

**In re: REGINALD DWIGHT PARR.
AWA Docket No. 99-0022.
Decision and Order filed August 30, 2000.**

Veterinary care – Recordkeeping – Housing – Employees – Perimeter fence – Willful – Consideration of whole record – Correction of violations – Civil penalty – License suspension – Cease and desist order.

The Judicial Officer affirmed the Decision by Administrative Law Judge Edwin S. Bernstein (ALJ), except the Judicial Officer reduced the sanction imposed on the Respondent by the ALJ. The Judicial Officer found the Respondent: (1) failed to maintain at the Respondent's facility records of acquisition, disposition, and identification of animals in violation of 7 U.S.C. § 2140 and 9 C.F.R. § 2.75(b)(1); (2) failed to maintain at the Respondent's facility a written program of veterinary care in violation of 9 C.F.R. § 2.40; (3) failed to provide animals with adequate shelter from inclement weather in violation of 9 C.F.R. § 3.127(b); (4) failed to provide animals with housing that was structurally sound and maintained in good repair in violation of 9 C.F.R. § 3.125(a); and (5) failed to utilize a sufficient number of employees to maintain the professionally acceptable level of husbandry practices set forth in 9 C.F.R. § 3.125 in violation of 9 C.F.R. § 3.132. The Judicial Officer rejected the Respondent's contention that he did not violate 9 C.F.R. §§ 2.40 and 2.75(b)(1) because he maintained the required records at his residence. The Judicial Officer held that the records required by 9 C.F.R. §§ 2.40 and 2.75(b)(1) must be maintained at an exhibitor's facility where they are readily available to Animal and Plant Health Inspection Service officials during inspections of the exhibitor's facility. The Judicial Officer held that, while 9 C.F.R. § 3.125(a) does not require the Respondent to have a perimeter fence, it does require an adequate safeguard to contain the Respondent's animals and that Respondent failed to maintain an adequate safeguard to contain the Respondent's animals. The Judicial Officer rejected the Respondent's contention that the ALJ failed to consider the whole record. The Judicial Officer rejected the Respondent's contention that his correction of a violation negates the willfulness of the violation and negates the violation. The Judicial Officer held a correction of a violation does not eliminate the fact that a violation has occurred and does not negate the willfulness of the violation. The Judicial Officer considered all the factors that must be considered when determining the amount of the civil penalty to be assessed (7 U.S.C. § 2149(b)) and assessed the Respondent a \$7,050 civil penalty and suspended the Respondent's Animal Welfare Act license for 3 years and 6 months.

Brian Thomas Hill, for Complainant.

Greg Gladden, Houston, TX, for Respondent.

Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.

Decision and Order issued by William G. Jenson, Judicial Officer.

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on April 29, 1999. Complainant instituted this proceeding under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [hereinafter the Animal Welfare Act]; the regulations and standards issued under the Animal Welfare Act (9 C.F.R. §§ 1.1-3.142) [hereinafter the Regulations and Standards]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

The Complaint alleges that on April 9, 1997, July 14, 1997, April 14, 1998, November 8, 1998, and November 16, 1998, Reginald Dwight Parr [hereinafter

Respondent] willfully violated the Animal Welfare Act and the Regulations and Standards (Compl. ¶¶ II-VI).

On July 1, 1999, Respondent filed an Answer to Complaint Under the Animal Welfare Act [hereinafter Answer].

Administrative Law Judge Edwin S. Bernstein [hereinafter the ALJ] presided over a hearing in Houston, Texas, on February 8 and 9, 2000. Brian Thomas Hill, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Greg Gladden represented Respondent. On April 10, 2000, Respondent filed Respondent's Memorandum of Law and Respondent's Findings of Fact and Conclusions of Law and Complainant filed Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof. On April 21, 2000, Respondent filed Respondent's Reply to Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof [hereinafter Respondent's Reply Brief]. On April 24, 2000, Complainant filed Complainant's Reply Brief.

On June 8, 2000, the ALJ issued a Decision and Order [hereinafter Initial Decision and Order]: (1) concluding that Respondent willfully violated the Animal Welfare Act and the Regulations and Standards; (2) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (3) assessing Respondent a \$10,000 civil penalty; and (4) suspending Respondent's Animal Welfare Act license for 5 years.

On July 12, 2000, Respondent appealed to, and requested oral argument before, the Judicial Officer. Complainant failed to file a timely response to Respondent's appeal petition or Respondent's request for oral argument. On August 11, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for decision and a ruling on Respondent's request for oral argument.

Respondent's request for oral argument before the Judicial Officer, which the Judicial Officer may grant, refuse, or limit (7 C.F.R. § 1.145(d)), is refused because Respondent has thoroughly addressed the issues and the issues are not complex. Thus, oral argument would appear to serve no useful purpose.

Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision and Order, except I disagree with the sanction imposed by the ALJ. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt the ALJ's Initial Decision and Order as the final Decision and Order with modifications to reflect my disagreement with the ALJ's sanction. Additional conclusions by the Judicial Officer follow the ALJ's Initial Decision and Order, as restated.

Complainant's exhibits are designated by "CX" and transcript references are designated by "Tr."

APPLICABLE STATUTORY PROVISIONS AND REGULATIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

....

**CHAPTER 54—TRANSPORTATION, SALE, AND HANDLING
OF CERTAIN ANIMALS**

§ 2131. Congressional statement of policy

The Congress finds that animals and activities which are regulated under this chapter are either in interstate or foreign commerce or substantially affect such commerce or the free flow thereof, and that regulation of animals and activities as provided in this chapter is necessary to prevent and eliminate burdens upon such commerce and to effectively regulate such commerce, in order—

- (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.

The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.

§ 2132. Definitions

When used in this chapter—

....

(h) The term “exhibitor” means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary, and such term includes

carnivals, circuses, and zoos exhibiting such animals whether operated for profit or not; but such term excludes retail pet stores, organizations sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, purebred dog and cat shows, and any other fairs or exhibitions intended to advance agricultural arts and sciences, as may be determined by the Secretary[.]

....

§ 2140. Recordkeeping by dealers, exhibitors, research facilities, intermediate handlers, and carriers

Dealers and exhibitors shall make and retain for such reasonable period of time as the Secretary may prescribe, such records with respect to the purchase, sale, transportation, identification, and previous ownership of animals as the Secretary may prescribe.

....

§ 2146. Administration and enforcement by Secretary

(a) Investigations and inspections

The Secretary shall make such investigations or inspections as he deems necessary to determine whether any dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter or any regulation or standard issued thereunder, and for such purposes, the Secretary shall, at all reasonable times, have access to the places of business and the facilities, animals, and those records required to be kept pursuant to section 2140 of this title of any such dealer, exhibitor, intermediate handler, carrier, research facility, or operator of an auction sale.

