UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 11-0380

In re:

JEFFERY[1] W. ASH, an individual

doing business as (d/b/a)

ASHVILLE GAME FARM,

Respondent.

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 was initiated upon the issuance of an Order by the Administrator of the Animal Plant Health Inspection Service ("APHIS"), an agency of the United States Department of Agriculture ("USDA"), directing Jeffery W. Ash, an individual d/b/a Ashville Game Farm ("Respondent"), to show cause why his exhibitor's license under the Animal Welfare Act, 7 U.S.C. §§2131 et seq. ("AWA" or "the Act") should not be revoked.

The AWA vests USDA-APHIS 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

[1]Respondent's first name is variably spelled throughout pleadings and documents as "Jeffery" and as "Jeffrey". In this Decision and Order, I shall strive to use the spelling associated with the pleading or documentary evidence

orders to promote the purposes of the AWA. 7. U.S.C. §2151. The Act and regulations fall within the enforcement authority of APHIS, which is also tasked to issue and renew licenses under the AWA.

This matter is ripe for adjudication, and this Decision and Order[2] is based upon the pleadings, documentary evidence, and arguments of the parties, 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 and Respondent's AWA license be revoked.

III. CONTENTIONS OF THE PARTIES

USDA contends that Respondent Jeffrey Ash is unfit for licensure under the AWA due to his conviction for the misdemeanor of reckless endangerment, second degree in relation with his exhibition of wild and exotic animals.

Respondent maintains that his conviction was not related to the treatment, transportation, care or welfare of the animals he exhibited, and therefore, does not meet the requisite criteria for denying his license under 9 C.F.R. § 2.11. Respondent argues that denial of a license is appropriate only in instances of willful violation of the Act, and maintains that he should be permitted to negotiate a settlement with USDA. Respondent asserts that the question of whether he is fit to be licensed should be determined only after a hearing, and urges denial of USDA's motion for summary judgment

[2] In this Decision and Order, documents submitted by Complainant shall be denoted as "CX-#" and documents submitted by Respondent shall be denoted as "RX-#".

IV. PROCEDURAL HISTORY

On August 31, 2011, USDA APHIS filed with the Hearing Clerk for the Office of Administrative Law Judges ("OALJ"; "Hearing Clerk") an Order to Show Cause Why Respondent's Animal Welfare Act License should not be terminated. On September 20, 2011, counsel for Respondent entered notice of appearance and filed a Response with the Hearing Clerk. A hearing was scheduled to commence on March 27, 2012. On March 6, 2012, Complainant moved for the entry of summary judgment. On March 26, 2011, Respondent filed an objection to the motion.

V. SUMMARY OF THE EVIDENCE[3]

1. Admissions

In his Response to APHIS' Order to Show Cause filed on August 31, 2011, Respondent admitted that he operated as an exhibitor as defined by the Act and Regulations, and held Animal Welfare Act license number 21-C-0359 as an individual. Respondent further admitted that on April 29, 2011, he was convicted of reckless endangerment, second degree in Washington County, New York.

2. Documentary Evidence

Respondent's AWA license records and renewal application

Indictment[4]

Uniform Sentence and Commitment Form, Superior Court Case # I-192-2010, Washington County, State of New York, dated April 29, 2011.

Orders and Conditions of Adult Probation

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[3] This summary judgment relies upon the pleadings and upon declarations and documentary evidence attached to the motions and objections filed by the Parties.

[4] Although I have admitted this document to the record, I give little probative weight to charges that did not result in conviction.

Notice of Denial of Applications for License Renewals, New York State Department of Environmental Conservation dated June 29, 2011.

Declaration of Elizabeth Goldentyer, D.V.M., APHIS Regional Director of Animal Care, Eastern Region

Declaration of Jeffery Ash

Affidavit of Lisa Johnson

Affidavit of Tucker C. Stanclift, Esq.

