

**In re: REGINALD DWIGHT PARR.
AWA Docket No. 99-0022.
Order Denying Respondent's Petition for Reconsideration filed October 17,
2000.**

Petition to reconsider – Veterinary care program – Recordkeeping – Knowledge of law presumed – Federal Register constructive notice – Perimeter fence – Correction of violations – Estoppel – Civil penalty – License suspension – Cease and desist order.

The Judicial Officer denied the Respondent's Petition for Reconsideration. The Judicial Officer rejected the Respondent's contention that he did not violate 9 C.F.R. § 2.40 and 9 C.F.R. § 2.75(b)(1) because he maintained the required written program of veterinary care and the required records at his residence. The Judicial Officer held that the written program of veterinary care required by 9 C.F.R. § 2.40 and the records of acquisition, disposition, and identification of animals required by 9 C.F.R. § 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 also rejected the Respondent's contention that he was not provided with sufficient notice that he was required to maintain the written program of veterinary care and records at his facility. The Judicial Officer stated the Respondent had actual and constructive notice of the requirement that he maintain the written program of veterinary care and records at his facility. The Judicial Officer rejected the Respondent's contention that the conclusions that he violated 9 C.F.R. § 3.125(a) were error. The Judicial Officer also rejected the Respondent's contention that the conclusions that he violated the Animal Welfare Act and the Regulations and Standards were error because he was erroneously instructed by an Animal and Plant Health Inspection Service inspector that the correction of violations eliminates the violations. The Judicial Officer stated that 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. In addition, the Judicial Officer found that the Secretary of Agriculture was not estopped from concluding that the Respondent violated the Animal Welfare Act and the Regulations and Standards because an Animal and Plant Health Inspection Service inspector erroneously instructed the Respondent that his correction of violations eliminated the violations.

Brian Thomas Hill, for Complainant.
Greg Gladden, Houston, TX, for Respondent.
Initial decision issued by Edwin S. Bernstein, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

Procedural History

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. On April 24, 2000, Complainant filed Complainant's Reply Brief.

On June 8, 2000, the ALJ issued an Initial Decision and Order: (1) concluding 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.

On August 30, 2000, I issued a Decision and Order: (1) denying Respondent's request for oral argument; (2) concluding Respondent willfully violated the Animal Welfare Act and the Regulations and Standards; (3) ordering Respondent to cease and desist from violating the Animal Welfare Act and the Regulations and Standards; (4) assessing Respondent a \$7,050 civil penalty; and (5) suspending Respondent's Animal Welfare Act license for 3 years and 6 months. *In re Reginald Dwight Parr*, 59 Agric. Dec. ___, slip op. at 3, 14-18, 39-41 (Aug. 30, 2000).

On September 15, 2000, Respondent filed Appellant's Petition for Reconsideration [hereinafter Respondent's Petition for Reconsideration]. On October 11, 2000, Complainant filed Response to Appellant's Petition for Reconsideration. On October 13, 2000, the Hearing Clerk transmitted the record of the proceeding to the Judicial Officer for reconsideration of the August 30, 2000, Decision and Order.

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.

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. . . .

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.

CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent raises three issues in Respondent's Petition for Reconsideration. First, Respondent contends the conclusions that he violated 9 C.F.R. § 2.40 and 9 C.F.R. § 2.75(b)(1) on April 9, 1997, are error (Respondent's Pet. for Recons. at ¶ I).

The Complaint alleges that on April 9, 1997, Respondent failed to maintain at Respondent's facility a program of veterinary care in violation of 9 C.F.R. § 2.40 and complete records of the acquisition, disposition, and identification of animals in violation of 9 C.F.R. § 2.75(b)(1) (Compl. ¶ II(A)-(B)). Respondent states he maintained the required written program of veterinary care and the required records of acquisition, disposition, and identification at his residence in Houston, Texas, rather than at his facility. Respondent contends 9 C.F.R. § 2.40 does not state the location at which an exhibitor must maintain the required written program of veterinary care, 9 C.F.R. § 2.75(b)(1) does not state the location at which an exhibitor must maintain the required records, and he was not provided with sufficient notice that he was required to maintain the written program of veterinary care and records at his facility. (Respondent's Pet. for Recons. ¶ I.)

