

1066001

USDA
OALJ/OHC

2012 MAR 16 PM 4:20

RECEIVED

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 Raymond Willis

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”). Respondent Raymond Willis (Respondent Willis) represents himself (appears *pro se*); he filed an answer 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. Respondent Raymond Willis 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. Respondent Raymond Willis, by failing to appear for the hearing, is 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 Respondent Raymond Willis. That order included:

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

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.

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.]

By February 2012, it appeared that Respondent Raymond Willis’s location had changed, but Respondent Willis had not filed notice of his changed contact information with the Hearing Clerk, as required. Respondent Willis had not filed notice to establish that “c/o

Mr. Young” was Respondent Willis’s new contact information or to identify Mr. Young’s role. It was not clear whether Mr. Young was authorized to act on behalf of Respondent Willis, as the representative of Respondent Willis. Moreover, from Mr. Young’s communications, it appeared that Respondent Willis would not communicate directly with my office, with the Complainant’s counsel, or with the Hearing Clerk.³

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 orders. Specifically, Complainant averred that none of these respondents had provided an exhibit list, a witness list, or copies of exhibits. Complainant specifically requested that the hearing location be changed to Washington, D.C., as I had indicated I would do.

On March 7, 2012, I granted Complainant’s motion, specifying the hearing location as **WASHINGTON, D.C., in the Office of Administrative Law Judge’s Hearing Room, 1400 Independence Avenue, S.W., Washington, D.C. 20250**. The Hearing Clerk served copies of the Complainant’s motion, and the signed order, on Respondent Raymond Willis. In addition, my office sent copies to Mr. Young.

On March 9, 2012, I filed a Hearing Room Designation, further identifying the specific room location for the hearing and providing instructions for access. The Hearing Clerk served copies of the Designation on Respondent Raymond Willis. In addition, my office sent copies to Mr. Young.

³ None of the other extant respondents has communicated with me, with the Complainant, or with the Hearing Clerk since 2009.

On March 9, 2012, Mr. Young sent me a letter stating that Respondent Willis had arrived in Boise, Idaho the previous evening (March 8, 2012), and conveying Respondent Willis's desire that the hearing be held in Boise, Idaho.

On March 10, 2012 (Saturday), Complainant's counsel sent Complainant's response to Mr. Willis's letter to me, to the Hearing Clerk, and to Mr. Young. In Complainant's response, Complainant suggested that if Mr. Willis desired to participate in the hearing by telephone, he should provide his telephone number and contact information to Complainant's counsel.

On March 12, 2012, I filed an order amending the case caption to reflect the resolution of this matter as to respondent Ben Korn. I sent that order by email to Complainant's counsel and to Mr. Young, with the following statement:

"Ms. Carroll and Mr. Willis, You will note that the Hearing remains scheduled to begin in Washington, D.C. at 10:30 am local time on March 13 (Tues) 2012. Parties and counsel are requested to arrive by 10:00 am. I have carefully considered the FAX from Jeff Young received March 9, 2012; and the Response from APHIS by Ms. Carroll received March 10, 2012. I agree with the Response, except that I will not order that anything be stricken from the record."

Also on March 12, 2012, by facsimile from Mr. Young, I received a three-page letter to Complainant's counsel from Respondent Willis (dated March 11, 2012, Sunday). In that letter, for the first time in this proceeding, Respondent Willis identified his location as West Virginia, specifically stating that he was employed by "Twilight Energy" as a "Special Projects Manager." Respondent Willis's letter generally objected to the manner in which the Complainant has conducted this case, and a previous case, and objected to the manner in which I had determined to hold the hearing. In closing, Respondent Willis stated:

“It is with regret that I will not be able to challenge your methods and interpretations at the hearing in Boise, Idaho, Ms. Carroll. My/our case revolved around law and evidence which I am quite confident you would not have been able to withstand. Sound investigations provide sound evidence which I fully intended to prove out in the hearings. Your ‘Perception is Reality’ methods would not have withstood the test I had planned for you based on law and proscribed practice.”

Respondent Willis did not provide any contact information for himself, and did not, as Complainant suggested, contact Complainant’s counsel to arrange to testify by telephone.

On March 13, 2012, Complainant filed a response to Respondent Willis’s letter.

Among other things, Complainant provided the following contact information for

Respondent Willis:

Raymond Willis
Director, Research and Development
Twilight Energy
3324 Pennsylvania Avenue - Suite #304
Charleston, WV
208-340-5783
raymond.rw33@gmail.com

Complainant averred that Mr. Willis’s supervisor at Twilight Energy had confirmed his (Mr. Willis’s) cell phone number as 208-340-5783.