Respondent's pleadings before the Superior Court of New York, prepared by Robert M. Winn, Esq., and related Affidavit of Jeffery Ash

APHIS inspection reports, Inspection Requirements, and photographs

Website of Central Park Zoo in New York, New York[5]

Pleadings in a civil action brought against Respondent[6]

On-line news article from "The Post-Star" dated December 27, 2010[7]

Letter regarding transfer of animals dated August 25, 2008

VI. DISCUSSION

Summary judgment is proper where there exists "no genuine issue as to any material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). 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).

[5] I accord no probative value to this evidence as it relates to a facility other than Respondent's.
[6] I accord no probative value to this evidence as the record fails to demonstrate that APHIS considered this information when denying Respondent's AWA license renewal.
[7] I accord no probative value to this evidence, as it constitutes hearsay.

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. Matsushita Elec. Indus. Co. Ltd. v.. Zenith Radio Corp., 475 U.S. 574 (1986).

I find that the record establishes no material issue of genuine fact, and that summary judgment is appropriate. I reject the following arguments of Respondent for the reasons stated:

1. Whether Respondent's conduct was willful and whether he should be afforded the opportunity to settle this matter

Respondent freely admits and the record clearly establishes that Respondent entered into a guilty plea and was convicted of one count, No. Twenty-nine (29) of a twenty-nine (29) count indictment. Count Number Twenty-Nine (29) states:

> Defendant Jeffrey Ash, on or about August 10, 2010, in the Town of Greenwich, Washington County, New York, did recklessly engage in conduct which created the risk of serious physical injury to another person by running Ashville Game Farm and by not properly caging animals including lemurs, monkeys, bears, turtles, alligators, pigs [,] goats, deer and other animals, and by encouraging visitors to the game farm including children to feed the animals, and did not allow visitors to the Game Farm to have contact with the animals, and did not have the animals vaccinated for rabies . . . (remaining charge concerns reptiles and other animals that are not regulated by the AWA)

Respondent relies upon the regulatory implementation of the Administrative Procedures Act, 5 U.S.C §551, et seq. for the proposition that in the absence of a showing of willfulness that may result in the revocation of a license, USDA shall afford an opportunity to achieve compliance. 7 C.F.R. § 1.133(b)(3). Respondent cites[8] decisions of the Judicial Officer of USDA where willful behavior supported the revocation of an AWA license. In those decisions, the Judicial Officer found that an action is willful if an act is done with careless disregard of statutory requirement.

I find that Respondent's conviction for "recklessly engag[ing] in conduct which created the risk of serious physical injury to another person . . ." sufficiently establishes the element of willfulness required to revoke his license.

Respondent insinuates that his entry of a guilty plea that led to the conviction at issue herein was a purely economic decision. However, Respondent has not asserted that he entered into his plea in Superior Court under the standard set forth in North Carolina v. Alford, 400 U.S. 25 (1970). There is no evidence that Respondent attempted to withdraw his guilty plea or to

[8] Respondent also makes certain factual allegations that are not of record in and which I decline to entertain.

appeal the conviction. Moreover, the prevailing regulation considers a nolo contendere plea equivalent to any other conviction. 9 C.F.R. 9 C.F.R. § 2.11 (a)(4); (a)(6).

Respondent's willing entry of a guilty plea to a criminal offense is sufficient to satisfy the requisite *mens rea,* or intent, to commit the crime to which he pled guilty. Accordingly, I find that Respondent's conviction demonstrates sufficient *mens rea* to establish willfulness under the Act. I conclude that APHIS is under no obligation to engage in settlement discussions with him.

2. Whether Respondent violated a statute, rule or regulation involving the transportation, ownership, neglect, or welfare of animals

Respondent argues that APHIS improperly denied his license due to his conviction for reckless endangerment. Respondent asserts that he was not found to have violated any Federal, State, or local laws or regulations pertaining to "animal cruelty". Respondent cites in its entirety the prevailing regulation at 9 C.F.R. § 2.11, which sets forth the standards for APHIS to use to deny an initial license application, and, pursuant to 9 C.F.R. § 2.12, to revoke an existing license.

