

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)
) [AWA]
Joseph M. Estes, an individual,) Docket No. **11-0027**
)
Respondent) **Decision and Order**

Appearances:

Colleen A. Carroll, Esq. with the Office of the General Counsel, United States Department of Agriculture, Washington D.C., for the Complainant (APHIS) ¹ ; and

Joseph M. Estes, an individual, representing himself (appearing *pro se*), the Respondent (Estes).

Decision Summary

1. This Decision does **not** turn on whether Respondent Estes donated the two bear cubs; rather, it turns on whether Respondent Estes, a person whose Animal Welfare Act license had been **revoked** in 2003, **delivered the two bear cubs for transportation** (even though Respondent Estes reasonably believed the two bear cubs were to be used as pets). Further, this Decision does **not** turn on whether Respondent Estes operated as a dealer or an exhibitor; rather, even though he did **not** operate as a dealer or an exhibitor,

1. The Complainant is the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture (“APHIS” or “Complainant”).

Respondent Estes violated 9 C.F.R. § 2.10(c), a regulation under the Animal Welfare Act, on or about February 26 or 27, 2010.

Agreed Procedure

2. The email from me to the parties, dated “Tue 11/20/2012 3:45 PM”, outlined the agreed procedure for this Decision:

Hello, Mr. Estes, and Ms. Carroll,

This confirms what I told you (just now) in our teleconference in 11-0027 AWA Estes. Mr. Estes, you are NOT required to appear for next week’s hearing, in Ft. Worth, Texas. Instead, the one count you are defending will be decided “on paper.”

I will GRANT Ms. Carroll’s request to file for summary judgment. After she files (on behalf of APHIS) (and her filing may not be anytime soon), you will have the opportunity to respond. Ordinarily you have only 20 days after receiving the APHIS Motion to file with the Hearing Clerk your response, so if you want more time, just ask for it before the 20 days ends. Email is fine for such requests.

Ms. Carroll states that whether you violated (the Animal Welfare Act) is a legal issue. I will decide the legal issue based on the paper submissions.

Either APHIS wins or Mr. Estes wins. In other words, I will consider Mr. Estes’ response his own motion for summary judgment (against APHIS).

If APHIS wins, I will need input from both sides regarding what a proper amount of civil penalty is. If Mr. Estes wins, the case ends; the one count Mr. Estes is defending is dismissed and cannot be brought again.

Thank you both for agreeing to this procedure, which simplifies things.

Jill Clifton U.S. Administrative Law Judge

Mixed Findings of Fact and Conclusions

3. Respondent Joseph M. Estes violated 9 C.F.R. § 2.10(c), when, after his Animal Welfare Act license had been **revoked** in 2003 (revocation is permanent), he **delivered for transportation** two bear cubs to be used as pets on or about February 26 or 27, 2010. *See* Respondent Estes' response and Exhibit 2 submitted as part of Respondent Estes' response.

4. I conclude that Jay Riggs' statement submitted as part of Respondent Estes' response (Exhibit 2, p. 1: "Jay Riggs' statement") is true. I have evaluated Jay Riggs' testimony during several days of hearing in two cases; consistently he is a credible witness. Though Jay Riggs is Respondent Estes' friend, I believe Jay Riggs' statement and consider what he stated therein to be the truth.

5. Respondent Estes was acting as agent for Safari Joe's Wildlife Ranch, Inc. *See* Respondent Estes' response and Exhibit 1 submitted as part of Respondent Estes' response.

6. The two bear cubs were used for exhibition within days after the donation, by Eric Drogosch (who worked for the licensee Jamie Palazzo).

7. Respondent Estes was told and reasonably believed that the two bear cubs were to be used as pets by Jamie Palazzo (the licensee). *See* especially Jay Riggs' statement submitted as part of Respondent Estes' response.

8. Respondent Estes did not sell the two bear cubs; he donated them.

9. Respondent Estes did not trade the two bear cubs; even though Respondent Estes acquired tigers close-in-time to when he donated the two bear cubs, the tigers were **not** compensation for the two bear cubs.

10. On behalf of APHIS, Ms. Carroll's analysis that whether Respondent Estes violated the Animal Welfare Act is a legal issue, is correct: the issue before me is a legal issue, not a factual issue.

11. The scope of prohibition under 9 C.F.R. § 2.10(c) is broad, broader than that specified under 7 U.S.C. § 2134, especially here, where the evidence does **not** show that Respondent Estes was dealing or exhibiting; and the phrase "in commerce" is not included in 9 C.F.R. § 2.10(c).

12. The two bear cubs are warm-blooded animals that Respondent Estes **delivered for transportation** to be used as pets.

13. The definition of *Animal* includes any used as a **pet** (emphasis added). 9 C.F.R. § 2.1.

14. Any person whose license has been suspended or revoked shall not buy, sell, transport, exhibit, or **deliver for transportation** any **animal** (emphasis added) during the period of suspension or revocation. 9 C.F.R. § 2.10(c).

15. Respondent Estes' response includes: "USDA has told me repeatedly that it was Ok to take in and or place any regulated animal as long as it was not sold or bought or traded for by me or safarijoes. (I have taped phone conversation to USDA that states this.)"

16. The USDA Judicial Officer has held that "reliance on erroneous advice is not a defense" to a violation of 9 C.F.R. § 2.10(c). *In re The International Siberian Tiger Foundation*, 61 Agric. Dec. 53, 80 (2002).