I agree with Respondent's contentions that 9 C.F.R. § 2.40 does not state the location at which an exhibitor must maintain the required written program of veterinary care and 9 C.F.R. § 2.75(b)(1) does not state the location at which an

exhibitor must maintain the required records. 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, 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 the required written program of veterinary care and records of acquisition, disposition, and identification of animals at the exhibitor's facility.

The Animal Welfare Act is published in the statutes at large and the United States Code, and Respondent is presumed to know the law.¹ Therefore, Respondent is presumed to know that 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. The Regulations and Standards are published in the *Federal Register*, thereby constructively notifying² Respondent of the requirement in 9 C.F.R. § 2.126 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 allow

¹See *Atkins v. Parker*, 472 U.S. 115, 130 (1985); *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 283 (1925); *Johnston v. Iowa Dep't of Human Servs.*, 932 F.2d 1247, 1249-50 (8th Cir. 1991).

²See *FCIC v. Merrill*, 332 U.S. 380, 385 (1947); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 71 (2^d Cir. 1994); *United States v. Wilhoit*, 920 F.2d 9, 10 (9th Cir. 1990); *Jordan v. Director, Office of Workers' Compensation Programs*, 892 F.2d 482, 487 (6th Cir. 1989); *Kentucky ex rel. Cabinet for Human Resources v. Brock*, 845 F.2d 117, 122 n.4 (6th Cir. 1988); *Government of Guam v. United States*, 744 F.2d 699, 701 (9th Cir. 1984); *Bennett v. Director, Office of Workers' Compensation Programs*, 717 F.2d 1167, 1169 (7th Cir. 1983); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1405 (10th Cir. 1976); *Wolfson v. United States*, 492 F.2d 1386, 1392 (Ct. Cl. 1974) (per curiam); *United States v. Tijerina*, 407 F.2d 349, 354 n.12 (10th Cir.), cert. denied, 396 U.S. 867, and cert. denied, 396 U.S. 843 (1969); *Ferry v. Udall*, 336 F.2d 706, 710 (9th Cir. 1964), cert. denied, 381 U.S. 904 (1965).

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.

Moreover, 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). The Animal and Plant Health Inspection Service supplies each applicant for an Animal Welfare Act license with a copy of the Regulations and Standards, and each applicant for an Animal Welfare Act license must acknowledge receipt of the Regulations and Standards and agree to comply with them.³ Further, the Animal and Plant Health Inspection Service supplies each applicant for renewal of an Animal Welfare Act license with a copy of the Regulations and Standards, and each applicant for renewal of an Animal Welfare Act license must acknowledge receipt of the Regulations and Standards, certify that, to the best of his or her knowledge and belief, he or she is in compliance with the Regulations and Standards, and agree to continue to comply with the Regulations and Standards.⁴

³Section 2.2(a) of the Regulations provides, as follows:

§ 2.2 Acknowledgement of regulations and standards.

(a) *Application for initial license.* APHIS will supply a copy of the applicable regulations and standards to the applicant with each request for a license application. The applicant shall acknowledge receipt of the regulations and standards and agree to comply with them by signing the application form before a license will be issued.

9 C.F.R. § 2.2(a).

⁴Section 2.2(b) of the Regulations provides, as follows:

§ 2.2 Acknowledgement of regulations and standards.

....
(b) *Application for license renewal.* APHIS will supply a copy of the applicable regulations and standards to the applicant for license renewal with each request for a license renewal. Before a license will be renewed, the applicant for license renewal shall acknowledge receipt if [sic] the regulations and standards and shall certify by signing the applications [sic] form that, to the best of the applicant's knowledge and belief, he or she is in compliance with the regulations and standards and agrees to continue to comply with the regulations and standards.

9 C.F.R. § 2.2(b).

The Animal and Plant Health Inspection Service supplied Respondent with a copy of the Regulation and Standards. Respondent explicitly acknowledged receipt of the Regulations and Standards and agreed to comply with the Regulations and Standards in his application for an Animal Welfare Act license (CX 1). Respondent also explicitly acknowledged receipt of the Regulations and Standards and certified that he was in compliance with the Regulations and Standards in his applications for renewal of his Animal Welfare Act license (CX 5, CX 10).⁵ I find, under these circumstances, that Respondent had actual notice of the requirement that he keep at his facility a written program of veterinary care required by 9 C.F.R. § 2.40 and the records required by 9 C.F.R. § 2.75(b)(1) where they would be available for inspection by Animal and Plant Health Inspection Service officials. I reject Respondent's contention that he was not given sufficient notice of the requirement that he keep the written program of veterinary care required by 9 C.F.R. § 2.40 and the records required by 9 C.F.R. § 2.75(b)(1) at his facility.

