

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MELANIE BOYNES and TARZAN'S)
BIG CAT SANCTUARY, INC.,)
)
Petitioners,)
) Case No. 12-2909
vs.)
)
FLORIDA FISH AND WILDLIFE)
CONSERVATION COMMISSION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on January 22 and 23, 2013, in West Palm Beach, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Robert A. Melchiorre, Esquire
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For Respondent: Ryan Smith Osborne, Esquire
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STATEMENT OF THE ISSUE

Whether the Florida Fish and Wildlife Conservation Commission (FWC) should grant or deny the application for a license to Possess Class I and/or Class II Wildlife for Exhibition or Public Sale submitted to FWC by Melanie Boynes and Tarzan's Big Cat Sanctuary, Inc. (Ms. Boynes or, collectively, Petitioners).

PRELIMINARY STATEMENT

On or about April 20, 2012, Petitioners submitted to FWC an application for a License to Possess Class I and/or Class II Wildlife for Exhibition or Public Sale (the subject application) at a facility located at 3384 C Road, Loxahatchee, Florida (the premises). Petitioners indicated on their application that the application was for a sanctuary for big cats (the proposed facility). Prior to February 27, 2012, big cats had been housed on the premises pursuant to two licenses to "Possess Class I and/or Class II Wildlife for Exhibition or Public Sale" for the purported purposes of exhibition and/or sale (the prior facility). As will be discussed below, one of those license had been issued to Ms. Boynes and the other had been issued to Steve Sipek (Mr. Sipek).

On August 10, 2012, FWC issued its "Notice of Intent to Deny License Application," which stated the grounds for the

denial. Those grounds will be discussed in the Findings of Fact section of this Recommended Order. Thereafter, Petitioners timely filed a Petition for Administrative Proceeding, the matter was forwarded to DOAH, and this proceeding followed.

At the formal hearing, the parties presented three consecutively-numbered joint exhibits, each of which was admitted into evidence. Petitioners presented the testimony of Ms. Boynes, Katherine Stearns, and Vernon Yates. Petitioners presented two consecutively-numbered exhibits, which were admitted into evidence. FWC presented the testimony of Shannon Wiyda, Jon Garzaniti, Megan Adams, Dr. Gregory Gaj, and Dr. Laurie Gage. FWC presented the following pre-marked exhibits, each of which was admitted into evidence: 1-5, 7-10, 13, 14, 22-27, 31, and 32.

Prior to the formal hearing, the parties executed a Joint Pre-Hearing Stipulation that contained factual stipulations. Those stipulated facts have been incorporated in this Recommended Order to the extent the stipulated facts have been found to be relevant.

A Transcript of the proceedings, consisting of two volumes, was filed on January 11, 2013. Both parties filed Proposed Recommended Orders (PROs), which have been duly considered by the undersigned in the preparation of this Recommended Order.

All statutory references are to Florida Statutes (2012). All references to rules are to the rule in effect as of the entry of this Recommended Order.

FINDINGS OF FACT

1. FWC is the agency of the State of Florida that regulates the possession, sale, and display of captive wildlife in Florida.

2. Petitioners applied for the subject license by filing Application ID No. 2038 with FWC on or about April 20, 2012.^{1/} Petitioners want to operate the proposed facility as a sanctuary for big cats. The operation of the proposed facility as a sanctuary would not require commercial activity, and it would not require a license from the United States Department of Agriculture (USDA).

3. Ms. Boynes was licensed by FWC from September 25, 2006, to October 2, 2011, to possess Class I and Class II wildlife "for exhibition or public sale" at the prior facility. Ms. Boynes represented to FWC on the 2006 license application, and on the subsequent annual renewal applications (the prior FWC applications), that the intended commercial activity for the prior facility was a "permanent exhibition." That operation required commercial activity at the facility, and it required a license from the USDA. Ms. Boynes applied for the requisite USDA license, but she was denied that license by the USDA. On

her USDA application, she represented that she intended to keep the big cats at the prior facility as pets. Ms. Boynes's representations to FWC that she intended to possess the big cats as a "permanent exhibit" on the prior FWC applications were misrepresentations of her intentions. As will be discussed below, there was no evidence that the big cats were being possessed at the prior facility as anything other than pets.