17. Respondent Estes and Safari Joe's Wildlife Ranch, Inc. are located in and do business in the Tenth Circuit.

18. The Judicial Officer has held that "willfulness" as used in 5 U.S.C. § 558(c) (Administrative Procedure Act) is defined in the Tenth Circuit as "an intentional misdeed or such gross neglect of a known duty as to be the equivalent of an intentional misdeed". *In re The International Siberian Tiger Foundation*, 61 Agric. Dec. 53, 80-81 (2002).

19. APHIS claims that Respondent Estes' violation was "willful"; I do not find Respondent Estes' violation to be willful. Respondent Estes thought, wrongly, that if he donated the two bear cubs, he was not in violation. Respondent Estes did **not** commit an intentional misdeed or its equivalent.

20. Respondent Estes avoided acting as a dealer by not selling or trading the bear cubs, and instead donating the bear cubs; but, because Respondent Estes' Animal Welfare Act license had been revoked, he did not avoid a violation. 9 C.F.R. § 2.10(c).

21. Even though the two bear cubs were to be used as pets, Respondent Estes violated 9 C.F.R. § 2.10(c) when he, after his Animal Welfare Act license had been **revoked** in 2003, **delivered for transportation** the two bear cubs.

22. Willfulness is not required under the Animal Welfare Act to impose cease and desist orders or to order Respondent Estes to pay civil penalties. 7 U.S.C. § 2149.

23. The maximum civil penalty for violations occurring from June 23, 2005 through June 17, 2008, was \$3,750.² Since June 18, 2008, the maximum civil penalty for a violation has been \$10,000.³

24. The factors regarding the appropriateness of a penalty under 7 U.S.C. § 2149(b) include size of the business, gravity of the violations, whether there is good faith, and the history of previous violations.

25. APHIS requests a \$10,000.00 civil penalty, plus a \$1,650.00 civil penalty for failure to obey a cease and desist order. Respondent Estes requests zero civil penalty.

26. Even though the scope of prohibition under 9 C.F.R. § 2.10(c) is broader than that specified under 7 U.S.C. § 2134, 9 C.F.R. § 2.10(c) furthers the objectives of the Animal Welfare Act and should be upheld in a case such as this, involving two bear cubs.

27. A person whose AWA license has been suspended or revoked is permitted to do **less**.

If the prohibition against **delivering for transportation** any **animal**, even an animal to be

2. 28 U.S.C. § 2461; 70 Fed. Reg. 29575 (May 24, 2005)(final rule effective June 23, 2005); 7 C.F.R. § 3.91(b)(2)(ii) (“Civil penalty for a violation of Animal Welfare Act, codified at 7 U.S.C. 2149(b), has a maximum of \$3,750; and knowing failure to obey a cease and desist order has a civil penalty of \$1,650.”).

3. 7 U.S.C. § 2149(b).

used as a pet, even when there is no sale or trade, catches Respondent Estes by surprise, I have empathy for him; I, too, was not cognizant of that impact of 9 C.F.R. § 2.10(c) until this case.

28. Contrary to APHIS's argument, when I evaluate (a) Respondent Estes' lack of "willfulness"; (b) the newness of this concept that a violation of 9 C.F.R. § 2.10(c) can be committed when the person whose license has been suspended or revoked is acting as neither a dealer nor an exhibitor (APHIS's Motion for Summary Judgment at p. 12); (c) size of the business (unknown, and not relevant here); (d) gravity of the violations, moderate; (e) no proof of lack of good faith here; and (f) history of previous violations (revocation), I find \$1,000.00 in civil penalties to be an adequate remedy (\$500.00 for each of the bear cubs), plus \$1,650.00 in civil penalties for failure to obey cease and desist orders, plus a cease and desist order tailor-made for the circumstances here.

Order

29. The following **cease and desist** provisions of this Order (paragraph 30) shall be effective on the day after this Decision becomes final. [*See* paragraph 33.]

30. Respondent Joseph M. Estes, an individual and agent for Safari Joe's Wildlife Ranch, Inc., his agents and employees, successors and assigns, directly or indirectly, or through any corporate or other device or person, shall cease and desist from violating 9 C.F.R. § 2.10(c), including but not limited to **delivering for transportation any animal** (as defined in 9 C.F.R. § 2.1), even an animal to be used as a pet, even when there is no sale or trade.

31. Respondent Estes is assessed civil penalties totaling **\$2,650.00** [which includes \$1,650.00 for failure to obey a cease and desist order], which he shall pay by certified check(s), cashier's check(s), or money order(s), made payable to the order of "**Treasurer of the United States,**" within one year after this Decision becomes final. [See paragraph 33.]

32. Respondent Estes shall reference **AWA 11-0027** on his certified check(s), cashier's check(s), or money order(s). Payments of the civil penalties shall be sent to, and received by, Colleen A. Carroll, at the following address, or at any other address specified by Colleen A. Carroll:

US Department of Agriculture
Office of the General Counsel
Attn: Colleen A. Carroll
South Building, Room 2314, Stop 1417
1400 Independence Ave SW
Washington DC 20250-1417

Finality

33. This Decision and Order shall be final and effective without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see Appendix A).

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

Done at Washington, D.C.
this 20th day of March 2014

s/ Jill S. Clifton

Jill S. Clifton
Administrative Law Judge

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