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UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:)
) AWA Docket No. 09-0196
FOR THE BIRDS, INC., an Idaho)
corporation; JERRY LeROY KORN,)
an individual; MICHAEL SCOTT KORN,)
an individual; and RAYMOND WILLIS,)
an individual,) Decision and Order as to
Respondents.) ONLY For the Birds, Inc.,
) Jerry LeRoy Korn and
) Michael Scott Korn

Procedural History

This proceeding was instituted under the Animal Welfare Act, as amended (7 U.S.C. § 2131 *et seq.*) (the "Act") by a Complaint filed September 14, 2009, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture, alleging that the respondents willfully violated the regulations and standards issued pursuant to the Act (9 C.F.R. § 1.1 *et seq.*). This Decision and Order is entered pursuant to section 1.141(e) of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.141(e)).

The Administrator of the Animal and Plant Health Inspection Service ("APHIS" or "Complainant") initiated this case in furtherance of USDA's statutory mandate under the Act to ensure that animals transported, sold or used for exhibition are treated humanely and carefully.¹ APHIS is represented by Colleen Carroll, Office of the General Counsel, United

¹ The Animal Welfare Act, 7 U.S.C. § 2131 *et seq.* (the "Act"), was originally passed by Congress specifically to address the public's interest in preventing the theft of pets and in

States Department of Agriculture. APHIS seeks penalties against respondents for violating the Act and the regulations and standards promulgated thereunder, 9 C.F.R. § 2.1 *et seq.* (the "Regulations" and "Standards"). For the Birds, Inc. is represented by Jerry LeRoy Korn; and Jerry LeRoy Korn and Michael Scott Korn represent themselves (*appear pro se*); all three filed answers denying the material allegations of the Complaint.²

The hearing was held in Washington D.C. on March 13, 2012, with telephone connection available to respondents. Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed, without good cause, to appear at the hearing. Complainant moved for issuance of a decision pursuant to section 1.141(e) of the Rules of Practice applicable to this proceeding (7 C.F.R. § 1.141(e)), and I granted Complainant's motion. Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn, by failing to appear for the hearing, are deemed to have admitted the allegations in the Complaint, waived the right to an oral hearing, and to have admitted any facts presented at the hearing. Section 1.141(e) of the Rules of Practice (7 C.F.R. § 1.141(e)).

My Prehearing Deadlines and Instructions issued in July 2011 had been ignored by Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn. That order included:

ensuring that animals used in research were treated humanely. The Act was amended to regulate the transportation, purchase, sale, housing, care, handling and treatment of animals used for exhibition purposes or as pets.

² There were seven respondents. On February 17, 2012, I issued a Consent Decision and Order as to Respondents John Breidenbach and Dawn Talbott. On March 9, 2012, I issued a Consent Decision and Order as to Respondent Patrick Ben Korn. Four respondents remain.

Each Respondent and counsel for APHIS shall file with the Hearing Clerk on or before August 31 (Wednesday) 2011, any corrections and additions to paragraphs 1 and 2, and his or her current contact information for use in this case, to be used by not only the Hearing Clerk and me, but also, by the other parties. The current contact information shall include: (1) mailing address; (2) delivery address for commercial carriers such as FedEx or UPS; (3) e-mail address(es); (4) phone number(s); and (5) FAX number(s).

That order also required the respondents and counsel for APHIS to “promptly file with the Hearing Clerk any *changes* in contact information while this case is pending . . .” In addition, paragraphs 8 and 11 of my order state:

8. By Wednesday, February 22, 2012, each of the Respondents will deposit for next business day delivery to counsel for APHIS, by a commercial carrier such as FedEx or UPS, copies of proposed exhibits, list of proposed exhibits, and a list of anticipated witnesses. [These may be submitted jointly (by more than one Respondent), if the submission clearly identifies the Respondents who are submitting the documents.] . . .

. . . 11. IF Respondents fail to comply with this Order, I expect to change the hearing location to Washington, D.C. [Respondents who fail to participate in prehearing requirements are likely to fail to appear at the hearing, and I do not want to travel to Boise, Idaho if no Respondents will appear.]