....

§ 2149. Violations by licensees

(a) Temporary license suspension; notice and hearing; revocation

If the Secretary has reason to believe that any person licensed as a dealer, exhibitor, or operator of an auction sale subject to section 2142 of this title, has violated or is violating any provision of this chapter, or any of

the rules or regulations or standards promulgated by the Secretary hereunder, he may suspend such person's license temporarily, but not to exceed 21 days, and after notice and opportunity for hearing, may suspend for such additional period as he may specify, or revoke such license, if such violation is determined to have occurred.

(b) Civil penalties for violation of any section, etc.; separate offenses; notice and hearing; appeal; considerations in assessing penalty; compromise of penalty; civil action by Attorney General for failure to pay penalty; district court jurisdiction; failure to obey cease and desist order

Any dealer, exhibitor, research facility, intermediate handler, carrier, or operator of an auction sale subject to section 2142 of this title, that violates any provision of this chapter, or any rule, regulation, or standard promulgated by the Secretary thereunder, may be assessed a civil penalty by the Secretary of not more than \$2,500 for each such violation, and the Secretary may also make an order that such person shall cease and desist from continuing such violation. Each violation and each day during which a violation continues shall be a separate offense. No penalty shall be assessed or cease and desist order issued unless such person is given notice and opportunity for a hearing with respect to the alleged violation, and the order of the Secretary assessing a penalty and making a cease and desist order shall be final and conclusive unless the affected person files an appeal from the Secretary's order with the appropriate United States Court of Appeals. The Secretary shall give due consideration to the appropriateness of the penalty with respect to the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations. . . .

. . . .

§ 2151. Rules and regulations

The Secretary is authorized to promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of this chapter.

7 U.S.C. §§ 2131, 2132(h), 2140, 2146(a), 2149(a), (b), 2151.

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

**CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE,
DEPARTMENT OF AGRICULTURE**

SUBCHAPTER A—ANIMAL WELFARE

PART 1—DEFINITION OF TERMS

§ 1.1 Definitions.

For the purposes of this subchapter, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also signify the plural and the masculine form shall also signify the feminine. Words undefined in the following paragraphs shall have the meaning attributed to them in general usage as reflected by definitions in a standard dictionary.

....

Exhibitor means any person (public or private) exhibiting any animals, which were purchased in commerce or the intended distribution of which affects commerce, or will affect commerce, to the public for compensation, as determined by the Secretary. This term includes carnivals, circuses, animal acts, zoos, and educational exhibits, exhibiting such animals whether operated for profit or not. This term excludes retail pet stores, horse and dog races, organizations sponsoring and all persons participating in State and county fairs, livestock shows, rodeos, field trials, coursing events, purebred dog and cat shows and any other fairs or exhibitions intended to advance agricultural arts and sciences as may be determined by the Secretary.

....

PART 2—REGULATIONS

....

**SUBPART D—ATTENDING VETERINARIAN AND ADEQUATE VETERINARY
CARE**

§ 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 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.

....

SUBPART G—RECORDS

§ 2.75 Records: Dealers and exhibitors.

....

(b)(1) Every dealer other than operators of auction sales and brokers to whom animals are consigned, and exhibitor shall make, keep, and maintain

records or forms which fully and correctly disclose the following information concerning animals other than dogs and cats, purchased or otherwise acquired, owned, held, leased, or otherwise in his or her possession or under his or her control, or which is transported, sold, euthanized, 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.

(i) The name and address of the person from whom the animals were purchased or otherwise acquired;

(ii) The USDA license or registration number of the person if he or she is licensed or registered under the Act;

(iii) The vehicle license number and state, and the driver's license number and state of the person, if he or she is not licensed or registered under the Act;

(iv) The name and address of the person to whom an animal was sold or given;

(v) The date of purchase, acquisition, sale, or disposal of the animal(s);

(vi) The species of the animal(s); and

(vii) The number of animals in the shipment.

....

SUBPART H—COMPLIANCE WITH STANDARDS AND HOLDING PERIOD

§ 2.100 Compliance with standards.

(a) Each dealer, exhibitor, operator of an auction sale, and intermediate handler shall comply in all respects with the regulations set forth in part 2 and the standards set forth in part 3 of this subchapter for the humane handling, care, treatment, housing, and transportation of animals.

....

§ 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.

....

PART 3—STANDARDS

....

SUBPART F—SPECIFICATIONS FOR THE HUMANE HANDLING, CARE, TREATMENT, AND TRANSPORTATION OF WARMBLOODED ANIMALS OTHER THAN DOGS, CATS, RABBITS, HAMSTERS, GUINEA PIGS, NONHUMAN PRIMATES, AND MARINE MAMMALS

FACILITIES AND OPERATING STANDARDS

§ 3.125 Facilities, general.

(a) *Structural strength.* The facility must be constructed of such material and of such strength as appropriate for the animals involved. The indoor and outdoor housing facilities shall be structurally sound and shall be maintained in good repair to protect the animals from injury and to contain the animals.

....

§ 3.127 Facilities, outdoor.

....

(b) *Shelter from inclement weather.* Natural or artificial shelter appropriate to the local climatic conditions for the species concerned shall be provided for all animals kept outdoors to afford them protection and to prevent discomfort to such animals. Individual animals shall be acclimated before they are exposed to the extremes of the individual climate.

....

ANIMAL HEALTH AND HUSBANDRY STANDARDS

....

§ 3.132 Employees.

A sufficient number of adequately trained employees shall be utilized to maintain the professionally acceptable level of husbandry practices set forth in this subpart. Such practices shall be under a supervisor who has a background in animal care.

