

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island
John Tardie
Notice of Violation
AAD No. 11-001/F&WE
April 2011

DECISION AND ORDER

I. INTRODUCTION

On December 14, 2010 the Department of Environmental Management (“DEM”) issued a Notice of Violation (“NOV”) charging Respondent John Tardie of violating Rule 1.1 of DEM's Rules and Regulations Governing the Importation of Native Wildlife (often referred to as “the Regulations”) for importing a bobcat into Rhode Island without a permit. Rule 1.1 reads in pertinent part that, “[n]o person shall import ... a native animal ... unless in possession of a current permit issued by the Director pursuant to these regulations.” (see DEM Exhibit 1). Based on the NOV, DEM requests this Tribunal rule Tardie in violation of the Regulations and allow DEM to find suitable placement for the subject animal. DEM also asks Tardie pay the costs for the housing of the animal at a licensed facility during the pendency of this litigation. The animal was placed under quarantine by Superior Court order.

Tardie counters by challenging the legal validity of the regulations that he is charged under and asking this Tribunal to issue a declaratory ruling declaring their illegality pursuant to R.I.Gen.Law § 42-35-8 (hereinafter all statutory references shall be to the Rhode Island General Laws). Tardie also claims he was told by a DEM official that DEM does not issue permits for bobcats because they are native to Rhode Island. Therefore he thought a permit was unnecessary.

II. STIPULATED FACTS

1. The Respondent imported the subject animal, a bobcat, into the State of Rhode Island from the State of Montana on or about August 31, 2010.
2. The Respondent is a resident of the State of Rhode Island.
3. The Respondent received the NOV from the Division of Fish and Wildlife (“Division”) on December 14, 2010.
4. On January 4, 2011, Respondent requested a hearing.
5. The Respondent was in possession of the animal at his residence from approximately August 31, 2010 through December 10, 2010 when the animal was surrendered to the Division pursuant to a Superior Court order.
6. Respondent purchased the bobcat from Barbara Roe, a licensed breeder from the State of Montana.
7. The bobcat was shipped from Montana to Respondent in Rhode Island.

III. SUMMARY OF MATERIAL TESTIMONY AND EXHIBITS

Scott Marshall testified. He has been the Rhode Island State Veterinarian since January of 2007. Tr. 42. His responsibilities include protection of animal health and public health and safety relative to native and exotic wildlife. Tr. 43. Marshall was asked what role he routinely has in the interpretation and implementation of the Regulations. Marshall stated that he would consult the Division on animal pre-importation requirements, health requirements and specific diseases to

test proposed animals to be imported. He would also review health certifications from the states of origin and ensure adequate housing were to be provided. Tr. 44-45.

Marshall was shown DEM 4, a November 24, 2010 memo from Dr. Laura Brannigan to him. It discussed Brannigan's veterinary examination of a bobcat owned by John Tardie. Marshall had asked Brannigan for the memo. Thereafter, he spoke to Tardie. Tr. 52. Tardie admitted he was in possession of a bobcat. Marshall told him a permit was required. Tardie told Marshall that Marshall had previously told him no permit was required, which jogged Marshall's memory of a conversation he had with a gentleman a year or so earlier requesting a permit for a bobcat. At this point Marshall told Tardie about the requirement of the permit and that the issue had to be resolved. Marshall is aware that Tardie has suggested the subject animal is a member of a subspecies of the bobcat genus and therefore not subject to the Regulations. Tr. 54. Marshall thought the argument was meritless. Tr. 55.

Marshall testified that he has inspected the subject animal and recognizes the animal as a bobcat, subject to the Regulations. Tr. 55. The reason is because bobcats are considered native wildlife, native to Rhode Island. Tr. 55-56. Marshall testified that as State Veterinarian he is aware of the extent rabies might be spread within Rhode Island and those animals that may be carriers of rabies. Tr. 56. Marshall noted that he is Chairman of the State Rabies Control Board. Tr. 57. Bobcats native to the State of Rhode Island are within the Board's purview. Marshall stated that bobcats are able to contract rabies and there is no vaccine developed for rabies prevention in bobcats. Tr. 58. The subject animal had been vaccinated for rabies using a drug licensed for another species. This is called an off-label vaccine. As a result, Marshall cannot consider the subject animal vaccinated according to Rhode Island law. Tr. 59. Marshall confirmed that he had a post-importation conversation with Tardie and Tardie had not applied for an application to possess the subject animal. No permit has ever been issued. Tr. 62.

