

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) HPA Docket No. 15-0150
)
Terry Wayne Sims,)
)
Respondent) **Decision and Order**

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on July 20, 2015. The Administrator instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [Horse Protection Act]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

The Administrator alleges, on August 24, 2012, Terry Wayne Sims violated 15 U.S.C. § 1824(2)(B) by entering, for the purpose of showing or exhibiting, a horse known as “The Spooky Spook” as entry number 526, in class number 53, at the 74th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while The Spooky Spook was sore.¹

On July 29, 2015, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], by certified mail, served Mr. Sims with the

¹Compl. ¶ II 3, at first and second unnumbered pages.

Complaint, the Rules of Practice, and the Hearing Clerk's service letter, dated July 20, 2015.² Mr. Sims failed to file an answer within 20 days after the Hearing Clerk served Mr. Sims with the Complaint, as required by 7 C.F.R. § 1.136(a).

On October 21, 2015, Administrative Law Judge Janice K. Bullard [ALJ] filed an Order to Show Cause Why Default Should Not Be Entered [Order to Show Cause] in which the ALJ provided Mr. Sims and the Administrator 20 days within which to show cause why a default order should not be entered in favor of the Administrator due to Mr. Sims' failure to file an answer. The Administrator requested additional time within which to respond to the Order to Show Cause,³ which request the ALJ granted.⁴ On November 16, 2015, in response to the ALJ's Order to Show Cause, the Administrator filed a Motion for Adoption of Proposed Decision and Order and Response to Order to Show Cause Why Default Judgment Should Not Be Entered Against the Respondent [Motion for Default Decision] and a Proposed Decision and Order Upon Admission of Facts by Reason of Default [Proposed Default Decision]. On December 17, 2015, Mr. Sims filed a response to the Administrator's Motion for Default Decision and Proposed Default Decision.

On January 14, 2016, in accordance with 7 C.F.R. § 1.139, the ALJ filed a Decision Without Hearing by Reason of Admissions [Default Decision]: (1) concluding Mr. Sims violated the Horse Protection Act, as alleged in the Complaint; (2) assessing Mr. Sims a \$2,200 civil penalty; and (3) disqualifying Mr. Sims for five years from showing, exhibiting, or entering

²United States Postal Service Domestic Return Receipt for article number 7012 3460 0003 3833 2777.

³Administrator's Mot. for Extension of Time, filed October 29, 2015.

⁴ALJ's Order Granting Mot. for Extension of Time, filed November 5, 2015.

any horse and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.⁵

On February 3, 2016, Mr. Sims appealed the ALJ's Default Decision to the Judicial Officer, and, on April 14, 2016, the Administrator filed Response to Document Filed on February 3, 2016. On April 27, 2016, the Hearing Clerk transmitted the record to the Office of the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the ALJ's Default Decision.

DECISION

Statement of the Case

Mr. Sims failed to file an answer to the Complaint within the time prescribed in 7 C.F.R. § 1.136(a). The Rules of Practice (7 C.F.R. § 1.136(c)) provide the failure to file an answer within the time prescribed in 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, pursuant to 7 C.F.R. § 1.139, the failure to file a timely answer constitutes a waiver of hearing. Accordingly, the material allegations of the Complaint are adopted as findings of fact. I issue this Decision and Order pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Mr. Sims is an individual who lives in Kentucky.
2. Mr. Sims failed to file an answer to the Complaint.
3. On August 24, 2012, Mr. Sims entered a horse known as "The Spooky Spook" as entry number 526, in class number 53, at the 74th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee.

⁵ALJ's Default Decision at 4-5.

4. On August 24, 2012, the horse known as “The Spooky Spook,” entered by Mr. Sims at the 74th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, was inspected and found to be sore.

5. On July 29, 2009, Mr. Sims signed *Lunsford* (Consent Decision as to Sims), HPA Docket No. 08-0111, 2009 WL 2762668 (U.S.D.A. Aug. 6, 2009), to resolve allegations that he violated the Horse Protection Act.

6. Chief Administrative Law Judge Peter M. Davenport issued *Sims* (Default Decision), HPA Docket No. 12-0192, 2012 WL 3877366 (U.S.D.A. July 20, 2012), in which Chief Administrative Law Judge Peter M. Davenport concluded Mr. Sims violated the Horse Protection Act.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. Mr. Sims violated 15 U.S.C. § 1824(2)(B) by entering, for the purpose of showing or exhibiting, a horse known as “The Spooky Spook” as entry number 526, in class number 53, at the 74th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while The Spooky Spook was sore.
3. The Order in this Decision and Order is authorized by the Horse Protection Act and justified under the circumstances described in this Decision and Order.