In July 2011 I also issued a Hearing Notice setting the hearing for March 13 through 16, 2012, in Boise, Idaho. However, in part because, in a previous case, Respondents For the Birds, Inc. (through its then-representative Raymond Willis), Jerry LeRoy Korn and Michael Scott Korn all failed to appear, without good cause, at the scheduled hearing, I included the following proviso in Paragraph 2 in my Hearing Notice:

2. IF Respondents fail to comply with my order “Prehearing Deadlines and Instructions” issued the same date as this Hearing Notice, I expect to change the hearing location to Washington, D.C. [Respondents who fail to participate in prehearing requirements are likely to fail to appear at the hearing, and I do not want to travel to Boise, Idaho if no Respondents will appear.]

On March 2, 2012, the Complainant filed a motion advising that respondents For the Birds, Inc., Jerry LeRoy Korn, Michael Scott Korn and Raymond Willis had not complied with my prehearing order. Specifically, Complainant averred that none of these respondents had provided an exhibit list, a witness list, or copies of exhibits. Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn have not communicated with me, with the Complainant, or with the Hearing Clerk since 2009.

Complainant's motion requested that the hearing be held in Washington, D.C. On March 7, 2012, I granted Complainant's motion. The Hearing Clerk served copies of the Complainant's motion, and the signed order, on Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn.

The Complaint alleges (in paragraphs 12, 19, 23, 27, 31, and 35) that during a four-year period³ totaling 2,819 days,⁴ Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn exhibited animals without a license, violated three provisions of the veterinary care Regulations, and violated two of the handling Regulations.⁵ Paragraphs 17, 18, and 39 of the Complaint allege a total of nine additional separate violations.⁶

³ September 15, 2004, through September 14, 2009, excepting six specific dates within that time frame.

⁴ The period between September 15, 2004, and June 23, 2005, comprises 276 days. The period between June 23, 2005 and June 17, 2008 comprises 1089 days. The period between June 17, 2008, and September 14, 2009 (the filing of the Complaint) comprises 454 days.

⁵ 7 U.S.C. § 2149(b)(“Each violation and each day during which a violation occurs shall be a separate offense.”).

⁶ Complainant has deleted references to a violation by respondents on September 25, 2003, as barred by the applicable statute of limitations. The maximum assessable civil penalty for the nine violations in paragraphs 17, 18, and 39 is \$30,750.

The maximum civil penalty for each violation occurring between September 15, 2004, and June 23, 2005, was \$2,750.⁷ The maximum civil penalty for each violation occurring between June 23, 2005, through June 17, 2008, was \$3,750.⁸ Since June 18, 2008, the maximum civil penalty for a violation has been \$10,000.⁹

Complainant elected to present evidence, in part, in the form of affidavits and oral testimony. Complainant introduced the testimony of eleven witnesses¹⁰ and moved the admission of thirty-eight exhibits, which I admitted in evidence. I issue this initial Decision and Order on March 16, 2012.

Findings of Fact

1. Respondent For the Birds, Inc., is an Idaho corporation (currently administratively dissolved) whose agent for service of process is Jerry L. Korn, 6999 Little Willow Road, Payette, Idaho 83661.¹¹ At all times mentioned herein, Respondent For the Birds, Inc., was an exhibitor as that term is defined in the Act and the Regulations.

⁷ 28 U.S.C. § 2461; 62 Fed. Reg. 40924 (July 31, 1997); 62 Fed. Reg. 42857 (Aug. 8, 1997); 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 \$2,750; and knowing failure to obey a cease and desist order has a civil penalty of \$1,650.”).

⁸ 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.”).

⁹ U.S.C. § 2149(b).

¹⁰ The following witnesses testified by telephone: Frank Lolli, Keith Schuller, Susan Dahnke, Craig Perry, Dr. Jeff Rosenthal, Joelene Janicek Gould (whose testimony was cut short by a fire alarm in the South Building), Kelly Kitchens, John Breidenbach, Dawn Talbott, and Captain Toby Hauntz. Retired USDA Investigator Kirk B. Miller testified in person.

