

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) AWA Docket No. 07-0114
)
Robert and Lou Ann Hurd,)
d/b/a Hurd's Kennel)
)
Respondents)

DECISION AND ORDER

This is an administrative disciplinary proceeding initiated by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service (“APHIS”), an agency of the United States Department of Agriculture (“USDA”), that alleges Respondents violated the Animal Welfare Act, as amended (7 U.S.C. §§ 2131- 2159; “the Act”), and the regulations and standards issued under the Act (9 C.F.R. §§ 1.1-3.142; “regulations and standards”). On May 20, 2008, a transcribed hearing was conducted by telephone at which evidence was received. APHIS was represented by its attorney, Sharlene Deskins, Office of the General Counsel, Washington D.C. Respondents participated *pro se*. At the conclusion of the hearing, the parties were given until June 20, 2008 to file briefs, arguments, or written explanatory statements. The time for filing briefs was subsequently extended until July 11, 2008. Upon consideration of the record evidence, the arguments and explanations of the parties, and controlling law, it is found for the reasons that follow, Respondents have violated the Act and the regulations and standards, and should be made subject to a cease and desist order and assessed a civil penalty of \$ 10,000.00.

Findings

1. Respondents, Robert and Lou Hurd breed and sell dogs in their own names and under the business names of Hurd Kennels and Precious Pets. Respondents and both of their businesses are located at the same address, 5465 170th Avenue, Carlyle, Iowa 50047, where the records for each business are kept. Neither “Hurd Kennels” nor “Precious Pets” have been registered by Respondents as business names.

2. Robert and Lou Hurd were dealers licensed under the Animal Welfare Act for approximately eight years. They voluntarily surrendered their license on June 10, 2004, and APHIS terminated it on July 2, 2004. The license application Respondents filed for 2004 indicated that, in 2003, they derived \$98,000.00 in income from activities regulated by the Act. Respondents have also reported the income from their businesses on their income tax returns. While Respondents were still licensed, they annually received copies of the Act and the regulations and standards, and agreed in writing to comply with them.

3. (a) Respondents have stipulated that APHIS inspected their premises on June 10, 2004, and found that health certificates had not been provided for 42 dogs they shipped in interstate commerce on February 19, 2004.

(b) APHIS conducted the inspection in response to a complaint from a dog rescue group which had received most of these dogs shipped without health certificates, that some of the dogs tested positive for canine brucellosis. (Tr.51). (Dog rescue groups believe dogs are mistreated at kennels and purchase dogs of breeds for which they have a particular affection to keep those dogs from being used for breeding at

kennels, and then give the “rescued dogs” to people who will keep them as pets (Tr.40-41)).

4. On February 17, 2004, Robert Hurd sold 4 dogs to Bobby Warden who owns and operates a dog breeding kennel in Grove, Oklahoma. Mr. Warden testified he had no independent recollection of the facts of the transaction. He stated in an affidavit (CX-10) given to an APHIS investigator: “I do not recall receiving health papers with these dogs.”

5. On March 17, 2004, Respondents transported 3 puppies that were less than 8 weeks of age. (CX-2 p.12)

6. On March 25, 2004, Respondents transported 4 puppies that were less than 8 weeks of age. (CX-2 p.13)

7. The APHIS review of records obtained from Respondents at or prior to the June 10, 2004 inspection revealed that records for dogs purchased by Precious Pets had not been fully completed and there were missing entries for the delivery method used, breed type, date of birth, signature of the person who received animals, identification number of animals and the license number of the dealer who sold the dogs. (CX-2, pp.4, 9, 10, 11, 12).

8. On September 3, 2004, Respondents sold 10 dogs through a consignment auction held at the Southwest Auction Service in Wheaton, Missouri for a total of \$3,025.00 that netted them, after the deduction of commissions, \$2,722.50. Seven of the dogs were purchased by dealers holding AWA licenses. (CX-16, CX-17 pp.2 and 6).

