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UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	AWA Docket No. 15-0058
Douglas Keith Terranova, an individual; and	)	AWA Docket No. 15-0059
Terranova Enterprises, Inc., a Texas corporation,	)	AWA Docket No. 16-0037
	)	AWA Docket No. 16-0038
Respondents.	)	

ORDER DENYING RESPONDENTS' PETITION FOR RECONSIDERATION OF THE JUDICIAL OFFICER'S AUGUST 30, 2019 DECISION AND ORDER

Appearances:

Ciarra A. Toomey, Esq., and Donna Erwin, Esq., with the Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue, SW, Washington, DC 20250, for the Complainant, Animal and Plant Health Inspection Service ("APHIS"); and

William J. Cook, Esq., of Tampa, FL, for the Respondents, Douglas Keith Terranova and Terranova Enterprises, Inc.

On Petition for Reconsideration to the Judicial Officer, Judge Bobbie J. McCartney.

SUMMARY OF PROCEDURAL BACKGROUND AND ISSUES IN DISPUTE

On August 30, 2019, in my capacity as USDA's Judicial Officer ("JO"), I issued a Decision and Order ("DO") in this disciplinary enforcement proceeding, initiated on January 16, 2015[1] by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service

[1] The case was assigned AWA Docket Nos. 15-0068 and 15-0069.

("APHIS"), United States Department of Agriculture ("Complainant"),[2] finding, among other things, that Douglas Keith Terranova and Terranova Enterprises, Inc. ("Respondents") willfully violated the Animal Welfare Act (7 U.S.C. §§ 2131 – 2159) ("AWA" or "Act") and the regulations promulgated thereunder (9 C.F.R. §§ 1.1 – 3.142) ("Regulations") on multiple occasions between August 2010 and September 2013.

The Administrative Law Judge's September 26, 2016 Initial Decision ("ID") was before me for consideration[3] by reason of Complainant's Petition for Appeal of the Initial Decision and a "Memorandum of Points and Authorities" in support filed on November 29, 2016 ,[4] contending that the number and nature of Respondents' violations are the kind of serious, repeat, and willful violations of the Act and the Regulations and Standards that warrant assessment of higher civil penalties than assessed by the ALJ when the required statutory factors are fully considered.[5] On January 9, 2017, Respondents filed their Response to Appeal Petition and Cross Appeal Petition ("Response").[6] Respondents contended that the ALJ imposed excessive sanctions for what

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[2] While I recognize the Administrator is a person, I will use the pronoun "it" when referring to the "Complainant" herein.

[3] A lengthy procedural history has been provided in the August 30, 2019 Decision and Order.

[4] The Initial Decision was filed on September 26, 2016 and served on Complainant the following date. Complainant had thirty days from the date of service to file an appeal with the Hearing Clerk. 7 C.F.R. § 1.145(a). Weekends and federal holidays shall be included in the count; however, if the due date falls on a Saturday, Sunday, or federal holiday, the last day for timely filing shall be the following work day. 7 C.F.R. § 1.147(h). In this case, Complainant's appeal petition was due on or before October 27, 2016; however, per Complainant's request, Judicial Officer Jenson extended the filing deadline to November 29, 2016.

[5] *See* Appeal at 18 ("Consideration of the required statutory factors in accordance with departmental precedent should have led the Judge to conclude that a greater civil penalty was warranted for respondents' ten violations."); *see also* section 19(b) of the Act (7 U.S.C. § 2149(b)).

