspectors cited this as a violation solely because the attending veterinarian’s treatment schedule had been violated. The judicial officer did not seem to accept this allegation, however, as a basis for his finding that Section 2.40 had been violated on Jan. 18, 1994; the judicial officer’s opinion cites testimony by the attending vet, Dr. Johnson, that his course of treatment was flexible, that Ms. Longhi was “very good” at determining the animal’s responsiveness to treatment, and that if the animal failed to respond to the antibiotic within the prescribed time period, a longer treatment would be necessary. *Id.* at *14.

uphold the findings for September 13, 1994 and November 22, 1994.

There is good reason to question whether any of these findings is supported by evidence that can fairly be characterized as “substantial.” In the first place, Dr. Dellar (who was present at all the inspections) admitted that she did not perform a true physical examination of *any* of the animals. Rather, she made her reports based on “doing a visual examination only,” a methodology that she admitted was insufficient to support an actual medical diagnosis. She further disclaimed any role that would include making medical diagnoses.⁹

Actual diagnoses by the attending veterinarians undermine the allegations made by the inspectors. Starting in early 1994, the Hodgins asked Dr. Johnson to examine all animals that the APHIS inspectors had cited as unhealthy. Dr. Johnson began doing so, usually examining each animal within 24 hours of an APHIS citation. He was cross-examined extensively about 17 specific animals that had been the subject of citations. As to each animal, he testified that the animal was either mis-diagnosed or was already being treated appropriately and was in the process of recovery at the time of the citation.

Here is an example of misdiagnosis. The APHIS inspectors reported on April 5, 1994, that they had found a cat that had a limp and enlarged lymph nodes. Dr. Johnson testified, however, that the limp was either an untreatable condition or an old injury that antedated the cat’s arrival at Hodgins Kennels. He also testified that the cat did not have enlarged lymph nodes, but rather had prominent jowls, as do many older cats. In other words, Dr. Dellar had (because of her practice of making a “diagnosis” by a mere visual examination) mistaken a common, harmless condition of older cats for a medical disease.

We give the following as an example of an animal in the process of recovery:

⁹The transcript records the following exchange:

A. “I exam [sic] animals by looking at them, doing a visual examination only. So, when I do an inspection I examine every animal.”

Q. “With your eyes?”

A. “With my eyes.”

Q. “Do you do enough of any exam to allow you to diagnose an animal?”

A. “No.”

Q. “And that’s not your role, is it, for the USDA?”

A. “Correct.”

the APHIS inspectors issued a citation for a pig for with mange, but Dr. Johnson testified that the pig was being treated with Ivermectin and “recovered completely.” The APHIS inspectors thus based a citation on an animal’s simply being ill, even though it was being successfully treated.

Based on his repeated examinations of the animals cited by APHIS inspectors, Dr. Johnson testified as follows:

Q. “And, Dr. Johnson, why don’t you take a moment and look through these documents and see if we can generalize with respect to what you found? With respect to most of these animals, were they already on appropriate antibiotics at the time they were cited for inadequate veterinary care?”

A. “Yes, I would have to say yes.”

Q. “Now, for the ones that were not yet on antibiotics, did your review of these and examination of these animals reveal that they had symptoms emerging as you expect them to emerge and as you found them to be appropriately treated by Hodgins Kennels on a regular basis?”

A. “Yes.”

* * *

Q. “Did you find that all of the animals cited here were receiving adequate veterinary care?”

A. “Yes.”

Dr. Johnson was then questioned about a later group of citations:

Q. “[D]uring the course of your post-inspection examinations, did you see any substantial basis for citing these animals for inadequate veterinary care?”

A. “No.”

Q. “Did you find that most of the observations or claims by the USDA inspectors ended up being unfounded?”

A. “Yes.”

Dr. Johnson was then questioned about the inspection reports of September and November 1994:

Q. “[W]ere your conclusions with respect to all of those reports and examinations consistent with what you’ve already testified to with respect to the other inspection dates?”

A. “Yes.”

Dr. Johnson then testified about the USDA inspections in general:

Q. “After the meeting with Dr. Dellar, did you have a concern that the USDA was going to pursue Hodgins Kennels to try to meet standards that weren’t possible to meet?”

A. “Yes.”

Q. “That weren’t consistent with generally accepted veterinary practices?”

A. “Yes.”

Q. “Did you get an impression that they were pressing for a level of care that was inappropriate?”

A. “Yes.”

Q. “Inappropriately high?”

A. “Yes.”

Moreover, Dr. Johnson and Dr. Vaupel both wrote letters to the USDA answering the allegations regarding veterinary care. Dr. Johnson wrote as follows:

“The citations with respect to individual animals are best described as ludicrous. I examined individual animals within 24 hours of the animals being cited by the Department’s Veterinarian. The vast majority of these animals were found to be on appropriate treatment, misdiagnosed by the Department’s Veterinarian, or in normal health!!

“Pointing to an animal that is ill and currently on treatment does not articulate a complaint as to the level of veterinary care. These are random

source animals that have been stressed and exposed to various pathogens before Hodgins Kennels receives them. A certain percentage of these animals are going to become ill.”

Dr. Vaupel wrote a letter in a similar vein:

“I have provided a detailed veterinary protocol and plan to your Department, which, to my knowledge, has never been criticized. In accordance with that protocol, all of the Hodgins Kennels animals receive and have received over the years veterinary care that is far above average and far above adequate. The animals are wormed and vaccinated upon arrival and they receive courses of antibiotic treatment as necessary during their stay at Hodgins Kennels and other treatment as required. The Kennel’s veterinary program includes weekly visits to the Kennels and availability by telephone or for emergency visits as necessary.

“I have also been mystified by allegations of inadequate veterinary care with respect to specific animals. I now routinely try to examine these ‘cited’ animals within twenty-four (24) hours after a citation of inadequate veterinary care and routinely find that the animal, if ill, is already on a course of antibiotic treatment that is adequate and appropriate. In other cases, I find that animal cited is not sick at all.

* * *

“As we know the Department is aware, animals in kennel situations can become sick and sometimes injured; that is the whole point of a veterinary program. Furthermore, these animals can develop illnesses quite rapidly in kennel situations. In some cases, it might be possible for symptoms in a given animal to appear during the course of an inspection, that would not have been apparent during the previous walk-through by staff. That is the nature of kennel situations and does not indicate that the staff is not checking for illness or signs of illness throughout the day. It has been my experience that the Hodgins staff is well trained and well qualified in recognizing signs of illness and consulting with me for appropriate courses of treatment.

“Indeed their livelihood depends on it. They sell medically conditioned animals which are guaranteed against illness. It would be completely counter-productive to their business to ignore illness and it has been my consistent experience that they do not do so.”

The evidence seems clear that the attending veterinarians were in a better position than were the APHIS inspectors to assess accurately the health of the animals at Hodgins Kennels. Dr. Harlan admitted in testimony that she never performed follow-up visits or checked the veterinary records to see if any of the cited animals had improved under treatment. She further admitted that a kennel's attending veterinarian was in a better position to assess the progress that diseased animals were making. Dr. Dellar also admitted in testimony that she had never checked with any actual practicing veterinarians to determine whether the level of care at Hodgins Kennels met standard practices.

To sum up: all the allegations of mistreated animals rested on reports by Dr. Dellar, a non-practicing veterinarian, who admitted that she did not perform any medical examinations but simply conducted a visual inspection. A large number of her "diagnoses" were specifically challenged as inaccurate by both Dr. Johnson and Dr. Vaupel, the attending veterinarians, who unequivocally testified that whenever they reexamined the animals that the APHIS inspectors said were being mistreated, the animals were either healthy or were being treated appropriately and recovering normally.