At the beginning of the March 13, 2012 hearing, I noted that Respondent Willis had not communicated a telephone number to reach him, not to my office, or the Hearing Clerk, or Complainant’s counsel. I called the cell phone number that Complainant had obtained for Mr. Willis, and left Respondent Willis a voice message, giving him the number to call my office (which number he had received previously on numerous communications), if he desired to participate in the hearing by telephone. I never heard from Respondent Willis.

The Complaint alleges that from June 11, 2008, through the filing of the Complaint on September 14, 2009, Respondent Raymond Willis operated as an exhibitor, without a license, violated three provisions of the veterinary care Regulations, and violated two provisions of the handling Regulations.⁴ During that same period, Respondent Willis was the chief executive officer of Respondent For the Birds, Inc., and exercised control over that corporation. The maximum civil penalty for violations occurring from June 23, 2005 through June 17, 2008, was \$3,750.⁵ Since June 18, 2008, the maximum civil penalty for a violation has been \$10,000.⁶

The Complainant presented evidence, in part, in the form of affidavits and oral testimony. Complainant introduced the testimony of eleven witnesses⁷ and moved the admission of thirty-eight exhibits, which I admitted in evidence. I issue this Decision and Order on March 16, 2012.

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

⁵ 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.”).

⁶ 7 U.S.C. § 2149(b).

⁷ 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.

Findings of Fact

1. Respondent Raymond Willis is an individual whose mailing address is 3324 Pennsylvania Avenue, Suite 304, Charleston, West Virginia 25302. From at least June 11, 2008, through the filing of this Complaint on September 14, 2009, Respondent Raymond Willis was chief executive officer and a director of Respondent For the Birds, Inc., and 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.

2. Respondent Raymond Willis operated 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 Respondent Raymond Willis knowingly exhibited animals without having a valid license, failed to provide animals with adequate veterinary care, and failed to handle animals humanely.

3. Respondent Raymond Willis does not have a history of violations, however, he has not shown good faith. He was made aware of the licensing, handling and veterinary care requirements of the Animal Welfare Act and nevertheless 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. The testimony and exhibits introduced at the hearing establish by more than

a preponderance of the evidence that Respondent Raymond Willis in his capacity as principal of respondent For the Birds, Inc., operated as an exhibitor, without being licensed to do so, as alleged in the Complaint. The evidence introduced also established that Respondent Raymond Willis handled animals in a manner that exposed people and animals to harm, and that he failed, on multiple occasions, to provide minimally-adequate care to the animals in the respondents' custody, and specifically failed to provide the animals with necessary veterinary care.

4. From June 11, 2008, through the filing of this Complaint, Respondent Raymond Willis operated as an exhibitor, without having been licensed by the Secretary to do so, and specifically, operated a zoo.

5. From June 11, 2008, through the filing of this Complaint, Respondent Raymond Willis failed to have an attending veterinarian who provided adequate veterinary care to respondents' animals.

6. From June 11, 2008, through the filing of this Complaint, Respondent Raymond Willis 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.

7. From June 11, 2008, through the filing of this Complaint, Respondent Raymond Willis failed to establish and maintain programs of adequate veterinary care.

8. From June 11, 2008, through the filing of this Complaint, Respondent *Raymond Willis 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.

9. From June 11, 2008, through the filing of this Complaint, Respondent Raymond Willis 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.

Conclusions

1. From June 11, 2008, through the filing of this Complaint, Respondent Raymond Willis operated as an exhibitor, 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. From June 11, 2008, through the filing of this Complaint, Respondent Raymond Willis 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).

3. From June 11, 2008, through the filing of this Complaint, Respondent Raymond Willis 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).

4. From June 11, 2008, through the filing of this Complaint, Respondent Raymond Willis 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).

5. From June 11, 2008, through the filing of this Complaint, Respondent Raymond Willis 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).

6. From June 11, 2008, through the filing of this Complaint, Respondent Raymond Willis 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).

Order

1. Respondent Raymond Willis, his 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 Raymond Willis is permanently disqualified from obtaining an Animal Welfare Act license.

3. Respondent Raymond Willis is assessed a civil penalty of \$6,000, for his violations herein.

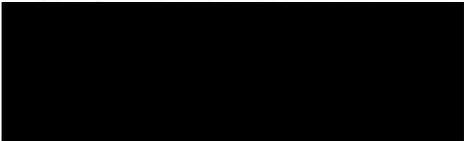
4. The civil penalty in paragraph 3 above is to be paid, within 60 days of the date of this Decision and Order, by certified check or money order made payable to order of **Treasurer of the United States**, marked with **AWA 09-0196**, and remitted to:

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]udicial [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

