

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JAMES HAMMONDS,

Petitioner,

vs.

Case Nos. 19-6307
19-6326

FLORIDA FISH AND WILDLIFE
CONSERVATION COMMISSION,

Respondent.

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RECOMMENDED ORDER

Administrative Law Judge, John D. C. Newton, II, of the Division of Administrative Hearings (Division), conducted the final hearing in this matter on May 14, 2020, by Zoom video conference.

APPEARANCES

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For Respondent: Rhonda E. Parnell, Esquire
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STATEMENT OF THE ISSUES

A. Did Respondent, Florida Fish and Wildlife Conservation Commission (Commission) correctly deny the application of Petitioner, James Hammonds, to renew his Game Farm License (Case No. 19-6307)?

B. Did the Commission correctly deny Mr. Hammonds' application to renew his License to Possess Class III Wildlife for Exhibition or Public Sale (Case No. 19-6326)?

PRELIMINARY STATEMENT

The Commission denied Mr. Hammonds' separate applications to renew a Game Farm License¹ and a License to Possess Class III Wildlife for Exhibition or Public Sale.² The Notices of Denial (Notices) are identical, save for two introductory paragraphs and the paragraph identifying which application is denied. The Notices charge Mr. Hammonds with selling wildlife, a Capuchin monkey, to an unlicensed entity in violation of Florida Administrative Code Rule 68A-6.0023(7).³ The Notices also charge Mr. Hammonds with unlawfully transferring a Rhesus Macaque monkey and violating section 379.3762, Florida Statutes (2017), by unlawfully possessing a Rhesus Macaque monkey.⁴ Mr. Hammonds petitioned for a formal administrative hearing to contest both denials. The Commission referred the dispute to the Division to conduct the requested hearings. The cases were

¹ May 10, 2019, Notice of Denial; Application ID 69947; Case No. 19-6307.

² August 16, 2019, Notice of Denial; Application ID 69947; Case No. 19-6326.

³ All citations to Florida Administrative Code Rules are to the 2017 version unless noted otherwise. See *Anderson v. Anderson*, 468 So. 2d 528, 531 (Fla. 3d DCA 1985) (The forfeiture statute in effect at date of decedent's death governs.); *Kraft Dairy Group v. Sorge*, 634 So. 2d 720, 721 (Fla. 1st DCA 1994) (The fee statute in effect at the time of an injury governs because amendments to substantive statute "may not be retroactively applied.").

⁴ All citations to Florida Statutes are to the 2017 codification unless noted otherwise. *Anderson v. Anderson*, 468 So. 2d 528, 531 (Fla. 3d DCA 1985); *Kraft Dairy Group v. Sorge*, 634 So. 2d 720, 721 (Fla. 1st DCA 1994).

consolidated. The hearing was scheduled for February 26, 2020. After granting one unopposed motion for continuance, the hearing was re-scheduled to start May 14, 2020.

The undersigned conducted the hearing as scheduled. Mr. Hammonds testified on his own behalf. Mr. Hammonds' Exhibits 1 and 3 through 5 were admitted into evidence. Mr. Hammonds also entered the Exhibits pre-marked as Respondent's exhibits 3 and 4. The Commission presented testimony from Robert O' Horo. The transcript was filed May 26, 2020. The parties timely filed proposed recommended orders. They have been considered in the preparation of this Recommended Order.

The Notices list a violation of section 837.06, Florida Statutes (2017) as one reason for denying Mr. Hammonds' renewals. The Commission does not advance this position in its Proposed Recommended Order. The Commission has, therefore, abandoned that claimed basis for denial. *Cf. D.H. v. Adept Cmty. Servs.*, 271 So. 3d 870 (Fla. 2018) (Claims of error not raised in initial brief deemed abandoned); *Wickham v. State*, 124 So. 3d 841, 860 (Fla. 2013) (Failure to pursue a claim amounts to abandonment of the claim.); *Downs v. Moore*, 801 So. 2d 906, 912, n. 9 (Fla. 2001) (Failure to propose jury instruction on an issue is deemed abandonment of the issue). Section 837.06 prohibits making a false written statement intended to mislead a public servant in the performance of official duties. In any event, the Commission did not prove a violation of the statute.