Second, Respondent contends the conclusions that he violated 9 C.F.R. § 3.125(a) on April 14, 1998, and November 8, 1998, are error. Specifically, Respondent contends he was cited by an Animal and Plant Health Inspection Service inspector for not having a perimeter fence and the requirement that outdoor housing facilities be enclosed by a perimeter fence was not effective until May 17, 2000. (Respondent's Pet. for Recons. at ¶ II.)

I agree with Respondent that section 3.125(a) of the Standards (9 C.F.R. § 3.125(a)) does not specifically require that facilities must be enclosed by a perimeter fence. Further, I agree with Respondent that the requirement in 9 C.F.R. § 3.127(d) that outdoor housing facilities be enclosed by a perimeter fence did not become effective until May 17, 2000. However, the Animal and Plant Health Inspection Service inspector's April 14, 1998, inspection report does not indicate that the inspector cited Respondent for a violation of 9 C.F.R. § 3.125(a) based on Respondent's failure to enclose his facility with a perimeter fence, as Respondent contends.⁶ Instead, the Animal and Plant Health Inspection Service inspector states in the April 14, 1998, inspection report that he based his finding that Respondent violated 9 C.F.R. § 3.125(a) on Respondent's failure to maintain "animal areas . . . in good repair to protect animals from injury and to contain the animals."

⁵Respondent did not explicitly agree to continue to comply with the Regulations and Standards on his applications for renewal of his Animal Welfare Act license (CX 5, CX 10). However, Respondent's failure to explicitly agree to continue to comply with the Regulations and Standards is not relevant to this proceeding.

⁶The record contains no evidence that an Animal and Plant Health Inspection Service inspector conducted an inspection of Respondent's facility on November 8, 1998.

(CX 14 at 1.)⁷

Moreover, Respondent's focus on the Animal and Plant Health Inspection Service inspector's inspection report is misplaced. Respondent's failure to enclose his facility with a perimeter fence is not the basis for the allegations in the Complaint that Respondent violated 9 C.F.R. § 3.125(a) on April 14, 1998, and November 8, 1998. The Complaint alleges that on April 14, 1998, and November 8, 1998, Respondent's housing facilities for animals were not structurally sound and maintained in good repair so as to protect the animals from injury, to contain the animals, and to restrict the entrance of other animals, in willful violation of 9 C.F.R. § 3.125(a) (Compl. ¶¶ IV, V(1)). Complainant proved the allegations that on April 14, 1998, and November 8, 1998, Respondent willfully violated 9 C.F.R. § 3.125(a) by a preponderance of the evidence.⁸ Therefore, I reject

⁷The April 14, 1998, inspection report does indicate that the Animal and Plant Health Inspection Service inspector was under the impression that the installation of a perimeter fence was the only means available to Respondent to correct the violation of 9 C.F.R. § 3.125(a) (CX 14 at 1).