The subject animal is currently in possession of DEM, surrendered pursuant to a Superior Court order. The animal is at a licensed veterinary facility. Tr. 63. The cost of the placement is a discounted fee of \$20 per day.

Marshall was aware that it has been suggested by Tardie that the bobcat is covered by the Rules and Regulations Governing Importation and Possession of Exotic Wild Animals. (DEM 6). Tr. 74. Marshall was the primary author of these regulations. Tr. 75. Marshall stated no application was ever filed under the Exotic Animal regulations. Tr. 76.

Upon questioning by the undersigned, Marshall testified that it was his belief that bobcats are dangerous to humans. They grow up to 40 pounds and are carnivores, unlike dogs that are omnivores which can eat meat or vegetables. Carnivores hunt their prey and eat a strict meat diet. Tr. 78. There are bobcats in the wild in Rhode Island today. Tr. 78-79. In Marshall's opinion it would be dangerous for an individual to have a bobcat as a pet. Individuals would not be allowed to keep a bobcat as a pet in Rhode Island because of their natural wild behaviors. Tr. 79. Marshall said bobcats are not domestic animals that have been bred in captivity for thousands of generations and have been selected for human interaction due to certain traits, behavior, temperament and physical traits that make them suitable to live beside people. Wild animals have not had the benefit of this selection over time so they exhibit wild traits such as hunting and aggressive behaviors, often making them unpredictable. The bobcat is an animal of 40 pounds or larger that has natural hunting behaviors and is not a suitable pet. It has a natural home range measured in square miles and should not be kept in a cage. Tr. 80.

On cross-examination Marshall stated he was aware some people claim there are subspecies of bobcats. He does not believe there is a subspecies of bobcat. Tr. 110.

Charles Brown testified. He is the Principal Wildlife Biologist with the Division of Fish and Wildlife. This post includes dealing with issues related to furbearers. He also oversees the State Wildlife Rehabilitation Program, the Nuisance Wildlife Control Specialist Program, is the Division's representative to the State Rabies Board and serves as the State's representative for the Northeast Furbearers Resources Technical Committee. Brown was shown the Regulations (DEM

1). Tr. 112. Brown testified that he participated in the drafting of the Regulations. In his position, if an application to import native wildlife was received, he would be involved in the review of the application.

Brown testified that Dr. Marshall contacted him around November 16, 2010 when he became aware there was a bobcat in the state. Brown confirmed that bobcats are native to Rhode Island. Tr. 113. He testified his conclusion was based on physical specimen records and other historical and current information. The Division did not receive an application from the Respondent to import a bobcat from the State of Montana or an application for a permit to possess a bobcat originally imported from the State of Montana. Tr. 114.

Brown testified that he was contacted by Tardie via email on November 17 concerning the status of the bobcat species in Rhode Island. Brown's conclusion was that if it is a *lynx rufus*, as he believed it was, it is a bobcat and bobcats are native to Rhode Island. Brown was also aware of a contention in this case by Respondent that a subspecies of bobcat is somehow exempt from the Regulations. Brown stated he has researched the issue and recognizes that some literature identifies between 9 and 14 species of bobcat. Tr. 117. He believes these are arbitrary delineations of the same species. Brown believes the subject animal is governed by the Regulations and is a *lynx rufus* native to Rhode Island. Tr. 118. On cross-examination Brown specifically identified several of his research sources on the subspecies topic.

DEM called Respondent John Tardie to testify. Tardie admitted he imported a bobcat into Rhode Island on or about August 31, 2010. Tr. 131. He testified that on or about December 2008 he contacted Dr. Marshall to find out the requirements to secure a permit for a bobcat. Dr. Marshall told Tardie that the bobcat is a native animal and DEM does not issue permits for bobcats. Tardie was under impression a permit was not needed. Tr. 132. On cross-examination Tardie stated his telephone conversation with Marshall was originally to get a permit for an exotic animal. The outcome a day later was that he learned a bobcat was a native animal and was told Rhode Island does not issue permits for native animals. Tr. 134. DEM rested with this testimony.