Mr. Sims’ Appeal Petition

On February 3, 2016, Mr. Sims filed a letter in which he contends the five-year disqualification period imposed against him by the ALJ is excessive and payment of the \$2,200 civil penalty assessed by the ALJ would cause him and his family extreme hardship. The Administrator argues that Mr. Sims’ February 3, 2016, filing does not comply with the

requirements for an appeal petition in the Rules of Practice and requests that I remove the filing from the record (Administrator's Response to Document Filed on February 3, 2016, at 2).

The Rules of Practice set forth requirements for an appeal petition, as follows:

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

7 C.F.R. § 1.145(a). The Judicial Officer has consistently dismissed purported appeal petitions that do not remotely conform to the requirements of 7 C.F.R. § 1.145(a).⁶ However, I am reluctant to dismiss a filing in which a party fails to comply with all of the requirements of 7 C.F.R. § 1.145(a) but, nonetheless, clearly identifies those parts of an administrative law judge's decision with which that party disagrees. Mr. Sims' February 3, 2016, filing identifies

⁶Tierney (Order Dismissing Purported Appeal Pet.), OFPA Docket No. 13-0196, 2014 WL 7534276 (U.S.D.A. Dec. 9, 2014); Estes (Order Dismissing Purported Appeal Pet. and Cross-Appeal), AWA Docket No. 11-0027, 2014 WL 4311065 (U.S.D.A. June 12, 2014); Kasmiersky (Order Dismissing Purported Appeal Pet.), P.&S. Docket No. 12-0600, 2014 WL 4311063 (U.S.D.A. June 9, 2014); Oasis Corp. (Order Dismissing Purported Appeal Pet.), PACA Docket No. D-12-0423, 2013 WL 8208340 (U.S.D.A. Jan. 25, 2013); Gentry (Order Dismissing Purported Appeal Pet.), P.&S. Docket No. D-07-0152, 2009 WL 9534126 (U.S.D.A. Mar. 18, 2009); Breed (Order Dismissing Purported Appeal), A.Q. Docket No. 89-72, 50 Agric. Dec. 675 (U.S.D.A. Jan. 11, 1991); Lall (Order Dismissing Purported Appeal), P.Q. Docket No. 88-28, 49 Agric. Dec. 895 (U.S.D.A. July 5, 1990).

those parts of the ALJ's Default Decision with which Mr. Sims disagrees. Therefore, while Mr. Sims' February 3, 2016, filing does not comply in all respects with the requirements in 7 C.F.R. § 1.145(a) for an appeal petition, I find the filing sufficient to constitute Mr. Sims' appeal of the sanctions imposed by the ALJ, and I reject the Administrator's request that I remove Mr. Sims' February 3, 2016, filing from the record.

The Horse Protection Act (15 U.S.C. § 1825(b)(1)) authorizes assessment of a civil penalty of not more than \$2,000 for each violation of 15 U.S.C. § 1824. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil monetary penalty that may be assessed under 15 U.S.C. § 1825(b)(1) for each violation of 15 U.S.C. § 1824 by increasing the maximum civil penalty from \$2,000 to \$2,200.⁷ The Horse Protection Act (15 U.S.C. § 1825(b)(1)) provides, when determining the amount of the civil penalty, the Secretary of Agriculture shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

The United States Department of Agriculture's sanction policy is set forth in *S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (U.S.D.A. Feb. 8, 1991), *aff'd*, 991 F.2d 803 (9th Cir. 1993) (not to be cited as precedent under the 9th Circuit Rule 36-3), as follows:

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the

⁷7 C.F.R. § 3.91(b)(2)(viii).

recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Mr. Sims contends payment of a \$2,200 civil penalty would cause him and his family extreme hardship; however, extreme hardship is not one of the statutory factors that the Secretary of Agriculture must take into account when determining the amount of the civil penalty. Even if I were to construe Mr. Sims' claim of extreme hardship as an assertion that he is not able to pay a \$2,200 civil penalty, I would not reduce the civil penalty assessed by the ALJ. While the Horse Protection Act requires that I take into account a respondent's ability to pay a civil penalty, the burden is on the respondent to come forward with some evidence indicating an inability to pay the civil penalty.⁸ Mr. Sims has not introduced any evidence indicating his inability to pay a \$2,200 civil penalty, and, in the absence of evidence to the contrary, I deem Mr. Sims capable of paying the \$2,200 civil penalty.

