

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 14-0084
Docket No. 14-0085

In re: Kirby VanBurch

and

VanBurch Productions, LLC,
doing business as Kirby VanBurch Theatre

Respondents



Default Decision and Order

Preliminary Statement

This proceeding was instituted under the Animal Welfare Act ("Act"), as amended (7 U.S.C. § 2131 et seq.), by an complaint filed by the Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture, alleging that the Respondents willfully violated the Act and the regulations issued thereunder (9 C.F.R. § 1.1 et seq.).

Copies of the Complaint and the Rules of Practice governing proceedings under the Act, 7 C.F.R. §§ 1.130-1.151, were served upon the Respondent Kirby VanBurch by certified mail on March 27, 2014 to the Respondents. The certified mailing to the corporate Respondent was returned by the Postal Service as "unclaimed" and the corporate Respondent was then served by regular mail on April 21, 2014.¹ The Respondents failed to file an Answer to the Complaint and on April 17, 2014, the Hearing Clerk sent a letter to Respondent Kirby VanBurch notifying him that a timely answer had not been received. On April 22, 2014, I entered an Order directing the

¹ Although the time for the corporate Respondent to file an Answer had not run when I entered the Show Cause Order, it since has expired and the corporate Respondent is now also in default.

parties to show cause why a Default Decision and Order should not be entered. On May 2, 2014, the Hearing Clerk's Office received a letter addressed to Teresa Lorenzano of APHIS, Counsel for Complainant, and the Hearing Clerk from Kirby VanBurch with the same address at which the certified mail containing the Complaint and the Rules of Practice had been sent which indicated that he had not received the Complaint and expressing a lack of knowledge as to that he was a Respondent.

On May 5, 2014, Complainant moved for adoption of a proposed [default] decision and order. Consistent with the Rules of Practice, the Motion and Proposed Decision were served upon Respondents by certified mail on May 19, 2014. No further response has been forthcoming from Mr. VanBurch.

The record establishes that Respondents failed to file an Answer to the Complaint within the time prescribed in Section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) and that Respondents failed to deny or otherwise respond to the allegations contained in the Complaint despite having been provided ample opportunity to do so. Accordingly, such failure shall be deemed, for purposes of this proceeding, an admission of the allegations in the Complaint and the following Findings of Fact, Conclusions of Law and Order will be entered pursuant to Section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Kirby VanBurch is an individual residing in Branson, Missouri who holds Animal Welfare Act License Number is 43-C-0320.
2. VanBurch Productions, LLC, doing business as Kirby VanBurch Theatre, is a corporation organized and existing under the laws of Missouri.
3. Respondents at all times material hereto, were operating as an exhibitor as defined in the Act and the regulations.
4. On or about May 6, 2011, APHIS inspected respondents' premises and found the following violations and deficiencies:
 - a. Respondents failed to maintain programs of adequate veterinary care under the supervision and

assistance of a doctor of veterinary medicine and to have failed to provide adequate veterinary care to at least four exotic cats at the respondents' facility.

b. The facility was not constructed of such material and such strength and was not maintained in good repair to protect the animals from injury and contain the animals.

c. Enclosures were not constructed and maintained so as to provide sufficient space to allow each animal to make normal postural and social adjustments with adequate freedom of movement.

d. Food provided to animals was not wholesome, palatable, and free from contamination and of sufficient quantity and nutritive value to maintain all animals in good health and the diet provided to animals was not prepared with consideration for the age, species, condition, size, and type of the animal.

5. On May 19 and May 20, 2011, APHIS inspected Respondents' premises and found Respondents continued to fail to maintain a program of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine and failed to provide adequate veterinary care to an exotic cat named "Charlie".

6. On June 22, 2011, APHIS inspected Respondents' premises and again found Respondents continued to fail to maintain a program of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine.

7. On April 11, 2013, APHIS inspected Respondents' premises and yet again found Respondents continued to fail to maintain a program of adequate veterinary care under the supervision and assistance of a doctor of veterinary medicine.

8. On or about April 15, 2013, APHIS inspected respondents' premises and found the following violations:

a. The facility was not constructed of such material and such strength as appropriate for the animals and was not maintained in good repair to protect the animals from injury and contain

the animals.

b. Provisions were not made for the removal and disposal of animal and food wastes, bedding, dead animals, trash and debris in order to minimize vermin infestation, odors, and disease hazards.

c. Suitable sanitary methods were not provided to eliminate excess water from indoor housing facilities.

d. Animals were placed in cargo space that did not have a supply of air sufficient for normal breathing for each live animal.

9. On or about June 27, 2013, APHIS inspected respondents' premises and found animals were being not handled as expeditiously and carefully as possible in a manner that does not cause trauma, overheating, excessive cooling, behavioral stress, physical harm, or unnecessary discomfort.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Respondents willfully violated Sections 2.40, 2.100(a), 3.125(a), 3.125(d), 3.126(d), 3.128(a), 3.129(a), 3.131(b)(1), and 3.138(c) of the Regulations, 9 CFR §§2.40, 2.100(a), 3.125(a), 3.125(d), 3.126(d), 3.128(a), 3.129(a), 3.131(b)(1), and 3.138(c).

Order

1. Respondents, their agents and employees, successors and assignees, directly or through any corporate or other device, shall cease and desist from violating the Act and the regulations issued thereunder, and in particular, shall cease and desist from exhibiting animals without a license.
2. Respondents are jointly and severally assessed a civil penalty of \$8,500, which shall be paid by a certified check or money order made payable to the Treasurer of United States. The notation "Docket Nos. 14-0084 and 12-0085" shall appear on the certified check or money order. The check shall be sent to Sharlene Deskins, USDA OGC, Mail Stop 1417, 1400 Independence Ave. S.W., Washington, D.C. 20250-1417.

3. Respondent Van Burch's Animal Welfare Act License is revoked; however, such revocation shall not become effective until ninety days after date of entry of this Decision and Order to allow Respondent VanBurch time to dispose of any regulated animals presently owned by him.

4. Respondent VanBurch Productions, LLC doing business as Van Burch Theatre is disqualified from obtaining a license.

5. This Order shall become effective on the first day after service of this decision on the Respondents.

6. This decision becomes final without further proceedings 35 days after service as provided in sections 1.142 and 1.145 of the Rules of Practice, 7 C.F.R. §§ 1.142 and 1.145.

Copies of this Decision and Order shall be served upon the parties.

June 27, 2014



Peter M. Davenport
Chief Administrative Law Judge