It is plain that no kennel can always keep 100 percent of its animals 100 percent healthy; to expect such perfection is utopian. Yet that is seemingly what the APHIS inspectors demanded of the Hodgins Kennels. It is not a reasonable interpretation of "adequate veterinary care," 9 C.F.R. § 2.40, to insist that all the animals under such care should have unflaggingly perfect health.

After reviewing the record in its entirety, we conclude that the agency's determination that Hodgins Kennels violated 9 C.F.R. § 2.40 is not supported by substantial evidence.

4. Identification of Animals

The Hodgins were found guilty on four counts of failing to have certain animals individually tagged, in violation of 7 U.S.C. § 2141,¹⁰ and 9 C.F.R. § 2.50. *In re Hodgins*, 1997 WL 392606, at *18. The relevant inspections were those of November 16, 1993, January 18, 1994, March 1, 1994, and September 13, 1994.

The regulation has not been changed substantially since 1989. See 54 Fed. Reg. 36123-01 (Aug. 31, 1989). However, APHIS's internal interpretation of this regulation seems to have been liberalized. At the time of the alleged violations.

¹⁰This provision reads as follows:

"All animals delivered for transportation, transported, purchased, or sold, in commerce, by a dealer or exhibitor shall be marked or identified at such time and in such humane manner as the Secretary may prescribe: Provided, That only live dogs and cats need be so marked or identified by a research facility."

APHIS took the position that every dog had to have a collar/tag on its body. As Dr. Dellar testified, however, the agency's current interpretation allows a tag to be placed on the cage door if a dog is particularly resistant to being tagged on its body. (We could find no evidence that either interpretation was ever published in the Federal Register or made public in any fashion.)

The Hodgins were cited because they occasionally placed an animal's tag on the door of its cage, if that animal had chewed off its collar or showed great distress at being tagged. The judicial officer held that the Hodgins "were not in compliance with APHIS' policy at the time of the inspections, and therefore violated" the Animal Welfare Act and its regulations. *In re Hodgins*, 1997 WL 392606, at *18.

The prior APHIS interpretation of 9 C.F.R. § 2.50 was, in our view, arbitrary and capricious in violation of 5 U.S.C. § 706(2)(A).¹¹ The USDA regulation itself explicitly allowed the placement of a cat's tag on the door of its cage if the cat "exhibits serious distress from the attachment of a collar and tag." 9 C.F.R. § 2.50(b)(4). There is no rational reason why this same exception should not extend to dogs that claw off their collars repeatedly or show distress at being tagged.

The placement of dog tags is hardly a matter that requires extensive scientific expertise or specialized knowledge. The deference that federal courts show to agency interpretations on scientific matters such as the biological effects of non-thermal radiation, see *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 90 (D.C. Cir. 2000), or technical matters such as discounted cash flow methodologies, see *Illinois Bell Telephone Co. v. FCC*, 988 F.2d 1254 (D.C. Cir. 1993), is inappropriate here. The purpose of the regulation and the statute – identifying each individual animal – is served just as well by a tag hanging on a cage door as by a tag on the animal's neck. As Dr. Johnson testified, the Hodgins were always able to identify any animal by number when asked. Dr. Vaupel agreed, saying that he had never seen an animal without a tag either on its neck or on its cage door. Even the inspectors, when citing tag violations, identified the untagged animals by their number, indicating that they had no problem matching the number to the animal. (See, e.g., the report of January 18, 1994, which states, "Dog # 41126 had no tag in Bldg. # 4. . . . In the cat bldg., cat number 42215 and 42216 had no tags.")

The judicial officer found that no sanction, except a cease-and-desist order, was

¹¹At least Two of the cited violations were not willful in any event. The November 18, 1993, inspection found several dogs untagged. The Hodgins responded to APHIS in a letter dated Nov. 18, 1993, that they had been instructed by a previous APHIS inspector that it was permissible to place a dog's tag on the door of its cage. They said that now that the policy was clear, they would place tags on all the dogs.

The March 1, 1994 inspection found only one dog that was not tagged. In the Hodgins' letter responding to this complaint, they noted that this particular dog was their personal pet. Since the Animal Welfare Act has no requirements for the treatment of personal pets, this is not a violation.

warranted for the alleged violations of the identification requirements. *In re Hodgins*, 1997 WL 392606, at *50. We find such an order inexplicable – why should the Hodgins be ordered to cease and desist from doing that which the regulations admittedly permit?

5. Recordkeeping

The Animal Welfare Act requires Class B dealers to keep records of “the purchase, sale, transportation, identification, and previous ownership of animals as the Secretary may prescribe.” 7 U.S.C. § 2140. The purpose of this recordkeeping requirement is to prevent stolen animals from being sold for medical research.¹²

The judicial officer found five violations of the recordkeeping requirements. On January 18, 1994, Hodgins Kennels had rabbits and goats with no records. On March 1, 1994, Hodgins Kennels was cited for a pig with no record of acquisition. At the next inspection, April 5, 1994, the pig’s record had been corrected, but there were five dogs and one cat on the records that were not present in the facility. On May 10 and June 23, 1994, the inspectors counted one fewer dog in the facility than the records showed. *In re Hodgins*, 1997 WL 392606, at *18.

The judicial officer agreed with the Hodgins that there was no evidence or allegation that the Hodgins Kennels had trafficked in stolen animals, the purpose underlying the extensive recordkeeping requirements of 9 C.F.R. § 2.75. Nevertheless, the judicial officer found that the “failure to maintain the required records, even for a short period of time, constitutes a violation. . . .” *In re Hodgins*, 1997 WL 392606, at *19.

The Hodgins explain the discrepancies as resulting from a brief lag time between an animal’s arrival, sale or euthanization, and the entry of the event in the record books. This would seem understandable, as it appears that the Hodgins keep their records at their home. (Dr. Dellar testified that she had to go to their home to examine the records.) As the Hodgins argued in their appeal to the judicial officer, “[s]ince the inspections involved are unannounced, it appears that the only way to

¹²The relevant regulation is 9 C.F.R. § 2.75, which states:

“Records: Dealers and exhibitors.

“(a)(1) Each dealer, other than operators of auction sales and brokers to whom animals are consigned, and each exhibitor shall make, keep, and maintain records or forms which fully and correctly disclose the following information concerning each dog or cat purchased or otherwise acquired, owned, held, or otherwise in his or her possession or under his or her control, or which is transported, euthanized, sold, or otherwise disposed of by that dealer or exhibitor. The records shall include any offspring born of any animal while in his or her possession or under his or her control.”

avoid litigation on a record keeping violation is to have records that are absolutely perfect at every moment of every day, with no paperwork, not even a single journal entry, left undone, even for the briefest period of time.”

More importantly, the evidence does not suggest any willful violation of the recordkeeping requirements; rather, the “violations” discovered seem to be nothing more than temporary and remediable discrepancies. Without evidence of willfulness, the Hodgins should have been given a chance to demonstrate compliance with the recordkeeping regulation. 5 U.S.C. § 558(c)(2). No license suspension can be based on this citation, although a minimal fine might be supportable.

6. Structural Violations

The fourth set of violations concerns the upkeep of the structures in which the Hodgins Kennels animals were housed.¹³ The November 16, 1993, inspection reportedly found some broken cement blocks, a door with a poorly-patched hole, gaps underneath two doors, and cracking concrete. The January 18, 1994, inspection allegedly disclosed that some wall panels were loose or missing, and that ceiling panels in the cat building needed repair. It also alleged that a door was falling apart. The March 1, 1994, inspection disclosed that the “main barn ceiling had missing panels” and that the roof was leaking in another building. *In re Hodgins*, 1997 WL 392606, at *19. The Hodgins responded at the time that the panels were loose because of recent renovations and posed no harm to the animals. They repaired the panels immediately. They stated that the leaky roof had recently developed because of severe weather, and they requested additional time to “effect a proper repair.” *Id.* The April 5, 1994, report stated that a barn ceiling was poorly repaired, “leaving exposed insulation and holes.” As the judicial officer found, the Hodgins immediately repaired the ceiling. *Id.*

The Hodgins were also cited several times for bent or broken pen-wires, which (as Dr. Vaupel testified) is the natural and unavoidable result of keeping often-rowdy animals in cages.