¹¹ CX 3, CX 3a.

2. Respondent Jerry LeRoy Korn, also known as Jerry L. Korn, is an individual whose mailing address is 6999 Little Willow Road, Payette, Idaho 83661. At all times mentioned herein, said Respondent was an exhibitor as that term is defined in the Act and the Regulations. Between 2001 and May 23, 2003, said Respondent held Animal Welfare Act license number 82-C-0035, issued to "JERRY L. AND SUSAN F. KORN DBA FOR THE BIRDS," which license was cancelled on May 23, 2003.¹² That license was revoked by an order of the Secretary of Agriculture issued on June 22, 2005.¹³

3. Respondent Michael Scott Korn is an individual whose mailing address is 6999 Little Willow Road, Payette, Idaho 83661. At all times mentioned herein, Respondent Michael Scott Korn was (1) operating as an exhibitor, as that term is defined in the Act and the Regulations, and/or (2) acting for or employed by an exhibitor (Respondent For the Birds, Inc., and/or Respondent Jerry LeRoy Korn), and his acts, omissions or failures within the scope of his employment or office are, pursuant to section 2139 of the Act (7 U.S.C. § 2139), deemed to be his own acts, omissions, or failures, as well as the acts, omissions, or failures of Respondent For the Birds, Inc., and/or Respondent Jerry LeRoy Korn.

4. Respondents For the Birds, Inc., and Jerry LeRoy Korn and Michael Scott Korn operate a moderate-sized business exhibiting farm, wild and exotic animals. The gravity of the violations alleged in the Complaint is great, and include repeated instances in which these Respondents knowingly exhibited animals without having a valid license, failed

¹² CX 1.

¹³ *In re For the Birds, Inc., et al.*, 64 Agric. Dec. 306 (2005).

to provide animals with adequate veterinary care, and failed to handle animals humanely.

The testimony and exhibits introduced at the hearing establish by more than a preponderance of the evidence that Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn operated as exhibitors and dealers, without being licensed to do so, as alleged in the Complaint. The evidence introduced also established that these Respondents handled animals in a manner that exposed people and animals to harm, and that they failed, on multiple occasions, to provide minimally-adequate care to the animals in their custody, and specifically failed to provide them with necessary veterinary care.

5. Respondent Michael Scott Korn is a son of Respondent Jerry LeRoy Korn. The evidence introduced by Complainant establishes that Respondent Michael Scott Korn committed the violations herein;¹⁴ however, it appears that Respondent Michael Scott Korn has to some extent been subject to the influence, direction and instruction of his father, Respondent Jerry LeRoy Korn, to the detriment of Respondent Michael Scott Korn.

6. Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn have continually failed to comply with the Regulations, after having been repeatedly advised of deficiencies. Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn have not shown good faith. To the contrary, Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn have repeatedly and knowingly demonstrated an unwillingness to comply with the Act's and the Regulations' prohibition against exhibiting animals without having a valid license and requirements for exhibiting animals safely.

¹⁴ CX 7, CX 15; Testimony of Kirk Miller.

7. Respondents For the Birds, Inc., and Jerry LeRoy Korn have an extensive history of previous violations. Specifically, this is the third administrative enforcement action instituted by the Secretary of Agriculture against Respondents For the Birds, Inc., and Jerry LeRoy Korn. *See In re For the Birds, Inc., et al.*, 64 Agric. Dec. 306 (2005), WL 1524662 (Decision and Order as to For the Birds, Inc., and Jerry L. Korn); and *In re For the Birds, Inc., et al.*, 67 Agric. Dec. 191, 2008 WL 4675786 (2008).¹⁵ This is the second administrative enforcement proceeding against Respondent Michael Scott Korn.

8. Respondent For the Birds, Inc., was assessed a \$28,050 civil penalty in 2005, for its 1,545 violations; and was assessed a \$57,750 civil penalty in 2008 for its 21 violations.¹⁶ Respondent For the Birds, Inc., has not remitted any portion of these assessments.

