STATE OF NORTH CAROLINA

COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 WRC 07077

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC.,
Petitioner,

v.

NORTH CAROLINA WILDLIFE RESOURCES COMMISSION,
Respondent .

FINAL AGENCY DECISION GRANTING SUMMARY JUDGMENT

This matter comes on for determination before Fred G. Morrison Jr., Senior Administrative Law Judge, upon cross-motions for summary judgment filed by Petitioner, People for the Ethical Treatment of Animals, Inc. ("Petitioner" or "PETA"), and Respondent, North Carolina Wildlife Resources Commission ("Respondent" or "WRC"). Based upon the undisputed facts, set forth below, and the arguments of the parties, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. North Carolina businessman Clay Logan ("Logan") conducts an annual New Year's Eve event known as the "Opossum Drop," at his gas station and grocery store in Brasstown, Clay County, in order to garner publicity and market his business for financial gain. [Affidavit of Calley Gerber in Support of Petitioner's Cross-Motion for Summary Judgment ("Gerber Aff. I"), Exhibit C (PETA v. Myers, et al., Clay Logan's Answer to Plaintiff's Amended Complaint) at p. 1,¶1; p. 2, ¶14; p. 6, ¶9; *see also* Respondent's Pre-Hearing

Statement at p. 2; *and see* Gerber Aff. I, Exhibit F (Transcript of September 25, 2012 Hearing ("Hearing Tr.")) at pp. 10:25 to 11:1-16].

2. During the event, a live-captured wild opossum is confined in a clear box and suspended above a stage for several hours before the animal is lowered at approximately midnight. [*See, e.g., id.*, Respondent's Pre-Hearing Statement at p. 2; Gerber Aff. I, Exhibit F (Hearing Tr. at pp. 10-11)].

3. For purposes of conducting the Opossum Drop event on December 31, 2011, Logan was in possession of a wild-captured opossum from at least December 15, 2011, through January 1, 2012. [Stipulation of Facts, No. 18].

4. When Logan captured the opossum, the animal "was not unfit for immediate release into his natural habitat at, or immediately after, the time [the animal was taken]." [Stipulation of Facts, No. 51].

5. Logan did not hold the opossum in captivity for rehabilitation purposes.

6. At the time Logan captured the opossum he had a Sportsman License that allowed the hunting and capture of the opossum; however, the Sportsman License did not allow Logan to retain a live opossum in captivity. [Gerber Aff. I, Exhibit E, Admission No. 2, at p. 1; Gerber Aff. I, Exhibit A (PETA v. Myers, WRC Responses to Interrogatories, Interrogatory No. 11, at pp. 4-5)]. It has been WRC's practice in the past that when "an animal [is] lawfully taken alive by hunting or trapping, and the person taking such animal wishes to retain it alive notifies WRC, WRC takes the position that some sort of permit is required[.]"

7. Logan submitted a "captivity permit application" to WRC on December 15th, 2011. [Gerber Aff. I, Exhibit A (PETA v. Myers, et al., Myers' Response to Interrogatory No.4,

at p. 2; Interrogatory No. 7, at p. 3); *see also* Stipulation of Facts, No. 1]. WRC did not grant Logan's request for a captivity permit.

8. At the time Logan applied for a Captivity Permit, the opossum was not in need of rehabilitation. [Stipulation of Facts, Nos. 21, 22].

9. The period of time for which Logan requested to hold the opossum in captivity was not required for rehabilitation, but rather was for the period of time Logan needed for using the opossum in the Opossum Drop event. [*See id.,* Nos. 23, 24, 25].

10. WRC was aware that Logan did not intend to hold the opossum in captivity for rehabilitation purposes, but for display to the public during the Opossum Drop. [*Id.,* No. 26].

11. The activity for which Logan sought the Captivity Permit was to "possess" an opossum he had taken alive from the wild and to hold the opossum in captivity from December 15, 2011, through January 2, 2012. [Stipulation of Facts, Nos. 2 and 3].