4. Ms. Boynes applied for a renewal of her FWC license prior to its expiration on October 2, 2011. The FWC denied that application for renewal.^{2/}

5. On March 1, 2012, Ms. Boynes incorporated Tarzan's Big Cat Sanctuary, Inc. (the corporate Petitioner) as a not-for-profit corporation for purposes that included submitting the subject application. Ms. Boynes is president of the corporate Petitioner.

6. The premises consist of caging for big cats, an open-air area, and perimeter fencing on a five-acre tract. While the prior facility has been operated under the name of Tarzan's Big Cat Sanctuary for many years, the business was not incorporated until March 1, 2012.

7. Mr. Sipek is a former actor who once starred in Tarzan movies. Mr. Sipek held a FWC license for the prior facility and possessed big cats there for many years before Ms. Boynes became involved with the prior facility. Mr. Sipek's FWC license

authorized him to possess Class I and Class II wildlife for the same purposes as Ms. Boynes's license. His license also required commercial activity at the prior facility, and it required a license from USDA. Mr. Sipek has not held a FWC license since May 5, 2011. There was no evidence that he ever held a USDA license.

8. Ms. Boynes first became associated with the prior facility as a volunteer in 2006. Ms. Boynes has been residing on the premises with Mr. Sipek since December 8, 2007.

9. Mr. Sipek was listed as vice president of the corporation when it was first incorporated. Mr. Sipek has not been an officer or director of the corporate Petitioner since October 25, 2012.

10. Until February 27, 2012, three big cats were housed at the prior facility. The prior facility had a four-and-a-half year-old tiger named Lepa, a seven-year-old tiger named Bo, and a 17 year-old leopard named Oko. On February 27, 2012, Mr. Sipek was arrested and FWC removed Lepa, Bo, and Oko from the facility. FWC delivered all three cats to Vernon Yates, who has provided them sanctuary. All three cats were healthy when Mr. Yates received them. Ms. Boynes intends to have all three of those animals returned to the proposed facility if the subject application is granted and Petitioners become licensed to operate the proposed facility as a sanctuary.

11. Shannon Wiyda and Jon Garzaniti are investigators employed by FWC. As part of their duties, they conduct inspections of animals in caged security enclosures to ensure humane treatment and sanitary conditions for animals and to make sure the public is kept safe.

12. Inv. Wiyda conducted an inspection of the prior facility in September 2007. Ms. Boynes was present during that inspection.

13. Numerous violations were detected during that inspection. Those violations included gaps in caging, rust on caging, and vegetation on fencing. Gaps in caging can enable an animal to escape and can enable visitors to the facility to get too close to an animal. Rust on caging can cause the cage to lose its structural integrity and could cause parts of the cage to break off, leaving a sharp object that could injure an animal. Vegetation on the fences compromised the structural integrity of the fencing, and provided a means for the animals to climb the fencing.

14. The caging and fencing deficiencies constituted a potential danger to the animals and to the public.

15. Ms. Boynes received verbal warnings of the violations and a copy of the written report generated by Inv. Wiyda.

16. Inv. Wiyda conducted an inspection of the prior facility in October 2008. Ms. Boynes was present during that inspection.

17. Some deficiencies present in the 2007 inspection had been corrected, but others had not. There were still caging and fencing deficiencies. Gaps in the caging and rust were still present. The wire used to connect fencing or caging was not of sufficient gauge (strength). Vegetation was overgrowing the perimeter fence. Structures had been placed too close to the perimeter fence.

18. The caging and fencing deficiencies constituted a potential danger to the animals and to the public.

19. Ms. Boynes received verbal warnings of the violations and a copy of the written report generated by Inv. Wiyda.

20. Inv. Wiyda conducted an inspection of the prior facility in March 2009. Ms. Boynes was present during that inspection.

21. Numerous caging and fencing deficiencies were detected during that inspection. Wire less than the required nine-gauge was used to connect pieces of the cages and fencing. Surface rust was observed. One of the animal enclosures did not have a roof, which is required to prevent animals from escaping. Structures were placed too close to the perimeter fencing. Vegetation was growing over parts of the perimeter fence.

22. The caging and fencing deficiencies constituted a potential danger to the animals and to the public.

23. Inv. Wiyda conducted an inspection of the prior facility in May of 2010. Ms. Boynes was present during that inspection.

