UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 12-0538

In re:

JAMES G. WOUDENBERG,
doing business as
R&R RESEARCH,

Respondent.

Appearances:

Sharlene Deskins, Esq., for Complainant

Nancy Kahn, Esq., for Respondent

Before:

Janice K. Bullard
Administrative Law Judge

DECISION AND ORDER

The above captioned matter involves administrative disciplinary proceedings brought by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), an agency of the United States Department of Agriculture ("USDA"; "Complainant") against James G. Woudenberg, d/b/a R&R Research ("Respondent"). Complainant alleges that Respondent violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131 et seq. ("the Act"), and the Regulations and Standards issued under the Act (9 C.F.R. §§ 1.1 et seq. ("Regulations and Standards"). The instant decision[1] is based upon consideration of the record evidence; the pleadings, arguments and explanations of the parties; and controlling law.

[1]In this Decision & Order, the transcript of the hearing shall be referred to as "Tr. at [page number]. Complainant's evidence shall be denoted as "CX-[exhibit #]"and Respondents' evidence shall be denoted as "RX-[exhibit number]". Exhibits admitted to the record sua sponte shall be denoted as "ALJX-[exhibit number]".

I. ISSUES

1. Whether Respondent violated the Animal Welfare Act; and if so
2. Whether sanctions should be imposed against Respondent;
3. Whether evidence should have been excluded from the record, consistent with the Jencks Act, 18 U.S.C. § 3500, pursuant to 7 C.F.R. 1.141(h)(1)(iii);
4. Whether my denial of Complainant's motion to recuse myself is supported.

II. STATEMENT OF THE CASE

1. Procedural History

On July 20, 2012, Complainant filed a complaint against Respondent, charging Respondent with five counts of obtaining animals from a source that the regulations do not permit the respondent to utilize as a source in willful violation of 9 C.F.R. § 2.132(a). On August 9, 2012, after the grant of an extension of time, Respondent filed an Answer. By Order issued August 21, 2012, I set deadlines for the exchange of evidence and filing of lists. Complainant exchanged submissions and filed lists.[2] On October 26, 2012, Respondent filed submissions which were supplemented on November 8, 2012. Subsequently, a hearing was set to commence in July, 2013 in Detroit, Michigan.

On June 17, 2013, Respondent moved for the grant of summary judgment in its favor. On June 27, 2013, Complainant objected to the entry of summary judgment. By Order issued June 28, 2013, I denied the motion.

The hearing commenced on July 10, 2013 and continued until July 11, 2013. At the hearing, I admitted to the record Complainant's and Respondent's exhibits. I agreed to hold the record open in order to allow Respondent to attempt to locate a witness that Respondent's counsel sought to subpoena, Mr. Tom Rippy. Mr. Rippy is employed as an investigator by the

[2]I denied Respondent's motion to exclude Complainant's evidence as untimely filed.

Investigative Enforcement Service ("IES") of APHIS, and counsel could not locate him to effect service. Counsel for the Complainant made it clear that she would not assist Respondent to identify where Mr. Rippy could be served. Tr. at 317-318. Before I closed the hearing, Respondent decided against serving the subpoena. Tr. at 432-435.

I ruled on Respondent's motion for the production of an investigative report by APHIS IES employee Harry Dawson, pursuant to the Jencks Act, 18 U.S.C. §3500 and 7 C.F.R. 1.141(h)(1)(iii) of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary, USDA, ("the Rules of Practice"). Complainant objected that the statement was not subject to the Jencks Act, and also by privileges and privacy issues. Tr. at 193-201; 243-260; 302-310. After a long discussion in which I invited counsel for Complainant to redact those portions of the report that raised concerns, and following a recess for the parties to research the issue, I excluded Mr. Dawson's testimony from the record[3]. Testimony at Tr. 167-193; 201-225; Discussion at Tr. 193- 201; 243-260; 302-310. Complainant's counsel specifically declined an offer for an *in camera* inspection of the statement. Tr. at 256.

I also denied Complainant's counsel's motion to recuse myself from the proceedings for bias.[4] Tr. at 310-314.

Respondent raised the issue of whether USDA's policies unfairly discriminated against his business. I admitted to the record testimony and evidence on this issue to preserve it, and agreed to further consider its relevance to my adjudication. I conclude that I am not authorized by either the Administrative Procedures Act, 5 U.S.C. 551, or by specific delegation from the Secretary of Agriculture, to review policy decisions of the Secretary.

[3] I shall revisit this ruling herein, as the testimony was preserved, and Complainant has addressed the issue in written closing argument.

[4] I shall discuss this ruling further herein, because counsel for Complainant advised that Complainant would appeal my ruling to the Judicial Officer for the Secretary of Agriculture (Tr. at 314).

The written transcript of the hearing has been submitted to the record. I granted a motion from Complainant's counsel for additional time to file written closing arguments, which have been filed and considered. The record in this matter is now closed.

