

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	AWA Docket No. D-08-0164
)	
Bret B. Hicken, an individual; and)	
Animal Industries, LLC,)	
)	
Petitioners)	Decision and Order

Bret B. Hicken initiated this proceeding, on August 11, 2008, by filing a petition in which he alleged that the Animal and Plant Health Inspection Service (APHIS), an agency of the United States Department of Agriculture (USDA), had improperly denied a license he needs to exhibit animals pursuant to the terms of the Animal Welfare Act (7 U.S.C. §§ 2131-2159). The petition states that Mr. Hicken’s applications for a license were denied because APHIS erroneously assumed that he was attempting to circumvent the termination of the exhibitor’s license held by Animals of Montana, a corporation that Mr. Hicken, an attorney, had represented. On August 18, 2008, APHIS filed a response with a motion for summary judgment seeking the dismissal of the petition.

On January, 28, 2009, I held a transcribed hearing with Mr. Hicken participating by telephone. Both parties filed briefs subsequent to the hearing. Based on the facts developed at the hearing, I conclude that the present denial of an exhibitor’s license to Mr. Hicken and the company he owns is proper, and the actions so far taken by APHIS should be upheld. However, Mr. Hicken has testified that if he or his company should be

granted a license, he would observe conditions assuring his activities as a licensed exhibitor would be independent of and not a continuation of Animals of Montana, a company owned by his former client Troy Hyde. Based on that testimony and the stated concerns of APHIS, the order that follows includes the requirement that an exhibitor's license shall be issued to Mr. Hicken or his company, upon the filing of a future application that complies with all governing regulations, subject to the provision that the licensee shall meet and observe conditions specified in the order to assure the separation of its activities from those of Mr. Hyde and Animals of Montana.

Findings

1. Bret B. Hicken, who seeks an exhibitor's license from APHIS, has acted as the attorney for Troy Hyde, owner of Animals of Montana, Inc., who pled guilty (U.S. vs. Hyde, No. 03-315(6), D.C. Minn., March 8, 2005), to a misdemeanor trafficking violation of the Lacey Act and a violation of the Endangered Species Act. (RX 1).
2. On August 29, 2008, based on the guilty plea in the criminal case, an order was entered on behalf of USDA that terminated the license held by Animals of Montana that is required under the Animal Welfare Act for exhibiting animals, and disqualified it for two years from obtaining a new license. (RX 7). The order was affirmed by USDA's Judicial Officer on March 10, 2009. (*In re Animals of Montana, Inc.*, AWA Docket No. D-05-0005 (March 10, 2009)).
3. On April 27, 2008, Ms. Tracy Krueger, the companion of Troy Hyde and an officer of Animals of Montana, Inc., applied for an exhibitor's license to operate the Animals of Montana facility. APHIS denied her license application as an attempt to

circumvent the impending termination of Animals of Montana's license. (Transcript, pp. 69-75; RX 6, pp. 6-9).

4. Shortly after the denial of Ms. Krueger's application, Bret B. Hicken, on June 6, 2008, formed a limited liability company, Animal Industries, LLC, and began submitting applications to APHIS for an exhibitor's license. The first application was denied for being incomplete. The second application was denied for failing to send the licensing fee. The third application was submitted on July 11, 2008 and was denied by APHIS, on July 17, 2008, because: (1) Mr. Hyde and Animals of Montana continued to own the property, equipment and animals that the application stated Mr. Hicken had purchased; (2) Animals Industries, LLC did not appear to be authorized to transact business in Montana where the facility and animals were located; and (3) APHIS officials believed that the application by Mr. Hicken was an attempt to circumvent the termination of the license held by Animals of Montana. (Transcript, pp. 76-84; RX 6, pp. 10-16).

4. Mr. Hicken denies that he is seeking a license to circumvent the termination of the license formerly held by Animals of Montana, Inc. He testified that:

(a) Mr. Hicken has previous experience as an animal trainer from approximately 1979 to 1985, when he raised and trained wild animals to work his way through college and law school.