12. The purpose for seeking the permit was to conduct the Opossum Drop event.

13. Logan did not meet "any of the required conditions for a Captivity Permit." [Stipulation of Facts, No. 28].

14. "[I]t was clear" to WRC that Logan "would not qualify for either a captivity license or a captivity permit." [WRC Brief at p. 13; *see also id.* at p. 16 (stating that Logan "was not eligible for a captivity license or permit")].

15. During the time that Logan was in possession of the opossum, he did not have a Captivity Permit or Captivity License allowing him to hold the animal in captivity for his special purposes. [Stipulation of Facts, Nos.15, 16, 19, 20].

16. Instead of requiring Logan to release the opossum immediately or kill it, WRC created a special type of permit for the occasion, dubbed "Temporary Possession and Release Permit." [Gerber Aff. I, Exhibit G].

17. WRC "did not see necessarily any benefit to either the Wildlife resource, that is the population of the opossums as a whole or the individual opossum[,]" when it issued the permit. [Gerber Aff. II, Exhibit D (Superior Court, TRO Hearing Transcript at p. 28:16-20)

18. Although WRC claims to have issued "Temporary Possession and Release Permits" on prior occasions, WRC has provided no competent evidence to substantiate this claim. It has no such prior permits in its files. Even if a WRC employee wanted to issue such a permit, there are no "training or educational materials, policy manuals, or guidelines describing the circumstances or requirements for applying for, or issuing, or revoking the permit."

19. The Temporary Possession and Release Permit purported to allow Logan to have "continued possession" and "to hold" the opossum from December 15, 2011, until January 2, 2012, and "to exhibit" the opossum prior to its release. [Stipulation of Facts, Nos. 9, 10, 11].

20. The permit also purported to specifically authorize Logan that the opossum "may be . . . publicly displayed" from December 16, 2011, through January 2, 2012. [*See id.*, No. 46].

21. As authority for issuing the permit, WRC relied on N.C. Gen. Stat. § 113-274(c)(4). [*See* Gerber Aff. I, Exhibit G; *see also* Exhibit F (Hearing Tr. at p. 13:8-9)].

CONCLUSIONS OF LAW

1. A live native animal may only be possessed under circumstances that are "specifically permitted" by Subchapter IV of Chapter 113 of the North Carolina statutes or WRC rules enacted pursuant to Subchapter IV -- and WRC has no discretion to bypass

those statutes and regulations in the guise of creating and issuing a new type of "Other" permit pursuant to N.C. Gen. Stat. 113-274(c)(4).

a. N.C. Gen. Stat. § 113-291 states that "[e]xcept as specifically permitted in this Subchapter [IV] or in rules made under the authority of this Subchapter, no person may . . . possess . . . any wildlife – whether dead or alive. . ."

b. Similarly, according to N.C. Gen. Stat. § 113-291.3 (a), "[l]ive wildlife . . . may be . . . possessed . . . only as specifically authorized in this Subchapter [IV] or its implementing rules."

c. Therefore, the authority for creating new permits for exhibiting or possessing a live native animal may not be inferred or implied.

d. The activity of possessing a live native animal is only allowed to the extent that it is specifically permitted or authorized by Subchapter IV or its implementing administrative regulations.

e. Since the activity of publicly displaying and holding the opossum in captivity for purposes of public display was not specifically permitted or authorized by the applicable statutes or regulations, WRC had no authority to create and issue an "Other" permit that would allow the (otherwise prohibited) activity to occur.

2. Logan could not lawfully possess the opossum because he did not have, and did not qualify for, a Captivity Permit or Captivity License.

a. 15A N.C. Admin. Code 10H.0301 specifies that possessing any species of wild animal that is native to North Carolina is "unlawful" – unless the individual in possession has obtained either a Captivity Permit or a Captivity License.

b. Accordingly, Logan could not retain possession of the opossum after capture, unless he qualified for, and obtained, either a Captivity Permit or Captivity License.

c. Categories of permits that govern the activity of taking could not serve as substitute for meeting the requirements for, and obtaining, either a Captivity Permit or Captivity License.

d. Since Logan did not meet the requirements for a Captivity Permit or Captivity License, he could not lawfully retain possession of the opossum—let alone use the animal for public exhibition. WRC should therefore have instructed Logan to immediately release the opossum into the wild where the opossum had been captured, or kill it.