Mr. Tardie testified on his own behalf. He has lived in Rhode Island for approximately three (3) years. He currently lives in a 4,000 square foot home that sits on 22 acres of land in a remote area. The closest neighbor is approximately 2 acres away. Tr. 143. There is not much traffic at all. He lives with his wife and 2 children, five and three years old. He spent eight years in the army, "did some college" and then started his own corporation, an internet marketing firm. Tr. 144, 145. He already has a boxer dog at his home. Tr. 145. He decided to get a bobcat around 2007 because of the allure of an "exotic" animal. He had no prior experience with a bobcat or any other "exotic" animal. He never knew anyone who owned a bobcat. He did research on the internet on bobcats, their mannerisms, viciousness, and dietary needs. Tr. 147. The website of the breeder he purchased the bobcat from, Barbara Roe, which was very informative. Tr. 148. The site said bobcats were non-aggressive, never attack anyone and are friendly with other pets. Tr. 150. Tardie also read forums of other people stating their experience with bobcats. It brought Tardie to the conclusion that bobcats were good pets. Tr. 151.

Tardie stated that the short time he had the subject animal it was "like a regular kitten," with the same demeanor and mannerisms. Tr. 154. When he received the subject animal it was three pounds or "fairly tiny." Tr. 155. His experience with the bobcat was for approximately four to five months. He was like a house cat, and they'd take him on walks with a leash. Tr. 155. Based on Tardie's research he did not see any danger to his family. Tr. 158. He had the animal from about three weeks old to four months. Tr. 158-59. He was not concerned about disease because the cat was bred in captivity and shipped with a health certificate. It would be an indoor cat so there would not be any issue with him contracting a disease. Tr. 159.

Tardie testified that prior to purchasing the bobcat he called DEM and spoke with Dr. Marshall by telephone around December of 2008 regarding how to receive a permit to get an exotic animal. Marshall stated that bobcats were considered native animals in Rhode Island and permits are not issued for them. Tr. 162. Tardie thought this meant he did not need a permit. It was like finding a

snake in your backyard and keeping it as a pet. He did not understand at the time the distinction between native and exotic animals. Tr. 163. After talking to Dr. Marshall, about 8 months later he purchased the bobcat. Tr. 164. Tardie testified that based on his research there are 12 recognized subspecies of bobcats. Tr. 167.

Tardie testified that the conversation with Marshall occurred when he took the bobcat to his vet and received a phone call back stating the owner of the veterinary clinic contacted Marshall and Marshall wanted to speak to Tardie about having a bobcat. Tr. 177.

On cross-examination Tardie admitted there were some websites where it was said bobcats would not make good pets. Tr. 186. He also admitted that if a bobcat were cornered or scared it could attack. Tr. 189.

IV. ANALYSIS

A. Legal Argument on the validity of the Regulation

The Notice of Violation which triggered this litigation (DEM 2) states it is grounded on the DEM enabling statute, § 42-17.1-1 et seq. § 42-17.1-4(2) establishes the Fish and Wildlife Division which, related to wildlife, shall carry out “functions and duties as may from time to time be assigned by the director ...”. This language is to be liberally construed. § 42-17.1-10. Past Directors apparently believed a function or duty of DEM should be to regulate the importation of native wildlife. § 42-17.1-7 gives DEM the power general authority to promulgate regulations. The relevant regulation in the instant case, entitled Rules and Regulations governing Importation and Possession of native Wildlife, comes from the above authority, at the very least.

Nonetheless, a threshold matter, respondent Tardie challenges the validity and legal authority the DEM's Rules and Regulations Governing Importation and Possession of native Wildlife. Respondent requests a declaratory ruling pursuant to § 42-35-8 that “said rules and regulations are not valid.” See Request for Hearing and Declaratory Ruling, January 4, 2011. He claims numerous problems with the adoption of the regulations as well as the substance of the regulations. For example, he claims there is no public record that the DEM Director ever signed the certification required by law to implement the Rules and Regulations. He then proceeds to list a series of provisions from Title 20, Chapters 1, 17, and 37 which he argues the Regulation relies upon for its promulgation that are either legally deficient or do not give DEM clear, linear regulatory power. See generally Respondent's Statement of Disputed Issues, Facts and Request for Relief, January 4, 2011, p.p.1-2. Tr.8. He also argues the rules and regulations deemed applicable in this case are overbroad, vague and arbitrarily executed. Tr. 15.

