

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	HPA Docket No. 15-0041
)	
Tracy Essary,)	
)	
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 December 8, 2014. The Administrator instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [Horse Protection Act]; the regulations promulgated under the Horse Protection Act (9 C.F.R. pt. 11); 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: (1) on August 25, 2012, Tracy Essary, in violation of 15 U.S.C. § 1824(2)(B) and (7), entered for the purpose of showing or exhibiting a horse known as “Jose’s Diamond Doll” as entry number 820, in class number 76, at the 74th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Jose’s Diamond Doll was sore and bearing a prohibited substance;¹ and (2) on August 26, 2012, Mr. Essary, in violation of 15 U.S.C. § 1824(2)(D), allowed the entry for the purpose of showing or exhibiting a horse known as “Out On A Date” as entry number 819, in class number 91A, at the 74th Annual Tennessee Walking

¹Compl. ¶ 6 at 2.

Horse National Celebration in Shelbyville, Tennessee, while Out On A Date was sore.² On March 11, 2015, Mr. Essary filed an answer in which he denied the allegations of the Complaint.³

On April 24, 2015, Administrative Law Judge Janice K. Bullard [ALJ] issued an Order requiring the parties to exchange exhibits and lists of witnesses and exhibits.⁴ On July 17, 2015, the Administrator complied with the ALJ's April 24, 2015, Order by filing Complainant's List of Anticipated Witnesses and Complainant's List of Proposed Exhibits with the Hearing Clerk and by sending a copy of the Administrator's proposed exhibits, Complainant's List of Anticipated Witnesses, and Complainant's List of Proposed Exhibits to Mr. Essary. Mr. Essary failed to comply with the ALJ's April 24, 2015, Order.

On December 22, 2015, the ALJ issued an Order directing Mr. Essary to show cause why a decision on the written record should not be entered and setting a date for the parties' submission of evidence and argument to be considered by the ALJ.⁵ On January 29, 2016, the Administrator complied with the ALJ's December 22, 2015, Order by filing a Motion for Decision on the Record, exhibits in support of the Motion for Decision on the Record, a Memorandum of Points and Authorities in Support of a Decision on the Record, and a Proposed Decision and Order. Mr. Essary failed to comply with the ALJ's December 22, 2015, Order.

²Compl. ¶ 8 at 2.

³Undated letter from Mr. Essary to the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk].

⁴Order Setting Deadlines for Exchange and Submissions.

⁵Order Directing Respondents [sic] to Show Cause Why Decision on the Record Should Not Be Entered and Setting Date for Submissions. See also, the ALJ's January 4, 2016, Addendum Order Directing Respondents [sic] to Show Cause Why Decision on the Record Should Not Be Entered and Setting Date for Submissions.

On February 23, 2016, the Hearing Clerk served Mr. Essary with the Administrator's Motion for Decision on the Record and the Administrator's Proposed Decision and Order.⁶ Mr. Essary failed to file a response to the Administrator's Motion for Decision on the Record or the Administrator's Proposed Decision and Order.

On April 12, 2016, the ALJ issued a Decision and Order in which the ALJ: (1) admitted to the record the Administrator's exhibits (CX 1-CX 14) filed in support of the Administrator's Motion for Decision on the Record; (2) concluded Mr. Essary violated 15 U.S.C. § 1824(2)(B), (2)(D), and (7), as alleged in the Complaint; (3) assessed Mr. Essary a \$4,400 civil penalty; and (4) disqualified Mr. Essary from showing, exhibiting, or entering any horse or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction for a period of two years.⁷

On May 11, 2016, Mr. Essary appealed the ALJ's Decision and Order to the Judicial Officer,⁸ and, on June 6, 2016, the Administrator filed a response to Mr. Essary's Appeal Petition.⁹ On June 8, 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, pursuant to 7 C.F.R. § 1.145(i), I adopt the ALJ's April 12, 2016, Decision and Order as the final order in this proceeding.

⁶United States Postal Service Domestic Return Receipt for article number 7012 3460 0003 3833 2890.

⁷ALJ's Decision and Order at 2, 5-6.

⁸Mr. Essary's letter to the ALJ, dated May 6, 2016 [Appeal Petition].

⁹Complainant's Response in Opposition to Respondent's Notice of Appeal [Response to Appeal Petition].

DECISION

Mr. Essary's Appeal Petition

Mr. Essary raises three issues in his Appeal Petition. Mr. Essary raises each of these issues for the first time on appeal to the Judicial Officer. It is well-settled that new arguments cannot be raised for the first time on appeal to the Judicial Officer.¹⁰ Nonetheless, in this Decision and Order, *infra*, I briefly address each of the three issues raised by Mr. Essary.