3. WRC has a mandatory duty to refuse to issue permits for the possession of native wild animals to persons who do not qualify for a Captivity Permit or Captivity License – and WRC should not circumvent this duty by inventing a new "Temporary Possession and Release Permit."

a. WRC has no discretion to create exceptions and waive the statutory requirements for possessing native wild animals by issuing an "Other" permit to fill in perceived gaps in the permitting scheme for activities that are "unique" (as Logan's were described by WRC's counsel) and not expressly permitted by the applicable statutes and regulations.

b. The possession of a live native animal for purposes of exhibition (or otherwise) must be specifically authorized by Subchapter IV or its implementing regulations, and even with respect to such "specifically" authorized possession, WRC's authority is limited to issuing permits only to persons who qualify for them.

c. Before issuing any license or permit to persons subject to "administrative control," WRC has a nondiscretionary mandatory duty to ensure that those persons meet the qualifications for such permits.

d. WRC has no discretion to bypass specific statutory and regulatory requirements in the form of an "Other" permit that purports to authorize applicants to possess and exhibit native wild animals even though such applicants do not qualify for either a Captivity Permit or Captivity License, or other exemption.

4. Section 113-274(c)(4) does not authorize WRC to issue a "special" permit for the possession and exhibition of a native wild animal.

a. WRC's reliance on N.C. Gen. Stat. § 113-274(c)(4) as authority for issuing the "Temporary Possession and Release Permit" to Logan, is misplaced.

b. On its face, section 113-274(c)(4) does not regulate the possession and/or exhibition of animals. *See* N.C. Gen. Stat. § 113-274(c)(4) (stating that WRC may issue "Other Permits" for "taking, purchase, or sale of wildlife resources if the activity is lawfully authorized"). By specifically listing "taking, purchase, or sale of wildlife resources" the drafters are deemed to have specifically intended to exclude from the scope of this provision all activities that are not enumerated, including the activity of "possession" and public "display" of wildlife resources. *See, e.g., Granville Farms, Inc. v. County of Granville*, 170 N.C.App. 109, 114-115, 612 S.E.2d 156, 160 (2005) (the fact that the legislature provided for specific certified programs demonstrates that it did not intend that uncertified programs should be included).

c. Interpreting "temporary possession" and public "display" of a wild animal to come within the activities regulated by N.C. Gen. Stat. § 113-274(c)(4) runs afoul of the

established rule of statutory construction that when "a statute is intelligible without any additional words, no additional words may be supplied." *First Mount Vernon Indus. Loan Ass'n v. ProDev XXII, LLC,* 703 S.E.2d 836, 840 (N.C. Ct. App. 2011); *State v. Camp,* 286 N.C. 148, 151, 209 S.E.2d 754, 756 (1974) (same). Since section 113-274(c)(4) does not contain a provision for "possession" or "display" of a live native animal, WRC has no authority to add or infer such a provision in the guise of "interpreting" the statute.

d. Nevertheless, WRC argues it has such authority pursuant to the last sentence in the provision that states: "In addition, if a specific statute so provides, a permit under this subdivision may be required in addition to a license when there is a need for closer control than provided by the license." N.C. Gen. Stat. § 113-274(c)(4). This argument must be rejected for several reasons.

e. The provision upon which WRC relies unequivocally refers only to the authority to grant an additional (i.e., supplemental) permit to impose **additional** conditions ("closer control") beyond those that are already specified in an – already required – license. Nothing in this provision allows WRC to issue an "additional" § 113-274(c)(4) permit in order to lessen the controls provided by an existing licensing requirement or previously issued license. Nor does this sentence allow WRC to issue a § 113-274(c)(4) permit in lieu of a permit or license that may otherwise be required.