2. Statutory and Regulatory Authority

A. Animal Welfare 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.

Any person who "for compensation or profit delivers for transportation, or transports…buys, or sells, or negotiates the purchase of" regulated animals to facilities for research is considered a "dealer" under the AWA. 7 U.S.C. § 2132(f). A retail pet store is not considered a dealer unless it sells animals to a research facility, an exhibitor, or a dealer (7 U.S.C. § 2132(f)(i)), nor is "any person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year". 7 U.S.C. § 2132(f)(ii).

Dealers are required to obtain a license upon demonstration that their facilities comply with the standards promulgated by the Secretary pursuant to section 2143 of the Act. 7 U.S.C. § 2133. "[A]ny retail pet store or other person who derives less than a substantial portion of his income (as determined by the Secretary) from the breeding and raising of dogs or cats on his own

premises and sells any such dog or cat to a dealer or research facility shall not be required to obtain a license as a dealer or exhibitor". *Id.*. However, the AWA authorizes the Secretary to license, as dealers or exhibitors, persons who do not qualify as dealers or exhibitors as defined by the AWA "upon such persons' complying with the requirements specified above and agreeing, in writing, to comply with all the requirements of [the AWA] and the regulations promulgated by the Secretary…" 7 U.S.C. § 2133.

No dealer "shall buy, sell, offer to buy or sell, transport or offer for transportation in commerce. . . to or from another dealer . . . any animals unless and until such dealer shall have obtained a license from the Secretary. . ." 7 U.S.C. § 2134.

9 C.F.R. § 2.132 establishes standards for the procurement of dogs, cats, and other animals by dealers, and states that a class "B" dealer may obtain live random source dogs and cats only from other dealers who are licensed under the Act; from State, county, or city owned and operated animal pounds or shelters; and from legal entities organized under the laws of the State in which they are located, such as humane shelters. 9 C.F.R. § 2.132(a)(1)-(3). Further, "[n]o person shall obtain live dogs, cats, or other animals by use of false pretenses, misrepresentation, or deception. 9 C.F.R. § 2.132(b). [9 C.F.R. § 2.132(c) omitted as not relevant.]

9 C.F.R. § 2.132(d) provides:

> No dealer or exhibitor shall knowingly obtain any dog, cat, or other animal from any person who is required to be licensed but who does not hold a current, valid, and unsuspended license. No dealer or exhibitor shall knowingly obtain any dog or cat from any person who is not licensed, other than a pound or shelter, without obtaining a certification that the animals were born and raised on that person's premises and, if the animals are for research purposes, that the person has sold fewer than 25 dogs and/or cats that year, or, if the animals are for use as pets, that the person does not maintain more than three breeding female dogs and/or cats.

(Approved by the Office of Management and Budget under control number 0579-0254)
[54 FR 36147, Aug. 31, 1989, as amended at 69 FR 42102, July 14, 2004].

B. Jencks Act

Pursuant to the Rules of Practice:

> After a witness called by the complainant has testified on direct examination, any other party may request and obtain the production of any statement, or part thereof, of such witness in the possession of the complainant which relates to the subject matter as to which the witness has testified. Such production shall be made according to the procedures and subject to the limitations prescribed in the Jencks Act (18 U.S.C. § 3500).

7 C.F.R. § 1.141(h)(1)(iii).

The Jencks Act states:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under subsection

(b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means--

(I) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

C. Recusal

The Rules of Practice address the disqualification of a Judge and provide that "[a]ny party to the proceeding may, by motion made to the Judge, request that the Judge withdraw from the proceeding because of an alleged disqualifying reason. Such motion shall set forth with particularity the grounds of alleged disqualification. The Judge may then either rule upon or certify the motion to the Secretary, but not both." 7 C.F.R. § 1.144 (b)(1). "A judge shall withdraw from any proceeding for any reason deemed by the Judge to be disqualifying." 7 C.F.R. § 1.144 (b)(2).

The United States has codified the standard for disqualification of justice, judge or magistrate at 28 U.S.C. § 455, which states:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

28 U.S.C. § 455.

Further, a judge shall withdraw from a case where bias or prejudice of a judge against a party is established. 18 U.S.C. § 144 provides:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

18 U.S.C. § 144.

Canon 3(E)(1) of the American Bar Association's Code of Judicial Conduct states:

A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;…

3. Summary of the Evidence

A. Documentary Evidence

CX-1 through CX-30

RX-1, RX-4, RX-5, RX-11, RX-13, RX-17, RX-19, RX-20, RX-24, RX-27, RX-28, RX-30, RX-32, RX-33, RX-34

B. Admissions

James G. Woudenberg is a federally licensed Class B Dealer operating in Michigan under the name R & R Research and was such at all times relevant to this adjudication.

C. Factual Summary of the Testimony

Carrie Bongard (Tr. at 57-132)

Ms. Bongard is a licensed veterinary technician who has worked with USDA as an animal care inspector since 2002. Her job duties require her to inspect facilities throughout Michigan, including Respondent's facility. Her quarterly inspections of "random source dealers" such as Respondent include a review of records of acquisition and disposition of animals. Ms. Bongard traces back the source of animals donated to Respondent by reviewing certifications signed by the donors, and then documents the results of her trace. CX-4 and CX-13.