The judicial officer noted that the Hodgins “corrected many of these structural problems at the time of the inspections.” “Nevertheless, such deficiencies, even though corrected, are still violations of the Standards.” *Id.* at *20. Unless these violations were willful, however, the Hodgins were entitled to a written notice and

¹³Specifically, these citations alleged violations of 9 C.F.R. § 3.1(a):

“(a) Structure; construction. Housing facilities for dogs and cats must be designed and constructed so that they are structurally sound. They must be kept in good repair, and they must protect the animals from injury, contain the animals securely, and restrict other animals from entering.”

a chance to demonstrate or achieve compliance with the regulations. 5 U.S.C. § 558(c). There is no evidence of willfulness here.

As for written notice, the judicial officer held this requirement was satisfied because every member of the public is given constructive notice of all federal laws and regulations, the Hodgins had in fact been provided with copies of the regulations once per year, and the Hodgins were given written copies of each inspection report identifying each violation alleged by APHIS inspectors. The inspection reports satisfy the notice requirement, in our view, but it does not appear that the Hodgins were given the opportunity to demonstrate compliance.

The judicial officer's statement that "deficiencies, even though corrected [on the spot], are still violations" is simply wrong; correcting deficiencies on the spot is precisely what Congress envisioned would save a non-willful violator from a license suspension. 5 U.S.C. § 558(c). The cited violations for structural deficiencies that were corrected cannot be used to support a license suspension. Again, however, a minimal fine might be supportable.

7. Maintenance of Surfaces

The Hodgins were cited for two violations of 9 C.F.R. § 3.1(c)(3), a regulation requiring that surfaces be kept clean.¹⁴ Specifically, the September 13, 1994, inspection found “soiled, empty cages,” and also found urates (mineral deposits from urine) in gutters and on the just-cleaned concrete under the cages. *In re Hodgins*, 1997 WL 392606 at *21. The November 22, 1994, inspection found identical violations. The judicial officer, however, overturned the ALJ’s finding of liability on these charges. *Id.* at *22. Accordingly, these citations are not in issue here.

8. Storage of Food and Bedding

The Hodgins were held guilty of violating 9 C.F.R. § 3.1(e),¹⁵ by allegedly

¹⁴The provision states in full:

“(3) Cleaning. Hard surfaces with which the dogs or cats come in contact must be spot-cleaned daily and sanitized in accordance with §§ 3.11(b) of this subpart to prevent accumulation of excreta and reduce disease hazards. Floors made of dirt, absorbent bedding, sand, gravel, grass, or other similar material must be raked or spot-cleaned with sufficient frequency to ensure all animals the freedom to avoid contact with excreta. Contaminated material must be replaced whenever this raking and spot-cleaning is not sufficient to prevent or eliminate odors, insects, pests, or vermin infestation. All other surfaces of housing facilities must be cleaned and sanitized when necessary to satisfy generally accepted husbandry standards and practices. Sanitization may be done using any of the methods provided in §§ 3.11(b)(3) for primary enclosures.” *Id.*

¹⁵This provision states:

“(e) Storage. Supplies of food and bedding must be stored in a manner that protects the supplies from spoilage, contamination, and vermin infestation. The supplies must be stored off the floor and away from the walls, to allow cleaning underneath and around the supplies. Foods requiring refrigeration must be stored accordingly, and all food must be stored in a manner that prevents contamination and deterioration of its nutritive value. All open supplies of food and bedding must be kept in leakproof containers with tightly fitting lids to prevent contamination and spoilage. Only food and bedding that is currently being used may be kept in the animal areas. Substances that are toxic to the dogs or cats but are required for normal husbandry practices must not be stored in food storage and preparation areas, but may be stored in cabinets in the animal areas .”

keeping food and bedding unprotected from spoilage, contamination and vermin.¹⁶ Specifically, the January 18, 1994, inspection found bedding stored open and soiled bedding stored next to fresh food and bedding. The March 1, 1994, inspection found paint stored with feed. Finally, the September 13, 1994, inspection found open bedding, food stored on top of the furnace, rabbit feed placed in the dead animal storage room, and feed in the same room as gasoline.

The judicial officer found that the instances where food was found next to paint and gasoline (on March 1 and September 13) “were matters that were corrected immediately.” *In re Hodgins*, 1997 WL 392606, at *22. The judicial officer reiterated the proposition that the immediate correction of these violations was irrelevant, and that the violations were still punishable. This is incorrect – without a finding of willfulness (a finding for which there is no substantial evidence), the immediate correction of the violations means, according to 5 U.S.C. § 558(c)(2), that they cannot be used to support a license revocation.

As for the charge of soiled bedding stored next to fresh bedding on January 18, 1994, the photograph reveals a wheelbarrow full of wood chippings and fecal matter sitting next to several large packages (presumably of fresh wood chips) that are wholly sealed and packed tightly. The Hodgins maintain that the wheelbarrow was inadvertently left in that place because it was too cold to take it outside that day (January 18 was the record-breaking cold day) and the staff had been sent home. Dr. Johnson testified that the placement of the wheelbarrow would not create any health hazard for the animals. We therefore see no reason to think that the placement of the wheelbarrow caused any danger of “contamination” within the meaning of 9 C.F.R. § 3.1(e). Moreover, considering the extreme weather conditions of January 18, we see no evidence of willfulness; therefore, the Hodgins should have been a chance to demonstrate compliance by moving the wheelbarrow.

As for the violations on September 13, the Hodgins point out that the bedding was open because of the time of day – 9:00 a.m., when they were in the process of changing bedding throughout the kennel. We see no reason to dispute this point; it is hard to imagine how a kennel owner is supposed to change an animal’s bedding (as required) without ever having an open bag of fresh bedding somewhere. The Hodgins also note that the food found on the furnace was actually a bag of dog biscuits that belonged to an employee. This violation, if it can be called that, shows no signs of willfulness. The Hodgins argue that the barrel of rabbit feed in the dead animal storage room was completely closed, and that there were no rabbits in their kennel at the time of the inspection. The record is devoid of evidence suggesting that a danger of contamination might arise from storing a closed barrel of rabbit food in the same room as a freezer full of dead animals. Without such evidence, we have no reason to think that the placement of the barrel was a violation of the

¹⁶The November 16, 1993, inspection cited open bags of bedding and feed, but the judicial officer dismissed this allegation.

regulation, much less a willful violation.

9. Drainage and Waste Disposal

The seventh set of violations concerns 9 C.F.R. § 3.1(f), which requires adequate measures to clean waste materials from the animal housing areas.¹⁷ Specifically, the January 18, 1994, inspection found puddles of water due to “melting snow off the equipment,” piles of soiled bedding in the aisles, and standing water and feces in the drainage troughs. On March 1, 1994, inspectors found standing water, urine, and fecal debris in the drainage troughs. On June 23, 1994, inspectors found standing water in a walkway; Dr. Dellar testified that the water was “so high it was actually flowing into one of the dog enclosures and getting the bedding wet.”