9. Respondent Jerry LeRoy Korn was assessed a \$20,597 civil penalty in 2005, for his 749 violations; and was assessed a \$57,750 civil penalty in 2008 for his 21 violations.¹⁷ Respondent Jerry LeRoy Korn has not remitted any portion of these assessments.

10. Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn were also ordered, in previous cases, to cease and desist from violating the Act and the Regulations and Standards. Each of the violations by Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn constitutes a knowing failure to obey a cease and

¹⁵ CX 2a, CX 2c.

¹⁶ CX 2a, CX 2c, CX 2d, CX 2e.

¹⁷ CX 2a, CX 2c, CX 2d, CX 2e.

desist order issued by the Secretary of Agriculture, which subjects Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn to assessment of a civil penalty of \$1,650 for each such offense, pursuant to section 2149(b) of the Act. 7 C.F.R. § 2149(b).

11. From September 15, 2004, to the date of the filing of this Complaint (excepting November 13 and 26, and December 4, 11 and 18, 2004, and January 12, 2005), Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn operated as exhibitors, without having been licensed by the Secretary to do so, and specifically, operated a zoo.¹⁸

12. On September 23, 2004, Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn operated as dealers, without having been licensed by the Secretary to do so, and specifically, bought or negotiated the purchase of a vervet for use in exhibition.¹⁹

13. On or about November 1, 2004, Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn operated as dealers, without having been licensed by the Secretary to do so, and specifically, delivered for transportation or transported two tigers for use in exhibition.²⁰

¹⁸ CX 5, CX 7, CX 14, CX 15, CX 16, CX 17, CX 18, CX 20, CX 21, CX 22, CX 24, CX 25, CX 26, CX 27, CX 28, CX 29, CX 29a, CX 30, CX 31, CX 32, CX 33; Testimony of: John Breidenbach, Dawn Talbott, Susan Dahnke, Keith Schuller, Kelly Kitchens, Captain Toby Hauntz, Kirk Miller.

¹⁹ CX 6; Testimony of Kirk B. Miller; Testimony of Frank Lolli.

²⁰ CX 8, CX 9, CX 10; Testimony of Kirk B. Miller; Testimony of Craig Perry.

14. From September 15, 2004, to the date of the filing of this Complaint (excepting November 13 and 26, and December 4, 11 and 18, 2004, and January 12, 2005), Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to have an attending veterinarian who provided adequate veterinary care to Respondents' animals.²¹

15. From September 15, 2004, to the date of the filing of this Complaint (excepting November 13 and 26, and December 4, 11 and 18, 2004, and January 12, 2005), Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to employ an attending veterinarian under formal arrangements, and with appropriate authority to ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use.²²

16. From September 15, 2004, to the date of the filing of this Complaint (excepting November 13 and 26, and December 4, 11 and 18, 2004, and January 12, 2005), Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to establish and maintain programs of adequate veterinary care.²³

17. From September 15, 2004, to the date of the filing of this Complaint (excepting November 13 and 26, and December 4, 11 and 18, 2004, and January 12, 2005), Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to handle

²¹ CX 7, CX 8, CX 11, CX 12; CX 13, CX 19; Testimony of Kirk Miller.

²² CX 7, CX 11, CX 12; Testimony of Kirk Miller.

²³ CX 7, CX 8, CX 11, CX 12, CX 13, CX 34; Testimony of Kirk Miller; Testimony of Dr. Jeff Rosenthal; Testimony of Captain Toby Hauntz.

animals as expeditiously and carefully as possible in a manner that would not cause them trauma, unnecessary discomfort, behavioral stress, or physical harm.²⁴

18. From September 15, 2004, to the date of the filing of this Complaint (excepting November 13 and 26, and December 4, 11 and 18, 2004, and January 12, 2005), Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, and specifically allowed the public to handle tigers without any barrier or distance.²⁵

19. On July 23, 2006, Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals (9 C.F.R. §§ 3.125-3.142), as follows:

a. Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to ensure that housing facilities were structurally sound and maintained in good repair.²⁶

²⁴ CX 7, CX 8, CX 10, CX 11, CX 12, CX 13, CX 14, CX 15, CX 16, CX 17, CX 18, CX 19, CX 21, CX 22, CX 24, CX 26, CX 27, CX 28, CX 29, CX29a, CX 30, CX 31, CX 32, CX 33, CX 34; Testimony of John Breidenbach; Testimony of Kirk Miller; Testimony of Susan Dahnke; Testimony of Captain Toby Hauntz; Testimony of Joelene Janicek Gould; Testimony of Dr. Jeff Rosenthal.