f. It is clear that the "Temporary Possession and Release Permit" was not issued "in addition" to another license that would qualify Logan to retain the opossum in captivity and to exhibit the animal during the Opossum Drop. It therefore cannot be said as a matter of law that the "Temporary Possession and Release Permit" was issued because WRC wanted to exert "closer control" over the exhibition and possession of the opossum

than that already provided by another license. Since no other permit or license for possessing the animal was in effect from the December 16 through January 2 period for which the "Temporary Possession and Release Permit" was issued, it would be legally impossible for WRC to issue an "additional" permit to Logan for that period.

g. Irrespective of whether WRC may have the authority to impose **additional** requirements upon Logan by issuing an "Other" permit, this did not give it the authority to exempt Logan from having to meet the threshold requirements for possessing a captured live opossum. Since Logan did not qualify for any permit or license to possess and exhibit the opossum, the question of whether WRC could issue an "additional" Other permit in order to provide "closer control" of the activity, is legally irrelevant.

h. Furthermore, N.C. Gen. Stat. § 113-274(c)(4) makes clear that even the authority to issue an "additional" permit arises only "if a specific statute so provides." *See* N.C. Gen. Stat. § 113-274(c)(4). WRC's claims that N.C. Gen. Stat. 113-261 and 113-275(i) make such provisions are not persuasive arguments. To the contrary, by arguing at the September 25th Hearing that it was "necessary" to create special permits for activities that "do not fit" into any existing permit category, WRC essentially concedes (as it must) that it has no specific statutory authority in order to issue a permit for such conduct. WRC's attempt to create a permit for the possession and exhibition of a live wild animal that is not specifically permitted or authorized by existing Subchapter IV or its implementing regulations must therefore be found to be without proper authority..

i. Furthermore, while N.C. Gen. Stat. § 113-274(c)(4) grants WRC the authority to add to (and thus make more stringent) the conditions of the license that the applicable statutes already require for conducting the activity, it does not give WRC the authority to

lessen control of the activities or to eliminate the requirements of a statutorily mandated license by issuing special permits to persons who do not qualify for the statutorily mandated license.

5. Section 113-133.1 does not authorize WRC to disregard or waive mandatory permitting requirements of Subchapter IV and its implementing regulations.

a. WRC argued that its permitting decisions are based (and in this case were based) on "a balancing test of all the competing interests involved." *See* WRC Brief at p. 20. WRC argued that this balancing test is authorized by N.C. Gen. Stat. § 113-133.1, which instructs WRC to administer the governing statutes in a manner that equitably serves "the various competing interests of the people[.]" G.S. § 113-133.1. We reject the contention that this provision would allow WRC to make permitting decisions on the basis of a balancing test, rather than based on whether an applicant meets the mandatory qualifications set forth in the permitting statutes and regulations. This is especially so in the absence of training or educational materials, policy manuals, or guidelines describing the circumstances for applying for, issuing, or revoking an "Other" permit.

b. Furthermore, the maxims of statutory construction require "that a more specific statute controls over a statute of general applicability." *Stewart v. Johnston County Bd. Of Educ.*, 129 N.C.App. 108, 110, 498 S.E.2d 382, 384 (1998). "When two statutes apparently overlap, it is well established that the statute [that is] special and particular shall control over the statute general in nature." *Technocom Business Systems, Inc. v. North Carolina Dept. of Revenue*, — N.C.App. —, —, 723 S.E.2d 151, 155 (N.C.App. 2012).

c. Section 113-133.1 is a statute of general applicability which speaks to the equitable administration of statutes in general. It does not control over statutes that deal more directly and specifically with the question of when, where, and how wild animals may be held captive. *See id; see also Oxendine v. TWL, Inc.*, 184 N.C.App. 162, 165, 645 S.E.2d 864, 866 (2007) ("[w]here one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability").