As to the violations alleged for January 18, 1994, Mr. Hodgins testified that the problems occurred because some employees did not make it to work that day, the temperature being 19 degrees below zero. He stated:

“[T]here was no place to go with [the used bedding]. We cleaned the pens and left it in there because of the extreme cold temperatures. And the manure spreader could not be dumped because it was froze, so we were in a situation where we couldn’t get rid of it. So until that manure spreader got thawed out and we dumped it the next day, then it would

¹⁷The provision reads:

“(f) Drainage and waste disposal. Housing facility operators must provide for regular and frequent collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals, in a manner that minimizes contamination and disease risks. Housing facilities must be equipped with disposal facilities and drainage systems that are constructed and operated so that animal waste and water are rapidly eliminated and animals stay dry. Disposal and drainage systems must minimize vermin and pest infestation, insects, odors, and disease hazards. All drains must be properly constructed, installed, and maintained. If closed drainage systems are used, they must be equipped with traps and prevent the backflow of gases and the backup of sewage onto the floor. If the facility uses sump or settlement ponds, or other similar systems for drainage and animal waste disposal, the system must be located far enough away from the animal area of the housing facility to prevent odors, diseases, pests, and vermin infestation. Standing puddles of water in animal enclosures must be drained or mopped up so that the animals stay dry. Trash containers in housing facilities and in food storage and food preparation areas must be leakproof and must have tightly fitted lids on them at all times. Dead animals, animal parts, and animal waste must not be kept in food storage or food preparation areas, food freezers, food refrigerators, or animal areas.”

have been removed. But the pens were cleaned, the feces were in the middle of the floor in small piles.” *Id.*

The puddles of water from “melting snow off the equipment” on January 18 were present because the Hodgins had to bring a piece of equipment into the building to thaw it out. Mr. Kovach admitted in testimony that the equipment had been placed in the equipment area of the building, which is separated from the animal area by concrete walls and wooden doors. The regulation prohibits only “puddles of water *in animal enclosures.*” 9 C.F.R. § 3.1(f) (emphasis added). The puddles found on January 18 are thus not punishable.

As for the violations concerning the drainage trough (on Jan. 18, 1994, and March 1, 1994), the Hodgins argued that the troughs’ very purpose is to catch urine and feces “so that it is taken away from the area in which the animals are kept and the animals stay clean and dry.” The Hodgins also argue that the inspections usually took place at 9 a.m., at which time the daily trough cleaning had not taken place. Mr. Kovach, one of the inspectors, was asked whether there might not normally be some urine and feces in the trough that is intended to carry such waste away from the cages. His response: “Well there might be some, but from what I observed it looked like maybe a day or so worth of feces and urine.” This observation is consistent with the Hodgins’ assertion that they did in fact do a daily cleaning, which is all the regulations require.

The judicial officer stated that the standards have no exception for “extreme weather conditions” or “because the inspection occurs early in the work day.” A failure to comply with the regulations is punishable no matter what excuse might be offered.

But the regulation does not outlaw “violations” arising only because of the time of the inspection. 9 C.F.R. § 3.1(f) provides that there must be “regular and frequent collection, removal, and disposal of animal and food wastes.” Regular disposal of waste is not the same as *continuous* disposal of waste. No matter how regular the cleaning efforts of the kennel, there is bound to be *some* time of the day at which an inspection will discover waste that has not been cleaned up at that particular moment. The judicial officer seemed to interpret § 3.1(f) as though it read: “Housing facility operators must provide for immediate and continuous [rather than “regular and frequent”] collection, removal, and disposal of animal and food wastes, bedding, debris, garbage, water, other fluids and wastes, and dead animals. . . .” This is not a tenable interpretation. Accordingly, the findings of violations predicated on the failure to remove waste are not sustainable.

As to the alleged violation of June 23, 1994, where standing water was said to have been found flowing into a dog enclosure, the photographs do not support the claim. Moreover, the record contains no evidence of how standing water could have reached such a level (the cages are elevated at Hodgins Kennels), and there is no evidence of willfulness in any event. Having overturned the alleged structural

violations, we think that no license suspension or fines can be predicated upon those citations.

10. Temperature

One citation was based on a low temperature reading on January 18, 1994.¹⁸ That was the day, it will be recalled, when outdoor temperature was at a record low – around 20 degrees below zero. The inspectors found that the temperature in one kennel was 41 degrees and in the other kennel was 44 degrees. Mr. Hodgins testified that Dr. Dellar’s first reading (with the thermometer in the air) was above 50 degrees, but that she took repeated readings on the floor, where the low temperatures were recorded.¹⁹

The judicial officer held that there was a violation because the indoor temperature was under 50 degrees. This holding, however, does not square with the regulation. The regulation requires that the *ambient* temperature (defined as “the air temperature surrounding the animal,” 9 C.F.R. § 1.1) be at or above 50 degrees.

¹⁸9 C.F.R. § 3.2(a) provides:

“(a) Heating, cooling, and temperature. Indoor housing facilities for dogs and cats must be sufficiently heated and cooled when necessary to protect the dogs and cats from temperature or humidity extremes and to provide for their health and well-being. When dogs or cats are present, the ambient temperature in the facility must not fall below 50 degrees F (10 degrees C) for dogs and cats not acclimated to lower temperatures, for those breeds that cannot tolerate lower temperatures without stress or discomfort (such as short-haired breeds), and for sick, aged, young, or infirm dogs and cats, except as approved by the attending veterinarian. Dry bedding, solid resting boards, or other methods of conserving body heat must be provided when temperatures are below 50 degrees F (10 degrees C). The ambient temperature must not fall below 45 degrees F (7.2 degrees C) for more than 4 consecutive hours when dogs or cats are present, and must not rise above 85 degrees F (29.5 degrees C) for more than 4 consecutive hours when dogs or cats are present. The preceding requirements are in addition to, not in place of, all other requirements pertaining to climatic conditions in parts 2 and 3 of this chapter.”

¹⁹Mr. Hodgins’ full statement on this issue was as follows:

“[S]he asked Dr. Harlan to place the thermometer on a portable dog cage that was sitting in the dry floor area of the kennel, and she did that. And they waited a few minutes and she asked Dr. Harlan what the temperature was. Dr Harlan told her that it was 50 degrees and Dr. Dellar stated, “That’s not good enough. Put it on the pallet, on the floor.” It was about two or three inches off the floor. So they placed the thermometer down there and they got a 42 or 41 degree reading. That’s the explicit memory that I have on that.”

A temperature reading obtained only by putting the thermometer on a pallet on the floor would not show the ambient temperature. While seeming to prohibit all ambient temperatures below 50 degrees, moreover, the regulation goes on to provide that if the temperature *does* drop below 50 degrees, the animals must be provided with “dry bedding, solid resting boards, or other methods of conserving body heat.” Clearly, then, the regulation does not create an absolute ban on any ambient temperature below 50 degrees; rather, the regulation envisions situations in which keeping the ambient temperature above 50 degrees might be impossible (something that could easily happen during record-breaking cold temperatures) and provides for methods of keeping the animals warm in that situation.

Given the undisputed testimony of Mr. Hodgins about the floor location of the temperature readings, we are not persuaded that substantial evidence supports a finding that the ambient (or atmospheric) temperature was actually below 50 degrees on January 18, 1994. Even if it was, the record contains no substantial evidence (or any evidence, for that matter) that the Hodgins Kennels failed to provide “dry bedding, solid resting boards, or other methods of conserving body heat.” This citation will not support a fine or suspension of the license.

11. Ventilation

There were six counts of failing to ventilate the kennels properly, in violation of 9 C.F.R. § 3.2(b).²⁰ On the inspections of November 16, 1993, March 1, 1994, April 5, 1994, May 10, 1994, September 13, 1994, and November 22, 1994, the inspectors claim to have detected strong ammonia odors. The inspectors claimed that the odor could have been reduced by increased cleaning, ventilation, or a decreased animal population.

The Hodgins testified that their ventilation fans run constantly, and Dr. Vaupel testified that he had never noticed an excessive odor at the kennel. *In re Hodgins*, 1997 WL 392606, at *24. Dr. Dellar, however, testified that the ammonia odor burned her eyes and throat, and Dr. Harlan testified that her eyes watered as well. Based on the latter testimony, the judicial officer found six violations of § 3.2(b).