These arguments require the undersigned, as an administrative hearing officer, to rule a regulation unconstitutional or invalid. As stated aptly in Department of Environmental Regulation v. Leon County et al., 344 So.2d 297, 298 (Fla. App. 1977), a case involving Florida's environmental agency, “a hearing officer does not have power to adjudicate the constitutionality of a rule, such power being a judicial rather than a quasi-judicial power ... the determination of the constitutionality or unconstitutionality ... requires exercise of judicial power which is vested only in the courts.” Similarly, the Rhode Island Supreme Court has stated “[t]he Judiciary ... sits as ‘final arbiter of the validity or interpretation of statutory law’ as well as of any agency regulations promulgated to administer that law.” Clarke v. Morsilli, 714 A.2d 597, 600 (R. I. 1998). This administrative hearing officer, based out of an executive branch agency, is not a member of the judiciary.

§ 42-35-8, entitled “Declaratory rulings by agencies,” which the Respondent relies upon for his relief from this Tribunal, reflects the limited agency jurisdictional principles set forth above. § 42-35-8 talks in term of an agency ruling on “the applicability of any statutory provision or of any rule or order of the agency.” There is a distinction with a difference between the “applicability” or “validity” of a rule or regulation. Black's Law Dictionary defines the word “apply” as “To put

to use with a particular subject matter,” such as “to apply the law only to transactions in interstate commerce.” Black's Law Dictionary, Seventh Deluxe Edition, page 96. Hence under an “applicability review, there is no question surrounding the legality of the regulation or law, but just whether it should be applied to a certain set of facts or subject matter. In contrast, Black's defines the word “valid” as “legally sufficient.” Id. at 1548. An inquiry regarding the legal sufficiency of a statute quickly involves constitutional issues such as due process or unrestricted delegations of legislative power by the General Assembly. Simply put, the undersigned does not believe the legislature, in passing § 42-35-8, contemplated agency inquiry into constitutional questions surrounding the agency's regulations.

The case law surrounding the statute justifies the above conclusion. Indeed an example of the analysis surrounding the word “applicability” in § 42-35-8 can be found in a case offered by the Respondent himself, Greenwich Bay Yacht Basin Associates v. Brown, 537 A.2d 988 (R.I.1988), where the request for a declaratory ruling was limited “to the question of whether the 1978 or the 1983 program criteria would be utilized in adjudicating Greenwich's application.” Id. at 993. Hence the issue was what program criteria would be applied, not whether the program criteria were legally valid or constitutional. No other cases advanced by the Respondent justify a different reading into the reach of § 42-35-8. Some of the cases advanced enter into the constitutional realm of the nondelegation doctrine, which is also beyond this tribunal's authority.

The Respondent raises alleged deficiencies in the NOV, such as the NOV not being signed by the Director and allegedly not being served to the Respondent until he requested it after injunctive relief in Superior Court. Yet these issues are argued based on due process constitutional issues (See Respondent John Tardie's Prehearing Memorandum, page 1.) and therefore once again raise issues beyond this tribunal's authority.

In sum, the undersigned, an administrative hearing officer, will not rule on the validity or constitutionality of the regulations pursuant to § 42-35-8. Of course, the Respondent may raise these arguments in the Superior Court at a later point in time.

B. Substantive Analysis on the Regulation

Turning to the substantive issue in this case, after a review of the record evidence, the undersigned finds Respondent Tardie in violation of Rule 1.1 of the Regulations. There is no dispute that Tardie imported the subject animal from Montana on or about August 31, 2010. These facts constitute a violation of Rule 1.1 of the Regulation.

Furthermore, the undersigned concludes from the record evidence that the Regulations apply to bobcats. The testimony of two DEM witnesses in particular, with impressive scientific and occupational knowledge in this area, is persuasive. Charles Brown, Principal Wildlife Biologist within the Division of Fish and Wildlife, testified for DEM that in his opinion the animal is properly classified as a *lynx rufus*, native to Rhode Island and subject to the Regulations. Tr. 113, 117. He testified his conclusion was based on physical specimen records and other historical and current information about bobcats. Tr. 114. Brown's job deals with issues related to furbearers. He oversees the State Wildlife Rehabilitation Program, the Nuisance Wildlife Control Specialist Program, is on the State Rabies board and serves as the State's representative for the Northeast Furbearers Resources Technical Committee. He participated in the drafting of the Regulations. Tr. 112. Brown's conclusions in this area are persuasive.