FINDINGS OF FACT

The Parties

1. Article IV, Section 9 of the Florida Constitution creates the Commission. It charges the Commission to "exercise the regulatory and executive powers of the state with respect to wild animal life and fresh water

aquatic life, and ... exercise regulatory and executive powers of the state with respect to marine life," Chapter 379, Florida Statutes (2019), implements the constitutional provision and did so in 2017.

2. Mr. Hammonds owns and operates The Monkey Whisperer in Parrish, Florida. He breeds and sells exotic animals. Mr. Hammonds holds five separate licenses authorizing him to own, breed, sell, and transport wild life. They are a Class III license⁵ (with a Capuchin Monkey and Spider Monkey endorsement) that authorizes him to exhibit and sell wildlife, a game farm license, a deer herd management license, a United States Department of Agriculture (USDA) transport license, and a USDA license to trade in wildlife animals. The renewal of his Game Farm License and License for Exhibition and Public Sale of Wildlife are the subject of this matter. The Commission refused to renew both.

3. Mr. Hammonds has held these two licenses since 2012. Since obtaining his licenses, Mr. Hammonds has passed all Commission inspections. In addition, the Commission has issued him a game farm license.

The 2012 Conviction

4. In 2012 Mr. Hammonds pleaded no contest to a charge of unlawfully selling wildlife to an unpermitted entity. The offense was sale of a marmoset at a flea market to an unlicensed purchaser. The record does not provide a citation to the statute violated. Mr. Hammonds was new to the exotic animal trade. He relied upon statements by the purchaser and a Commission representative that the Commission had issued the purchaser a license and that it was en route.

5. The court adjudicated Mr. Hammonds guilty and ordered him to pay a fine and costs totaling \$450.00. It also required Mr. Hammonds to pay an additional \$50.00 for costs of prosecution. Mr. Hammonds paid the fine and

⁵ Section 379.3762(2), Florida Statutes (2019), creates three classifications of wildlife types. Class I is wildlife that because of its nature, habit, or status may not be possessed as a pet. Class II is wildlife presenting a real or potential threat to human safety. Class III is all wildlife not included in Classes I and II.

costs. Aware of this conviction, the Commission nonetheless routinely approved Mr. Hammonds' license renewal applications and approved his application for a game farm license over the next six years. There is no evidence of or charge of any other violations by Mr. Hammonds until the charges involved in these cases.

The Capuchin Monkey

6. In October 2017, Mr. Hammonds sold a Capuchin monkey to Christina Brown. He verified her identity and Nevada residency by looking at her Nevada driver's license. Nevada does not require a license to own exotic animals, including Capuchin monkeys. The Commission did not prove that Ms. Brown did not hold a Florida permit to own wildlife.⁶

7. Mr. Hammonds had a few conversations with Ms. Brown and her assistant Manny Ortiz about the sale.

8. On October 12, 2017, Mr. Hammonds completed the required USDA form, "Record of Acquisition, Disposition or Transport of Animals," for the Capuchin sale.⁷

9. Mr. Hammonds was advised that Jennifer and Michael Brister would pick up the monkey to transport it to Nevada. The Bristers are located in

⁶ Lack of proof is the hallmark of this case. The Commission relied solely upon the testimony of one witness. The testimony was almost entirely hearsay or descriptions of document contents. This is despite the Commission, according to its witness, having recordings, sworn statements, telephone records, and financial records to support its allegations. The Commission did not offer these into evidence. Hearsay alone cannot be the basis for a finding of fact unless it would be admissible over objection in a circuit court trial. § 120.57(1)(c), Fla. Stat. (2019). Document descriptions are subject to memory failings, incompleteness, inaccuracies, and other factors that make them less than persuasive. *See* § 90.952, Fla. Stat.; *See Williams v. State*, 386 So. 2d 538, 540 (Fla. 1980).

⁷ The form does not have a field calling for the buyer's telephone number, or any telephone number for that matter. This is noted because the Commission's witness and Notices emphasize, as proof of guilt, an unsupported claim that Mr. Hammonds put his telephone number on the form where the buyer's telephone number went. The unsupported testimony and insistence on its significance is one of the reasons that the witness' testimony is given little credence or weight. Also Mr. O'Horo testified that the form showed a Virginia address for Ms. Brown. It shows a Nevada address.