[6] The Petition for Appeal was filed on November 29, 2016 and served on Respondents' counsel the same day. Respondents had twenty days from the date of service to file a response to Complainant's appeal. 7 C.F.R. § 1.145(b). Weekends and federal holidays shall be included in the count; however, if the due date falls on a Saturday, Sunday, or federal holiday, the last day for timely filing shall be the following work day. 7 C.F.R. § 1.147(h). In this case, Respondents' response to the appeal was due on or before

Respondents describe as "a few non-willful paperwork and access violations."[7] Respondents also asserted that the ALJ erred in finding Respondents committed willful violations with respect to a tiger escape on April 20, 2013.[8]

My Decision and Order reversed, amended, or modified a number of rulings made in the Administrative Law Judge's September 26, 2016 Initial Decision in finding that Douglas Keith Terranova and Terranova Enterprises, Inc. willfully violated the Animal Welfare Act and the regulations promulgated thereunder on multiple occasions between August 2010 and September 2013. Further, I found that the number and nature of Respondents' violations are the kind of serious, repeat, and willful violations of the Act and the Regulations and Standards that warrant assessment of higher civil penalties than assessed by the ALJ when the required statutory factors are fully considered.

The Petition for Reconsideration filed by Respondents on September 23, 2019, alleges 21 instances of error in my August 30, 2019 Decision and Order. On October 21, 2019, Complainant timely filed its Reply to Petition for Reconsideration ("CR"), addressing each of the alleged instances of error. Complainant's Reply fully demonstrates that the alleged errors "... simply constitute the Petitioners' disagreement with the Judicial Officer's (and the ALJ's) findings and conclusions. Further, Petitioners have rehashed the same arguments made before the ALJ and the Judicial Officer (and rejected by them)."[9]

Accordingly, for the reasons discussed more fully below, Respondents' Petition for

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December 19, 2016; however, per Respondents' request, Judicial Officer Jenson extended the filing deadline to January 9, 2017.

[7] Response at 1.

[8] *Id.* at 3.

[9] CR at 1-2; see also FN1: "The purpose of a motion for reconsideration is to call to the court's attention 'the matters or controlling decisions which counsel believes the Court overlooked in the initial decision and order." *Jones v. Carolina Freight Carriers Corp.*, 152 F.3d 918 (2nd Cir. 1998)(unpublished).

Reconsideration is ***denied.***

ISSUES REGARDING THE BURDEN OF PROOF

Because I concur with Complainant's contention that Respondents' Petition for Reconsideration essentially reargues the same points which were made on appeal and which have already been fully considered and addressed in the August 30, 2019 Decision and Order, the 21 alleged errors will not be addressed separately here. Rather, the finding and conclusions set forth in the August 30, 2019 Decision and Order are hereby affirmed and adopted herein for all purposes. Further, Complainant's Reply to Respondents' Petition for Reconsideration is consistent with the evidence of record and applicable statutory, regulatory and judicial precedence and is affirmed and adopted herein as well. Accordingly, no further discussion is warranted, ***except*** in regard to issues regarding the burden of proof. Issues regarding the burden of proof are of such importance to the findings and conclusions set forth in the August 30, 2019 Decision and Order in this proceeding, as well as to future regulatory disciplinary proceedings raising similar issues, that the discussion will be revisited here.

Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. § 556(d), requires that "the proponent of a rule or order has the burden of proof," which the Supreme Court has construed as the ultimate "burden of persuasion" on an issue:

> The term, "burden of proof' referenced in the APA's section 556(d) means "the burden of persuasion." *See, e.g., Kobel v. Hapag-Lloyd A.G., Hapag Lloyd America, Inc., Limco Logistics, Inc. and International TLC, Inc.* 33 S.R.R. 594,597 (ALJ 2014) (quoting *Director, Office of Workers' Comp. Programs v. Greenwich Collieries,* 512 U.S. 267, 276 (1994)). "The party with the burden of persuasion must prove its case by a preponderance of the evidence." *Id.* (quoting *Steadman v. SEC,* 450 U.S. 91, 102 (1981). When the party with the burden of persuasion produces sufficient evidence (characterized as a prima facie case), the burden of production shifts to the other party to produce evidence rebutting that case. *Petition of South Carolina Ports Authority for Declaratory Order,* 27 S.R.R. 1137, 1161 (FMC 1997). See also *Steadman,* 450 U.S. at 101 n.16 ("Where a