9. On October 9, 2004, Respondents sold 4 dogs, 2 of which were sold to dealers with AWA licenses, at the Diamond T. Auction Service in Rocky Comfort,

Missouri for a total of \$430.50. Two other dogs were given away free by the Respondents at the sale that day; they were probably old and were taken for pets. (Tr. 28-45, Tr. 101, CX-16, CX-17 and CX-18).

Conclusions

1. Respondents violated the regulations and standards issued pursuant to the Act in that, on February 19, 2004, Respondents in violation of 9 C.F.R. § 2.78 (a), failed to provide health certificates for 42 dogs they caused to be transported in commerce.

2. Respondents violated the regulations and standards issued pursuant to the Act in that Respondents in violation of C.F.R. § 2.130, transported in commerce, 7 puppies under eight weeks of age.

3. Respondents violated the regulations and standards issued pursuant to the Act in that, on September 3, 2004, Respondents in violation of 9 C.F.R. § 2.1(a)(1), sold 10 dogs at the Southwest Auction Service in Wheaton, Missouri, in circumstances requiring a dealer's license, when they no longer had a valid dealer's license.

4. Respondents violated the regulations and standards issued pursuant to the Act in that, on October 9, 2004, Respondents in violation of 9 C.F.R. § 2.1(a)(1), sold 4 dogs at the Diamond T. Auction Service in Rocky Comfort, Missouri, in circumstances requiring a dealer's license, when they no longer had a valid dealer's license.

5. In accordance with the Act's provisions at 7 U.S.C. § 2149 (b), a civil penalty of \$10,000.00 should be assessed against Respondents for these violations, and an order requiring them to cease and desist from continuing these violations should be entered.

Discussion

Robert Hurd admitted at the hearing he violated the regulations, on February 19, 2004, when he shipped 42 dogs in commerce without health certificates. He explained that because he delivered the dogs directly to a veterinarian he mistakenly believed he was excused from procuring health certificates for them (Tr. 128).

He denies any other violation of the Act or the regulations and standards.

He contends that he and his wife may not be held liable for failure to keep proper records because the records pertained to dogs purchased and owned by Precious Pets which is a separate business entity from Hurd's Kennels. Though both Hurd's Kennels and Precious Pets are wholly owned by Robert and Lou Ann Hurd, Mr. Hurd argues that dogs purchased and sold by Precious Pets may not be regulated by USDA because it is licensed as a retail pet store by the State of Iowa and comes within the Act's exemption of pet stores from licensing.

...any 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 may not be required to obtain a license as a dealer or exhibitor under this chapter.

7 U.S.C. § 2133.

The Act's definition of a "dealer" also contains this retail pet store exemption:

The term "dealer" means any person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of, (1) any dog or other animal whether alive or dead for research, teaching, exhibition or use as a pet, or any dog for hunting, security, or breeding purposes, except that this term does not include –
(i) a retail pet store except such store which sells any animals to a research facility, an exhibitor, or a dealer....

7 U.S.C. § 2132 (f).

The regulations further define “dealer” and “retail pet store”:

Dealer means person who, in commerce, for compensation or profit, delivers for transportation, or transports, except as a carrier, buys, or sells, or negotiates the purchase or sale of: Any dog...for research, teaching, testing, experimentation, exhibition, or for use as a pet; or any dog at the wholesale level for hunting, security, or breeding purposes. This term does not include: A retail pet store, as defined in this section, unless such store sells any animal to a research facility, an exhibitor, or a dealer (wholesale); any retail outlet where dogs are sold for hunting, breeding, or security purposes....

Retail pet store means any outlet where only the following animals are sold or offered for sale, at retail, for use as pets: Dogs, cats.... Such definition excludes-

- (1) Establishments or persons who deal in dogs used for hunting, security or breeding purposes;
- (4) Any establishment wholesaling any animals (except birds, rats and mice).