9 C.F.R. § 2.11(a) states that a license will not be issued to any applicant who:

(1) Has not complied with requirements of Sec. 2.1, 2.2, 2.3, 2.4 (of the Regulations) and has not paid the fees indicated in Sec. 2.6;
(2) Is not in compliance with any of the regulations or standards in this subchapter;
(3) Has had a license revoked or whose license is suspended, as set forth in Sec. 2.10;
(4) Has pled nolo contendere (no contest) or has been found to have violated any Federal, State, or local laws or regulations pertaining to animal cruelty within 1 year of application, or after 1 year if the Administrator determines that the circumstances render the applicant unfit to be licensed;
(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 false or fraudulent records to the Department of 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.

Respondent's argument focuses on 9 C.F.R. § 2.11(a)(4), and I agree that the record is devoid of evidence that Respondent was found to be in violation of a law or regulation pertaining to animal cruelty. However, the prevailing Regulations require that an animal must be exhibited and handled so as to pose "minimal risk of harm to the animal *and the public*". . .9 C.F.R. § 2.131 (c)(1) (emphasis added). The uncontroverted evidence demonstrates that Respondent's exhibition of a lemur led to the animal interacting with members of the public in a manner that risked injury, as Respondent agreed when he pled guilty to reckless endangerment.

Moreover, APHIS' decision to terminate Respondent's license was not based upon allegations of animal cruelty, but rather, upon 9 C.F.R. § 2.11(a)(6). See, Order to Show Cause of August 31, 2011, ¶ 2. That regulation provides grounds for terminating an AWA license held by anyone who, in pertinent part, "has been found to have violated any Federal, State, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals. . ." 9 C.F.R. § 2.11(a)(6).

The Regional Director for APHIS, who has the authority to revoke Respondent's license, has concluded that Respondent's conviction for reckless endangerment was based upon the manner in which he exhibited animals that he owned. See, Declaration of Elizabeth Goldentyer, D.V.M.¶5; 7. The New York Penal Code at §120.20 provides that "a person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person." Accordingly, an action involving the transportation, ownership, neglect, or welfare of animals is not an element of the crime of reckless endangerment. However, in the instant circumstances, Respondent's ownership and exhibition of animals exposed the

public to risk in violation of prevailing regulations. In addition, Respondent's exhibition of animals was extrinsically related to the execution of the crime of reckless endangerment, so as to constitute the instrumentality of the crime. This conclusion is supported by the New York State Department of Environmental Conservation, which denied Respondent's application to renew his state license to own and exhibit animals in part because of his conviction. CX-3.

Therefore, I find that Respondent's conviction involved the ownership and exhibition of animals. As this is a conclusion of law, and not a finding of fact, I find that summary judgment is appropriate. The record establishes that APHIS has established sufficient grounds to terminate Respondent's AWA license pursuant to 9 C.F.R. § 2.11(a)(6).

3. Respondent's entitlement to a hearing on the question of fitness to hold an AWA license

Respondent asserts that genuine issues of material fact exist regarding his fitness to hold a license, and therefore, summary judgment is an inappropriate vehicle for the disposition of the instant matter. 9 C.F.R. § 2.12 provides that "[a] license may be terminated during the license renewal process or at any other time for any reason that an initial license application may be denied pursuant to § 2.11 after a hearing in accordance with the applicable rules of practice." 9 C.F.R. § 2.12.

It is well-established that summary judgment is appropriate where there is no factual dispute. In the instant circumstances there remains no genuine issue of material fact. The Regional Director for APHIS, who has the authority to revoke Respondent's license, concluded on the basis of Respondent's conviction that he is unfit to hold a

license under the Act. See, Declaration of Dr. Goldentyer, ¶¶ 6; 7. Although it is clear that Dr. Goldentyer reviewed the State of New York's denial of the renewal of Respondent's State license to possess and exhibit animals, there is no evidence that she relied upon anything other than Respondent's conviction for her determination that he is unfit to hold a license under the AWA. Id. Dr. Goldentyer did not refer to any other of the grounds cited by the State of New York for the denial of Respondent's State license. Declaration of Dr. Goldentyer, ¶ 7.