24. The licenses held by Mr. Sipek and Ms. Boynes were to possess the animals for sale or exhibition. Neither activity was occurring at the prior facility.

25. A USDA exhibitor's license was required for the facility. Neither Mr. Sipek nor Ms. Boynes had the required USDA license.

26. Numerous caging and fencing deficiencies were detected. The deficiencies observed during the 2010 inspection were similar to the deficiencies observed in the previous three inspections. Rust was observed on many surfaces of the cages and fencing. Required roofing was non-existent. Structures were placed next to fencing and vegetation overgrowth was present on the fencing. Structurally unsound enclosures, including cages, were discovered. Improper strength wire was used to hold cages together. The condition of the facility was poor.

27. The caging and fencing deficiencies constituted a potential danger to the animals and to the public.

28. On or about August 24, 2010, Mrs. Boynes and Mr. Sipek applied for the requisite USDA exhibitor's license.

29. Megan Adams, an Animal Care Inspector employed by the USDA, inspected the prior facility on August 10, 2010. Her observations and findings were similar to those of the FWC investigators. Ms. Adams observed unsanitary conditions and caging and fencing deficiencies.

30. Ms. Adams also noted that all three of the animals at the facility had been declawed. The USDA has prohibited declawing of big cats since before 2006 and the American Veterinary Medical Association condemns the practice. By letter dated September 16, 2010, the USDA denied the application submitted by Ms. Boynes and Mr. Sipek.

31. FWC does not have a rule that prohibits the declawing of big cats. Mr. Sipek had had Oko and Bo declawed before Ms. Boynes became involved with the prior facility. In 2008, Lepa arrived at the prior facility. Lepa was considered to be Ms. Boynes's animal.

32. When Inv. Wiyda inspected the prior facility in 2008, she told Ms. Boynes not to declaw Lepa, and gave her a copy of the USDA policy against declawing big cats. Ms. Boynes subsequently had Lepa declawed by a veterinarian. At the formal hearing, Ms. Boynes testified, credibly, that she would not

declaw any other big cats should FWC grant the subject application.

33. Inv. Garzaniti conducted an inspection of the prior facility in August 2011. Ms. Boynes was present during that inspection. Mr. Sipek was not licensed at the time of the inspection. Ms. Boynes's license was active at the time of the inspection.

34. Numerous caging and fencing deficiencies were detected. There were gaps in the caging, which compromised the integrity of the enclosures. Caging and fencing was mended together and piecemealed with bailing wire of less gauge than required. Rust was observed on surfaces of cages. One area of a cage had several pieces of rebar extending down from the ceiling of the cage with no brace on the bottom to support the rebar. One of the pieces of rebar broke off when light pressure was applied.

35. Vegetative overgrowth was present on perimeter fencing, which negatively impacted the integrity of the fencing. The perimeter fencing was structurally unsound.

36. The caging and fencing deficiencies constituted a potential danger to the animals and to the public.

37. Ms. Boynes possessed no USDA license as required.

38. There was no evidence that the animals were being possessed for any purpose other than as pets.

39. Invs. Wiyda and Garzaniti conducted an inspection of the prior facility on February 27, 2012. Ms. Boynes was present during the inspection.

40. Numerous caging and fencing deficiencies continued to exist. The cages and the perimeter fencing were not structurally sound. Structures were placed too close to the perimeter fencing. Vegetative overgrowth was observed on the perimeter fencing.

41. Sanitation violations were also observed. Standing water was discovered in cages. Proper drainage for surface water runoff was not provided. Standing water is unsanitary and can contain bacteria and feces, which can make an animal sick. There were multiple piles of old feces throughout the enclosure. Fecal waste is required to be removed daily because it is unsanitary and contains bacteria that can make an animal sick. Unclean water dishes with yellow and brown slime were discovered.

42. The caging and fencing deficiencies constituted a potential danger to the animals and to the public.

43. The unsanitary conditions constituted a potential danger to the animals.

44. Ms. Boynes did not have the required USDA license.

45. There was no evidence that the animals were being possessed for any purpose other than as pets.

46. On February 27, 2012, FWC arrested Mr. Sipek and removed the animals from the prior facility.

47. Ms. Boynes was emailed and sent a copy of the report that was generated by the investigators.

48. As to each FWC inspection, Ms. Boynes received verbal warnings as to the violations during and following each inspection, but she was not issued a written citation by FWC or the USDA for any of the deficiencies set forth above.