(b) Though Mr. Hicken has represented Mr. Hyde, he had been involved in the animal business before becoming acquainted with Mr. Hyde. Mr. Hicken is licensed to practice law and has represented not only Mr. Hyde, but a number of other clients in his practice. He is now at the point that he wishes to retire and return to the

animal training business. He regards the termination of Mr. Hyde's license by APHIS as presenting him with an opportunity to purchase his client's business.

(c) Mr. Hicken has filed Articles of Incorporation in the State of Utah for a new corporation named Animal Industries, Inc. that he proposes should be granted an exhibitor's license under which it will operate the business in replacement of Animals of Montana. Mr. Hicken as the corporation's owner would operate the business under a new name, with new personnel, new telephone and contact number, and probably a new location. Mr. Hicken has entered into a contact with Mr. Hyde to purchase his animals and equipment, but not the real property where the animals were exhibited. If Mr. Hicken is unable to reach a rental agreement with the current owner of the real estate, Mr. Hicken would move the animals to a new location, and create an entirely new business.

Conclusions

1. APHIS properly denied an exhibitor's license to Petitioners in that the property, equipment and animals that were the subject of the application were still owned by Mr. Hyde and Animals of Montana, Inc.
2. At such time in the future as Mr. Hicken, or a company that he owns, files a new application that complies with 9 C.F.R. §§ 2.1, 2.2, 2.3 and 2.6, for a license under the Animal Welfare Act to exhibit animals, the license should be issued subject to the following conditions which if not observed shall be grounds for license termination under 9 C.F.R. § 2.12 for violating 9 C.F.R. § 2.11(d), in that the license shall be presumed to have been obtained to circumvent the order that terminated the license held by Animals of Montana:

- a) The licensee shall not employ the name, logo, advertisements, employees, or principals of Animals of Montana, Inc.; and neither Troy Hyde nor Tracey Krueger (or any of their agents or assigns) shall be a full or part-time employee of petitioner(s).
- b) Troy Hyde shall not participate in any way in promotional or marketing activities or in the exhibition of animals other than as a part-time consultant on an independent contractor basis who is not present at any animal exhibition.
- c) The licensee shall not hold, use or house any animals personally owned, held or otherwise used by, or in the custody of, Troy Hyde, Tracey Krueger or Animals of Montana, Inc.
- d) Troy Hyde, Tracey Krueger and/or Animals of Montana, Inc., or their agents or assigns, shall have no interest, financial or otherwise, in petitioner(s) Animal Welfare Act activities, or in any business operated by the licensee that is subject to regulation under the Animal Welfare Act.

Discussion

Mr. Hicken would like to purchase his client's animal exhibition business and retire from the practice of law in the State of Utah. The need of his client, Troy Hyde, to sell his animal exhibition business, is perceived by Mr. Hicken as a unique opportunity to return to a business he knows. However, he cannot exhibit wild animals without first obtaining a license from APHIS as required by the Animal Welfare Act (7 U.S.C. §§ 2131-2159). Under applicable USDA regulations, a person seeking such a license must file an application that among other conditions sets forth "...a valid premises address where animals, animal facilities, equipment, and records may be inspected for compliance...." (9 C.F.R. § 2.1). Mr. Hicken cannot comply with this requirement until he actually purchases the animals and equipment, and acquires a facility where they will be kept. He is therefore presently ineligible for a license, but is afraid to purchase Mr. Hyde's animals and equipment without assurance that the needed license will be granted. APHIS has made it clear that it is fearful that Mr. Hicken, contrary to 9 C.F.R. § 2.11 (c)