Ms. Bongard could not specifically recall doing the trace backs that she recorded on CX-1, CX-2, and CX-12, but she spoke with the donors and made notes of her discussions. CX-13; CX-4. Her notes reflect that both donor Hawley and donor Castle told Ms. Bongard that they had not raised from birth the dogs they donated to Respondent. Ms. Bongard recalled speaking with Kate

Snyder, who told her that she had bought the dog that she had donated to Respondent seven or eight years before she donated it.

When Ms. Bongard learned that individuals donated animals that they had not raised from birth, she cited Respondent for violating the regulations. RX-1. Initially, Ms. Bongard thought that she would charge Respondent with violating the regulation that states that a licensed B dealer such as Respondent cannot knowingly accept an animal unless it is born and raised on the donor's property (9 C.F.R. §1.132(d)).. However, after consulting her supervisors, it was determined that because the donors surrendered animals that they hadn't raised, then they were considered brokers who should have been licensed, and that Respondent had violated 9 C.F.R. §1.132(a). Ms. Bongard believed that the situation with the donations was not specifically provided for by the regulations, but was clearly not permitted.

Sandra Castle (Tr. at 37-57)

Ms. Castle went to R & R Research on August 28, 2008, and gave her cat to a woman. Ms. Castle did not know where the cat was born, but she got it when it was two years old.. She thought that she had reported that she had not raised the cat, but she could not recall. She received no payment for the cat. Ms. Castle signed some papers that she could not read because she did not have her glasses. She confirmed that the document identified as CX-18 was a copy of the form she had signed.

Kate Snyder (Tr. at 135-151)

Ms. Snyder donated one dog to Respondent in November, 2008, according to paperwork documenting the transaction. She purchased the dog for about $75.00 in 2002 when it was about six (6) weeks old.. She recalled telling Mr. Woudenberg that she had purchased the dog. When Ms. Snyder donated her dog to Mr. Woudenberg, she signed a form that she identified as CX-25. Ms. Snyder was subsequently visited by a female employee of USDA who interviewed her and

summarized her statements, which Ms. Snyder signed. Ms. Snyder remembered talking only to a female USDA employee, but she acknowledged that the statement that she had provided is witnessed with a man's name. See, CX-25.

Ms. Snyder could not explain why the written affidavit she signed did not disclose that she told Mr. Woudenberg that she had purchased the donated dog and had not raised it from birth. Ms. Snyder acknowledged that she signed a statement for Respondent that stated that she had bred and raised the dog she donated, but she was very upset about needing to give her dog away.

Max Hawley (Tr. at 153- 166)

Mr. Hawley donated a dog to Mr. Woudenberg, but could not recall when. Mr. Hawley agreed that the date marked on a form that he signed was the date of the donation. Mr. Hawley did not breed and raise the dog, but got it from outside of a grocery store. He had the dog for about a year before he donated it to Respondent.

Mr. Hawley did not recall Mr. Woudenberg asking where the dog came from, but Mr. Hawley signed the form provided by Mr. Woudenberg. Mr. Hawley remembered talking to someone from USDA about his donation, but did not recall when, or who, the USDA employee was. He thought he was interviewed only once, but he conceded it may have been more than once. He did not deny that the date of his signed affidavit was the date of the conversation. He testified that the information in his statements to USDA were correct. Mr. Hawley acknowledged that the form that he had signed asserted that he had bred the dog, but he had not.

Beth Woudenberg (Tr. at 263-269)

Ms. Woudenberg is married to Mr. Woudenberg. She is not employed by R&R Research, and has only infrequently helped with chores at the business. Ms. Woudenberg believed that Respondent had a female employee at one time, but not in or after 2008. She guessed that the company last employed a female in 2004 or 2005. Any one who surrenders an animal must deal

with Mr. Woudenberg. Ms. Woudenberg denied accepting an animal from Ms. Castle. She observed that the certification form that Ms. Castle signed indicated that the animal was accepted by her husband, as she recognized his handwriting. She has never accepted an animal from a donor, as her husband wants to accept all animals.

James Woudenberg (Tr. at 227 – 241; 320-411)

R & R Research was started in 1969 by Mr. Woudenberg's parents. The primary source of animals for the company has been animal shelters and people who had raised animals from their birth. He sells animals to research facilities and medical and veterinary schools. Random source animals provide a unique research subject and are desirable to many institutions.

When people donate animals to Respondent, Mr. Woudenberg asks them to sign a document that he created to comply with regulations requiring certification that the animal was bred and raised by the donors. See, e.g., CX-1. Mr. Woudenberg asks donors whether the animal was born and raised on their premises, and if people respond in the affirmative, he gives them his form to complete. Mr. Woudenberg verifies the information on the form by comparing it with the donor's driver's license. If a form is incomplete, or if the information does not match the donor's identification, Respondent does not accept a donation.

Mr. Woudenberg follows the same procedure with each donation, and always asks if the animal was "born or raised on [the donor's] premises". Tr. at 240. Mr. Woudenberg did not consider it necessary to witness the people signing the document, as he verifies their identification and address. He had no reason to doubt that the donors at issue herein raised the animals they donated, as his business is located in a rural area where many residents raise animals.