9 C.F.R. §§ 1.1; 2.40, .75(b)(1), .100(a), .126; 3.125(a), .127(b), .132.

**ADMINISTRATIVE LAW JUDGE'S
INITIAL DECISION AND ORDER
(AS RESTATED)**

Findings of Fact

1. Respondent is an individual whose mailing address is 6916 Dusty Lane, Conroe, Texas 77303 (Respondent's Reply Brief at 1; Respondent/Appellant's Petition for Appeal [hereinafter Appeal Petition] at 5).
2. At all times material to this proceeding, Respondent was licensed and operating as an exhibitor, as defined in the Animal Welfare Act and the Regulations (Answer ¶ I(B); CX 1, CX 5, CX 10, CX 13, CX 18 at 1; Tr. 22-31).
3. At all times material to this proceeding, Respondent was doing business as Animal Extravaganza, the address of which is 6916 Dusty Lane, Conroe, Texas 77303 (CX 5, CX 6 at 1, CX 7 at 1-2, CX 10, CX 13, CX 14 at 1, CX 15, CX 17 at 1, CX 18 at 1).
4. On April 9, 1997, an Animal and Plant Health Inspection Service inspector inspected Respondent's facility and issued an inspection report (CX 6). The following conditions existed at that time:
 - a. Respondent failed to maintain at Respondent's facility a written program of veterinary care;
 - b. Respondent failed to maintain at Respondent's facility complete records showing the acquisition, disposition, and identification of animals; and
 - c. An animal kept outdoors at Respondent's facility was not provided with adequate shelter from inclement weather.
5. On July 14, 1997, an Animal and Plant Health Inspection Service inspector inspected Respondent's facility and issued an inspection report (CX 7). At that

time, an animal was not kept in housing that was structurally sound and maintained in good repair to protect the animal from injury, to contain the animal, and to restrict the entrance of other animals.

6. On April 14, 1998, an Animal and Plant Health Inspection Service inspector inspected Respondent's facility and issued an inspection report (CX 14). At that time, animals were not kept in housing that was structurally sound and maintained in good repair to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals.

7. On November 8, 1998, the following conditions existed at Respondent's facility:

a. Animals at Respondent's facility were not kept in housing that was structurally sound and maintained in good repair to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals (CX 14, CX 16, CX 17, CX 18 at 7-8; Tr. 72, 102-12, 146-50); and

b. A sufficient number of employees were not utilized to maintain a professionally acceptable level of husbandry practices (CX 18 at 5-6).

8. On November 16, 1998, an Animal and Plant Health Inspection Service inspector inspected Respondent's facility and issued an inspection report (CX 15). At that time, Respondent failed to maintain an up-to-date written program of veterinary care.

Conclusions and Discussion

1. The April 9, 1997, Inspection

On April 9, 1997, a very experienced Animal and Plant Health Inspection Service inspector, Charles M. Curren, inspected Respondent's facility and found deficiencies of the Animal Welfare Act and the Regulations and Standards (CX 6, CX 18 at 3; Tr. 65-68). Mr. Curren testified in detail as to his normal inspection procedure (Tr. 55-57). Mr. Curren testified further that he discussed the deficiencies found during the April 9, 1997, inspection with Respondent's caretaker, Allen David O'Neal, as part of the process of educating and communicating with Animal Welfare Act licensees (Tr. 66-67). Mr. Curren found the following deficiencies:

a. The Failure to Maintain Proper Records

There were no records of acquisition, disposition, and identification of animals available to Mr. Curren at Respondent's facility during the April 9, 1997, inspection (CX 6; Tr. 66). Respondent admits that the required records of acquisition, disposition, and identification of animals were not at the facility on April 9, 1997. Respondent states that he kept the required records of acquisition,

disposition, and identification of animals at his residence in Houston, Texas. (Answer ¶ II; CX 18 at 3.) I conclude that on April 9, 1997, Respondent willfully violated section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the Regulations (9 C.F.R. § 2.75(b)(1)) by failing to maintain at Respondent's facility records of acquisition, disposition, and identification of animals.

b. The Failure to Maintain a Written Program of Veterinary Care

There was no written program of veterinary care available to Mr. Curren at Respondent's facility during the April 9, 1997, inspection (CX 6; Tr. 67). Respondent admits that the required written program of veterinary care was not at Respondent's facility on April 9, 1997. Respondent states that he kept the required written program of veterinary care at his residence in Houston, Texas. (Answer ¶ II(A); CX 18 at 3.) I conclude that on April 9, 1997, Respondent willfully violated section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to maintain at Respondent's facility a written program of veterinary care.

c. The Failure to Provide Adequate Shelter From Inclement Weather

Mr. Curren testified that he observed a tiger in an enclosure that had a roof but had no protection on its sides from wind or blowing rain (CX 6; Tr. 65-66). Respondent states that he completed the repairs necessary to comply with 9 C.F.R. § 3.127(b) by April 20, 1997 (CX 18 at 3). I conclude that on April 9, 1997, Respondent willfully violated section 3.127(b) of the Standards (9 C.F.R. § 3.127(b)) by failing to provide an animal shelter from inclement weather.

2. The July 14, 1997, Inspection

On July 14, 1997, Mr. Curren inspected Respondent's facility and found that Respondent failed to provide structurally sound housing facilities (CX 7; Tr. 68-69). Mr. Curren testified that he observed a tiger housed in a trailer that had holes in the floor. This condition prevented the trailer from being adequately cleaned and sanitized (CX 7; Tr. 68-69). Mr. Curren discussed this violation with Mr. O'Neal (Tr. 69). Respondent states that he removed the tiger from the housing facility after Mr. Curren found the violation and started the repair of the housing facility (Answer ¶ III; CX 18 at 4). I conclude that on July 14, 1997, Respondent willfully violated section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) by failing to provide an animal with housing that was structurally sound and maintained in good repair to protect the animal from injury, to contain the animal, and to restrict the entrance of other animals.

3. The April 14, 1998, Inspection

On April 14, 1998, Mr. Curren inspected Respondent's facility and found that Respondent failed to provide structurally sound housing facilities (CX 14; Tr. 71-73). Mr. Curren testified that he observed that Respondent's tigers and cougars were not enclosed by a continuous perimeter fence or other adequate safeguard necessary for the safe containment of dangerous, carnivorous, wild animals. Mr. Curren also testified that he discussed the violation with Zettler Monroe Cude, Jr., Respondent's caretaker at the time, and that this violation was deemed to be critical because of the risk of animals escaping or unwanted people getting close to the animals (CX 14; Tr. 72). Mr. Curren also stated that, in his conversation with Mr. Cude, it was agreed that the deficiency must be corrected within 4 months (CX 14; Tr. 72). Respondent admits that he did not begin to install a perimeter fence around the animal cages until August 14, 1998, and the perimeter fence was not complete until November 9, 1998 (Answer ¶ IV). I conclude that on April 14, 1998, Respondent willfully violated section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) by failing to provide animals with housing that was structurally sound and maintained in good repair to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals.

4. The November 8, 1998, Incident

Mr. Cude testified that as of November 8, 1998, 3 months after the time that Mr. Curren and Mr. Cude had agreed that a perimeter fence would be in place, no perimeter fence or other equivalent safeguard to ensure the safe containment of dangerous, carnivorous, wild animals had been completed (CX 14; Tr. 72, 146-50). As a result, two tigers escaped from Respondent's facility. Local authorities killed these two tigers because they were a threat to human life (CX 16, CX 17, CX 18 at 7-8; Tr. 102-12). I conclude that on November 8, 1998, Respondent willfully violated section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) by failing to provide animals with housing that was structurally sound and maintained in good repair to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals.