There is no evidence that APHIS looked beyond the prima facie conclusion of the State of New York's Department of Environmental Conservation. I accord substantial weight to Dr. Goldentyer's determination. The recommendations of administrative officials charged with responsibility for enforcing the Act are highly relevant and are entitled to great weight, considering the experience gained by administrative officials during their day-to-day supervision of regulated industry. See, In re: Judie Hansen, 57 Agric. Dec. 1072 (1998). I find it significant that the State of New York also considered the fact of Respondent's conviction when deciding to revoke his State license, as that determination supports APHIS' conclusion.

Because the record fails to establish that APHIS considered any factors other than Respondent's conviction when determining his fitness to be licensed, there is no genuine issue of material fact. Summary judgment in favor of Respondent is appropriate..

VII. **FINDINGS OF FACT**

1. Respondent Jeffrey Ash is an individual who did business as Ashville Game Farm, and who operated as an exhibitor as defined by the Act and Regulations, and whose mailing address is in Greenwich, New York.

2. Animal Welfare Act license number 21-C-0359 was issued to Respondent as an individual in March, 2010.
3. Respondent Jeffrey Ash, on or about April 29, 2011, was convicted of reckless endangerment, second degree, pertaining to his August 10, 2010, exhibition of animals in the Town of Greenwich, Washington County, New York.
4. Respondent was convicted on one charge of a twenty-nine (29) charge indictment on April 29, 2011.
5. The State of New York revoked Respondent's State license to exhibit animals in part due to his conviction.
6. On or about December 28, 2010, APHIS Regional Director, Animal Care, Eastern Region, Elizabeth Goldentyer, D.V.M. was notified by a member of her staff that Respondent had been indicted on twenty-nine (29) counts of alleged criminal conduct related to his exhibition of animals at his facility in Greenwich, New York.
7. Upon the subsequent request by APHIS, on July 27, 2011 Dr. Goldentyer was provided with certified copies by the State of New York of Respondent's April 29, 2011 conviction for one count out of the twenty nine (29) enumerated in the indictment, namely, Count Twenty-nine (29), reckless endangerment, second degree.
8. Respondent's conviction involved the manner in which he exhibited animals at Ashville Game Farm.
9. On or about August 10, 2011, APHIS received a copy of a letter dated June 29, 2011 from the New York State Department of Environmental Conservation directed to Mr. Ash, in which the State of New York denied the renewal of his State license to possess and exhibit animals.

10. The June 29, 2011 letter relied in part upon Respondent's conviction.

11. APHIS determined that Respondent was unfit to hold a license under the Animal Welfare Act.

12. On or about June 8, 2011, Dr. Goldentyer requested that APHIS institute administrative proceedings to terminate Respondent's Animal Welfare Act license based upon his conviction for reckless endangerment in connection with his exhibition of wild and exotic animals.

VIII. CONCLUSIONS OF LAW

1. The Secretary, USDA, has jurisdiction in this matter.
2. Respondent timely filed a response to USDA's Order to Show Cause Why his license under the AWA should not be terminated.
3. The material facts involved in this matter are not in dispute and the entry of summary judgment in favor of USDA is appropriate.
4. Respondent's conviction for reckless endangerment, second degree, under the Penal Code of the State of New York involved the possession and exhibition of animals.
5. Respondent's conviction establishes that his conduct was willful, within the meaning of the AWA and prevailing regulations.
6. APHIS concluded that Respondent's conviction demonstrates that he is unfit to hold a license to possess and exhibit animals under the AWA.
7. APHIS did not rely upon other factors for its determination to revoke Respondent's license.
8. APHIS' revocation of Respondent's license pursuant to 9 C.F.R. §2.11(a)(6), promotes the remedial nature of the AWA and is hereby AFFIRMED.

ORDER

Respondent's Animal Welfare Act license, number 21-C-0359, is hereby revoked.

This Decision and Order shall be effective 35 days after this decision is served upon the Respondent unless there is an appeal to the Judicial Officer pursuant to 7 C.F.R. § 1.145.

So Ordered this 3rd day of April, 2012 in Washington, D.C.

[redacted]

Janice K. Bullard
Administrative Law Judge