

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 12-0191

In re:

JESSICA ELROD, an individual,

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 Jessica Elrod (“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 Order¹ 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 should be dismissed.

III. PROCEDURAL HISTORY

On December 27, 2011, Petitioner filed with the Hearing Clerk for the Office of Administrative Law Judges (OALJ) ("Hearing Clerk") a request for a hearing regarding the November 10, 2011 denial by APHIS of her application for a license under the AWA. On January 23, 2012, Petitioner supplemented her hearing request by filing a copy of the denial of her application, which is hereby identified as "PX-1". On February 22, 2012, the matter was assigned to me. By Order issued March 9, 2012, I found that Respondent's request for a hearing was not timely filed pursuant to 7 C.F.R. §2.11(b), and concluded that the right to a hearing had been waived. I found it appropriate to issue a Decision and Order on the record, and instructed Petitioner and APHIS to submit all documentation to the record by May 11, 2012.

On April 27, 2012, counsel for APHIS moved for summary judgment and filed documentation in support of its position, identified as "RX-1 through RX-11". Petitioner did not submit any documentation in response to my Order. Petitioner did not respond to APHIS' motion within the time permitted in accordance with 7 C.F.R. §1.143(d).

All documents are hereby admitted to the record.

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-#".

IV. SUMMARY OF THE EVIDENCE

Petitioner was issued license number 84-C-0111 under the AWA in September, 2008, following an inspection of her facility and receipt of her license fee. RX-1. Following inspections on April 20, 2009, and on July 21, 2009, APHIS cited Petitioner with violations of controlling regulations. RX-2. Petitioner's license was nevertheless renewed in 2009 upon her payment of the applicable fee. RX-3. In May, 2010, Petitioner advised APHIS that she had changed the physical site of her exhibition business, but she failed to submit a completed license renewal form and appropriate fees. RX-4. Accordingly, Petitioner's license expired on November 11, 2010. RX-5.

In April, 2010, the Humane Society for the Pike's Peak Region conducted an investigation of Petitioner's business. RX-6. Following a second investigation started in July, 2011, fifty-seven (57) of Petitioner's animals were confiscated and removed from her premises on October 18, 2011. RX-6. The investigating agency provided information about the investigations and photographs to APHIS, including a statement by Officer Kaiser that Petitioner had represented that she held a license under the AWA. RX-7; RX-6 at 6. The investigation also disclosed that Petitioner had sold an adult hedgehog on October 16, 2011. RX-6 at 7-8; RX-9. On an APHIS record of acquisition and disposition of animals, Form 7020, it is represented that Petitioner held a valid AWA license on that date. RX-9.

On October 19, 2011, Petitioner applied to APHIS for a new exhibitor's license. RX-8. On November 10, 2011, APHIS denied Petitioner's application for a license. PX-1. Subsequently, on March 2, 2012, Petitioner pled guilty to three counts of animal cruelty and a stipulated Order for deferred judgment and sentence were filed in the District and County Courts of El Paso County, Colorado. RX-11. A condition of the deferred judgment and sentence required

Petitioner to no longer engage in the breeding of any animal, whether for profit or not, and restricted Petitioner to keeping no more than twenty-nine (29) animals of any kind. RX-11.

V. LEGAL STANDARDS

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).

The AWA authorizes the Secretary of USDA to “issue licenses . . .in a manner as he may prescribe” (7 U.S.C. §2133) and to “promulgate such rules, regulations, and orders as he may deem necessary in order to effectuate the purposes of [the Act]” (7 U.S.C. §2151).

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

(5) Is or would be operating in violation or circumvention of any federal, State or local laws; or (6) Has made any false or fraudulent statements or provided any false or fraudulent records to the department or other government agencies, or has pled *nolo contendere* (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)(5) and (6).

Pursuant to 9 C.F.R. § 2.5, Duration of license and termination of license, an AWA license shall be valid unless “the license has expired or been terminated”. 9 C.F.R. §2.5(a)(3).

Further:

Any person who is licensed must file an application for a license renewal and an annual report form. . . and pay the required annual license fee. The required annual license fee must be received in the appropriate Animal Care regional office on or before the expiration date of the license of the license will expire and automatically terminate...