Respondent states that, after Mr. Curren's April 14, 1998, inspection, he (Respondent) asked Mr. Cude to build the perimeter fence, but Mr. Cude was unable to do so because of illness. Respondent states that he did not start to build a perimeter fence until August 14, 1998, and, because of limitations placed on his ability to travel by the State of Texas, he was not able to complete the perimeter fence until November 9, 1998 (CX 18 at 5). I conclude that on November 8, 1998, Respondent willfully violated section 3.132 of the Standards (9 C.F.R. § 3.132) by failing to utilize a sufficient number of employees to maintain the professionally acceptable level of husbandry practices set forth in 9 C.F.R. §§ 3.125-.142.

5. The November 16, 1998, Inspection

Mr. Curren testified that Respondent was not able to produce an up-to-date written program of veterinary care (CX 15; Tr. 73-74). Respondent admits that his written program of veterinary care had expired (Answer ¶ VI). I conclude that on November 16, 1998, Respondent willfully violated section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to maintain an up-to-date written program of veterinary care.

The Appropriate Sanctions

Respondent was given notice of the deficiencies at his facility and was given ample opportunity to correct the deficiencies. The Animal and Plant Health Inspection Service conducted eight inspections of Respondent's facility between September 28, 1995, and November 16, 1998. Following each inspection, an Animal and Plant Health Inspection Service official pointed out the deficiencies and recommended corrections. Animal and Plant Health Inspection Service officials discussed the Animal Welfare Act with Respondent and devoted time to educating him regarding the requirements of the Animal Welfare Act and the Regulations and Standards. (CX 2, CX 3, CX 4, CX 6, CX 7, CX 8, CX 14, CX 15, CX 18, CX 19; Tr. 56-57.)

Respondent's violations of the Animal Welfare Act and the Regulations and Standards were willful. A "willful violation" is one in which the violator "(1) intentionally does an act which is prohibited,--irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements." *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 306 (1978), *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978). Respondent intentionally did acts which were prohibited and acted with careless disregard of statutory and regulatory requirements.

Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that, with respect to the amount of the civil penalty to assess, the Secretary of Agriculture shall consider the size of the business of the person involved, the gravity of the violation, the person's good faith, and the history of previous violations.

Respondent's April 14, 1998, and November 8, 1998, violations of section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) and Respondent's November 8, 1998, violation of section 3.132 of the Standards (9 C.F.R. § 3.132) were of significant gravity. These violations enabled two dangerous tigers to escape from Respondent's facility and to terrorize the neighboring community and resulted in the death of these two tigers (CX 16; Tr. 102-12). Furthermore, Respondent had previously been warned during a December 8, 1995, inspection that a violation of section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) poses a risk of animals escaping (CX 3, CX 19; Tr. 59-61). The fact that Respondent was saddened that the two tigers that escaped and terrorized the community were required to be put to

death and the fact that Respondent has subsequently made efforts to bring his facility into compliance does not detract from the gravity of these violations.

The purpose of administrative sanctions is deterrence of not only the violator, but also other potential violators. The Animal Welfare Act authorizes a civil penalty of \$2,500 for each violation (7 U.S.C. § 2149(b)). Accordingly, I assess Respondent a civil penalty of \$7,050 and suspend Respondent's Animal Welfare Act license for 3 years and 6 months.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises 10 issues in Respondent's Appeal Petition. First, Respondent contends the ALJ erroneously concluded that on April 9, 1997, Respondent violated section 2.40 of the Regulations (9 C.F.R. § 2.40). Respondent states he maintained the required written program of veterinary care at his residence in Houston, Texas, and he is not required by section 2.40 of the Regulations (9 C.F.R. § 2.40) to keep the written program of veterinary care at his facility. (Appeal Pet. at 1-2.)

I agree with Respondent that section 2.40 of the Regulations (9 C.F.R. § 2.40) does not state the location at which an exhibitor must maintain the required written program of veterinary care. However, the Animal and Plant Health Inspection Service's ability to ensure that each exhibitor establishes and maintains a written program of veterinary care would be thwarted if each exhibitor was allowed to keep his or her written program of veterinary care in a location at which the program was not readily available to Animal and Plant Health Inspection Service officials during inspection.

Section 2.126 of the Regulations (9 C.F.R. § 2.126) requires that each exhibitor allow Animal and Plant Health Inspection Service officials to enter the exhibitor's place of business and examine records and make copies of records required to be kept by the Animal Welfare Act and the Regulations and requires that each exhibitor allow Animal and Plant Health Inspection Service officials the use of facilities necessary for the proper examination of records required to be kept by the Animal Welfare Act and the Regulations. While Complainant did not allege that Respondent violated section 2.126 of the Regulations (9 C.F.R. § 2.126), this provision makes clear that each exhibitor must keep required records at the exhibitor's facility. Respondent admits that on April 9, 1997, he kept his written program of veterinary care at his residence in Houston, Texas (Answer ¶ II(A); CX 18 at 3). Respondent's facility is located in Conroe, Texas (CX 5, CX 6 at 1, CX 7 at 1-2, CX 10, CX 13, CX 14 at 1, CX 15, CX 17 at 1, CX 18 at 1). Therefore, I agree with the ALJ's conclusion that on April 9, 1997, Respondent violated section 2.40 of the Regulations (9 C.F.R. § 2.40) by failing to keep at his facility a written program of veterinary care where the written program would be readily available for inspection by Animal and Plant Health Inspection Service officials.

Second, Respondent contends the ALJ erroneously concluded that on April 9, 1997, Respondent violated section 2.75(b)(1) of the Regulations (9 C.F.R. § 2.75(b)(1)). Respondent states he maintained the required records of acquisition and disposition of animals at his residence in Houston, Texas, and he is not required by section 2.75(b)(1) of the Regulations (9 C.F.R. § 2.75(b)(1)) to keep records of acquisition and disposition of animals at his facility. (Appeal Pet. at 2.)

I agree with Respondent that section 2.75(b)(1) of the Regulations (9 C.F.R. § 2.75(b)(1)) does not state the location at which an exhibitor must maintain the required records of acquisition, disposition, and identification of animals. However, section 10 of the Animal Welfare Act (7 U.S.C. § 2140) requires exhibitors to make and retain records of acquisition, disposition, and identification of animals, and section 16(a) of the Animal Welfare Act (7 U.S.C. § 2146(a)) provides that the Secretary of Agriculture shall, at all reasonable times, have access to records required to be kept pursuant to 7 U.S.C. § 2140.