⁸The proponent of an order has the burden of proof in proceedings conducted under the Administrative Procedure Act (5 U.S.C. § 556(d)), and the standard of proof by which the burden of persuasion is met is the preponderance of the evidence standard. *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Animal Welfare Act is preponderance of the evidence. *In re James E. Stephens*, 58 Agric. Dec. 149, 151 (1999); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1107-08 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1052 (1998); *In re Richard Lawson*, 57 Agric. Dec. 980, 1015 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Marilyn Shepherd*, 57 Agric. Dec. 242, 272 (1998); *In re John D. Davenport*, 57 Agric. Dec. 189, 223 n.4 (1998), *appeal dismissed*, No. 98-60463 (5th Cir. Sept. 25, 1998); *In re Peter A. Lang*, 57 Agric. Dec. 59, 72 n.3 (1998), *aff'd*, 189 F.3d 473 (9th Cir. 1999) (Table) (not to be cited as precedent under 9th Circuit Rule 36-3); *In re Samuel Zimmerman*, 56 Agric. Dec. 1419, 1455-56 n.7 (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, 1246-47 n.*** (1997), *appeal docketed*, No. 97-3899 (6th Cir. Aug. 12, 1997); *In re David M. Zimmerman*, 56 Agric. Dec. 433, 461 (1997), *aff'd*, 156 F.3d 1227 (3^d Cir. 1998) (Table); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 166, 169 n.4 (1997), *aff'd*, 172 F.3d 51, 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), printed in 58 Agric. Dec. 85 (1999); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 109 n.3 (1996); *In re Otto Berosini*, 54 Agric. Dec. 886, 912 (1995); *In re Micheal McCall*, 52 Agric. Dec. 986, 1010 (1993); *In re Rommie Faircloth*, 52 Agric. Dec. 171, 175 (1993), *appeal dismissed*, 16 F.3d 409, 1994 WL 32793 (4th Cir. 1994), printed in 53 Agric. Dec. 78 (1994); *In re Craig Lesser*, 52 Agric. Dec. 155, 166 (1993), *aff'd*, 34 F.3d 1301 (7th Cir. 1994); *In re Pet Paradise, Inc.*, 51 Agric. Dec. 1047, 1066-67 (1992), *aff'd*, 61 F.3d 907, 1995 WL 309637 (7th Cir. 1995) (not to be cited per 7th Circuit Rule 53(b)(2)); *In re Terry Lee Harrison*, 51 Agric. Dec. 234, 238 (1992); *In re Gus White, III*, 49 Agric. Dec. 123, 153 (1990); *In re E. Lee Cox*, 49 Agric. Dec. 115, 121 (1990), *aff'd*, 925 F.2d 1102 (8th Cir.), *reprinted in* 50 Agric. Dec. 14 (1991), *cert. denied*, 502

Respondent's contention that the conclusions that Respondent willfully violated 9 C.F.R. § 3.125(a) on April 14, 1998, and November 8, 1998, are error.

Third, Respondent contends the conclusions that he violated the Animal Welfare Act and the Regulations and Standards are error because an Animal and Plant Health Inspection Service inspector, Charles M. Curren, instructed Respondent that a correction of a violation removes that violation (Respondent's Pet. for Recons. at ¶ III).

Respondent does not cite any portion of the record which establishes that Mr. Curren erroneously instructed Respondent that a correction of a violation removes the violation, and I have been unable to locate evidence supporting Respondent's assertion.

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.⁹ Therefore, even if I found that Mr. Curren erroneously instructed Respondent about the effect of the correction of violations, as Respondent contends, that finding would not cause me to alter my conclusions that Respondent violated the Animal Welfare Act and the Regulations and Standards.

I infer that Respondent contends the Secretary of Agriculture is estopped from concluding that Respondent violated the Animal Welfare Act and the Regulations and Standards because an Animal and Plant Health Inspection Service inspector erroneously instructed Respondent that the correction of violations eliminates those violations. The doctrine of equitable estoppel is not, in itself, either a claim or a

U.S. 860 (1991); *In re Zoological Consortium of Maryland, Inc.*, 47 Agric. Dec. 1276, 1283-84 (1988); *In re David Sabo*, 47 Agric. Dec. 549, 553 (1988); *In re Gentle Jungle, Inc.*, 45 Agric. Dec. 135, 146-47 (1986); *In re JoEtta L. Anesi*, 44 Agric. Dec. 1840, 1848 n.2 (1985), *appeal dismissed*, 786 F.2d 1168 (8th Cir.) (Table), *cert. denied*, 476 U.S. 1108 (1986).

⁹*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 (Table), 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), printed in 58 Agric. Dec. 85 (1999); *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)).

defense; rather, it is a means of precluding a litigant from asserting an otherwise available claim or defense against a party who has detrimentally relied on that litigant's conduct.¹⁰ One key principle of equitable estoppel is that the party claiming the theory must demonstrate reliance on the other party's conduct in such a manner as to change his or her position for the worse.¹¹ Respondent has not shown that his position in this proceeding was changed for the worse based upon the alleged instruction by an Animal and Plant Health Inspection Service inspector.

Further, even if Respondent had acted to his detriment based on Mr. Currer's erroneous instruction, it is well settled that the government may not be estopped on the same terms as any other litigant.¹² It is only with great reluctance that the doctrine of estoppel is applied against the government, and its application against the government is especially disfavored when it thwarts enforcement of public laws.¹³ Equitable estoppel does not generally apply to the government acting in its sovereign capacity,¹⁴ as it is doing in this case,¹⁵ and estoppel is only available if the

¹⁰*Kennedy v. United States*, 965 F.2d 413, 417 (7th Cir. 1992); *Olsen v. United States*, 952 F.2d 236, 241 (8th Cir. 1991); *ATC Petroleum, Inc. v. Sanders*, 860 F.2d 1104, 1111 (D.C. Cir. 1988); *FDIC v. Roldan Fonseca*, 795 F.2d 1102, 1108 (1st Cir. 1986).