9 C.F.R. §2.5(b).

VI. DISCUSSION

The report of the investigation by the Humane Society clearly establishes that Petitioner made false statements and provided fraudulent records. Petitioner did not have a valid AWA

license during the pendency of the investigation in 2011, since her license had expired on November 11, 2010. Petitioner had failed to pay the appropriate license fee and had failed to submit a completed renewal form. Petitioner tacitly acknowledged that she did not have a valid AWA license by submitting an application for a new license in October, 2011. Accordingly, by asserting that she had a valid license in statements to investigating officers and on documents recording the sale of an animal, it is clear that Petitioner made false statements and the first prong of the two-part test set forth at 9 C.F.R. 2.11(a)(6) has been met.

The second part of the test is established by APHIS' conclusion that Petitioner is unfit to be licensed. PX-1. APHIS relied upon its own inspections and the confiscation of animals by local authorities in reaching that conclusion. I find that APHIS' determination that Petitioner's false statements combined with the conclusions of State investigations and APHIS inspections are sufficient to support APHIS' decision to deny Petitioner's application for a license. The rejection of Petitioner's application was a proper exercise of USDA's authority to regulate the AWA. Summary judgment is hereby entered in favor of Respondent.

I find that the evidence regarding Petitioner's guilty plea and conditional sentence would support the future denial of a license. However, since the plea was entered months after APHIS denied her license application, the plea cannot support the instant denial. I find that the terms of Petitioner's conditional sentence, which prohibits her from breeding any animal for any purpose, and which restricts the number of animals she may "keep", would meet the standard set forth at 2.11(a)(5). However, the terms of the plea and conditional sentence post-dated APHIS' decision to deny Petitioner's application for a license, and therefore, that evidence does not support that denial. Undoubtedly, it would support a future denial of any application for a license under the AWA that Petitioner may submit.

Accordingly, the evidence regarding the entry of the guilty plea and the terms of Petitioner's sentence has little probative value to this determination and is hereby credited with no weight.

VII. FINDINGS OF FACT

1. Jessica Elrod is an individual who had a business in Colorado Springs known as "Critter Crossings". RX-1
2. Petitioner held a valid license under the AWA, license number 84-C-0111, pursuant to an application filed in September 2008. RX-1.
3. APHIS cited Petitioner with violations of prevailing regulations upon inspections conducted in April and July, 2009. RX-2.
4. Petitioner's AWA license was renewed in 2009. RX-3.
5. In May, 2010, Petitioner filed an incomplete application to renew her AWA license and failed to pay the requisite fee, and her license expired on November 11, 2010.
6. Investigations into Petitioner's business conducted in April, 2010 and July, 2011 by the Humane Society for Pike's Peak Region resulted in the confiscation of fifty-seven (57) animals from her premises on October 18, 2011. RX-6.
7. During the course of the investigation, on or about August 1, 2011, Petitioner represented to an investigating officer that she held a valid AWA license. RX-6.
8. On an APHIS form documenting the sale of a hedgehog on October 16, 2011, Petitioner represented that she held a valid AWA license. RX-9.
9. On October 19, 2011, Petitioner applied to APHIS for a new exhibitor's license. RX-8.
10. On November 10, 2011, APHIS denied Petitioner's application for a new license.

VIII. CONCLUSIONS OF LAW

1. The Secretary, USDA, has jurisdiction in this matter.
2. The request for a hearing was not 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. Petitioner failed to meet the requirements for renewing her license, and accordingly, it expired and terminated on November 11, 2010, pursuant to 9 C.F.R. §§2.5(a)(3) and 2.5(b).
5. APHIS has established that Petitioner made false statements to an official and made fraudulent representations on documents when she asserted that she held a valid AWA license after its expiration in November, 2010.
6. APHIS has further established that Petitioner was not fit to be a licensee under the AWA, pursuant to 2.11(a)(6).
7. 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.
8. Petitioner's disqualification from applying for a license for a period of one year 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.

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk.

So Ordered this 30th day of May, 2012 in Washington, D.C.

Janice K. Bullard
Administrative Law Judge