and (d), is attempting to obtain the license to enable his client, Mr. Hyde, to continue his operations as an animal exhibitor in circumvention of the license termination and the two-year proscription that USDA has imposed. Mr. Hicken states that APHIS is mistaken in that his company is a completely different entity from Mr. Hyde's. He argues that because the two companies are not intertwined, a license may not be denied for circumventing the prior order. *Suncoast Primate Sanctuary Foundation, Inc.*, 65 Agric. Dec.113, 65 Agric. Dec. 1197 (vacated by the Judicial Officer but reaching this conclusion, January 8, 2008, AWA Docket No. D-05-0002, 67 Agric. Dec (2008)). Additionally, Mr. Hicken testified at the hearing that he would be agreeable to conditions being placed upon the grant of a license to assure that the activities of his company would not involve Mr. Hyde. He specifically stated that those conditions could include prohibiting Mr. Hyde's presence when the animals are exhibited. (Transcript, p. 124).

The parties face an impasse that may only be overcome by an advance specification of the conditions under which a license shall be granted that adequately assures that the license is not actually obtained for Mr. Hyde.

Subsequent to the hearing, APHIS undertook to delineate such conditions. Though Mr. Hicken has not addressed the APHIS proposal in his brief, APHIS advises that he presently objects to a proposed requirement that Mr. Hyde may not attend future animal exhibitions by the new licensee. Even though he testified at the hearing that he would agree to this condition (Transcript, p. 124), APHIS advises in its brief, that Mr. Hicken now contends that Mr. Hyde's presence at the exhibitions is needed for his expertise on the animals' training and upbringing to better assure the safety of clients. That may be, but the fact that Mr. Hyde would be present at exhibitions is grounds for a

reasonable inference that Mr. Hicken seeks an exhibitor's license as a subterfuge to circumvent Mr. Hyde's two-year disqualification. Animals are regularly sold by one trainer to another with the new owner assuming all training duties before the animals are again exhibited. To the extent Mr. Hicken needs advice from Mr. Hyde, it should be obtained prior to exhibiting the animals. If Mr. Hicken cannot in that way obtain the expertise and confidence he needs when he exhibits these wild animals, he has the choice of hiring some expert other than Mr. Hyde to assist him at the exhibitions, or not entering into a dangerous business that he is not properly trained and experienced to conduct.

In sum, I find the conditions elaborated by APHIS for the issuance of an exhibitor's license to Mr. Hicken to be prudent and reasonable, and with some modifications I have included them as part of the order being entered in this proceeding.

ORDER

1. The denial of an exhibitor's license to petitioners by APHIS was in accordance with law and is hereby upheld.
2. At such time in the future as Mr. Hicken, or a company that he owns, files a new application that complies with 9 C.F.R. §§ 2.1, 2.2, 2.3 and 2.6, for a license under the Animal Welfare Act to exhibit animals, the license should be issued subject to the following conditions which if not observed shall be grounds for license termination under 9 C.F.R. § 2.12 for violating 9 C.F.R. § 2.11(d), in that the license shall be presumed to have been obtained to circumvent the order that terminated the license held by Animals of Montana:

(a) Mr. Hicken and/or his company, shall not employ the name, logo, advertisements, employees, or principals of Animals of Montana, Inc.; and neither Troy

Hyde nor Tracey Krueger (or any of their agents or assigns) shall be a full or part-time employee of the licensee.

(b) Troy Hyde shall not participate in any way in promotional or marketing activities or in the exhibition of animals other than being hired by Mr. Hicken and/or his company, as a part-time consultant on an independent contractor basis who is not present at any animal exhibition.

(c) Mr. Hicken and/or his company, shall not hold, use or house any animals personally owned, held or otherwise used by, or in the custody of, Troy Hyde, Tracey Krueger, or Animals of Montana, Inc.

(d) Troy Hyde, Tracey Krueger and/or Animals of Montana, Inc., or their agents or assigns, shall have no interest, financial or otherwise, in the Animal Welfare Act activities of Mr. Hicken and/or his company, or in any business operated by Mr. Hicken and/or his company, that is subject to regulation under the Animal Welfare Act.

This Decision and Order shall be final 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 as provided in 7 C.F.R. §1.145.

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

Dated: May 1, 2009

VICTOR W. PALMER
Administrative Law Judge