Mr. Woudenberg used the form that was signed by the donors involved in this matter for a number of years until he replaced it in 2009. When he created it, he imported the language

"bred and raised" from the regulations in use at the time. In 2009 he changed the form to read "born and raised" in conformity with the extant regulations, but he considers the terms interchangeable.

Mr. Woudenberg has discussed the language on his form with APHIS inspector Bongard. He wanted to avoid situations where people certify that the animal they donated was bred and raised by them, but later tell USDA officials that they had not raised the animal from birth. Ms. Bongard recommended that he ask people "where did you get the animal", and he incorporated that question into his form. Mr. Woudenberg has used three different forms over the years, which he discussed with Ms. Bongard, who did not make any specific criticisms or recommendations about his language. He asked for feedback from investigators, and Mr. Dawson suggested that he consult his attorney, which he did. Mr. Woudenberg sent the form with a request for input to APHIS Director Kevin Shea, with a copy to Regional Director Dr. Goldentyer, but received no response.

When Mr. Woudenberg learned that Mr. Dawson was assigned to investigate the instant case, he contacted Mr. Dawson to show his cooperation. Mr. Woudenberg signed an affidavit after his interview by Investigator Tom Rippy. Mr. Rippy had advised Mr. Woudenberg that he would recommend that APHIS cite the people who made the dishonest certifications to him.

Mr. Woudenberg did not specifically recollect the donations discussed herein, but he averred that Ms. Castle's memory about surrendering her animal to a woman was wrong. "I absolutely know she's mistaken because I'm the only person that would accept an animal for release since the year 2000 because I want – my name is on the license. I want to make sure that it was followed in the same procedure each and every time." Tr. at 344. Mr. Woudenberg notated on the form that he received the animal. He also assigns the animal a number, and describes it in accordance with USDA regulations.

Over the years, Mr. Woudenberg has observed that USDA has implemented policies designed to reduce, if not eliminate, Class "B" dealers who sell random source animals for research. His business also has been pressured by animal rights activists. He experienced loss of business due to the complaint that USDA filed against his company.

4. Discussion

A. Violations

The complaint brought against Respondent alleges five counts of violating standards set forth at 9 C.F.R. § 2.132(a), which provides:

> (a) A class "B" dealer may obtain live random source dogs and cats only from:
>
> (1) Other dealers who are licensed under the Act and in accordance with the regulations in part 2;
>
> (2) State, county, or city owned and operated animal pounds or shelters; and
>
> (3) A legal entity organized and operated under the laws of the State in which it is located as an animal pound or shelter, such as a humane shelter or contract pound.

9 C.F.R. § 2.132(a).

Respondent is admittedly a licensed Class "B" dealer. Random trace inspections of Respondent's business in 2008 identified four individuals who donated five animals to Respondent. The donors were not dealers licensed under the Act, and were not humane shelters or animal pounds. In an attempt to support the charges of violations of 7 C.F.R. § 1.132(a), the government posited that the donors in this matter should have been licensed. Ms. Bongard testified that she and her supervisors concluded that although the regulation did not specifically address the circumstances of donation of animals, the individuals who donated animals that they had not raised from birth were acting as unlicensed brokers. Tr. at 89.

This conclusion is not supported by the plain language of the AWA, which specifically excludes from the definition of "dealer" "any person who does not sell, or negotiate the purchase

or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year". 7 U.S.C. § 2132(f)(ii). Because the donors at issue herein were not compensated for the animals, and because the record fails to demonstrate that they derived income from the sale of other animals, the AWA does not anticipate that they would need to be licensed. Therefore, the allegations charged in the complaint are unsupported.

However, I am unable to dismiss the complaint outright, where the evidence addressed, a fortiori, 7 C.F.R. § 1.132(d), which permits Class "B" dealers to obtain animals from some unlicensed sources[5]. Pursuant to § 1.132(d), Class "B" dealers may accept animals from persons who need no license upon their certification that they raised the animals from birth at their premises.

There is no dispute that the donors in this case gave pets that they had not bred and raised from birth to Respondent, although they certified that they had.[6] Accordingly, Respondent accepted animals from sources not sanctioned by §1.132. The government argues that "[i]t is irrelevant whether or not the Respondent knew that animals were not born and raised by the individuals who provided the animals to him [sic.]." Complainant's brief at page 5.

