UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 11-0138

In re:

CYNTHIA EYSAMAN,

Petitioner

DECISION AND ORDER GRANTING SUMMARY JUDGMENT

I. INTRODUCTION

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes ("the Rules"), set forth at 7 C.F.R. subpart H, apply to the adjudication of the instant matter. The case involves a petition for a hearing ("Petition") filed by pro se petitioner Cynthia Eysaman ("Petitioner") upon her objection to the United States Department of Agriculture's ("USDA"; "Respondent") denial of her application for an exhibitor's license under the Animal Welfare Act, 7 U.S.C. §§2131 et seq. ("AWA" or "the Act"). The AWA vests USDA with the authority to regulate the transportation, purchase, sale, housing, care, handling and treatment of animals subject to the Act. Pursuant to the AWA, persons who sell and transport regulated animals, or who use animals for research or exhibition, must obtain a license or registration issued by the Secretary of the USDA. 7 U.S.C. §2133. Further, the Act authorizes USDA to promulgate appropriate regulations, rules, and orders to promote the purposes of the AWA. 7. U.S.C. §2151. The Act and regulations fall within the enforcement authority of the Animal Plant Health Inspection Service ("APHIS"), an agency of USDA. APHIS is the agency tasked to issue licenses under the AWA.

This matter is ripe for adjudication, and this Decision and Order[1] is based upon the documentary evidence, as I have determined that summary judgment is an appropriate method for disposition of this case.

II. ISSUE

The primary issue in controversy is whether, considering the record, summary judgment may be entered in favor of USDA and Petitioner's request for a hearing may be dismissed.

III. PROCEDURAL HISTORY

On January 10, 2011, Petitioner applied to APHIS for a license to allow her to exhibit a bobcat for educational purposes. By letter dated January 28, 2011, amended on February 22, 2011, APHIS denied Petitioner's application. On February 9, 2011, Petitioner filed an objection to APHIS' denial of her application for an exhibitor's license and requested a hearing before USDA's Office of Administrative Law Judges ("OALJ"). On March 1, 2011, counsel for Respondent filed a response to the Petition. On April 8, 2011, Respondent moved for summary judgment. Petitioner has not filed a response to Respondent's motion.

IV. SUMMARY OF THE EVIDENCE[2]

Petitioner purchased what she believed to be a legally bred hybrid bobcat kitten from an internet vendor in 2008. The kitten arrived at Petitioner's home on June 13, 2008 and lived in Petitioner's home with her family and her other pets. The cat was neutered and declawed, and was allowed to roam Petitioner's 75 acre property. The cat generally returned home at night voluntarily, but failed to do so on two occasions. Petitioner was concerned about the cat when it had stayed out, and therefore constructed a large outside cage where the cat could safely stay.

[1] In this Decision and Order, documents submitted by Petitioner shall be denoted as "PX-#" and documents submitted by Respondent shall be denoted as "RX-#".
[2] This summary relies upon statements set forth in the Petition.

Petitioner has no children, but sometime after she acquired the cat, her nephew and his family moved in with her. Her nephew's school-aged children and their classmates became aware of the cat, and on October 20, 2009, Petitioner was visited by an officer with the New York State Environmental Conservation Officer ("the State"). Petitioner was instructed to cease taking the cat for walks. Petitioner confined the cat to the house and its cage, and since her nephew and his family were no longer in residence, she believed the cat was safe with her.

Sometime after the State's visit, Petitioner was advised by the State to return the cat to its breeder, but since the cat was spayed the breeder rejected it. Petitioner was unable to place the cat in another suitable home with proper licensing. Petitioner entered into a Consent Order with the State whereby she paid for DNA testing that showed the cat was 98% bobcat. In addition, Petitioner paid a fine. Petitioner applied for an AWA license, but the application was returned as incomplete. She reapplied and was denied again due to a technical deficiency. Petitioner applied once more, and the denial of that application is at the heart of the instant adjudication.

V. DISCUSSION

An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or other materials show that there is no genuine issue as to any material fact. Veg-Mix, Inc. v. United States Dep't of Agric., 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations); Federal Rule of Civil Procedure 56(c). An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. Alder v. Wal-Mart Stores, Inc., 144 F.3d

664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. Schwartz v. Brotherhood of Maintenance Way Employees, 264 F.3d 1181, 1183 (10th Cir. 2001).

The usual and primary purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. Celotex Corp. v. Catrett, 477, U. S. 317, 323-34 (1986). If the moving party properly supports its motion, the burden shifts to the non-moving party, who may not rest upon the mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. Muck v. United States, 3 F.3d 1378, 1380 (10th Cir. 1993). In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. Adler, 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. Conaway v. Smith, 853 F.2d 789, 793 (10th Cir. 1988). However, in reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, 477 U.S. 262 (1986).

By motion filed April 8, 2011, Respondent moved for summary judgment, and filed supporting documentation and a brief with the Hearing Clerk for USDA's OALJ. Pursuant to 7 C.F.R. §1.143(d), a response to a motion is due within 20 days after service of the motion.

The Hearing Clerk sent a copy of the motion and documents to Petitioner on April 11, 2011 by certified mail, and on April 18, 2011, Petitioner acknowledged receipt of the mail. As of the date of this Decision and Order, Petitioner has failed to file a response. Regardless, the record is sufficiently developed to allow me to find that the material facts underlying the instant

adjudication are not in dispute, and that entry of summary judgment in favor of Respondent is appropriate.