d. Nothing in section 113-133.1 gives the Agency discretion to disregard the "special" and "particular" requirements for the possession of wildlife set forth in 15A N.C. Admin. Code 10H.0301(a)(1). If the General Assembly had wanted the Executive Director to apply a balancing test instead, it could and would have said so. It did not, and its clearly expressed intent to the contrary governs. *See, e.g., Sara Lee Corp. v. Carter*, 351 N.C. 27, 35, 519 S.E.2d 308, 313 (N.C. 1999) (when language in a statute is clear and unambiguous, courts must refrain from judicial construction and accord words "their plain and definite meaning"). When the language of a statute is plain, unequivocal and comprehensive, "[t]here seems to be no room for construction. If the Legislature had meant otherwise, it would have said so." *Grimes v. Andrews*, 88 S.E. 513, 514 (N.C. 1916).

6. Section 113-261 provides no authority for WRC's issuance of the Temporary Possession and Release Permit.

As support for the permit to Logan, WRC also relied on N.C. Gen. Stat. § 113-261, a statute that on its face does not apply to the activity of possessing and exhibiting live wild animals. Section 113-261 regulates the "taking" of wildlife resources for

"scientific purposes" in a "normally unauthorized manner". As such, it has no bearing on the activities for which Logan requested a permit.

7. Section 113-275(i) provides no authority for issuing the Temporary Possession and Release Permit.

a. N.C. Gen. Stat. § 113-275(i) states that "[i]t is unlawful to refuse to comply with any provisions of this Article or of rules and administrative requirements reasonably promulgated under the authority of this Article." WRC purports to have relied on this provision when it issued the permit, but does not explain the basis for such reliance.

b. We agree with Petitioner that far from providing authority for issuing the permit, N.C. Gen. Stat. § 113-275(i) supports the opposite conclusion. As the statute makes clear, compliance with the provisions in Article 21 and the rules and requirements promulgated thereunder is mandatory, and failure to comply with these provisions is "unlawful."

c. As such, section 113-275(i) only buttresses the conclusion that WRC has no authority to exempt permit applicants from these mandatory provisions.

8. Capturing an animal alive pursuant to a Sportsman License does not entitle a hunter to lawfully retain possession of the animal.

a. Logan's sportsman license is irrelevant since it merely regulates the taking of the animal, not possession and exhibition.

b. While Logan could lawfully take the opossum alive pursuant to a Sportsman License, this did not entitle Logan to retain possession of the animal beyond the short period of time "immediately" after the animal was captured. This is so because a

Sportsman License does not govern the retaining or holding of live wildlife in captivity. It only entitles the hunter "to take" an animal. This is consistent with WRC's historical interpretation of the applicable laws, since it has been WRC's practice in the past when "an animal [is] lawfully taken alive by hunting or trapping, and the person taking such animal wishes to retain it alive notifies WRC, WRC takes the position that some sort of permit is required[.]

c. WRC may not contradict its prior admission that on December 15, 2011, Logan had no permit that would allow him to legally maintain possession of the opossum unless he had taken its life by lawful means. "To take" is clearly defined as activities **immediately** preceding, during, and after an animal is taken.

d. Furthermore, "[w]ords and phrases of a statute may not be interpreted out of context," as the Agency has attempted to do. *See Fort v. County of Cumberland,* — N.C. App. —, —, 721 S.E.2d 350, 355 (N.C.App. 2012). WRC takes the phrase "reduce to possession" from the definition of the term "to take" (set forth in section 113-130 (7)) out of context to suggest that reducing an animal to possession is the legal equivalent of taking a live animal home and retaining the animal in captivity. WRC's strained interpretation violates the statutory construction principle that words in a statute must be "interpreted as a composite whole so as to harmonize with other statutory provisions and effectuate legislative intent." *Fort*, 721 S.E.2d at 355. WRC's interpretation would eviscerate – rather than harmonize with – the statutory scheme that regulates the possession of wild animals that are taken alive.