I decline to apply the government's somewhat convoluted interpretation of the strict liability implied by §1.132(a) to circumstances where a Class "B" dealer obtained required certifications from individuals who falsely signed, or authorized a signature on, written certifications that they had bred and raised the donated animals. The government's interpretation of the regulatory scheme is contrary to the plain language of the regulation, and contrary to its intent. The language, "[n]o dealer shall **knowingly** obtain any dog or cat from any person who is not licensed, other than a pound or a shelter, **without obtaining a certification that the animals**

[5] This is the regulation provision that Ms. Bongard believed that Respondent had violated.
[6] Affidavits provided by Mr. Beemer, who donated two dogs, reflect that he or his wife signed the certification form produced by Mr. Woudenberg. Mr. Beemer was incompetent to testify due to a medical condition.

were born and raised on that person's premises..." [emphasis added] (9 C.F.R. § 2.132(d)), prohibits Class "B" dealers from accepting an animal from an unlicensed source without a certification that the animal was born and raised on the source's premises. The "knowingly" language pertains to the dealer's obligation to secure a certification, which was the conclusion reached in the case Complainant cited in support of its argument. See, *In re: C.C. Baird d/b/a Martine Creek Kennel*, 57 Agric. Dec. 127, 146 (1998). (In that case, the Secretary affirmed Administrative Law Judge James Hunt's conclusion that the Respondent violated § 2.132 by acquiring random source dogs without a certification and without even asking whether the animals had been bred and raised by the individuals who relinquished them).

The uncontroverted evidence demonstrates that the donors sighed certifications attesting that they had bred and raised the animals.[7] Although the evidence establishes that the donors did not breed and raise the animals, there is no credible evidence that Respondent knew or should have known that they had not bred and raised the animals. I credit Mr. Woudenberg's testimony that he asked all of the donors at issue herein whether they had bred and raised the animals. The testimony of the donors does not merit substantial weight.

Mr. Hawley admitted that he had signed the certification without understanding what he was signing. Ms. Castle testified credibly that she signed the certification without reading it. Although she believed that she surrendered her cat to a woman, I credit the testimony of Mr. Woudenberg and his wife that no woman accepted animals during the period when Ms. Castle made her donation. Mr. Woudenberg's signature on the certification undermines Ms. Castle's recollection.

[7] I find little substantive distinction between the language "born" and "bred" and credit Mr. Woudenberg's testimony that he adopted current regulatory language into his certification. I note that Ms. Snyder admitted that she understood "bred" to mean "born".

Ms. Snyder testified that she told Mr. Woudenberg that she had purchased her dog, but nevertheless signed a certification stating that she had bred and raised the animal. Ms. Snyder realized that she had misrepresented herself later, but did not do anything to rectify that problem. Ms. Snyder's recollection of her conversation with Mr. Woudenberg conflicts with her signed certification, and with an affidavit she gave closer in time to the event, which omits the conversation. Ms. Snyder's recall about the affidavit is suspect, as she did not recall speaking to a male investigator, whose signature appears on the affidavit. Her recollection about her conversation on the date of the donation is also unreliable because she was very upset on the day she surrendered her dog.

Mostly, I find it implausible that Mr. Woudenberg would accept an animal whose owner told him that it was not born and raised on the owner's premises. Mr. Woudenberg was aware that APHIS traced back donations to owners, and, given his concern about the precarious longevity of his business, I decline to credit Ms. Snyder's recollection about her conversation.

I accord substantial weight to Mr. Woudenberg's testimony regarding his procedure for accepting donated animals. I find it reasonable to conclude that it was not unusual for people in a rural area to relinquish animals that they had bred and raised. I credit Mr. Woudenberg's concerns about the risks of losing his AWA license, and the preponderance of the evidence shows a marked decline in Class "B" dealers. I make no correlation between APHIS' policies and the reduction in Class "B" dealers. It is axiomatic that APHIS has authority to make policy regarding its enforcement powers. However, given the undisputed evidence that very few Class "B" dealers remain licensed by APHIS, I conclude that Mr. Woudenberg would have made every effort to comply with regulations governing his business and would not have overtly defied them.

Complainant suggests that Respondent had an affirmative duty to confirm the reliability of the certifications offered by the donors. Complainant cites to no precedent supporting that conclusion, and provides no stated USDA policy holding Class "B" dealers strictly liable for false statements made by animal donors in their certifications. I accord little weight to Dr. Goldentyer's instructions that APHIS should seek permanent revocation of Respondent's license (RX-33), as they are conclusory. I find no support for the government's position.

The regulation requires dealers to secure a certification, and does not further provide that false certifications by animal donors shall be imputed to dealers. If the regulation was meant to impose a strict liability standard on dealers who accept animals from unlicensed persons, then it would require **dealers** to certify that the animals were born and raised on the premises of persons who surrendered them, rather than require dealers to **obtain** a certification. In addition, a strict liability standard would render superfluous the prohibition on a dealer **knowingly** obtaining a certification from unlicensed persons relinquishing animals.

Even if I were to find merit in the government's argument, it would be mere speculation to conclude that investigation by Respondent would have revealed that the donors had not bred and raised their animals. It is patently manifest that the donors focused on surrendering their animals to Respondent, and not on verifying the representations they made on the forms they signed. It is immaterial that the donors later admitted that they had falsified their certifications.

I acknowledge that Respondent's inquiry into the genesis of the donated animals was less than artful. Mr. Woudenberg has since revised the form to elicit more thorough information about an animal's birth and origin. However, Respondent had been using the form that was falsely certified for years and no one from USDA gave Mr. Woudenberg constructive criticism about its efficacy, despite his requests for USDA's input. Moreover, no matter how much

information is requested about the source of an animal, Class "B" dealers are dependent upon the answers of the people who dispose of their animals.