The number of applications that Petitioner made for a license is a fact that is genuinely in dispute. Petitioner refers to three applications (see, Petition), while the evidence supports that at least two applications were filed (PX-2; PX-3; RX-1; RX-2). I find that the determination of the number of applications Petitioner filed is not material to my inquiry into whether APHIS properly rejected Petitioner's request for a license. The applications were denied because of Petitioner's violation of State law, which is a circumstance that remains immutable. Petitioner has argued that she was prejudiced by the amount of time APHIS took to reach its ultimate determination in her quest for a license. When APHIS rejected Petitioner's most recent application, it advised that she could re-apply for a license "one year from the date the denial of your application becomes final". (PX-3; RX 2). Ms. Eysaman posits that had her license been rejected earlier, the year long prohibition from re-applying would have commenced earlier. However, this argument fails to consider the effect of Petitioner's request for a hearing, which delayed the date that a denial may be deemed final. In addition, Petitioner has no way of knowing how long it took APHIS to conclude its investigation into her eligibility for a license. As of July 20, 2010, APHIS had not confirmed whether Petitioner had filed any false information on any license application. (See, RX-4, page 1). Accordingly, I find that it would be speculative to conclude that APHIS's actions with respect to Petitioner's applications were not timely performed. Further, a finding otherwise would not be material to my inquiry into whether APHIS properly denied Petitioner's applications.

The record clearly establishes that Petitioner admitted in a Consent Order with the State of New York that she possessed a bobcat in violation of State law. RX-4. Petitioner suggests

that the bobcat is not a "wild animal" as it has been domesticated and is tame. Indeed, since the cat has been declawed, it would be difficult to release it to the wild. However, it is not the character or the personality of the cat that determines

its classification under the law, but its genetics. Accordingly, Petitioner's possession of a wild animal in violation of State law is not in dispute.

Pursuant to 9 C.F.R. §2.11(a) A license shall not be issued to any applicant who:

> (6) Has made any false or fraudulent statements or provided any false or fraudulent records to the department of other government agencies, or has pled *nolo contendre* (no contest) or has been found to have violated any Federal State or local laws or regulations pertaining to the transportation, ownership, neglect or welfare of animals or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act.

9 C.F.R. §2.11(a)(6).

Petitioner's violation of the State law meets the first test of this two part inquiry into her eligibility for an AWA license to exhibit the cat. The second test is established by APHIS' conclusion that Petitioner's violation of the Act rendered her unfit to be licensed. PX-3; RX-2. I find that APHIS' determination that Petitioner's violation of State Law disqualified her from eligibility for a license was a proper exercise of USDA's authority to regulate the AWA. Summary judgment is hereby entered in favor of Respondent. However, I find no grounds have been provided to support the disqualification of Petitioner for a two-year period, as counsel for Respondent has requested. I find that the one year period of disqualification determined by APHIS in its initial and amended denial letters promotes the remedial nature of the Act. (See, PX-3; RX-2).

VI. FINDINGS OF FACT

1. In the spring of 2008, Petitioner bought a cat from an internet vendor that she believed to be a hybrid between housecat and bobcat, but which DNA tests revealed to be 98% bobcat. (See Petition for hearing)
2. The State cited Petitioner for a violation of a statute prohibiting possession of wild animals, including bobcats. (RX 4)
3. Petitioner entered into a Consent Order with the State in which she admitted that she had violated Article 1.1 of New York State's Environmental Conservation Law by acquiring a wild animal (bobcat) for use as a pet. (See, Declaration of Elizabeth Goldentyer, D.V.M., Regional Director, Animal Care, Easter Region, APHIS, hereby identified and admitted to the record as RX-3; Copy of Consent Order, hereby identified and admitted to the record as RX-4).
4. Shortly after entering into the Consent Order, Petitioner requested information about obtaining a license under the AWA. (See, attachment to Petition, hereby identified and admitted to the record as PX-1).
5. Petitioner applied[3] for a license from APHIS. (PX-2; RX-2).
6. APHIS denied Petitioner's application by letter dated January 28, 2011. (PX-3).
7. On February 8, 2011, Petitioner requested a hearing before OALJ. (See, Petition).
8. On February 22, 2011, APHIS sent a second letter denying the application, which amended the grounds for the denial of Petitioner's application. (RX-2).

[3] It appears as though Petitioner filed an application in 2010 that was returned as incomplete (PX-2) and then filed another application in January, 2011 (RX-1)

9. APHIS denied the license because Petitioner had admitted to violating a State law regarding the possession of an animal, which the agency concluded rendered her unfit for an AWA license.
10. By letter dated June 3, 2010, Petitioner was advised by the New York State Department of Environment that the terms of her Consent Order had been satisfied, and was further advised to "consider this matter closed". (PX-4).

VII. CONCLUSIONS OF LAW

1. The Secretary, USDA, has jurisdiction in this matter.
2. The request for a hearing was timely filed, in compliance with 9 C.F.R. §2.11(b) and 7 C.F.R. § 1.141(a)
3. The material facts involved in this matter are not in dispute and the entry of summary judgment in favor of Respondent is appropriate
4. APHIS' denial of a license to Petitioner pursuant to 9 C.F.R. §2.11(a)(6), promotes the remedial nature of the AWA and is hereby AFFIRMED.
5. Petitioner's disqualification from applying for a license is appropriate.

ORDER

Petitioner is hereby disqualified from obtaining an AWA license for a period of one year, commencing on the date that this Order becomes final. This Decision and Order shall be effective 35 days after this decision is served upon the Petitioner unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

So Ordered this 11th day of May, 2011 in Washington, D.C.

Janice K. Bullard
Administrative Law Judge