9 C.F.R. § 1.1.

Inasmuch as the pertinent regulation (9 C.F.R. § 2.75) places its requirements for keeping full and correct records only on dealers and exhibitors and not on pet stores receiving dogs from dealers, there is merit to Respondents’ argument if indeed the incomplete records noted by APHIS concerned purchases by an exempt retail pet store. The evidence received at the hearing did not fully preclude this possibility and inasmuch as each identified record shows “Precious Pets” as the buyer, I am dismissing the inadequate recordkeeping charges.

I am also dismissing charges against Respondents for failing to provide health certificates when they sold dogs to Bobby Warden since his testimony did not prove that he did not receive them; only that he did not recall receiving them.

Respondents, however, came within the regulation (9 C.F.R. § 2.130) that prohibits any person from transporting a dog that is less than 8 weeks of age in commerce in that they transported at least 7 puppies that were underage (CX-2 pp. 3 and 8).

Respondents also sold dogs to others after they were no longer licensed in circumstances that required them to hold a valid dealer's license. Again they assert that they were exempt as a retail pet store. But many of the sales were to dealers and all were wholesale rather than retail in nature. Accordingly, they violated 7 U.S.C. § 2134 and 9 C.F.R. § 2.1(a)(1) in respect to their sale of 14 dogs. However, I have dismissed charges relating to their disposition of two dogs that they apparently gave away rather than sold.

Violations of the Act subject the violator to a cease and desist order and a civil penalty of up to \$3,750 for each violation (7 U.S.C. § 2149 (b), as amended by 28 U.S.C. § 2462 and implemented by 7 C.F.R. §3.91(b)(2)(ii)). In assessing the penalty, the Act requires that due consideration be given to its appropriateness with respect to the size of the business, the gravity of the violation, good faith and the history of previous violations.

The size of Respondents business is demonstrated by their \$98,000 in sales for their last full year of operations as a licensed dealer.

Causing dogs to be transported without health certificates is a serious violation. The obvious point of the regulation is to prevent sick animals with possibly contagious diseases from being shipped in commerce. The potential for this happening is illustrated by the fact that the June 10, 2004, APHIS inspection of Respondents' records was prompted by a complaint that some of dogs shipped had canine brucellosis. Transporting puppies less than eight weeks of age is also a serious violation that can cause the puppies undue stress and harm. And, of course, continuing to sell dogs wholesale to dealers, breeders and persons other than individuals buying dogs for their own pets, demonstrates lack of good faith and willful disregard for the licensing requirements of the Act and the

regulations. During the eight years they were licensed, Respondents received one warning notice for a violation in 2003.

APHIS has requested that a cease and desist order be entered against Respondents and the assessment of a civil penalty of \$17,500.00. Inasmuch as I have not found Respondents to have committed several of the violations alleged, I consider the recommended civil penalty to be excessive. Instead I am entering an order that imposes in addition to a cease and desist order, a civil penalty of \$10,000.00. I believe that is the amount that best complies with the requirements of the Act.

ORDER

1. Respondents, their agents and employees, successors and assigns, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations and standards issued pursuant to the Act, and in particular, shall cease and desist from:

- (a) Failing to provide health certificates for animals moving in commerce;
- (b) Transporting in commerce dogs or cats under eight weeks of age;
- (c) Selling animals without a valid USDA license in circumstances requiring a USDA license; and
- (d) Engaging in any activity that requires a license under the Act.

2. Respondents are jointly and severally assessed a civil penalty of \$10,000.00, which shall be paid by certified check or money order made payable to the Treasurer of the United States, and shall be sent to Sharlene Deskins, Office of the General Counsel, Marketing Division, United States Department of Agriculture, Mail Stop 1417, South Building, Washington, D.C. 20250-1417.

This decision and order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service.

Copies shall be served by the Hearing Clerk upon the parties.

Dated: _____

Victor W. Palmer
Administrative Law Judge