²⁵ CX 7, CX 14, CX 15, CX 16, CX 21, CX 24, CX 25, CX 26, CX 27, CX 28, CX 29, CX 29a, CX 30, CX 31; Testimony of John Breidenbach; testimony of Kelly Kitchens; Testimony of Captain Toby Hauntz; Testimony of Kirk Miller.

²⁶ CX 26, CX 27; Testimony of Susan Dahnke; Testimony of Kirk Miller.

b. Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to maintain their perimeter fence structurally sound and in good repair, and specifically, there was no perimeter fence around Respondents' facility.²⁷

c. Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to provide tigers with adequate shelter from inclement weather.²⁸

d. Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to keep the premises clean and in good repair, and free from excessive weed growth, trash and accumulated debris.²⁹

e. Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to provide animals (tigers and bears) with clean, potable water as often as necessary for their health and well-being.³⁰

f. Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to provide tigers with adequate shelter from sunlight.³¹

Conclusions

1. From September 15, 2004, to the date of the filing of this Complaint (excepting November 13 and 26, and December 4, 11 and 18, 2004, and January 12, 2005), Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn operated as

²⁷ CX 26, CX 27; Testimony of Susan Dahnke; Testimony of Kirk Miller.

²⁸ CX 26, CX 27; Testimony of Susan Dahnke; Testimony of Kirk Miller.

²⁹ CX 26, CX 27; Testimony of Susan Dahnke; Testimony of Kirk Miller.

³⁰ CX 26, CX 27; Testimony of Susan Dahnke; Testimony of Kirk Miller.

³¹ CX 26, CX 27; Testimony of Susan Dahnke; Testimony of Kirk Miller.

exhibitors, without having been licensed by the Secretary to do so, and specifically, operated a zoo, in willful violation of sections 2.1(a) and 2.100(a) of the Regulations. 9 C.F.R. §§ 2.1(a), 2.100(a).

2. On September 23, 2004, Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn operated as dealers, without having been licensed by the Secretary to do so, and specifically, bought or negotiated the purchase of a vultur for use in exhibition, in willful violation of sections 2.1(a) and 2.100(a) of the Regulations. 9 C.F.R. §§ 2.1(a), 2.100(a).

3. On or about November 1, 2004, Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn operated as dealers, without having been licensed by the Secretary to do so, and specifically, delivered for transportation or transported two tigers for use in exhibition, in willful violation of sections 2.1(a) and 2.100(a) of the Regulations. 9 C.F.R. §§ 2.1(a), 2.100(a).

4. From September 15, 2004, to the date of the filing of this Complaint (excepting November 13 and 26, and December 4, 11 and 18, 2004, and January 12, 2005), Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to have an attending veterinarian who provided adequate veterinary care to Respondents' animals, in willful violation of section 2.40(a) of the veterinary care regulations. 9 C.F.R. § 2.40(a).

5. From September 15, 2004, to the date of the filing of this Complaint (excepting November 13 and 26, and December 4, 11 and 18, 2004, and January 12, 2005), *Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to employ an attending veterinarian under formal arrangements, and with appropriate authority to*

ensure the provision of adequate veterinary care and to oversee the adequacy of other aspects of animal care and use, in willful violation of section 2.40(a)(1)-(2) of the veterinary care regulations. 9 C.F.R. § 2.40(a)(1)-(2).