Tennessee. The Bristers held a USDA Class T Carrier permit issued under the federal Animal Welfare Act. Mr. Hammonds obtained proof that the Bristers held this federal permit required for interstate transport of the monkey. He went so far as to obtain a copy of their USDA certification to provide this service. Mr. Hammonds was also aware that the Bristers frequently did business in Florida. Other breeders recommended them highly. The Commission did not prove that the Bristers did not hold a Florida permit to own wildlife.

10. The Bristers picked up the monkey, on behalf of Ms. Brown, from Mr. Hammonds in Florida. Other than to receive a telephone call reporting that the monkey had been delivered, Mr. Hammonds had no further contact with or communications about the monkey or Ms. Brown until the Commission's investigator contacted him.

11. There is no admissible, credible, persuasive evidence about what happened to the monkey from this point forward. The Commission offered only uncorroborated hearsay testimony from Mr. O'Horo on this subject.

The Rhesus Macaque Monkey

12. Mr. Hammonds also assists people in rescues of exotic animals whose owners have realized they cannot care for them. In 2017, Mr. Hammonds facilitated the transfer of a Rhesus Macaque monkey from one individual to another. A Macaque monkey is a Class II animal. The monkey owner came to Mr. Hammonds' business seeking assistance because he could not handle the monkey. The monkey was in a pet carrier.

13. Mr. Hammonds recalled a woman in Orlando who had contacted him in the past seeking a Macaque. He put the two individuals in touch with each other. The two individuals agreed to the exchange of the monkey.

14. The woman came the same day, met the Macaque owner, and accepted the monkey from him. The owner kept the monkey with him in the carrier until he gave it to the woman. Mr. Hammonds was paid for his services in facilitating the exchange. There is no competent, persuasive evidence that

Mr. Hammonds ever had ownership, physical possession, control, or custody of the Macaque monkey in any form.

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

15. The Division has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2019). *See also* Fla. Admin. Code R. 68-1.008(5)(c)3. (2019).

16. The Commission proposes to deny renewal of Mr. Hammonds' licenses for violations of rules and statutes. The proposed denials are sanctions for violating licensure requirements. The parties properly stipulated that the Commission bears the burden of proving the charges by clear and convincing evidence. *Coke v. Dept. of Child. and Fam. Servs.*, 704 So. 2d 726 (Fla. 5th DCA 1998); *Holly v. Fla. Fish and Wildlife Conserv. Comm.*, Case No. 15-3310 (Fla. DOAH Feb. 1, 2016, modified in part, *Fla FFWCC* March 31, 2016). Clear and convincing evidence must be credible. The memories of witnesses must be clear and not confused. The evidence must produce a firm belief that the truth of allegations has been established. *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). Evidence that conflicts with other evidence may be clear and convincing. The trier of fact must resolve conflicts in the evidence. *G.W.B. v. J.S.W. (in Re Baby E.A.W.)*, 658 So. 2d 961, 967 (Fla. 1995).

2012 Conviction

17. Section 379.3762(1) prohibits possession of, among other things, Class II and Class III wildlife without a Commission permit. In 2017, Florida Administrative Code Rule 68-1.010 established reasons that the Commission could deny a permit. The reasons include "an adjudication other than acquittal or dismissal of any provision of Chapter 379, F.S., or rules of the Commission, or similar laws or rules in another jurisdiction that relate to the subject matter of the application sought." Fla. Admin. Code R. 68-1.010(2)(a).

18. The evidence does not reveal what statute or rule violation was the basis for Mr. Hammonds' 2012 conviction. The parties have conducted themselves as if the conviction were for an offense that might support denial of a license. Therefore the undersigned accepts the implied stipulation that the conviction was one for which a license could be denied.

Capuchin Monkey

19. Rule 68A-6.0023(7) makes transfer or sale of wildlife to an unpermitted entity within Florida unlawful. The Commission argues that Mr. Hammonds' transfer of the Capuchin monkey to the Bristers for transport to Nevada was an unlawful transfer of wildlife. The Commission did not prove this charge. It did not prove that the Bristers did not have a permit. Furthermore, the only evidence about a permit proved that the Bristers had a USDA Class T permit for transportation of wildlife. Rule 68A-1.004(21), by defining common carrier to include person certified as a common carrier by the appropriate federal agency, recognizes that a federal agency may permit the transportation of wildlife.