Moreover, the Animal and Plant Health Inspection Service's ability to ensure that each exhibitor makes, keeps, and maintains records of acquisition, disposition, and identification of animals would be thwarted if each exhibitor was allowed to keep these records in a location at which the records were not readily available to Animal and Plant Health Inspection Service officials during inspection.

Section 2.126 of the Regulations (9 C.F.R. § 2.126) requires that each exhibitor allow Animal and Plant Health Inspection Service officials to enter the exhibitor's place of business and examine records and make copies of records required to be kept by the Animal Welfare Act and the Regulations and requires that each exhibitor allow Animal and Plant Health Inspection Service officials the use of facilities necessary for the proper examination of records required to be kept by the Animal Welfare Act and the Regulations. While Complainant did not allege that Respondent violated section 2.126 of the Regulations (9 C.F.R. § 2.126), this provision makes clear that each exhibitor must keep required records at the exhibitor's facility. Respondent admits that on April 9, 1997, he kept records of the acquisition, disposition, and identification of animals at his residence in Houston, Texas (Answer ¶ II; CX 18 at 3). Respondent's facility is located in Conroe, Texas (CX 5, CX 6 at 1, CX 7 at 1-2, CX 10, CX 13, CX 14 at 1, CX 15, CX 17 at 1, CX 18 at 1). Therefore, I agree with the ALJ's conclusion that on April 9, 1997, Respondent violated section 10 of the Animal Welfare Act (7 U.S.C. § 2140) and section 2.75(b)(1) of the Regulations (9 C.F.R. § 2.75(b)(1)) by failing to keep at his facility records of acquisition, disposition, and identification of animals where the records would be readily available for inspection by Animal and Plant Health Inspection Service officials.

Third, Respondent contends the ALJ erroneously concluded that on April 14, 1998, and November 8, 1998, Respondent violated section 3.125 of the Standards (9 C.F.R. § 3.125) by failing to have a perimeter fence. Respondent asserts that section 3.125 of the Standards (9 C.F.R. § 3.125) does not require a perimeter fence

and that the requirement that outdoor housing facilities be enclosed by a perimeter fence was not effective until May 17, 2000. (Appeal Pet. at 2-3.)

Respondent is correct that section 3.125 of the Standards (9 C.F.R. § 3.125) does not specifically require a perimeter fence. Section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) requires that indoor and outdoor animal housing facilities must be structurally sound and must be maintained in good repair to protect the animals from injury and to contain the animals. However, I disagree with Respondent's assertion that the ALJ concluded that on April 14, 1998, and November 8, 1998, Respondent violated 9 C.F.R. § 3.125(a) because Respondent failed to have a perimeter fence around Respondent's animal housing facilities. The ALJ makes clear that his conclusion that on April 14, 1998, and November 8, 1998, Respondent violated 9 C.F.R. § 3.125(a) is based on Respondent's failure to have a perimeter fence or other adequate safeguard to ensure the safe containment of Respondent's animals (Initial Decision and Order at 5-6). I agree with the ALJ's conclusion that on April 14, 1998, and November 8, 1998, Respondent failed to have a perimeter fence or other adequate safeguard to ensure the safe containment of Respondent's animals in violation of 9 C.F.R. § 3.125(a).

Fourth, Respondent contends that the ALJ erroneously concluded that on November 8, 1998, Respondent violated section 3.132 of the Standards (9 C.F.R. § 3.132) by failing to have a sufficient number of adequately trained employees to maintain the professionally acceptable level of husbandry practices required by 9 C.F.R. §§ 3.125-.142 (Appeal Pet. at 3-4).

Complainant alleges that on November 8, 1998, Respondent failed to utilize a sufficient number of employees to maintain the prescribed level of husbandry practices in violation of section 3.132 of the Standards (9 C.F.R. § 3.132) (Compl. ¶ V(2)). Complainant does not allege that Respondent's employees were not adequately trained to maintain the prescribed level of husbandry practices (Compl. ¶ V(2)). Therefore, the ALJ's conclusion regarding the adequacy of Respondent's caretaker's training is not relevant to this proceeding.¹

However, I conclude that on November 8, 1998, Respondent willfully violated

¹The ALJ found that Respondent's caretaker, Mr. Cude, received only 1 week of training before he undertook his responsibilities at Animal Extravaganza (Initial Decision and Order at 6). Mr. Cude undertook his responsibilities at Animal Extravaganza in August or September 1997 (CX 18 at 6; Tr. 138). Complainant alleges Respondent violated section 3.132 of the Standards (9 C.F.R. § 3.132) on November 8, 1998, by failing to utilize a sufficient number of employees. Even if Complainant had alleged that Respondent violated 9 C.F.R. § 3.132 by failing to utilize a sufficient number of adequately trained employees, the extent of Mr. Cude's training prior to August or September 1997 would not dispose of the issue of whether Respondent violated 9 C.F.R. § 3.132 on November 8, 1998. The record establishes that Mr. Cude received significant training between the time he undertook his responsibilities at Animal Extravaganza in August or September 1997 and November 8, 1998, the date Complainant alleges Respondent violated 9 C.F.R. § 3.132 (Tr. 144-54).

section 3.132 of the Standards (9 C.F.R. § 3.132) by failing to utilize a sufficient number of employees to maintain the professionally acceptable level of husbandry practices set forth in 9 C.F.R. §§ 3.125-.142. On April 14, 1998, Mr. Curren inspected Respondent's facility and found that Respondent failed to provide structurally sound housing facilities (CX 14; Tr. 71-73). Mr. Curren testified that he observed that Respondent's tigers and cougars were not enclosed by a continuous perimeter fence or other adequate safeguard necessary for the safe containment of dangerous, carnivorous, wild animals. Mr. Curren also testified that he discussed the violation with Mr. Cude, Respondent's caretaker at the time, and that this violation was deemed to be critical because of the risk of animals escaping or unwanted people getting close to the animals (CX 14; Tr. 72). Mr. Curren also stated that, in his conversation with Mr. Cude, it was agreed that the deficiency must be corrected by August 8, 1998 (CX 14; Tr. 72). Mr. Cude testified that as of November 8, 1998, 3 months after the time that Mr. Curren and Mr. Cude had agreed that a perimeter fence would be in place, no perimeter fence or other equivalent safeguard to ensure the safe containment of dangerous, carnivorous, wild animals had been completed (CX 14; Tr. 72, 146-50). Respondent states that, after Mr. Curren's April 14, 1998, inspection, he (Respondent) asked Mr. Cude to build the perimeter fence, but Mr. Cude was unable to do so because of illness. Respondent states that he did not start to build a perimeter fence until August 14, 1998, and, because of limitations placed on his ability to travel by the State of Texas, he was not able to complete the perimeter fence until November 9, 1998 (CX 18 at 5). I conclude, under these circumstances, Respondent failed to utilize a sufficient number of employees to maintain the professionally acceptable level of husbandry practices set forth in 9 C.F.R. § 3.125.