Buttressing Brown's testimony is the testimony of Dr. Scott Marshall, the Rhode Island State Veterinarian. Marshall testified that he actually inspected the subject animal and recognized it as a bobcat subject to the Regulations. Tr. 55. Marshall's testimony revealed knowledge in the subject matter of bobcats and importation regulations. His responsibilities as State Veterinarian include dealing with native and exotic wildlife and he routinely consults the Division on animal pre-importation issues, including health requirements, specific diseases to test for and necessary health certificates from other jurisdictions.

Marshall is Chairman of the State Rabies Board. He noted the hazards to public safety that the bobcat represented in that there are no rabies vaccine for bobcats recognized by Rhode Island law. He also stated his belief that bobcats were dangerous to humans. This is because they grow up to 40 pounds, are carnivores, hunt their prey, eat strictly meat and have natural wild behaviors. Tr. 78-80. He also stated an animal with a natural home range measured in square miles should not be kept in a home as an "indoor cat" or cage. Tr. 80, 159. This testimony is convincing on the wisdom of keeping bobcats in a domestic setting.

Against this testimony of persons familiar with bobcats due to a scientific knowledge and occupational experience, Tardie merely countered with his own lay testimony. He admitted he had no prior experience with bobcats. He never knew anyone who owned a bobcat. Tr. 147. He relied on internet websites about bobcat mannerisms and their level of viciousness to reach his conclusions. Yet even on the internet, Tardie admitted he found a split view on these issues. Some websites said the bobcats were not aggressive and could be a pet. Tr. 150. Some websites said bobcats would not make good pets. Tr. 186. Tardie merely offered his own lay testimony and internet surfing site, materials not capable of cross-examination. It should be noted that a considerable amount of the internet material Tardie offered was unearthed during his testimony at hearing with no prior opportunity for DEM to review the material prior to the hearing and prepare for the hearing. The material was not allowed into evidence. Tr. 169.

Tardie claims that if his bobcat was considered a subspecies it arguably would not have been considered native and he could have filed an application for an exotic animal permit. Yet Brown testified that Rhode Island does not follow or recognize some sources which recognize subspecies of bobcats. In his opinion, adopted by Rhode Island officials, these subspecies are arbitrary delineations of the same species. Brown cited several scientific sources supporting his conclusion. Tr. 118. Marshall also rejected the subspecies argument. Tr. 110. Brown's and Marshall's conclusions on the subspecies issue are sufficient for this case. It is not enough that Tardie disagrees with Brown and Marshall. Even if there is a split of authority on this issue nationally, Rhode Island officials have taken the view of Brown and Marshall. Therefore, Tardie's argument here fails.

Finally, Tardie makes much of the fact that he talked to Dr. Marshall a year or two before he imported the bobcat and was told permits were not issued for bobcats, which he thought meant he was free to import the bobcat. Marshall meant a permit was needed but could not be obtained by individuals seeking bobcats as pets, only institutional skilled at handling wild animals such as zoos. Regardless, from a legal standpoint, the innocent misunderstanding during a telephone conversation between Tardie and a state official does not mean Tardie is relieved of the underlying legal duty to follow the law requiring him to secure a permit. The result remains the same legally. The bobcat cannot be housed with Tardie as a pet without a permit.

V. FINDINGS OF FACT

1. Respondent Tardie imported a bobcat into the State of Rhode Island from the State of Montana on or about August 31, 2010.
2. Respondent was in possession of the animal at his residence from approximately August 31, 2010 through December 10, 2010 when the animal was surrendered to DEM pursuant to a Superior Court order.
3. Bobcats are native wildlife, native to Rhode Island.

VI. CONCLUSIONS OF LAW

1. Respondent's action violated Rule 1.1 of the Regulations.

VII. ORDER

The appeal is denied. The NOV is sustained. Pursuant to Rule 8 of the Regulations, the Department shall make reasonable attempt to find a suitable location or placement for the subject animal. Respondent Tardie shall pay the costs of board, fee, veterinary care and transport for the animal up to and until the date of this order, or until administrative proceedings have been completed.

Entered as an Administrative Order this _____ day of April, 2011

Jeffrey Greer
Hearing Officer