> party having the burden of proceeding has come forward with a prima facie or substantial case, he will prevail unless his evidence is discredited or rebutted.")(internal citations omitted). When direct evidence is unavailable inference may be drawn from certain fact and circumstantial evidence may be sufficient so long as the fact finder does not rely on mere speculation. See *Kobel,* 33 S.R.R. at 597 (citing *Waterman* S.S. *Corp v. General Foundries, Inc.,* 26 S.R.R. 1173, 1180 (ALJ 1993)). If the evidence produced by both parties is evenly balanced the party with the burden of evidence loses. *Id.* (citing *Greenwich Collieries,* 512 U.S. at 281).

Salomon and Jasmin Gruenberg-Reisner v. Overseas Moving Specialists, Inc. d/b/a Int'! Sea & Air Shipping, FMC Informal Docket No. 1947(1); 2017 WL 2241031, at *9 (F.M.C. Oct. 7, 2016).

It is well established that the Complainant has the burden of proof in this proceeding.[10] The standard of proof by which the burden is met in an administrative proceeding conducted under the Animal Welfare Act is preponderance of the evidence.[11] In meeting its burden of proof, Complainant bears the initial burden of coming forward with evidence sufficient for a *prima facie* case.[12] The burden of *production* then *shifts* to Respondents to rebut Complainant's *prima facie* showing.[13] Shifting burdens of production are necessary tools in developing a full

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[10] 5 U.S.C. § 556(d).

[11] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). *See also Tri-State Zoological Park of W. Md., Inc.*, 72 Agric. Dec. 128, 174-75 (U.S.D.A. 2013); *Schmidt*, 66 Agric. Dec. 159, 210 (U.S.D.A. 2007); *Int'l Siberian Tiger Found., Inc.*, 61 Agric. Dec. 53, 79 n.3 (U.S.D.A. 2002) (Decision and Order as to The International Siberian Tiger Foundation, Diana Cziraky, The Siberian Tiger Foundation, and Tiger Lady); *Parr*, 59 Agric. Dec. 269, 643-44 n.8 (U.S.D.A. 2000) (Order Den. Pet. for Recons.), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001); *Shepherd*, 57 Agric. Dec. 242, 272 (U.S.D.A. 1998).

[12] *JSG Trading Corp.*, 57 Agric. Dec. 710, 721-22 (U.S.D.A. 1998) (Order Den. Pet. for Recons. as to JSG Trading Corp.). *See Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 266 (D.C. Cir. 1989), *cert. denied sub nom. Am. Petroleum Inst. v. EPA*, 498 U.S. 849 (1990); *Bosma v. U.S. Dep't of Agric.*, 754 F.2d 804, 810 (9th Cir. 1984); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 176 (2d Cir. 1965), *cert. denied*, 384 U.S. 972 (1966); *see also* ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 75 (1947) ("There is some indication that the term 'burden of proof' was not employed in any strict sense, but rather as synonymous with the 'burden going forward'"); 3 KENNETH C. DAVIS, ADMIN. LAW TREATISE § 16:9 (1980 & Supp. 1989) (the burden allocated by the Administrative Procedure Act is the burden of going forward and not the ultimate burden of persuasion).

[13] *See Nat'l Mining Ass'n v. Dep't of Labor,* 292 F.3d 849, 871-72 (D.C. Circuit 2002) *("Greenwich Collieries* carefully distinguishes agency regulations that shift the bmden of proof (prohibited by the

and complete record and in assessing the weight to assign evidence where, as here, there is a "failure to act" element of the violation.[14]

The legislative history of APA section 7(c) (5 U.S.C. § 556(d)) explains:

> That the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain. Similarly the requirement that no sanction be imposed or rule or order be issued except upon evidence of the kind specified means that the proponents of a denial of relief must sustain such denial by that kind of evidence....