49. As a licensee, Ms. Boynes was required to assure that the caging complied with FWC's rules setting caging, fencing, and sanitation standards. As alleged in FWC's denial letter, Ms. Boynes violated those rules.^{3/}

50. On July 9, 2012, Ms. Boynes became solely responsible for the operations and maintenance of the facility.

51. Since that date, Ms. Boynes has built three new pens and new perimeter fence. Inv. Garzaniti inspected the re-built facility on July 9, 2012. The re-built facility met all applicable standards, and Inv. Garzaniti recommended that the subject application be granted and the license issued.^{4/}

52. FWC's denial letter stated as a ground for denying the subject application the alleged fact that Paul Fisher had been bitten by Oko (the leopard) at the prior facility on December 30, 2010. While FWC received a report of that

incident, there was insufficient proof to establish that the incident occurred.

53. FWC's denial letter also states as a ground for denying the application alleged deficiencies in the diet provided the animals at the prior facility. There was insufficient evidence to establish that the diet provided for the animals was insufficient.

CONCLUSIONS OF LAW

54. DOAH has jurisdiction over the subject matter of and the parties to this proceeding pursuant to sections 120.569 and 120.57(1).

55. This is a de novo proceeding designed to formulate final agency action. See Hamilton Cnty Bd. of Cnty Comm'rs v. Dep't. Env'tl. Reg., 587 So. 2d 1378 (Fla. 1st DCA 1991) and section 120.57(1)(k), Florida Statutes.

56. As the applicant, Petitioner has the burden of proving her entitlement to the license she seeks by a preponderance of the evidence. See Dep't of Banking and Fin. v. Osborne Stern, 670 So. 2d. 932 (Fla. 1996) and Dep't of Transp. v. J. W. C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

57. A "preponderance" of the evidence means the greater weight of the evidence. See Fireman's Fund Indem. Co. v. Perry, 5 So. 2d 862 (Fla. 1942).

58. In its PRO, FWC relies on rule 68A-5.004 as its authorization to grant or deny the subject application. That rule has been repealed effective March 24, 2013.

59. Notwithstanding the repeal of that rule, FCW clearly has the authority to grant or deny the subject application for licensure. Art. IV §9 Fla. Const. provides that FCW "shall exercise the regulatory and executive powers of the state with respect to wild animal life." Section 379.1025 provides as follows:

The Fish and Wildlife Conservation Commission may exercise the powers, duties, and authority granted by s. 9, Art. IV of the Constitution of Florida, and as otherwise authorized by the Legislature by the adoption of rules, regulations, and orders in accordance with chapter 120.

60. Pursuant to rule 68A-6.002, leopards and tigers are Class I wildlife. Section 379.3761 requires a FWC permit for the exhibition or sale of Class I wildlife, as follows:

(1) In order to provide humane treatment and sanitary surroundings for wild animals kept in captivity, no person, party, firm, association, or corporation shall have, or be in possession of, in captivity for the purpose of public display with or without charge or for public sale any wildlife, specifically . . . mammals . . . whether native to Florida or not, without having first secured a permit from the commission authorizing such person, party, firm, association, or corporation to have in its possession in captivity the species and number of wildlife specified within such permit . . .

61. Rule 68A-6.0023 provides, in relevant part, as follows:

(1) No person shall maintain captive wildlife in any unsafe or unsanitary condition, or in a manner which results in threats to the public safety, or the maltreatment or neglect of such wildlife.

(2) Caging Requirements:

(a) All wildlife possessed in captivity shall, except when supervised and controlled in accordance with subsection (3) hereof, be maintained in cages or enclosures constructed and maintained in compliance with the provisions of Rules 68A-6.003, 68A-6.004 and 68A-6.007, F.A.C.

(b) Cages or enclosures housing captive wildlife shall be sufficiently strong to prevent escape and to protect the caged animal from injury, and shall be equipped with structural safety barriers to prevent any physical contact with the caged animal by the public, except for contacts as authorized under subsection (3) of this rule . . .

62. The prior facility repeatedly failed to comply with rule 68A-6.0023(1) and (2) as alleged by FWC in its denial letter.