Rhesus Macaque Monkey

20. The Commission charges that Mr. Hammonds violated section 379.3761(1) by possessing and selling the Macaque, a Class II animal, without a permit. It also charges that he violated rule 68A-6.003(1) and argues that the rule prohibits possession of wildlife without a permit. The Commission's Proposed Recommended Order quotes the 2019 version of the rule. But, in 2017, the rule governed caging requirements. By footnote, the Commission notes that in 2017, rule 68A-6.0022 contained the prohibition against possessing a Class II animal without a permit.

21. The Commission did not prove Mr. Hammonds violated section 379.3761(1). It failed to prove the essential element that the woman who received the Macaque did not have a permit.

22. The Commission also advances a theory that facilitating the transaction between two independent parties amounted to "possession" of the

monkey and a violation of section 379.3761(1). Since the statute imposes a penalty, it must be strictly construed. *City of Miami Beach v. Galbut*, 626 So. 2d 192, 194 (Fla. 1993); *Turbeville v. Dep't of Fin. Servs.*, 248 So. 3d 194, 197 (Fla. 1st DCA 2018); *Roche Sur. & Cas. Co. v. Dep't of Fin. Servs., Office of Ins. Reg.*, 895 So. 2d 1139, 1141 (Fla. 2d DCA 2005).

23. Rule 68A-1.004(57) defines possession to include manual possession, physical possession, control or custody, and then goes on to describe specific types of possession such as in a vehicle, vessel, or clothing. It does not include facilitating, or brokering, a wildlife exchange as possession. Applying this definition to the facts, the Commission did not prove Mr. Hammonds possessed the Macaque.

24. If Mr. Hammonds never possessed the Macaque, he could not have transferred or sold it. In the absence of a special statutory definition, the ordinary dictionary definition of a word governs. *See WFTV, Inc. v. Wilken*, 675 So. 2d 674 (Fla. 4th DCA 1996).

25. Rule 68A-1.004(7) (defines sell as "the transfer of property or other things to a buyer for an agreed price." The rules do not define "transfer." The ordinary definition of "transfer" is to convey from one person to another or to cause something to pass from one person to another. <https://www.merriam-webster.com/dictionary/transfer> (last visited June 20, 2020). To transfer the Macaque monkey, Mr. Hammonds would have had to possess or control it. The individual who brought the monkey in the carrier and the person who received it were the people who had possession and control of the monkey. The Commission did not prove that Mr. Hammonds had possession or control of the monkey. It therefore failed to prove a violation of rule 68A-6.0023(7).

Aggravating and Mitigating Factors

26. The only basis proven for denying Mr. Hammonds' applications is the 2012 conviction. Rule 68-1.010 (2019) establishes general regulations relating to permits. Rule 68-1.010(1)(d) permits denial of the permits because of the

2012 conviction. However, rule 68-1.010(3) requires the Commission to consider aggravating and mitigating factors.

27. The factors are the severity of the conduct, the public danger created, prior violations, efforts to correct or prevent violation, related violations, and other factors reasonably related to public safety and protection of natural resources. Consideration of all factors weighs heavily in favor of granting Mr. Hammonds' renewal applications.

28. Nothing in the record indicates that the sale of the marmoset in 2012 was a severe offense. The minimal penalty imposed indicates that it was not.

29. The 2012 violation is Mr. Hammonds' only violation. It occurred when he had just entered the business. In addition, he made an effort to follow the law by calling the Commission to confirm that the buyer had a permit. Mr. Hammonds accepted responsibility for his error by pleading no contest to the charge.

30. Nothing in the record indicates that the sale of the marmoset created a public danger. The 2012 violation is Mr. Hammonds' only violation in eight years. He has passed every inspection since first getting his license. Mr. Hammonds has not violated wildlife regulations in any other jurisdiction.

31. Since the conviction, the Commission has renewed Mr. Hammonds' first two licenses six times and granted him an additional license. There could be no clearer determination that the 2012 conviction does not warrant denying license renewal in 2020.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent, Florida Fish and Wildlife Conservation Commission, issue a final order renewing the Game Farm License and the License to Possess Class III Wildlife for Exhibition or Public Sale of Petitioner, James Hammonds.

DONE AND ENTERED this 23rd day of June, 2020, in Tallahassee, Leon
County, Florida.



JOHN D. C. NEWTON, II
Administrative Law Judge
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Filed with the Clerk of the
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this 23rd day of June, 2020.

COPIES FURNISHED:

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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.