S. REP. NO. 752, 79th Cong., 1st Sess., 22 (1945).[15]

Based on my review of the record, I determined that in several instances Complainant came forward with evidence sufficient for a *prima facie* case, and that the burden of *production* then *shifted* to Respondents to rebut Complainant's *prima facie* showing, but that Respondents

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APA 'except as otherwise provided by statute,' 5 U.S.C. § 556(d)) from regulations that shift the burden of production (which the APA does not prohibit, *see* 512 U.S . at 270-80, 114 S.Ct. 2251 (distinguishing burden of proof from burden ofproduction)).").

[14] *See Campbell v. United States*, 365 U.S. 85, 96 (1961) ("[T]he ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary.") (citing *United States v. New York, N.H. & H.R. Co.*, 355 U.S. 253, 256 n.5 (1957)); *Saylor*, 44 Agric. Dec. 2238, 2672-73 (U.S.D.A. 1985) ("The facts concerning the size and effect on the violator's business are 'facts peculiarly within the knowledge of' the violator[.]") ("[A]s the Attorney General's Manual states, . . . under APA section 7(c), an agency is permitted . . . to draw such inferences or presumptions as the courts customarily employ, such as the failure to explain by a party in exclusive possession of the facts, or the presumption of continuance of a state of facts once shown to exist.").

[15] *See also* 2 4 J. STEIN, G. MITCHELL, & B. MEZINES, ADMINISTRATIVE LAW § 24.02 at 4-25 (1994) ("The legislative history of the A.P.A. burden of proof provision states that the party initiating the proceeding has, at a minimum, the burden of establishing a *prima facie* case, but a burden of proof may also rest on other parties seeking a different decision by the agency."); *see also Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 280 (1994) (*Almy v. Sebelius*, 679 F.3d 297, 305 (4th Cir. 2012) ("[W]hen the party with the burden of persuasion establishes a prima facie case supported by 'credible and credited evidence,' it must either be rebutted or accepted as true."); *see, e.g., Colette*, 68 Agric. Dec. 768, 783 (U.S.D.A. 2009) ("The evidence presented by the Administrator meets the burden of proof allowing me to conclude the Administrator proved his prima facie case. However, proving the prima facie case only shifts the burden, allowing Ms. Colette to rebut the Administrator's case. Ms. Colette contends the llamas were not "regulated" animals without presenting any legal or factual support for her theory. Therefore, Ms. Colette failed to overcome the prima facie case.").

failed to do so. For example: Complainant had established that: (1) according to Respondents' March 18, 2015 itinerary, all of Respondents' animals would be at Respondents' facility by April 2015;[16] and (2) on May 13, 2015, Animal Care Inspector ("ACI") (b) (7)(C) and Veterinary Medical Officer ("VMO") (b) (7)(C) conducted a routine inspection at Respondents' facility, whereupon they found that two groups of tigers were not present but instead were off-site performing at Respondents' traveling exhibition.[17] I found that this evidence of record established a *prima facie* violation of the itinerary regulation on May 13, 2015.[18]

Respondents then had the burden of producing evidence to rebut, defeat or otherwise outweigh the evidence supporting the allegation.[19] Such burden of *production* of evidence is distinct from, and does not shift, the ultimate burden of *persuasion* on a claim.[7] While Respondents insist that "Mr. Terranova submitted an itinerary prior to May 13, 2015 via email," Respondents produced no such email or any other supporting evidence of an itinerary submission after March 18, 2015.[20] Nor could he could identify the alleged recipient of the purported email.[21] I found that the only evidence Respondents offered to support their claim, Mr. Terranova's testimony, was "insufficient to rebut the prima facie showing of violation

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[16] *See* CX-19 at 1; Tr. 607-08; CX-23.

[17] *See* Tr. 608.

[18] DO at 32.

[19] *Id.*

[20] *See* IDO at 32, 60; Tr. 609-10, 740-41.

[21] *See* Tr. 740-41; Prehearing Brief at 3.

established by Complainant on this record."[22] This is not a shifting of the burden of proof; rather it is the weighing of competing evidence, which is an essential element of my responsibilities as the Judicial Officer.