63. Rule 68A-6.003 provides for facility and structural caging requirements for Class I, II, and III wildlife. The prior facility repeatedly failed to meet those standards pertaining to caging and fencing as alleged by FWC in its denial letter.

64. The prior facility also failed to meet the sanitation requirements found in rule 68A-6.0023(5) (b) and (d) pertaining,

respectively, to the provision of fresh drinking water and the removal of feces from cages as alleged by FWC in its denial letter.

65. Rule 68A-6.0022 required Ms. Boynes to obtain and maintain a valid USDA license for the prior facility. Mr. Sipek and Ms. Boynes operated the prior facility for years without the required USDA license. When they finally applied for a USDA license, the application was denied by USDA.

66. Section 379.3762(2)(a) provides that Class I wildlife shall not be possessed as a personal pet of the licensee. Pursuant to rule 68A-6.0024(1), the prior facility was required to "demonstrate consistent and sustained commercial activity in the form of exhibition or sale of such authorized wildlife." There was no evidence that the animals at the facility were maintained at the prior facility as anything other than pets.

67. Ms. Boynes had her young tiger declawed despite being advised not to do so by Inv. Wiyda and despite knowing that the USDA opposed declawing of big cats. FCW correctly argues that declawing is considered inhumane by the USDA and the AVMA. In declining to find that declawing the young tiger is a basis for denial of the subject application, the undersigned has considered that FCW does not prohibit declawing, a licensed veterinarian declawed the tiger, and Ms. Boynes has represented that she will have no other animals declawed.

68. FCW established that Ms. Boynes's repeated representations in her prior FWC applications that the facility was for "permanent exhibition" were material misrepresentations of fact. FCW can consider those misrepresentations when deciding whether to grant or deny the subject application.

69. The violations set forth in this Recommended Order are grounds to deny the application for licensure. It is within the sound discretion of FCW to grant or deny the subject application.

70. The undersigned is persuaded that Ms. Boynes is motivated by her affection for the animals. She has taken the extraordinary steps of forming a non-profit corporation so the facility can be managed as a sanctuary, and she has caused the facility to be re-built, with new cages and fencing. She has also taken over the management of the facility from Mr. Sipek.

71. Notwithstanding those considerations, the undersigned concludes that the subject application should be denied. In reaching the conclusion that the subject application should be denied, the undersigned is persuaded that the long-standing nature of the violations, the seriousness of the violations, the fact that the prior facility was operated without a USDA license, and that there was no evidence of commercial activity at the prior facility are factors that compel the recommendation that the subject application be denied.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that the Florida Fish and Wildlife Conservation Commission enter a Final Order adopting the findings of fact and conclusions of law set forth in this Recommended Order. It is further Recommended that the Final Order deny the subject application for licensure filed by Melanie Boynes and Tarzan's Big Cat Sanctuary, Inc.

DONE AND ENTERED this 29th day of March, 2013, in Tallahassee, Leon County, Florida.



CLAUDE B. ARRINGTON
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of March, 2013.

ENDNOTES

^{1/} Unless otherwise note, references to licenses in this Recommended Order are to licenses issued by FWC for the possession, sale, and display of Class I and/or Class II wildlife at the subject facility.

^{2/} That denial is not being challenged in this proceeding.

3/ In reaching that finding, the undersigned has not overlooked Ms. Boynes's credible testimony that her role at the prior facility had been subordinate to Mr. Sipek's role, up to the time he was arrested. The undersigned has also considered the evidence that Mr. Sipek is a strong-willed individual who can be difficult to deal with. Notwithstanding that relationship and Mr. Sipek's personality, Ms Boynes had, since the issuance of her FWC license in 2006, the obligation to adhere to relevant statutes and rules regulating the possession of the animals at the prior facility. If she could not convince Mr. Sipek to comply with the law, she should have relinquished her license and let Mr. Sipek suffer the consequences of these apparent and continuing sanitation, caging, and fencing deficiencies.

4/ FWC correctly points out that Inv. Garzaniti testified that his recommendation that the license be issued was only a statement that the appropriate caging was in place for the cats. He also testified that when he made the recommendation, he did not take into consideration the history of the facility, Ms. Boynes's history as a licensee, the well-being of the animals during her time with them, her lack of a USDA license, and the misrepresentation of her intended use of the facility on her applications to FWC.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.