Fifth, Respondent contends the ALJ did not consider Respondent's evidence, Respondent's explanations for his violations of the Animal Welfare Act and the Regulations and Standards, or the circumstances surrounding Respondent's violations of the Animal Welfare Act and the Regulations and Standards (Appeal Pet. at 5-9).

The Administrative Procedure Act provides that an order may not be issued except on consideration of the whole record or those parts cited by a party, as follows:

§ 556. Hearings; presiding employees; powers and burden of proof; evidence; record as basis of decision

. . . .

(d) . . . A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial

evidence.

5 U.S.C. § 556(d).

The ALJ states in the Initial Decision and Order that he considered all proposed findings, proposed conclusions, and arguments (Initial Decision and Order at 1). Moreover, the Initial Decision and Order reflects careful consideration of the record by the ALJ. Therefore, I reject Respondent's contention that the ALJ did not consider Respondent's evidence, Respondent's explanations for his violations of the Animal Welfare Act and the Regulations and Standards, or the circumstances surrounding Respondent's violations of the Animal Welfare Act and the Regulations and Standards.

Sixth, Respondent contends the ALJ erroneously found Respondent's mailing address is 101 West Rocky Creek, Houston, Texas 77076. Respondent contends his mailing address changed over the course of his ownership of Animal Extravaganza and his mailing address is now, and at the time the ALJ issued the Initial Decision and Order was, 6916 Dusty Lane, Conroe, Texas 77303. (Appeal Pet. at 5.)

The record contains evidence that, at times material to this proceeding, Respondent's mailing address was 101 West Rocky Creek, Houston, Texas 77076 (CX 1, CX 2 at 1, CX 3 at 1, CX 4 at 1, CX 5 at 1, CX 6 at 1, CX 7 at 1, CX 8 at 1, CX 10, CX 11, CX 18 at 1). However, the record establishes that Respondent's mailing address changed between the time of the violations alleged in the Complaint and the date the ALJ issued the Initial Decision and Order. For example, Respondent states in his Answer that his mailing address is 129 W. Rocky Creek Road, Houston, Texas 77076-2015 (Answer ¶ I(A)). Respondent states in Respondent's Findings of Fact and Conclusions of Law, Respondent's Reply Brief, and Respondent's Appeal Petition that his mailing address is 6916 Dusty Lane, Conroe, Texas 77303. Complainant does not dispute the assertion in Respondent's Appeal Petition that Respondent's mailing address is 6916 Dusty Lane, Conroe, Texas 77303. Therefore, I find Respondent's mailing address is 6916 Dusty Lane, Conroe, Texas 77303.

Seventh, Respondent contends the ALJ erroneously found Respondent's facility, Animal Extravaganza, is located at 5165 Dusty Lane, Conroy, Texas. Respondent contends Animal Extravaganza is located at 6916 Dusty Lane, Conroe, Texas 77303. (Appeal Pet. at 5.)

I agree with Respondent. The record does not contain any evidence to support the ALJ's finding that Animal Extravaganza is located at 5165 Dusty Lane, Conroy, Texas. I find that, at all times material to this proceeding, Respondent was doing business as Animal Extravaganza, a facility located at 6916 Dusty Lane, Conroe, Texas 77303 (CX 3, CX 4, CX 5, CX 6 at 1, CX 7, CX 8, CX 10, CX 13, CX 14, CX 15, CX 17, CX 18 at 1).

Eighth, Respondent contends the ALJ erroneously concluded Respondent's

violations of the Animal Welfare Act and the Regulations and Standards were willful. Respondent asserts his correction of violations and his efforts to comply with requirements establish that his violations of the Animal Welfare Act and the Regulations and Standards were not willful. (Appeal Pet. at 8.)

An action is willful under the Administrative Procedure Act (5 U.S.C. § 558(c)) if a prohibited act is done intentionally, irrespective of evil intent or reliance on erroneous advice, or done with careless disregard of statutory requirements.² The

²*Toney v. Glickman*, 101 F.3d 1236, 1241 (8th Cir. 1996); *Cox v. United States Dep't of Agric.*, 925 F.2d 1102, 1105 (8th Cir.), *cert. denied*, 502 U.S. 860 (1991); *Finer Foods Sales Co. v. Block*, 708 F.2d 774, 777-78 (D.C. Cir. 1983); *American Fruit Purveyors, Inc. v. United States*, 630 F.2d 370, 374 (5th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 997 (1981); *George Steinberg & Son, Inc. v. Butz*, 491 F.2d 988, 994 (2^d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3^d Cir. 1960); *In re James E. Stephens*, 58 Agric. Dec. 149, 201 n.7 (1999); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1144 (1998), *appeal dismissed*, No. 99-2640, 2000 WL 1010575 (Table) (8th Cir. July 24, 2000) (per curiam); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1061 (1998); *In re Richard Lawson*, 57 Agric. Dec. 980, 1034 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 286 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 223 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 81 (1998), *aff'd*, 189 F.3d 473 (9th Cir. 1998) (Table) (not to be cited as precedent under 9th Circuit Rule 36-3); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1454 n.4 (1997), *aff'd*, 173 F.3d 422 (3^d Cir. 1998) (Table), printed in 57 Agric. Dec. 869 (1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1352 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 476 (1997), *aff'd*, 156 F.3d 1227 (3^d Cir. 1998) (Table); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 255-56 (1997), *aff'd*, No. 97-3603 (6th Cir. Jan. 7, 1999); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 138 (1996); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1284 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 554 (1988). See also *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 n.5 (1973) (“‘Willfully’ could refer to either intentional conduct or conduct that was merely careless or negligent.”); *United States v. Illinois Central R.R.*, 303 U.S. 239, 242-43 (1938) (“In statutes denouncing offenses involving turpitude, ‘willfully’ is generally used to mean with evil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication. Our opinion in *United States v. Murdock*, 290 U.S. 389, 394, shows that it often denotes that which is ‘intentional, or knowing, or voluntary, as distinguished from accidental,’ and that it is employed to characterize ‘conduct marked by careless disregard whether or not one has the right so to act.’”)