¹¹*Heckler v. Community Health Servs.*, 467 U.S. 51, 59 (1984); *Carrillo v. United States*, 5 F.3d 1302, 1306 (9th Cir. 1993); *Kennedy v. United States*, 965 F.2d 413, 418 (7th Cir. 1992).

¹²*Heckler v. Community Health Servs.*, 467 U.S. 51, 60 (1984); *United States Immigration & Naturalization Serv. v. Hibi*, 414 U.S. 5, 8 (1973) (per curiam); *FCIC v. Merrill*, 332 U.S. 380, 383 (1947).

¹³*Muck v. United States*, 3 F.3d 1378, 1382 (10th Cir. 1993); *Trapper Mining, Inc. v. Lujan*, 923 F.2d 774, 781 (10th Cir.), *cert. denied*, 502 U.S. 821 (1991); *Emery Mining Corp. v. Secretary of Labor*, 744 F.2d 1411, 1416 (10th Cir. 1984); *United States v. Browning*, 630 F.2d 694, 702 (10th Cir. 1980), *cert. denied*, 451 U.S. 988 (1981).

¹⁴*United States v. Killough*, 848 F.2d 1523, 1526 (11th Cir. 1988); *Johnson v. Williford*, 682 F.2d 868, 871 (9th Cir. 1982).

¹⁵*See In re Mary Meyers*, 58 Agric. Dec. 861, 868 (1999) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act) (Order Denying Pet. for Recons.); *In re David M. Zimmerman*, 57 Agric. Dec. 1038, 1059 (1998) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 130 (1996) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Animal Welfare Act). *Cf. In re Sunland Packing House Co.*, 58 Agric. Dec. 543, 601 (1999) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Perishable Agricultural Commodities Act, as amended); *In re Dean Byard* (Decision as to Dean Byard), 56 Agric. Dec. 1543, 1561 (1997) (holding the government acts in its

government's wrongful conduct threatens to work a serious injustice, if the public's interest would not be unduly damaged by the imposition of estoppel, and, generally, only if there is proof of affirmative misconduct by the government.¹⁶ Respondent bears a heavy burden when asserting estoppel against the government, and Respondent has fallen far short of demonstrating that the traditional elements of estoppel are present in this case.

Therefore, even if I found that Mr. Curren erroneously instructed Respondent that the correction of violations eliminates those violations, I would reject Respondent's contention that the conclusions that he violated the Animal Welfare Act and the Regulations and Standards are error.

For the foregoing reasons and the reasons set forth in *In re Reginald Dwight Parr*, 59 Agric. Dec. ____ (Aug. 30, 2000), Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition for reconsideration.¹⁷

sovereign capacity in disciplinary proceedings under the Horse Protection Act of 1970, as amended); *In re Norwich Beef Co.*, 38 Agric. Dec. 380, 396-98 (1979) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Federal Meat Inspection Act), *aff'd*, No. H-79-210 (D. Conn. Feb. 6, 1981), *appeal dismissed*, No. 81-6080 (2^d Cir. Jan. 22, 1982); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 760-61 (1975) (holding the government acts in its sovereign capacity in disciplinary proceedings under the Perishable Agricultural Commodities Act, as amended), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977).

¹⁶*Lehman v. United States*, 154 F.3d 1010, 1016-17 (9th Cir. 1998), *cert. denied*, 526 U.S. 1040 (1999); *United States v. Omdahl*, 104 F.3d 1143, 1146 (9th Cir. 1997); *City of New York v. Shalala*, 34 F.3d 1161, 1168 (2^d Cir. 1994); *United States v. Vanhorn*, 20 F.3d 104, 112 n.19 (4th Cir. 1994); *United States v. Guy*, 978 F.2d 934, 937 (6th Cir. 1992); *Gestuvo v. District Director of INS*, 337 F. Supp. 1093, 1099 (C.D. Cal. 1971).