²⁰This provision states:

“(b) Ventilation. Indoor housing facilities for dogs and cats must be sufficiently ventilated at all times when dogs or cats are present to provide for their health and well-being, and to minimize odors, drafts, ammonia levels, and moisture condensation. Ventilation must be provided by windows, vents, fans, or air conditioning. Auxiliary ventilation, such as fans, blowers, or air conditioning must be provided when the ambient temperature is 85 degrees F (29.5 degrees C) or higher. The relative humidity must be maintained at a level that ensures the health and well-being of the dogs or cats housed therein, in accordance with the directions of the attending veterinarian and generally accepted professional and husbandry practices.”

Any ammonia level high enough to make an inspector's eyes water, he said, is too high for the health and well being of the animals.

This finding, however, fails to give full consideration to the veterinarians' testimony. Dr. Vaupel testified that the odor level at Hodgins Kennels "stacks up very, very well" compared to other kennels; that the odor was "minimal;" that he had never experienced any burning sensation from the odor; and that there was nothing about the odor or atmosphere at Hodgins Kennels that could "adversely affect" the animals there. Dr. Johnson similarly testified that he had never experienced a burning sensation in his eyes or throat at Hodgins Kennels; that he had never smelled an excessive odor there; and that the odor at Hodgins Kennels is "probably better than most."

The agency attempts to counter this testimony with a conclusory claim that an odor capable of making an inspector's eyes water is all that is needed to show inadequate ventilation. This argument, however, fails to account for the possibility that the inspectors might have been especially sensitive or allergic, or that a level of odor which made human eyes water was nevertheless safe for animals. The regulation does not penalize any level of odor that makes any given human being's eyes water; rather, it penalizes only a failure to maintain ventilation sufficient to minimize odors and provide for the "health and wellbeing" of the animals present. The agency presented no evidence that the odor tolerance of animals and humans is the same; on the other hand, the Hodgins did present a practicing veterinarian's testimony that the odor level he observed on his weekly visits could not adversely affect the animals there. On the record considered as a whole, the evidence on which the agency relies as support for its findings is not substantial.

12. Interior Surfaces

The Hodgins were found guilty of four counts of failing to keep interior surfaces impervious to moisture, as required by 9 C.F.R. § 3.2(d).²¹ The inspectors found on November 16, 1993, that many floors needed to be resealed, and that metal grating on the walls of one building had begun to peel, “leaving areas of unsealed material which cannot be readily sanitized.” *In re Hodgins*, 1997 WL 392606, at *25. On March 1, 1994, September 13, 1994, and November 22, 1994, the inspectors reported that the floors in the main barn needed to be resealed. *Id.*

The judicial officer found, however, that the inspectors’ test for determining whether the floors were impervious to moisture was not necessarily accurate, and also noted testimony by Mr. Hodgins that he had applied sealant just eight days prior to a citation for having unsealed floors. The judicial officer therefore found no violation of § 3.2(d), and the “interior surface” counts are not in issue here.

13. Space Requirements

The Hodgins were found guilty of one count of failing to provide sufficient space for animals in violation of 9 C.F.R. § 3.6(a)(2)(xi).²² On January 18, 1994, the inspectors found a pen in which too many dogs were housed together; nine dogs were in a pen that the inspectors said should have had only eight dogs.

²¹This provision states:

“(d) Interior surfaces. The floors and walls of indoor housing facilities, and any other surfaces in contact with the animals, must be impervious to moisture. The ceilings of indoor housing facilities must be impervious to moisture or be replaceable (e.g., a suspended ceiling with replaceable panels).”

²²This provision states:

“§ 3.6 Primary enclosures. Primary enclosures for dogs and cats must meet the following minimum requirements:

“(a) General requirements.

* * *

“(2) Primary enclosures must be constructed and maintained so that they:

“(xi) Provide sufficient space to allow each dog and cat to turn about freely, to stand, sit, and lie in a comfortable, normal position, and to walk in a normal manner”

But how was this determined? The regulation itself provides merely that each enclosure should provide “sufficient space.” It turns out that APHIS has its own unpublished standard for determining how exactly how many square inches count as sufficient. The inspectors’ report indicates that the pen had 12,312 square inches, but that because of the ninth dog, the pen should have had 13,603 square inches. (To put these calculations into square feet, the pen had 85.5 square feet, but should have had 94.5 square feet – which means that one dimension of the pen (either length or width) should have been 1.5 feet greater.) As for APHIS’s methodology, there being no published version, we quote the testimony of Mr. Kovach, one of the inspectors:

A. “You measure the dog from the tip of the nose . . . to the tip of the tail [emphasis added], you add six inches to that, then you multiply the two figures together, which gives you your square inches for that dog. Then you go down, if there’s nine dogs in a pen you add up the amount of square inches that are needed for that many dogs. Then you measure the cage length and width; that gives you your square inches of the cage.”

* * *

Q. “Do you have any idea how long it normally takes you to measure nine dogs and figure out the square inches in the cage?”

A. “Sometimes it can take 20 - 30 minutes. You have to get a care taker or handler to help you hold the dog to measure.”

* * *

Q. “Do you have to stretch out the tail and get the tape measure from the nose?”

A. “No. No, no, no, no.”

Q. “What parts do you measure?”

A. “You misinterpreted me. It’s from the tip of the nose to the *base of the tail*.” (Emphasis added.)

The judicial officer failed to discuss whether this violation was willful. As Mr. Kovach’s testimony indicates, the process of calculating can be quite cumbersome and confusing (Mr. Kovach himself gave conflicting testimony as to whether the measurement should be to the *tip* or the *base* of the dog’s tail).

Moreover, as noted above, the pen was a mere 1.5 feet shorter in length (or width) than it should have been for nine dogs. It thus seems unlikely that the violation was willful; there is every indication that it was, at worst, a temporary and accidental oversight.

Because there is no evidence of willfulness, and because the violation was immediately corrected by removing one of the dogs (as noted on the inspector's report), this violation is not punishable by a license suspension. A small fine might be supportable.

14. Housekeeping and Cleaning

Several types of housekeeping violations were cited.

First, the Hodgins were found guilty of two counts of failing to keep the primary dog enclosures clean, as required by 9 C.F.R. § 3.11(a).²³ The November 16, 1993, inspection found that "urine scale had built up on the floor under the dog enclosures." *In re Hodgins*, 1997 WL 392606 at *26. The September 13, 1994, inspection found urate scale (mineral residue from evaporated urine) on the floor beneath the pens, as well as hair and other debris stuck to the bottom of cages.

As for the allegations of urate scale buildup, the Hodgins correctly point out that an APHIS inspector admitted to never having tested the discolored spots to see if they really were urate scale. Moreover, Dr. Johnson testified that the water supply in the area had a high mineral content that would cause a mineral scale to appear on surfaces that had been repeatedly cleaned with the water; that he had never seen any mineral buildup, whether from urine or otherwise, that would pose a health threat to the animals; and that there was no "excessive buildup" of feces or debris under the cages, indicating to him that the areas underneath the cages had indeed been "washed down daily." Dr. Vaupel similarly testified that he had never seen urine

²³This provision states:

"(a) Cleaning of primary enclosures. Excreta and food waste must be removed from primary enclosures daily, and from under primary enclosures as often as necessary to prevent an excessive accumulation of feces and food waste, to prevent soiling of the dogs or cats contained in the primary enclosures, and to reduce disease hazards, insects, pests and odors. When steam or water is used to clean the primary enclosure, whether by hosing, flushing, or other methods, dogs and cats must be removed, unless the enclosure is large enough to ensure the animals would not be harmed, wetted, or distressed in the process. Standing water must be removed from the primary enclosure and animals in other primary enclosures must be protected from being contaminated with water and other wastes during the cleaning. The pans under primary enclosures with grill-type floors and the ground areas under raised runs with mesh or slatted floors must be cleaned as often as necessary to prevent accumulation of feces and food waste and to reduce disease hazards pests, insects and odors."

scale on the floors at Hodgins Kennels. Given the unanimous testimony of the practicing veterinarians, we conclude that the evidence supporting the above charges was not substantial.