The United States Court of Appeals for the Fourth Circuit and the United States Court of Appeals for the Tenth Circuit define the word “willfulness,” as that word is used in 5 U.S.C. § 558(c), as an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed. *Capital Produce Co. v. United States*, 930 F.2d 1077, 1079 (4th Cir. 1991); *Hutto Stockyard, Inc. v. United States Dep't of Agric.*, 903 F.2d 299, 304 (4th Cir. 1990); *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Appeal in this proceeding does not lie either to the United

record establishes that Respondent generally corrected violations found by Animal and Plant Health Inspection Service inspectors. Mr. Curren testified as to Respondent's compliance, as follows:

[BY MR. HILL:]

Q. Since you've been inspecting his facility, how would you characterize his record of compliance, in general?

[BY MR. CURREN:]

A. In general, Mr. Parr is pretty good. If I do identify non-compliances, normally by the next visit those non-compliances have been completed and corrected.

Tr. 56-57.

However, Respondent offers no authority for his contention that the correction of violations of the Animal Welfare Act and the Regulations and Standards negates willfulness. It is well settled that a correction of a violation of the Animal Welfare Act or the Regulations and Standards does not eliminate the fact that the violation occurred.³ Similarly, a correction of a willful violation does not negate the willfulness of the violation. I conclude Respondent's violations of the Animal Welfare Act and the Regulations and Standards were willful and Respondent's

States Court of Appeals for the Fourth Circuit or to the United States Court of Appeals for the Tenth Circuit. However, even under this more stringent definition, Respondent's violations would still be found willful.

³*In re Susan DeFrancesco*, 59 Agric. Dec. ___, slip op. at 23 n.12 (May 1, 2000); *In re Michael A. Huchital*, 58 Agric. Dec. 763, 805 n.6 (1999); *In re James E. Stephens*, 58 Agric. Dec. 149, 184-85 (1999); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 274 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 219 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1456 n.8 (1997), *aff'd*, 173 F.3d 422 (Table) (3^d Cir. 1998), printed in 57 Agric. Dec. 869 (1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1316 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 466 (1997), *aff'd*, 156 F.3d 1227 (3^d Cir. 1998) (Table); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 272-73 (1997) (Order Denying Pet. for Recons.); *In re John Walker*, 56 Agric. Dec. 350, 367 (1997); *In re Mary Meyers*, 56 Agric. Dec. 322, 348 (1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 254 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1070 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)).

correction of these violations does not negate Respondent's willfulness.

Ninth, Respondent contends the ALJ erroneously failed to address Mr. Currer's testimony that violations of the Animal Welfare Act and the Regulations and Standards are removed by the correction of the violative conditions (Appeal Pet. at 9).

Mr. Currer testified that a violation of the Animal Welfare Act or the Regulations and Standards is removed by a correction of that violation, as follows:

[BY MR. HILL:]

Q. So when someone is in violation and you write up a non-compliance, does later compliance with it remove the earlier violation? Does the earlier violation or non-compliance become moot once you write up that he's complied, maybe at your next visit or inspection down the line?

[BY MR. CURRER:]

A. It's removed, correct; it's noted that it has been corrected.

Tr. 96.

While I agree with Respondent that the ALJ did not discuss Mr. Currer's testimony regarding the effect of corrections of violations of the Animal Welfare Act and the Regulations and Standards, I do not find the ALJ's failure to discuss Mr. Currer's testimony error. It is well settled that a correction of a violation of the Animal Welfare Act or the Regulations and Standards does not eliminate the fact that the violation occurred.⁴ Therefore, Mr. Currer's belief regarding the effect of a correction of a violation is not relevant to this proceeding.

Respondent also asserts Mr. Currer erroneously advised Respondent that a correction of a violation would remove the violation. Respondent contends the ALJ should have addressed this erroneous advice "because this testimony illustrates that [Respondent] was not intentionally disregarding the [R]egulations and [S]tandards, but that he believed that his compliance after suggestions from the APHIS official would remove any violation." (Appeal Pet. at 9.)

Respondent does not cite any portion of the record which establishes that Mr. Currer advised Respondent that a correction of a violation removes the violation, and I have been unable to locate evidence supporting Respondent's assertion. However, even if I found Mr. Currer erroneously advised Respondent that the correction of a violation of the Animal Welfare Act or the Regulations and Standards removed that violation, I would not conclude that Respondent's violations of the Animal Welfare Act and the Regulations and Standards were not

⁴See note 3.

willful.

As discussed in this Decision and Order, *supra*, a “willful violation” is one in which the violator (1) intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or (2) acts with careless disregard of statutory requirements. Respondent intentionally did acts which were prohibited by the Animal Welfare Act and the Regulations and Standards and acted with careless disregard of the Animal Welfare Act and the Regulations and Standards. Even if I found Mr. Curren erroneously advised Respondent that the correction of a violation removed that violation and the erroneous advice induced Respondent to intentionally do an act prohibited by the Animal Welfare Act or the Regulations and Standards, I would not conclude that Mr. Curren’s erroneous advice negates Respondent’s willfulness because a willful violation includes the intentional doing of a prohibited act irrespective of erroneous advice. Moreover, even if I found Mr. Curren erroneously advised Respondent that the correction of a violation removed that violation and the erroneous advice induced Respondent’s careless disregard of the requirements of the Animal Welfare Act and the Regulations and Standards, I would not conclude that Mr. Curren’s erroneous advice negates Respondent’s careless disregard of the Animal Welfare Act and the Regulations and Standards.

Tenth, Respondent contends the ALJ did not discuss all of the factors that must be considered when determining the amount of the civil penalty to be assessed against Respondent and the \$10,000 civil penalty assessed by the ALJ against Respondent is extreme considering the nature of the violations, Respondent’s good faith, and the size of Respondent’s business (Appeal Pet. at 10-11).

I agree with Respondent that the ALJ did not discuss all of the factors that must be considered when determining the amount of the civil penalty to be assessed. However, I have considered all of the factors that must be considered when determining the amount of the civil penalty to be assessed. I find that Respondent operates a 7-acre facility and that, at all times material to this proceeding, Respondent had no more than five animals at the facility (CX 1, CX 3 at 3, CX 4 at 3, CX 5, CX 6 at 3, CX 7 at 3, CX 8 at 3, CX 10, CX 14 at 2, CX 18 at 6). Respondent does not derive any income from the facility (CX 18 at 6; Tr. 78). Therefore, I find the size of Respondent’s business is small.