In most Horse Protection Act cases, the maximum civil penalty per violation is warranted.⁹ Based on the factors that are required to be considered when determining the amount

⁸Jenne, HPA Docket No. 13-0080, 2015 WL 4538827, at *8 (U.S.D.A. July 17, 2015); Jenne, HPA Docket No. 13-0308, 2015 WL 1776433, at *6 (U.S.D.A. Apr. 13, 2015); Stepp, HPA Docket No. 94-0014, 57 Agric. Dec. 297, 318 (U.S.D.A. May 6, 1998), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 820 (U.S.D.A. Aug. 13, 1999); C.M. Oppenheimer (Decision as to C.M. Oppenheimer), HPA Docket No. 91-207, 54 Agric. Dec. 221, 321 (U.S.D.A. Mar. 6, 1995); Armstrong, HPA Docket No. 92-25, 53 Agric. Dec. 1301, 1324 (U.S.D.A. Aug. 12, 1994), *aff'd per curiam*, 113 F.3d 1249 (11th Cir. 1997) (unpublished); Burks, HPA Docket No. 91-120, 53 Agric. Dec. 322, 346 (U.S.D.A. June 24, 1994); Holt, HPA Docket No. 88-28, 49 Agric. Dec. 853, 865-66 (U.S.D.A. July 11, 1990).

⁹Jenne, HPA Docket No. 13-0080, 2015 WL 4538827, at *8 (U.S.D.A. July 17, 2015); Jenne, HPA Docket No. 13-0308, 2015 WL 1776433, at *6 (U.S.D.A. Apr. 13, 2015); Back, HPA Docket No. 08-0007, 69 Agric. Dec. 448, 463 (U.S.D.A. Mar. 17, 2010), *aff'd*, 445 F. App'x 826 (6th Cir. 2011); Beltz (Decision as to Christopher Jerome Zahnd), HPA Docket No. 02-0001, 64 Agric. Dec. 1487, 1504 (U.S.D.A. Dec. 28, 2005), *aff'd sub nom. Zahnd v. Sec'y of Agric.*, 479 F.3d 767 (11th Cir. 2007); Turner, HPA Docket No. 01-0023, 64 Agric. Dec. 1456, 1475

of the civil penalty to be assessed, I do not find a maximum civil penalty in this case to be inappropriate. The Administrator, an administrative official charged with responsibility for achieving the congressional purpose of the Horse Protection Act, requests a maximum civil penalty.¹⁰ Therefore, I affirm the ALJ's assessment of a \$2,200 civil penalty against Mr. Sims.

The Horse Protection Act (15 U.S.C. § 1825(c)) provides that any person assessed a civil penalty under 15 U.S.C. § 1825(b) may be disqualified from showing or exhibiting any horse and from judging or managing any horse show, horse exhibition, horse sale, or horse auction for a period of not less than one year for the first violation of the Horse Protection Act and for a period of not less than five years for any subsequent violation of the Horse Protection Act.

The purpose of the Horse Protection Act is to prevent the cruel practice of soring horses. Congress amended the Horse Protection Act in 1976 to enhance the Secretary of Agriculture's ability to end soring of horses. Among the most notable devices to accomplish the purpose of the Horse Protection Act is the authorization for disqualification which Congress specifically added to provide a strong deterrent to violations of the Horse Protection Act by those persons who have the economic means to pay civil penalties as a cost of doing business.¹¹

The Horse Protection Act (15 U.S.C. § 1825(c)) specifically provides that disqualification is in addition to any civil penalty assessed under 15 U.S.C. § 1825(b). While 15 U.S.C. § 1825(b)(1) requires that the Secretary of Agriculture consider specified factors when

(U.S.D.A. Oct. 26, 2005), *aff'd*, 217 F. App'x 462 (6th Cir. 2007); McConnell, HPA Docket No. 99-0034, 64 Agric. Dec. 436, 490 (U.S.D.A. June 23, 2005), *aff'd*, 198 F. App'x 417 (6th Cir. 2006); McCloy, Jr., HPA Docket No. 99-0020, 61 Agric. Dec. 173, 208 (U.S.D.A. Mar. 22, 2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004).

¹⁰Administrator's Mot. for Default Decision at 3.

¹¹See H.R. Rep. No. 94-1174, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1705-06.

determining the amount of the civil penalty to be assessed for a violation of the Horse Protection Act, the Horse Protection Act contains no such requirement with respect to the imposition of a disqualification period.