Second, the Hodgins were found guilty of one count of failing to use appropriate cleaning practices as required by 9 C.F.R. § 3.11(b)(3).²⁴ The November 22, 1994, inspection alleged the following: “poorly cleaned, empty cages,” “cages that have been cleaned (and were occupied) were still soiled between the grates and supports,” “urates are accumulating and need to be removed on a regular basis.” The judicial officer, inexplicably, upheld this violation despite the fact that he had previously held that there was no violation under 9 C.F.R. § 3.1(c)(3) for precisely the same conditions!

The inspection report shows a single paragraph with the heading “#12: Surfaces and Cleaning (3.1c3), # 36: Cleaning and Sanitation (3.11b3).” The report goes on to describe the conditions upon which both violations were charged. Yet the judicial officer held that the § 3.1(c)(3) violation had not been proved by a preponderance of the evidence, *In re Hodgins*, 1997 WL 392606 at *21, while at the same time upholding a violation under § 3.11(b)(3), *id.* at *27. This was capricious, and no penalty can be assessed with respect to this citation.

Third, the Hodgins were found guilty on seven counts of failing to clean the

²⁴This provision states:

“(b) Sanitization of primary enclosures and food and water receptacles.

* * *

“(3) Hard surfaces of primary enclosures and food and water receptacles must be sanitized using one of the following methods:

“(i) Live steam under pressure;

“(ii) Washing with hot water (at least 180 [degrees]F (82.2 [degrees]C)) and soap or detergent, as with a mechanical cage washer; or

“(iii) Washing all soiled surfaces with appropriate detergent solutions and disinfectants, or by using a combination detergent/disinfectant product that accomplishes the same purpose, with a thorough cleaning of the surfaces to remove organic material, so as to remove all organic material and mineral buildup, and to provide sanitization followed by a clean water rinse.”

premises in violation of 9 C.F.R. § 3.11(c).²⁵ On November 16, 1993, the inspectors found that certain walls “appeared moldy” and were “splattered with debris;” that the floor needed sweeping and tools and bottles needed to be removed;” and that “[d]ead flies, shingles, vents, and gasoline cans need[ed] to be cleared away.” *In re Hodgins*, 1997 WL 392606, at *27. The Hodgins responded that the splattered appearance of the walls was due to the installation of wallboard that had not been scrubbed yet. The Hodgins also noted that many of the items of which the inspectors complained were in a storage room, separated from the animals by a door. *Id.*

On January 18, 1994, the inspectors found cobwebs and rodent feces, and stated that the “walls and ceiling areas still need[ed] more cleaning.” *Id.* On March 1, April 5, May 10, and June 23, 1994, the inspectors cited dust, debris, and cobwebs on the walls, window sills, ventilation ducts, ceilings, and fixtures. The May 10 inspection additionally noted that the “barrel used to euthanize the animals had a strong odor and was soiled, and rusting.” *Id.* The September 13, 1994, inspection report claimed that the “entire facility was in need of a more frequent cleaning” because of dust, cobwebs, fecal accumulation, dead flies, and flaking light fixtures. *Id.*

As for the rust on the euthanization barrel (cited May 10), the charge reflects a fastidiousness that seems irrational. When a condemned man mounts the scaffold, shall he be heard to complain that the hangman has a communicable disease? Dr. Harlan testified that “[a]nything that comes in contact with the animals is required to be maintained in good condition, well repaired, no rusting surfaces, to allow for cleaning and disinfection. This includes everything associated with . . . euthanasia.” *Id.* (quoting Tr. 708). But the pertinent regulation merely provides that the “[p]remises where housing facilities are located, including buildings and surrounding grounds, must be kept clean and in good repair to protect the animals from injury” 9 C.F.R. § 3.11(c). (Emphasis supplied.) Euthanasia provides guaranteed protection against subsequent injury, and a euthanization barrel would not appear to be covered by the terms “premises” or “buildings and surrounding grounds” anyway. Dr. Harlan’s interpretation of the regulation is obviously overbroad.

²⁵This provision states:

“(c) Housekeeping for premises. Premises where housing facilities are located, including buildings and surrounding grounds, must be kept clean and in good repair to protect the animals from injury, to facilitate the husbandry practices required in this subpart, and to reduce or eliminate breeding and living areas for rodents and other pests and vermin. Premises must be kept free of accumulations of trash, junk, waste products, and discarded matter. Weeds, grasses, and bushes must be controlled so as to facilitate cleaning of the premises and pest control, and to protect the health and well-being of the animals.”

As to the charges relating to dust, cobwebs, and debris, we have reviewed the numerous photographs submitted by the APHIS inspectors and by the Hodgins. In light of the photographs, it is difficult to see how there could have been any risk of “injury” to the animals – which is what the regulation is aimed at preventing. 9 C.F.R. § 3.11(c). The pictures show a few cobwebs in a corner of a ceiling and on ventilation shafts. No evidence was presented as to how this could possibly have caused any harm to the animals; in fact, the ALJ noted that Dr. Robert Walker, head of the Northeast Sector of APHIS, had reprimanded the inspectors under his supervision for being “nitpicky” about dust and cobwebs. Moreover, the regulations themselves allow for floors to be made of “dirt, absorbent bedding, sand[,] gravel, grass, or other similar material.” 9 C.F.R. § 3.11(c)(3). If animals can be placed on dirt or sand (as they would be in a state of nature), is it not unduly nitpicky to complain about a little dust? The ALJ opined that “as the Standards are written, it is a judgment call by the inspectors whether the presence of such matters as dust and cobwebs, as well as fecal matter, constitutes a failure to comply with the Standards.” That may be true within limits, but scattered instances of dust and cobwebs, which is all we have here, are not sufficient to support a finding that the regulations have been violated. No penalty can be assessed in this connection.

Finally, as to all the above charges relating to “Housekeeping,” we note that the judicial officer had previously overturned findings of violations of § 3.1(c)(3), which provides that the surfaces “with which the dogs or cats come in contact must be spot-cleaned daily and sanitized in accordance with § 3.11(b) of this subpart to prevent accumulation of excreta and reduce disease hazards.” 9 C.F.R. § 3.1(c)(3). Compliance with § 3.1(c)(3) thus turns on the cleaning required by § 3.11(b). In explaining why he did not find any violations of § 3.1(c)(3), the judicial officer essentially quoted the text of § 3.11(a), which provides for daily cleaning of primary enclosures and cleaning under primary enclosures as often as necessary. *In re Hodgins*, 1997 WL 392606, at *21. He found that the Hodgins *do* clean the cages and the floors underneath on a daily basis, as well as changing the wood shavings in the pens. *Id.* at *22. Because the Hodgins “have instituted a program of daily cleaning,” the judicial officer declined to find any violations of § 3.1(c)(3). But if the reason there is no violation of § 3.1(c)(3) is that the Hodgins provided daily cleanings as required by § 3.11, it is irrational to hold the Hodgins liable for violations of § 3.11. No penalty can be assessed with respect to the above citations.

15. Pest Control

The Hodgins were found guilty on three counts of failing to maintain an effective program of pest control, as required by 9 C.F.R. § 3.11(d).²⁶ The March 1, 1994, inspection claimed to have found rodent feces and nesting material. The June 23, 1994, inspection claimed to have found mosquitos and rodent feces. The September 13, 1994, inspection claimed to have found flies. The judicial officer acknowledged that the regulation does not “require the complete elimination of pests, which is probably impossible to achieve, but an ‘effective program’ of control.” *In re Hodgins*, 1997 WL 392606, at *28. He found that Hodgins Kennels had failed to provide such a program.