9. WRC has no authority to issue any permit to Logan for the unlawful public display of a native wild animal at the Opossum Drop Event.

a. North Carolina law provides no authority allowing WRC to issue an "Other" permit authorizing a person to publicly display or exhibit a native wild animal under any conditions, including publicity, marketing or public "celebration" purposes.

b. Since public display and exhibition of live wildlife is not "specifically permitted" or "specifically authorized" in Subchapter IV or its implementing rules, the "Temporary Possession and Release Permit" – which purported to permit the public display of the opossum during the Opossum Drop event – must be deemed unauthorized. N.C. Gen. Stat. § 113-291 ("[e]xcept as specifically permitted in this Subchapter [IV] or in rules made under the authority of this Subchapter, no person may . . . possess . . . any wildlife – whether dead or alive. . ."); N.C. Gen. Stat. § 113-291.3 (a) ("[l]ive wildlife . . . may be . . . possessed . . . only as specifically authorized in this Subchapter [IV] or its implementing rules").

c. Nothing in the statutes and regulations gives WRC officials discretion to waive mandatory permitting requirements or to invent "special" permits for activities that "do not fit" into (i.e., comply with) the existing permitting regulations.

d. Contrary to WRC's argument that asks us to infer that WRC has discretion to issue special permits for unique circumstances, the sole discretion WRC has been given is to **increase** the strictures imposed for conducting certain activities by issuing "additional" permits pursuant to N.C. Gen. Stat. § 113-274(c)(4)—but not to waive or exempt North Carolina citizens from having to comply with the existing strictures imposed by Subchapter IV and its implementing regulations.

e. While it is well-settled that we give due consideration to the construction of a statute or regulation by agencies vested with authority to administer them, no

consideration is due where (as here) the agency's interpretation boils down to ignoring the plainly stated intent of the statute or regulation.

f. WRC's contention that Logan could continue to possess the opossum "lawfully" as long as WRC issued him some "Other" type of permit, contradicts the plainly stated intent of 15A N.C. Admin. Code 10H.0301, as well as N.C. Gen. Stat. § §113-291, 113-291.3 and 113-276.2(b). As such, WRC's "interpretation" that would simply disregard mandatory permitting provisions is not entitled to deference.

g. Furthermore, WRC has provided no competent evidence to demonstrate that the "interpretation" it has proffered in this case is anything other than a *post hoc* attempt to justify the challenged conduct. Nothing would support the conclusion that the proffered interpretation has ever been applied by WRC officials in any other case where an applicant who did not qualify for a Captivity Permit or Captivity License was given an "Other" permit, under another provision, that purported to allow the applicant to possess a live wild native animal.

h. In summary, according to Genesis 1:26 (NRSV) humans have been given "dominion over the fish of the sea, and over the birds of the air, and over the cattle, and over all the wild animals of the earth--." Our General Assembly created the WRC to "…manage, restore, develop, cultivate, conserve, protect, and regulate the wildlife resources of the State of North Carolina, and to administer the laws relating to game, game and freshwater fishes, and other wildlife resources enacted…" The General Assembly has further provided: "The enjoyment of the wildlife resources of the State belongs to all of the people of the State." Citizens are prohibited from capturing and

using wild animals for pets or amusement. Hunters must afford wild animals the same right Patrick Henry yearned for: "Give me liberty, or give me death!"

DECISION

Petitioner's motion for summary judgment is GRANTED. Respondent's motion for summary judgment is DENIED. Accordingly:

WRC should not issue any permit or license for possessing and publicly displaying a live opossum for use in an "Opossum Drop" event or for any other public display of a live opossum or other native wild animal, without obtaining specific authority to do so through its rulemaking procedures or additional legislation by the General Assembly.

NOTICE

Under the provisions of North Carolina General Statute 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision**. In conformity with the Office of Administrative Hearings' rule 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision**. N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review.

Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

Dated this 13th day of November, 2012.

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Fred G. Morrison Jr.
Senior Administrative Law Judge