The regulation prohibits Respondent from knowingly accepting animals from unlicensed sources without obtaining a certification. Respondent secured the requisite certifications. Therefore, Respondent did not violate 7 C.F.R. 1.132(d), or by imputation, violate 7 C.F.R. §1.132 (a).

The complaint is DISMISSED. Accordingly, no sanctions are warranted.

B. Jencks Act

The specific language of the Jencks Act requires the government to produce a report made by a witness whose testimony is material and whose credibility is attacked. The Jencks Act includes among its definitions of a "statement" of a witness called by the United States as "a written statement made by said witness and signed or otherwise adopted or approved by him" 18 U.S.C. § 3500 (e)(I)

Courts have required the government to produce a report made by a witness whose testimony is material and whose credibility is attacked. *Moore* v. *Administrator, Veterans Administration,* 475 F.2d 1283, 155 U.S.App.D.C.14 (App..D.C.1973). A report prepared by a law enforcement agent that summarizes his notes and recollections of interviews with witnesses is considered the agent's "statement" within the meaning of the Jencks Act, for both the author and any agent verifying the accuracy of the report. *U* S. v. *Sink,* 586 F.2d 1041 (5th Cir. 1978), cert. denied 443 U.S. 912 (1979).

In the instant adjudication, APHIS' IES initiated an investigation into Respondent's AWA practices. The case was reassigned from initial Investigator Rippy to Investigator Dawson. When Respondent learned that Complainant would not call Mr. Rippy as a witness, despite including him on the government's witness list, Respondent attempted to serve a subpoena for

Mr. Rippy's appearance. Complainant's counsel stated on the record that she would not assist Respondent in locating Mr. Rippy to serve the subpoena. Therefore, Mr. Dawson's testimony about Mr. Rippy's investigative findings was material to Respondent and, any mention of Mr. Rippy's report in Mr. Dawson's written report would have been crucial to Respondent's cross-examination.

Although the circumstances demonstrate the impeachment value of Dawson's report, Respondent is not required to prove the merit of a report, so long as it relates to the subject matter that the agent has testified about. *United States v. New,* 491 F.3d 369 (8th Cir. 2007). The Sixth Circuit has held that the government must provide a copy of an investigative report after a witness has testified, without regard to claims of privileged information. *U.S. v. Pope,* 335 Fed. Appx (6th Cir. 2009). The Court observed that the government could choose not to produce the report at the risk of exposure to mandatory sanctions under the Jencks Act. *Id.*

The Supreme Court addressed the consequences of the government refusing to produce material in its decision in *Jencks v. U.S.,* 353 U.S. 657 (1957), wherein the Court stated that "the protection of vital national interests may militate against public disclosure of documents in the Government's possession…but only at the price of letting the defendant go free". *U.S. v. Valenzuela-Bernal*, 353 U.S. 858, 670 (1982). The court explained, "[t]he rationale of this is that …since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense". *Id. At 671, quoting U.S. v. Reynolds,* 345 U.S. 1, 12. (1953).

Accordingly, I find that my ruling to exclude the testimony of the investigator Harry Dawson is well supported. I decline to accord weight to the cases that Complainant cited in support of its objection to the production of the report. The finding of the court in *Norinsberg*

Corporation v. *USDA,* 47 F. 3d 1224 (D.C. 1995), was that a memorandum summarizing the USDA's file on the subject of the hearing met the definition of a "statement" within the meaning of the Jencks Act, particularly since the report was written by an investigator who testified. Those are the circumstances that faced me at Respondent's hearing. The circumstances involved in the other case cited by Complainant, *In re Cozzi,* 42 Agric. Dec (1983), do not apply, as Mr. Dawson had specifically testified about events that he presumably summarized in the report.

I note that counsel for Complainant provided the report to me for distribution to the Respondent. The Jencks Act specifically requires, in salient part:

> (b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

18 U.S.C. §3500(b).

After first denying the availability of the report, Complainant found it and objected to its exchange with Respondent on the grounds that the report was not subject to the Jencks Act, and then on grounds that it contained privileged information. In written closing argument, Complainant alleges that the report was not producible because Respondent did not move for its production. The record establishes that Respondent's counsel asked for the production of Mr. Dawson's report after he testified, once it became clear that a report had been prepared. See Tr. at 193. Although it is true that I explained that the report should be produced under the Jencks Act and the Rules of Practice, I did so after counsel for Respondent asked Investigator Dawson, after direct examination, for its production.

The Jencks Act provides, in pertinent part:

> If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use…

18 U.S.C. § 3500(c)

In closing written argument, Complainant asserted that I failed to follow procedure by failing to conduct an *in camera* inspection of the report. Counsel maintains that she had provided an investigative report to me for *in camera review*, citing to Tr. at 199. The context of the entire colloquy contradicts that assertion. Counsel first denied having a report, and then after finding it, produced it with the objection that it was not subject to the Jencks Act, and was subject to attorney-client privilege. I asked counsel several times to redact the report for the undefined privileged information, and Counsel refused, repeatedly objecting to the production of the report. Without specific information about the extent of attorney-client privilege, I perceived very little merit in conducting an *in camera* inspection. Regardless, when I asked if counsel for Complainant if she wished me to conduct such a review, counsel declined my offer. Tr. at 256.