The Hodgins point out, however, that on at least one occasion Dr. Harlan claimed to have seen rodent feces by a furnace, but when the Hodgins asked her to look closer, she agreed that what she thought was rodent feces was actually dust and soot from the furnace. Dr. Vaupel testified that he had never seen any rodents in his visits to Hodgins Kennels, nor had he ever seen rodent feces. Dr. Johnson also testified that he had never seen a rodent at Hodgins Kennels, but that he had seen the rodent bait placed by the Hodgins as part of their pest control program.

As for the mosquitoes, the Hodgins point out that the inspector who saw the insects claimed to have been concerned about malaria, a disease not known to plague the residents of Michigan. As for the flies, the Hodgins argue that flies are indeed prevalent in the summer, and that a violation should not be charged just because the inspectors saw flies on one occasion. We find it difficult to imagine any human habitation, let alone an animal kennel with two hundred cats and dogs, making it through a Michigan summer without the occasional presence of mosquitoes and flies.

The evidence presented here might suffice to show that the Hodgins Kennels pest control program was inadequate, if inadequate is taken to mean less than perfect. But the evidence does not show any *willful* decision to allow the presence of mosquitoes (a one-time violation) or flies (another one-time violation) or rodents (of which the regular veterinarians never saw any evidence). Since the Hodgins were not given a chance to demonstrate compliance with the inspectors’ vision of a mosquito-free and fly-free animal kennel, they should not suffer a license suspension for these alleged violations.

²⁶This provision states:

“(d) Pest control. An effective program for the control of insects, external parasites affecting dogs and cats, and birds and mammals that are pests, must be established and maintained so as to promote the health and well-being of the animals and reduce contamination by pests in animal areas.”

16. Primary Conveyance

The Hodgins were found guilty on one charge of failing to keep the interior of a van clean in violation of 9 C.F.R. § 3.15.²⁷ The inspection report of November 22, 1994, claimed that “a van used to transport animals . . . contained paper and plastic trash – along with potentially toxic substances like brake fluid and oil.” Frances Hodgins provided more specifics, testifying that the inspectors found a McDonald’s napkin and a can of WD-40 oil in the back of the van and a McDonald’s wrapper in between the two passenger seats in the front of the van. Ms. Hodgins further testified that the dogs transported in that van are always kept in “portable airline cages.” (*Id.*) The dogs thus could not have been harmed by the can of WD-40 or the McDonald’s napkin.

Even if the dogs’ “health and well-being” or “safety and comfort” were threatened by the WD-40 and napkin, there is no evidence that the violation was willful. The Hodgins should therefore have been a chance to demonstrate compliance, as provided by 5 U.S.C. § 558(c)(2). This opportunity was denied them. No license suspension can be based on this citation.

²⁷This provision states, in relevant part:

“§ 3.15 Primary conveyances (motor vehicle, rail, air, and marine).

“(a) The animal cargo space of primary conveyances used to transport dogs and cats must be designed, constructed, and maintained in a manner that at all times protects the health and well-being of the animals transported in them, ensures their safety and comfort, and prevents the entry of engine exhaust from the primary conveyance during transportation.

* * *

“(g) The interior of the animal cargo space must be kept clean.

“(h) Live dogs and cats may not be transported with any material, substance (e.g., dry ice) or device in a manner that may reasonably be expected to harm the dogs and cats or cause inhumane conditions.”

17. Employees

The Hodgins were found guilty of seven counts of not having enough employees, in violation of 9 C.F.R. § 3.12.²⁸ The relevant inspection reports were those of November 16, 1993, and March 1, April 5, May 10, June 23, September 13, and November 22, 1994. The report for November 16, 1993 states:

“Most of the items cited on this report are a reflection of inadequate man hours spent at this facility. This facility must have enough employees to carry out the required level of husbandry. Several times the statement was made to the inspectors that they were short handed at this facility.”

In re Hodgins, 1997 WL 392606, at *28. As the judicial officer noted, however, this admission of short-handedness was actually due to the fact that some of the employees had gone hunting for the day and that Mr. Hodgins was out of town for an annual meeting.

The Hodgins also argued that because their workday started at 7:30 a.m., the employees did not have time to provide the animals with medical treatment, feeding, and cleaning by the time the inspectors arrived, as they typically did, at 9 a.m. Mr. Hodgins testified that the cleaning and medication of the animals began before 8 a.m. and lasted until late afternoon. Since most inspections took place in the early morning, the inspectors never saw the kennel after it had been cleaned for the day.

The judicial officer admitted that this argument was “reasonable.” *In re Hodgins*, 1997 WL 392606, at *29. He nonetheless held that the regulations required that the kennel “have enough employees at all times to carry out the level of husbandry practices and care required by the Standards regardless of the time of an inspection. By not having enough employees to maintain the required level of husbandry and care at all times, Respondents violated Section 3.12 of the Standards”

We conclude that the inspectors used an unsupportably high standard for the

²⁸This provision states:

“§ 3.12 Employees.

“Each person subject to the Animal Welfare regulations (9 CFR parts 1, 2, and 3) maintaining dogs and cats must have enough employees to carry out the level of husbandry practices and care required in this subpart. The employees who provide for husbandry and care, or handle animals, must be supervised by an individual who has the knowledge, background, and experience in proper husbandry and care of dogs and cats to supervise others. The employer must be certain that the supervisor and other employees can perform to these standards.”

number of employees. Various regulations require only that cleaning be done once per day. See, e.g., 9 C.F.R. § 3.1(c)(3) (requiring that hard surfaces be spot-cleaned daily); 9 C.F.R. § 3.11(a) (requiring the cleaning of primary enclosures once daily). Yet Dr. Harlan, one of the inspectors, testified that in her opinion, the regulations require cleaning *three times* per day if necessary. In the factual context presented here, this interpretation of the regulations goes too far.

Moreover, the citations for insufficient employees seem to be based explicitly on the inspectors' desire to see all tasks completed by 9:00 a.m. In one report (that of March 1, 1994) the inspectors wrote the following:

“When asked, one employee responded that she didn't have enough time to complete tasks such as medicine treatments, feeding, or cleaning by 9:00 am. This employee starts at 7:30 am. This answer was given on several occasions when asked why some tasks were not completed. This indicates an insufficient number of employee hours at this site. Correct by 4-01-94.”

The Hodgins responded to this citation with a letter making what seems to us an irrefutable point:

“We respectfully suggest that this is another example of completely unrealistic and unsubstantiated citations. Our employees, like any others, work eight hour shifts. If we hire enough employees so that all the work to be done is completed in the first hour and a half, what are our employees supposed to do for the rest of the day? Essentially, the federal government appears to be ordering us to hire enough employees to complete all of our routine work in the first hour and one half of the day. Obviously, it is not possible to have the cleaning, feeding and medicating of over 200 animals completed in an hour and 30 minutes.” (Letter of Hodgins Kennels to APHIS, March 8, 1994.

We agree. The regulations – which explicitly require no more than a daily cleaning – cannot with reason be interpreted to require that a kennel have enough employees to complete the daily cleaning and medicating by 9 a.m., or to do three rounds of cleaning per day. No license suspension or fine can be based on these citations.

C. Due Process

The Hodgins make several arguments to the effect that they were denied due process in the administrative hearing before the ALJ. We shall consider these arguments in turn.