6. From September 15, 2004, to the date of the filing of this Complaint (excepting November 13 and 26, and December 4, 11 and 18, 2004, and January 12, 2005), Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to establish and maintain programs of adequate veterinary care, in willful violation of section 2.40(b) of the veterinary care regulations. 9 C.F.R. § 2.40(b).

7. From September 15, 2004, to the date of the filing of this Complaint (excepting November 13 and 26, and December 4, 11 and 18, 2004, and January 12, 2005), Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to handle animals as expeditiously and carefully as possible in a manner that would not cause them trauma, unnecessary discomfort, behavioral stress, or physical harm, in willful violation of the handling regulations. 9 C.F.R. § 2.131(b)(1).

8. From September 15, 2004, to the date of the filing of this Complaint (excepting November 13 and 26, and December 4, 11 and 18, 2004, and January 12, 2005), Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to handle animals during public exhibition so there was minimal risk of harm to the animals and to the public, with sufficient distance and/or barriers between the animals and the general viewing public so as to assure the safety of animals and the public, in willful violation of the handling regulations, and specifically allowed the public to handle tigers without any barrier or distance. 9 C.F.R. § 2.131(c)(1).

9. On July 23, 2006, Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn willfully violated section 2.100(a) of the Regulations by failing to meet the minimum facilities and operating standards for animals other than dogs, cats, rabbits, hamsters, guinea pigs, nonhuman primates and marine mammals (9 C.F.R. §§ 3.125-3.142), as follows:

a. Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to ensure that housing facilities were structurally sound and maintained in good repair. 9 C.F.R. § 3.125(a).

b. Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to maintain their perimeter fence structurally sound and in good repair, and specifically, there was no perimeter fence around Respondents' facility. 9 C.F.R. § 3.127(d).

c. Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to provide tigers with adequate shelter from inclement weather. 9 C.F.R. § 3.127(b).

d. Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to keep the premises clean and in good repair, and free from excessive weed growth, trash and accumulated debris. 9 C.F.R. § 3.131(c).

e. Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to provide animals (*tigers and bears*) with clean, potable water as often as necessary (at a minimum) for their health and well-being. 9 C.F.R. § 3.130.

f. Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn failed to provide tigers with adequate shelter from sunlight. 9 C.F.R. § 3.128.

Order

1. Respondents For the Birds, Inc., Jerry LeRoy Korn and Michael Scott Korn, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Animal Welfare Act and the Regulations and Standards issued thereunder. The provisions of this paragraph shall become effective immediately.

2. Respondent For the Birds, Inc., is assessed a civil penalty of \$90,750, for its (at a minimum) 15 violations herein, and is assessed a further civil penalty of \$24,750 for its (at a minimum) 15 knowing failures to comply with a cease-and-desist order of the Secretary of Agriculture.

3. Respondent Jerry LeRoy Korn is assessed a civil penalty of \$90,750, for his (at a minimum) 15 violations herein, and is assessed a further civil penalty of \$24,750 for his (at a minimum) 15 knowing failures to comply with a cease-and-desist order of the Secretary of Agriculture.

4. Respondent Michael Scott Korn is assessed a civil penalty of \$10,000, for his (at a minimum) 15 violations herein, and is assessed a further civil penalty of \$24,750 for his (at a minimum) 15 knowing failures to comply with a cease-and-desist order of the Secretary of Agriculture.

5. The civil penalties in paragraphs 2, 3 and 4 above are to be paid, within 60 days of the date of this Decision and Order, by certified check or money order made payable to order of **Treasurer of the United States**, marked with **AWA 09-0196**, and remitted to:

Colleen A. Carroll
Office of the General Counsel
U.S. Department of Agriculture
1400 Independence Avenue, S.W.
Room 2325B, South Building
Washington, D.C. 20250-1417

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, **including those whose cases were previously decided by Consent Decisions.**

Done at Washington, D.C.
this 16th day of March 2012



Jill S. Clifton
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
South Building Room 1031
1400 Independence Avenue SW
Washington, D.C. 20250-9203
202-720-4443
Fax: 202-720-9776

APPENDIX A

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—ADMINISTRATIVE REGULATIONS

SUBPART H—RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time

for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]Judicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145