Complainant's counsel's overweening position was that the report should not be exchanged with Respondent. Tr. at 256-257. Accordingly, I concluded that the government refused to provide the report to Respondent, and struck Mr. Dawson's testimony, pursuant to 18 U.S.C. § 3500 (d).

In any event, because the material facts underlying this matter are largely undisputed, Mr. Dawson's testimony has limited probative value, and its exclusion does not prejudice Complainant.

C. Recusal

Although Complainant has not addressed this issue in its brief, Complainant's counsel advised at the hearing that she would address her motion for recusal in an appeal. Tr. at 314. Interlocutory appeals of rulings on motions for recusal may be taken[8] although such route is not specifically provided by the Rules of Practice governing this adjudication. Although no interlocutory appeal has been filed, I find it prudent to address the issue in the event that it is raised in an appeal of my Decision and Order.

It is generally recognized that a judge has a duty to sit and decide a case that is assigned to her, which is as serious as the duty to not sit if disqualified. *Laird v. Tatum*, 409 U.S. 824, 837 (1972). I am required to recuse myself only if it would appear to a reasonable person with knowledge of all the facts that my impartiality might reasonably be questioned. *Liljeberg v. Health Servs. Acquisition Corp.,* 486 U.S. 847 (1988). This standard is objective and is not based "on the subjective view of a party." *Browning v. Foltz*, 837 F.2d 276, 279 (6th Cir. 1988), cert. denied, _U.S. _, 1095 S.Ct. 816 (1989). In order to justify recusal, prejudice or bias must be personal, or extrajudicial. *Litkey v. U.S.*, 510 U.S. 540 (1994). The test of whether the alleged bias stems from an extrajudicial source is whether an opinion on the merits rests on some basis other than what the judge learned from her participation in the case. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966). Allegations of events emanating in the courtroom are generally insufficient to demonstrate bias. *Id*. The authority of judges depends upon the presumption that they have sworn to render impartial adjudications and will not be biased; therefore, allegations of bias must be rigorously supported to justify recusal.

[8] *In re United States*, 666 F.2d 690 (1st Cir. 1981); *In re IBM Corp*., 618 F. 2d 923 (2d Cir. 1980); *In re School Asbestos Litig*., 977 F. 2d 764 (3rd Cir. 1992); *In re Rogers*, 537 F. 2d 1196 (4th Cir. 1976); *In re Corrugated Container Antitrust Litig*., 614 F. 2d 958 (5th Cir. 1980); *In re Aetna Cas. & Surety*, 919 F. 2d 1136 (6th Cir. 1990); *Liddell v. Board of Educ*., 677 F. 2d 626 (8th Cir. 1982); *In re Cement Anti-trust Litig*., 673 F. 2d 1020 (9th Circ. 1992); *Bell v. Chandler*, 589 F. 2d 556 (10th Cir. 1978).

Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 822, (1986).

At the hearing, Complainant's counsel orally raised a motion for me to recuse myself on the grounds that I had disparaged her skills as counsel and had directed her to cease speaking. Tr. at 310-315. Without regard to the form of the motion for recusal, which generally requires an affidavit as to cause (18 U.S.C. § 144), I denied Complainant's motion.

I acknowledge that my colloquy with Complainant's counsel regarding the application of the Jencks Act to the production of an investigative report left me frustrated. First, counsel advised that she did not have the report, which she immediately followed by a brief search of her materials that disclosed that she indeed possessed it. She then summarily raised objections to its exchange without reviewing it. She asserted that the Jencks Act did not apply. She then raised objections on the grounds of privilege, but failed to provide enough details for me to conduct an in camera inspection of the report to confirm that it contained privileged information. She repeated her summary objection until I asked her not to.

I do not find that any expressions of frustration regarding counsel's actions are tantamount to criticism of counsel's competence. Even if one were to find them so, a judge's comments to an attorney regarding her skill does not mandate recusal. *U.S. v. Tucker*, 78 3rd 1313 (8th Cir. 1996), cert. denied, 117 St. Ct. 76. A party seeking recusal because of bias against an attorney must show that the bias extends to counsel's client, and the allegations must be more than conclusory. *U.S. v. Sykes*, 7 F.3d 1331 (7th Cir. 1993).

My directive that counsel not offer repetitive objections falls within my obligation to maintain order during a hearing and to assure that the record is complete and relevant. 7 C.F.R. §§ 1.144(c)(13) and (14). Moreover, I recessed the hearing to allow both counsel to research the issue. Tr. at 248. During a later discussion about counsel's offer of proof during cross-examination of a witness, I expressed my confusion about why the motion was made,

and whether I understood the legal underpinnings of offers of proof. Tr. at 404-407; 7 C.F.R. §1.141(h)(7). I do not find that my remarks merit recusal.