1. Cross-Examination

The Hodgins say that they were wrongly denied the right to cross-examine Dr. Dellar about whether she had ever actually practiced veterinary medicine. They note instances of Dr. Dellar's seeming unfamiliarity with small animals, such as her admission of ignorance as to whether kittens are born with teeth – an admission highly relevant to Dr. Dellar's assertion that feeding Friskies cat food to kittens was illegal. The Hodgins apparently wished to elicit further admissions of ignorance from Dr. Dellar on cross-examination, but the ALJ did not permit the Hodgins' lawyer to pursue a line of questioning about Dr. Dellar's practical experience.

While the stifling of cross-examination is troubling, we do not see any violation of due process here. As the judicial officer pointed out, the Hodgins failed to object at the time cross-examination was curtailed, and therefore failed to preserve their right to review on that issue. *In re Hodgins*, 1997 WL 392606, at *44. It had already been pretty well established, moreover, that Dr. Dellar had little practical experience in treating animals. Given her admission that she did nothing more than a visual inspection (rather than an actual medical examination) of the animals, we have taken her "diagnoses" with the appropriate grain of salt, especially where her conclusions are contradicted by Drs. Johnson and Vaupel, practicing veterinarians with over 50 years of experience between them.

2. USDA's refusal to provide a definite statement

The Hodgins next argue that the USDA denied them due process in refusing to provide a definite and detailed statement of the charges brought against them. The USDA's complaint listed only broad charges, such as "APHIS inspected respondents' premises and found that the respondents had failed to maintain programs of disease control and prevention, euthanasia, and adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide veterinary care to animals in need of care, in willful violation of section 2.40 of the regulations. . . ." (Complaint, ¶ IIA). The Hodgins responded to the complaint with a "motion for more definite statement," in which they asked for more specific allegations that would explain why the USDA thought the veterinary care program inadequate. Dr. Vaupel also submitted a letter requesting more specificity than the bare, conclusory allegations in the USDA complaint. The USDA responded by asserting that the Hodgins "are not entitled to a more definite statement" and suggesting that the complaint was specific enough for the Hodgins to file an answer denying the material violations.

At the hearing, the Hodgins' attorney found it difficult to pin the inspectors down on what, precisely, they considered to be a violation of the Animal Welfare Act. Consider, for example, the examination of Dr. Harlan as to how many cleanings per day would be required or whether lameness or diarrhea would count

as a violation, or what veterinary treatment (if any) would be necessary for a “thin” dog. At one point the Hodgins’ lawyer told the judicial officer that the USDA’s demands were “somewhat nebulous” and that they possibly exceeded the USDA’s authority; the USDA lawyer responded that asking the inspectors about the USDA requirements was inappropriate because the USDA’s position would be put in its brief.

Notice and an opportunity to be heard represent the essence of due process. *Yellow Freight System, Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). The Administrative Procedure Act thus requires that all persons subject to an agency hearing shall “be timely informed of . . . the matters of fact and law asserted.” 5 U.S.C. § 554(b)(3). This court has previously found violations of the notice requirement of the Act where the agency sustained a charge different from any listed in the complaint, see *Grand Rapids Die Casting Corp. v. NLRB*, 833 F.2d 605, 606 (6th Cir. 1987); *NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535, 544 (6th Cir. 1984).

Even where there is lack of notice prior to the administrative hearing, however, “due process is not offended if an agency decides an issue the parties fairly and fully litigated at a hearing. When parties fully litigate an issue they obviously have notice of the issue and have been given an opportunity to respond.” *Yellow Freight*, 954 F.2d at 358. Although the agency’s complaint against the Hodgins contained nothing more than recitations of the regulatory provisions that were allegedly violated, the complaint was based upon inspection reports that included numerous factual examples of the violations charged. And the specifics were debated and discussed at the administrative hearings in great detail. The complaint could have been drafted more clearly, but we do not think there was a denial of due process here. The Hodgins had a reasonably fair chance to litigate the specifics of each charge at the hearing, and that is all that is required.

3. Witnesses and Evidence

The Hodgins argue that the ALJ erred in not allowing them to depose or subpoena Dr. Joseph Walker, the head of APHIS’s Northeast Sector, or introduce into evidence tapes of his discussion of the case. They claim to have had numerous conversations with him, some on tape, and they assert that what he said would have confirmed their position on several key points. Dr. Walker could have testified, for example, that he instructed inspectors not to try to diagnose animals; that he admonished inspectors not to be nitpicky about cobwebs and dust; and that political pressure was exerted on the agency to eliminate Class B animal dealers altogether. The Hodgins say that Dr. Walker would have made numerous admissions that could have come in as those of a party opponent under Federal Rule of Evidence 801(d)(2).

The Hodgins also challenge the ALJ's refusal to let Mr. Hodgins shed light on possible bias on the part of the agency's inspectors. Mr. Hodgins wanted to testify as follows: that he had successfully sued animal rights activists for defamation; that since his lawsuit, activists had sought to eliminate Class B animal dealers; that an animal rights activist named Christine Stevens had tried to convince the agency to eliminate Class B animal dealers; and that Ms. Stevens had in fact testified before Congress asking for \$28 million in funding to do so. The ALJ did not allow Mr. Hodgins to testify to these matters. The Hodgins contend that given the evidence of selective enforcement (*e.g.*, Mr. Rippey's statement that some of the Hodgins' violations would not have been cited at other facilities, and the inspectors' seeming insistence on standards far above those actually in force), the ALJ should have taken Mr. Hodgins' evidence.

The judicial officer, adopting the ALJ's reasoning, held the evidence inadmissible. As for the attempt to subpoena Dr. Walker, the judicial officer held that his testimony would not provide any defense to the violations charged, nor would it be relevant to the proceeding. *In re Hodgins*, 1997 WL 392606, at *38. As for the tapes of Dr. Walker's conversations with the Hodgins, the judicial officer held it immaterial that his admissions were those of a party opponent under Federal Rule of Evidence 801(d)(2), because the Federal Rules of Evidence do not apply to administrative proceedings. Moreover, the judicial officer suggested that sound recordings must be accurate and authentic, and the Hodgins' recordings might have been altered. *Id.* at *43-44. As to Mr. Hodgins' proffered testimony, the judicial officer held that it was "irrelevant to whether Respondents violated the Animal Welfare Act. . . ." *Id.* at *70.

If it be true that the agency is biased in favor of animal rights activists and against Class B animal dealers, the existence of such bias may not be strictly relevant to the question whether the Hodgins violated any given regulation under the Animal Welfare Act. The Hodgins' allegations of bias and selective prosecution were clearly relevant, however, to the question whether the inspectors' testimony and reports were credible. The USDA bears the initial burden of proof in prosecuting violations of the Animal Welfare Act. The credibility of the inspectors is highly pertinent to a determination of whether the USDA has met that burden.

We are somewhat skeptical, moreover, of the judicial officer's overall approach to the Federal Rules of Evidence. It is true that ALJs are not bound by these rules, and are free to admit "any oral or documentary evidence" which is not "irrelevant, immaterial, or unduly repetitious evidence." 5 U.S.C. § 556(d). But it stacks the deck against a hapless defendant if the ALJ can use the non-applicability of the Federal Rules of Evidence to admit evidence against the defendant which would be forbidden by the Rules (hearsay, *e.g.*), and at the same time refuse to entertain exculpatory evidence that would be admissible under the Rules. What is sauce for the goose ought to be sauce for the gander, it seems to us.

4. Separation of Powers

James Madison warned that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.” *The Federalist* No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961). Although the Supreme Court has often upheld administrative actions that depart from the strict separation doctrine, “[the] Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.” *Mistretta v. United States*, 488 U.S. 361, 380 (1989). Whether the administrative proceedings at issue here illustrate the wisdom of the Framers’ judgment presents an interesting question, but it is not a question that this court need answer in order to decide the case now before us.

The petition for review is **GRANTED**, the challenged decision is **VACATED**, and the case is **REMANDED** to the agency for further proceedings not inconsistent with this opinion.