While disqualification is discretionary with the Secretary of Agriculture, the Administrator has recommended the imposition of a five-year disqualification period, in addition to the assessment of a civil penalty,¹² and I have held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which a respondent is found to have violated the Horse Protection Act for the first time.¹³

Congress has provided the United States Department of Agriculture with the tools needed to eliminate the practice of soring Tennessee Walking Horses, but those tools must be used to be effective. In order to achieve the congressional purpose of the Horse Protection Act, I generally find necessary the imposition of at least the minimum disqualification provisions of the 1976 amendments on any person who violates 15 U.S.C. § 1824.

Circumstances in a particular case might justify a departure from this policy. Since, under the 1976 amendments, intent and knowledge are not elements of a violation, few circumstances warrant an exception from this policy, but the facts and circumstances of each

¹²Administrator's Mot. for Default Decision at 3.

¹³Back, HPA Docket No. 08-0007, 69 Agric. Dec. 448, 464 (U.S.D.A. Mar. 17, 2010), *aff'd*, 445 F. App'x 826 (6th Cir. 2011); Beltz (Decision as to Christopher Jerome Zahnd), HPA Docket No. 02-0001, 64 Agric. Dec. 1487, 1505-06 (U.S.D.A. Dec. 28, 2005), *aff'd sub nom. Zahnd v. Sec'y of Agric.*, 479 F.3d 767 (11th Cir. 2007); Turner, HPA Docket No. 01-0023, 64 Agric. Dec. 1456, 1476 (U.S.D.A. Oct. 26, 2005), *aff'd*, 217 F. App'x 462 (6th Cir. 2007); McConnell, HPA Docket No. 99-0034, 64 Agric. Dec. 436, 492 (U.S.D.A. June 23, 2005), *aff'd*, 198 F. App'x 417 (6th Cir. 2006); McCloy, Jr., HPA Docket No. 99-0020, 61 Agric. Dec. 173, 209 (U.S.D.A. Mar. 22, 2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004).

case must be examined to determine whether an exception to this policy is warranted. An examination of the record does not lead me to believe that an exception from the usual practice of imposing the minimum disqualification period for Mr. Sims' violation of the Horse Protection Act, in addition to the assessment of a civil penalty, is warranted. As Mr. Sims has previously been found to have violated the Horse Protection Act,¹⁴ I affirm the ALJ's imposition of the minimum five-year period of disqualification on Mr. Sims.

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Sims is assessed a \$2,200 civil penalty. Mr. Sims shall pay the civil penalty by certified check or money order, made payable to the "Treasurer of the United States" and sent to:

USDA APHIS GENERAL
P.O. Box 979043
St. Louis, Missouri 63197-9000

Mr. Sims' civil penalty payment shall be forwarded to, and received by, USDA APHIS GENERAL within 60 days after service of this Order on Mr. Sims. Mr. Sims shall indicate on the certified check or money order that the payment is in reference to HPA Docket No. 15-0150.

2. Mr. Sims is disqualified for five uninterrupted years from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, corporation, partnership, or other device, and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (1) transporting, or

¹⁴See, Sims (Default Decision), HPA Docket No. 12-0192, 2012 WL 3877366 (U.S.D.A. July 20, 2012), in which Chief Administrative Law Judge Peter M. Davenport concluded Mr. Sims violated 15 U.S.C. § 1824(1)-(2)(B) and (2)(D), on August 29 and 30, 2009.

arranging for the transportation of, horses to or from equine events; (2) personally giving instructions to exhibitors; (3) being present in the warm-up or inspection areas or in any area where spectators are not allowed; and (4) financing the participation of others in equine events. The disqualification shall continue after the end of the five-year disqualification period until the \$2,200 civil penalty assessed against Mr. Sims is paid in full. The disqualification of Mr. Sims shall become effective on the 60th day after service of this Order on Mr. Sims.

RIGHT TO SEEK JUDICIAL REVIEW

Mr. Sims has the right to seek judicial review of the Order in this Decision and Order in the court of appeals of the United States for the circuit in which Mr. Sims resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Mr. Sims must file a notice of appeal in such court within 30 days from the date of this Order and must simultaneously send a copy of any notice of appeal by certified mail to the Secretary of Agriculture.¹⁵ The date of this Order is April 29, 2016.

Done at Washington, DC

April 29, 2016

William G. Jenson
Judicial Officer

¹⁵15 U.S.C. § 1825(b)(2), (c).