¹⁷*In re Mangos Plus, Inc.*, 59 Agric. Dec. ____, slip op. at 11 (Sept. 7, 2000) (Order Denying Pet. for Recons.); *In re David Tracy Bradshaw*, 59 Agric. Dec. ____, slip op. at 6 (Aug. 3, 2000) (Order Denying Pet. for Recons.); *In re Kirby Produce Co.*, 58 Agric. Dec. 1032, 1040 (1999) (Order Denying Pet. for Recons.); *In re James E. Stephens*, 58 Agric. Dec. 201, 209 (1999) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 58 Agric. Dec. 619, 625 (1999) (Order Denying Pet. for Recons. on Remand); *In re Sweck's, Inc.*, 58 Agric. Dec. 222, 227 (1999) (Order Denying Pet. for Recons.); *In re Produce Distributors, Inc.*, 58 Agric. Dec. 535, 540-41 (1999) (Order Denying Pet. for Recons. as to Irene T. Russo, d/b/a Jay Brokers); *In re Judie Hansen*, 58 Agric. Dec. 369, 387 (1999) (Order Denying Pet. for Recons.); *In re Daniel E. Murray*, 58 Agric. Dec. 77, 83 (1999) (Order Denying Pet. for Recons.); *In re David M. Zimmerman*, 58 Agric. Dec. 336, 338-39 (1999) (Order Denying Pet. for Recons.); *In re C.C. Baird*, 57 Agric. Dec. 1284, 1299 (1998) (Order Denying in Part and Granting in Part Pet. for Recons.); *In re JSG Trading Corp.*, 57 Agric. Dec. 710, 729 (1998) (Order Denying Pet.

Respondent's Petition for Reconsideration was timely filed and automatically stayed the August 30, 2000, Decision and Order. Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in the Decision and Order filed August 30, 2000, is reinstated; except that the effective dates in paragraphs 1 and 3 of the August 30, 2000, Order, and the date within which payment of the civil penalty was required to be sent to and received by Mr. Hill in paragraph 2 of the August 30, 2000, Order, are the dates indicated in paragraphs 1-3 of the Order in this Order Denying Respondent's Petition for Reconsideration.

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

Order

1. Respondent, his agents and employees, successors and assigns, directly or indirectly 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 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

for Recons. as to JSG Trading Corp.); *In re Peter A. Lang*, 57 Agric. Dec. 91, 110 (1998) (Order Denying Pet. for Recons.); *In re Jerry Goetz*, 57 Agric. Dec. 426, 444 (1998) (Order Denying Respondent's Pet. for Recons. and Denying in Part and Granting in Part Complainant's Pet. for Recons.); *In re Allred's Produce*, 57 Agric. Dec. 799, 801-02 (1998) (Order Denying Pet. for Recons.); *In re Michael Norinsberg*, 57 Agric. Dec. 791, 797 (1998) (Order Denying Pet. for Recons.); *In re Tolar Farms*, 57 Agric. Dec. 775, 789 (1998) (Order Denying Pet. for Recons.); *In re Samuel Zimmerman*, 56 Agric. Dec. 1458, 1467 (1997) (Order Denying Pet. for Recons.); *In re Kanowitz Fruit & Produce Co.*, 56 Agric. Dec. 942, 957 (1997) (Order Denying Pet. for Recons.); *In re Volpe Vito, Inc.*, 56 Agric. Dec. 269, 275 (1997) (Order Denying Pet. for Recons.); *In re City of Orange*, 56 Agric. Dec. 370, 371 (1997) (Order Granting Request to Withdraw Pet. for Recons.); *In re Five Star Food Distributors, Inc.*, 56 Agric. Dec. 898, 901 (1997) (Order Denying Pet. for Recons.); *In re Havana Potatoes of New York Corp.*, 56 Agric. Dec. 1017, 1028 (1997) (Order Denying Pet. for Recons.); *In re Saulsbury Enterprises*, 56 Agric. Dec. 82, 101 (1997) (Order Denying Pet. for Recons.); *In re Andershock Fruitland, Inc.*, 55 Agric. Dec. 1234 (1996) (Order Denying Pet. for Recons.).

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 the suspension provisions 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, each animal's location, the prospective buyer of each animal, the time that each animal will be moved, and the method of transportation of each animal. 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.

5. Respondent has the right to seek judicial review of this Order in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341, 2343-2350. Such court has exclusive jurisdiction to enjoin, to set aside, to suspend (in whole or in part), or to determine the validity of this Order. Respondent must seek judicial review within 60 days after entry of this Order. (7 U.S.C. § 2149(c).) The date of entry of this Order is October 17, 2000.