Because of the inherent dangers associated with the handling, transfer and showing of wild animals, it is absolutely essential that the USDA record keeping requirements, which were freely assumed by Respondents upon issuance of their license, be diligently complied with. Considering the totality of facts and circumstances adduced at the hearing in this proceeding, the unsupported testimony by a named Respondent regarding a "failure to act" violation of an affirmative obligation required by regulation of a USDA licensee was insufficient to rebut Complainant's *prima facie* showing. Accordingly, I concluded that Complainant proved the violation by a preponderance of the evidence and determined that "[o]n or about May 13, 2015, respondents willfully violated the Regulations by exhibiting animals at a location other than respondents' facility, and housing those animals overnight at that location, without having timely submitted a complete and accurate itinerary to APHIS. 9 C.F.R. § 2.126(c)."[23]

CONCLUSION AND SUMMARY

As Complainant's October 21, 2019 Reply demonstrates, Respondents have not shown any "controlling law or material facts" that were overlooked and might be expected to change the

[22] DO at 31.

[23] 2016 Complaint at 5 ¶ 9. *See* 9 C.F.R. § 2.126(c) ("Any person who is subject to the Animal Welfare regulations and who intends to exhibit any animal at any location other than the person's approved site ... shall submit a written itinerary to the AC Regional Director. The itinerary shall be received no later than 2 days in advance of any travel and shall contain complete and accurate information concerning the whereabouts of any animal intended for exhibition at any location other than the person's approved site ...."

outcome.[24] In fact, in connection with some of the arguments, the petition for reconsideration copies verbatim pages from Respondents' initial appeal petition. Petitioners' disagreement with the adverse findings and conclusions by the ALJ and the Judicial Officer is not a basis for reconsideration. "The purpose of a petition for reconsideration is to seek correction of manifest errors of law or fact. A petition for reconsideration is not to be used as a vehicle merely for registering disagreement with the Judicial Officer's decision. A petition for reconsideration is only granted, absent highly unusual circumstances, if the Judicial Officer has committed error or if there is an intervening change in the controlling law." *In re Bodie S. Knapp, etc., et al.,* 72 Agric. Dec. 766, 768 (2013) (Order Den. Am. Pet. For Recons.).

ORDER

Respondents arguments have been previously considered and are rejected. Accordingly, Respondents' Petition for Reconsideration is ***denied***.

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[24] *Speigler v. Israel Discount* 20 *Bank of New York,* 2003 WL 21983018 (slip op. at 1)(Not reported in F.Supp.2d)(S.D.N.Y. 2003)("Since Plaintiff has not demonstrated controlling law or material facts put before the Court in connection with its underlying motion that the Court overlooked in reaching its decision, reconsideration of the Opinion is not warranted.") "Reconsideration ... is not an avenue for relitigation of issues already considered and determined by the court.").

RIGHT TO SEEK JUDICIAL REVIEW

Respondents have the right to seek judicial review of the Decision and Order entered in this proceeding on August 30, 2019 and of this Order Denying Respondents' Petition for Reconsideration in the appropriate United States Court of Appeals in accordance with 28 U.S.C. §§ 2341–2350. Respondents must seek judicial review within sixty (60) days after entry of this Order.[25] The date of entry of the Order is November ____, 2019.

Copies of this Order shall be served by the Hearing Clerk upon each of the parties (by certified mail as appropriate), with courtesy copies provided via email where available.

Done at Washington, D.C.
this ____ day of November 2019

Judge Bobbie
J. McCartney

Judge Bobbie J. McCartney
Judicial Officer

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

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[25] The appeal deadline for the Decision and Order issued in this proceeding on 8/30/2019 was stayed by the timely filing of Respondents' Petition for Reconsideration and the time for judicial review shall begin to run for the date of entry of this Order as the final action on the petition in accordance with 7 CFR §1.146(b). Respondents must seek judicial review within sixty (60) days of entry of this Order in accordance with 7 U.S.C. § 2149(c).