Counsel moved for recusal upon my ruling against her on the Jencks Act issue. Adverse rulings against a party do not provide a sufficient basis for recusal. *Martin-Trigona v. Lavien*, 573 F. Supp. 1237 (1983). I find Complainant's motion trivial, considering how often I ruled in Complainant's favor. I denied a motion by the opposing party to exclude Complainant's evidence. I denied Respondent's motion for summary judgment. I did not order Complainant to produce a witness that Respondent hoped to subpoena, and I have made no adverse inference regarding his absence. I granted Complainant's motion for an extension of time to submit closing argument.

I further find no disqualifying impediment to hear and decide the instant matter that conflicts with the standards set forth at 28 U.S.C. § 455.

Upon further reflection of the motion for recusal, and again, without regard to the irregularity of its form, I find no grounds to deviate from my ruling. There is no reasonably objective rationale to support recusal. Complainant's motion is without merit, both factually and legally.

III. FINDINGS OF FACT

1. Respondent James G. Woudenberg is an individual with a mailing address in Michigan, who operated a business under the name of R & R. Research.
2. At all times herein, Respondent operated as a Class "B" dealer defined by the Act and regulations under AWA license No. 34-B-001.
3. On or about April 18, 2008, Respondent accepted a donation of a dog from Gilbert Beemer, who signed (or authorized his signature on) a certification that he had bred and raised the animal he donated.

4. On or about June 3, 2008, Respondent accepted a second donation of a dog from Gilbert Beemer, who signed (or authorized his signature on) a certification that he had bred and raised the animal he donated.
5. On or about June 10, 2008, Respondent accepted a donation of a dog from Max Hawley, who signed a certification that he had bred and raised the animal he donated.
6. On or about August 28, 2008, Respondent accepted a donation of a cat from Sandra Castle, who signed a certification that she had bred and raised the animal she donated.
7. On or about November 4, 2008, Respondent accepted a donation of a dog from Kate Snyder, who signed a certification that she had bred and raised the animal she donated.
8. APHIS conducted random inspections of animals in Respondent's inventory to trace back the origins of the animals.
9. APHIS' inspection disclosed that none of the animals that Respondent accepted from the donations identified in ¶¶ 3 through 7, supra., had been born and raised on the premises of the donors.
10. An investigation by APHIS' IES confirmed that all of the donors admitted that they had not bred and raised the animals, despite signing certifications that they had.
11. None of the donors were compensated for the donation of their pets.
12. Mr. Woudenberg personally accepted the animals and confirmed the identities of the donors.
13. Mr. Woudenberg drafted a form for donors to certify that they had bred and raised their animals, which he later revised to reflect current regulatory language.

IV. CONCLUSIONS OF LAW

1. The Secretary has jurisdiction over this matter.

2. Regulations governing Class "B" dealers set forth the sources from which the dealers may acquire animals. 9 C.F.R. § 1.132.
3. Class "B" dealers may accept random source animals from other dealers, from shelter and pounds, and from unlicensed individuals who have bred and raised the animals and who sell or donate up to 25 animals in a year. 9 C.F.R. § 1.132 (a) – (d).
4. The AWA excludes from its definition of dealer "[A]ny person who does not sell, or negotiate the purchase or sale of any wild animal, dog, or cat, and who derives no more than $500 gross income from the sale of other animals during any calendar year." 7 U.S.C. § 2132(f)(ii).
5. Since the donors at issue herein did not sell their animals to Respondent, they do not meet the definition of dealers under the Act, and were not required to secure an AWA license to legitimize their donations.
6. Because the donors are not considered unlicensed dealers under the Act, Respondent's acceptance of their animals did not violate 9 C.F.R. § 1.132(a), as charged in the complaint.
7. Similarly, because the donors were not dealers, by accepting the donations at issue here, Respondent did not violate the first sentence of 9 C.F.R. § 1.132(d), which prohibits Class "B" dealers from knowingly acquiring animals from a person who is required to be licensed but who does not hold a current, valid AWA license.
8. As a Class "B" dealer, Respondent is prohibited from knowingly accepting random source animals from unlicensed persons without obtaining a certification that the animals were born and raised on that person's premises. 9 C.F.R. § 1.132(d).
9. Respondent knowingly obtained certifications from each of the donors herein, which represented that the owners had bred and raised the donated animals on their premises.

10. The regulations do not require dealers to verify the origins of animals that they acquire.
11. The regulations do not hold dealers strictly liable for false statements made by donors on certifications that the donors signed, or caused to be signed on their behalf.
12. Respondent did not violate the AWA or its prevailing regulations.
13. Sanctions are not warranted where Complainant failed to established violations.

ORDER

The preponderance of the evidence fails to support the allegations stated in the complaint brought against Respondent. The complaint is, therefore, DISMISSED, with prejudice.

This Decision and Order shall become final and effective without further proceedings thirty-five (35) days after service on Respondents, unless appealed to the Judicial Officer for the U.S. Department of Agriculture by a party to the proceeding within thirty (30) days after service, pursuant to 7 C.F.R. §§ 1.139, 1.145.

The Hearing Clerk shall serve copies of this Decision and Order upon the parties.

So ORDERED this 20th day of December, 2013, in Washington, D.C.

_____
Janice K. Bullard
Administrative Law Judge