Respondent willfully violated the Animal Welfare Act and the Regulations and Standards eight times during the period of April 9, 1997, through November 16, 1998. Despite this history of previous violations,⁵ Mr. Curren, the Animal and Plant Health Inspection Service inspector who inspected Respondent’s facility during this period, described Respondent’s record of compliance as “[i]n general . . . pretty good.” (Tr. 56.) Moreover, Mr. Curren testified that when he cites Respondent for

⁵The ongoing pattern of violations of the Animal Welfare Act and the Regulations and Standards during the period of April 9, 1997, through November 16, 1998, establishes a history of previous violations for the purposes of section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)).

a violation of the Animal Welfare Act or the Regulations and Standards, Respondent generally corrects the violations by the next inspection (Tr. 57, 79). The record reveals that, except for Respondent's April 14, 1998, violation of section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)), Respondent expeditiously corrected the violations cited by Mr. Curren. While corrections of violations do not eliminate the fact that the violations occurred,⁶ corrections are to be encouraged and can be taken into account when determining the sanction to be imposed.⁷

I find that Respondent's April 14, 1998, and November 8, 1998, violations of section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) and November 8, 1998, violation of section 3.132 of the Standards (9 C.F.R. § 3.132) were very grave because they risked and resulted in the escape and death of Respondent's dangerous, carnivorous, wild animals. Further, Respondent's April 9, 1997, violation of section 3.127(b) of the Standards (9 C.F.R. § 3.127(b)) and Respondent's July 14, 1997, violation of section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) were serious because the violations directly involved the well-being of Respondent's animals.

The United States Department of Agriculture's current sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant

⁶See note 3.

⁷*In re Judie Hansen*, 57 Agric. Dec. 1072, 1146 n.26 (1998), *appeal dismissed*, No. 99-2640, 2000 WL 1010575 (Table) (8th Cir. July 24, 2000) (per curiam); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1456 n.8 (1997), *aff'd*, 173 F.3d 422 (3^d Cir. 1998) (Table) printed in 57 Agric. Dec. 869 (1998); *In re Fred Hodgins*, 56 Agric. Dec. 1242, 1316 (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 272-73 (1997) (Order Denying Pet. for Recons.); *In re John Walker*, 56 Agric. Dec. 350, 367 (1997); *In re Mary Meyers*, 56 Agric. Dec. 322, 348 (1997); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 142 (1996); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1070 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)).

to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497. However, the recommendation of administrative officials as to the sanction is not controlling, and in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.⁸

Complainant seeks a 5-year suspension of Respondent's Animal Welfare Act license, the assessment of a \$10,000 civil penalty against Respondent, and a cease and desist order. Complainant bases the requested sanction on the gravity of Respondent's willful violations. (Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof.)

Respondent could be assessed a maximum civil penalty of \$20,000 for Respondent's eight violations of the Animal Welfare Act and the Regulations and Standards.⁹ After examining all the relevant circumstances, in light of the United States Department of Agriculture's sanction policy, and taking into account the requirements of 7 U.S.C. § 2149(b), the remedial purposes of the Animal Welfare Act, and the recommendations of the administrative officials, I conclude that a cease and desist order, a 3-year and 6-month suspension of Respondent's Animal Welfare Act license, and a \$7,050 civil penalty are appropriate and necessary to ensure Respondent's compliance in the future, to deter others from violating the Animal Welfare Act and the Regulations and Standards, and to thereby fulfill the remedial purposes of the Animal Welfare Act.

For the foregoing reasons, the following Order should be issued.

Order

1. Respondent, his agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards and shall cease and desist

⁸*In re Judie Hansen*, 57 Agric. Dec. 1072, 1141 (1998), *appeal dismissed*, No. 99-2640, 2000 WL 1010575 (Table) (8th Cir. July 24, 2000) (per curiam); *In re Richard Lawson*, 57 Agric. Dec. 980, 1031-32 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 283 (1998); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 120 S.Ct. 530 (1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

⁹Section 19(b) of the Animal Welfare Act (7 U.S.C. § 2149(b)) provides that the Secretary of Agriculture may assess a civil penalty of not more than \$2,500 for each violation of the Animal Welfare Act and the Regulations and Standards.

from:

- a. Constructing and maintaining housing facilities for animals that are not structurally sound and in good repair to protect the animals from injury, to contain the animals securely, and to restrict other animals from entering;
- b. Failing to provide animals kept outdoors with shelter from inclement weather;
- c. Failing to maintain records of the acquisition, disposition, description, and identification of animals, as required; and
- d. Failing to establish and maintain a written program of veterinary care, as required.

The cease and desist provisions of this Order shall become effective on the day after service of this Order on Respondent.

2. Respondent is assessed a \$7,050 civil penalty. The civil penalty shall be paid by certified check or money order, made payable to the Treasurer of the United States. Respondent shall send the certified check or money order to:

Brian Thomas Hill
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building
Washington, DC 20250-1417

The certified check or money order shall be sent to, and received by, Mr. Hill within 60 days after service of this Order on Respondent. Respondent shall state on the certified check or money order that payment is in reference to AWA Docket No. 99-0022.

3. Respondent's Animal Welfare Act license is suspended for a period of 3 years and 6 months and continuing thereafter until Respondent demonstrates to the Animal and Plant Health Inspection Service that Respondent is in full compliance with the Animal Welfare Act, the Regulations and Standards, and this Order, including payment of the civil penalty assessed in this Order. When Respondent demonstrates to the Animal and Plant Health Inspection Service that he has satisfied the conditions in this paragraph of this Order, a Supplemental Order will be issued in this proceeding, upon the motion of the Animal and Plant Health Inspection Service, terminating the suspension of Respondent's Animal Welfare Act license after the expiration of the 3-year and 6-month license suspension period.

The Animal Welfare Act license suspension provisions of this Order shall become effective on the 60th day after service of this Order on Respondent.

4. In order to facilitate the care of animals during the suspension of Respondent's Animal Welfare Act license, Respondent may sell any animals under

his control on the effective date of this Order. Respondent shall notify the Animal and Plant Health Inspection Service in writing at least 10 days prior to any such sale and shall specify the species and identification number of each animal, its location, the prospective buyer, the time that the animal will be moved, and the method of transportation. This information shall be provided to: Dr. Walt Christensen, Director, Central Region, USDA, APHIS, ANIMAL CARE, P.O. Box 915004, Fort Worth, Texas 76115-9104 (Telephone number (817) 885-6923)). This paragraph does not modify the suspension of Respondent's Animal Welfare Act license, as provided in paragraph 3 of this Order, and shall not be construed as allowing Respondent to acquire any new animals for regulated activities, the sale and purchase of which is regulated by the Animal Welfare Act and the Regulations.