First, Mr. Essary asserts Kevin Gower, the trainer of Jose's Diamond Doll and Out On A Date, pled guilty to, and accepted responsibility for, the violations of the Horse Protection Act alleged in the Complaint. Mr. Essary contends he is therefore not responsible for the violations of the Horse Protection Act alleged in the Complaint (Appeal Pet.).

The Administrator alleged that both Mr. Gower and Mr. Essary violated the Horse Protection Act.¹¹ Mr. Gower did not plead guilty to the violations of the Horse Protection Act which he is alleged to have committed, as Mr. Essary contends. Instead, Mr. Gower settled this proceeding as it relates to him by entering into a Consent Decision and Order in which he admitted the jurisdictional allegations in the Complaint but neither admitted nor denied the remaining allegations of the Complaint.¹² Mr. Gower's resolution of this proceeding as it relates to him by

¹⁰ZooCats, Inc. (Order Denying Respondents' Pet. to Reconsider and Administrator's Pet. to Reconsider), AWA Docket No. 03-0035, 68 Agric. Dec. 1072, 1074 n.1 (U.S.D.A. Dec. 14, 2009); Schmidt (Order Denying Pet. to Reconsider), AWA Docket No. 05-0019, 66 Agric. Dec. 596, 599 (U.S.D.A. May 9, 2007); Reinhart (Order Denying William J. Reinhart's Pet. for Recons.), HPA Docket No. 99-0013, 60 Agric. Dec. 241, 257 (U.S.D.A. Jan. 23, 2001).

¹¹Specifically, the Administrator alleged Mr. Gower violated 15 U.S.C. § 1824(2)(B) and (7) (Compl. ¶¶ 6-7 at 2) and Mr. Essary violated 15 U.S.C. § 1824(2)(B), (2)(D), and (7) (Compl. ¶¶ 6 and 8 at 2).

¹²Gower (Consent Decision), HPA Docket No. 15-0040, 2015 WL 8484476, at *1 (U.S.D.A. Mar. 31, 2015).

entry of a Consent Decision and Order is not relevant to the allegations in the Complaint that Mr. Essary violated the Horse Protection Act and does not dispose of the proceeding as to Mr. Essary.¹³ Therefore, I reject Mr. Essary's contention that he is not responsible for the violations of the Horse Protection Act which the Administrator alleges Mr. Essary committed.

Second, Mr. Essary asserts he no longer owns any Tennessee Walking Horses (Appeal Pet.).

Mr. Essary does not indicate how his current lack of ownership of Tennessee Walking Horses is relevant to this proceeding. Mr. Essary does not cite and I cannot locate any case in which a respondent's termination of ownership of all Tennessee Walking Horses was relevant to a violation of the Horse Protection Act that occurred prior to that respondent's termination of ownership. However, I identified three proceedings conducted under the Animal Welfare Act, as amended (7 U.S.C. §§ 2131-2159) [Animal Welfare Act], in which the respondents argued disposal or the intention to dispose of animals regulated under the Animal Welfare Act operated as a defense to their violations of the Animal Welfare Act which predated the disposal or the intent to dispose of animals regulated under the Animal Welfare Act. I rejected each of those arguments as having no merit.¹⁴ Similarly, I find Mr. Essary's assertion that he no longer owns any Tennessee

¹³After entry of Gower (Consent Decision), HPA Docket No. 15-0040, 2015 WL 8484476 (U.S.D.A. Mar. 31, 2015), the ALJ amended the caption of this proceeding by omitting the references to "Kevin Gower" and "HPA Docket No. 15-0040" and maintaining the references to "Tracy Essary" and "HPA Docket No. 15-0041" in order to reflect that a final disposition of this proceeding had been entered as to Mr. Gower but that a final disposition of this proceeding had not been issued as to Mr. Essary (Order Setting Deadlines for Exchange and Submissions at 1 n.1).

¹⁴Hill, AWA Docket No. 04-0012, 64 Agric. Dec. 91, 147 (U.S.D.A. Oct. 8, 2004) (finding the respondents' disposal or intention to dispose of animals after the respondents committed violations of the Animal Welfare Act is not a meritorious basis for denying the Administrator's motion for default decision or relevant to the proceeding), *appeal dismissed*, No. 05-1154 (7th Cir. Aug. 23, 2005); Meyers, AWA Docket No. 96-0052, 56 Agric. Dec. 322, 348 (U.S.D.A. Mar. 13, 1997) (stating the respondent's disposal of animals regulated under the Animal Welfare Act is not a defense to the respondent's violation of the Animal Welfare Act that occurred prior to the disposal

Walking Horses is not a defense to the Administrator's allegations that Mr. Essary violated the Horse Protection Act and has no relevance to this proceeding.

Third, Mr. Essary asserts he is unable to pay the \$4,400 civil penalty assessed by the ALJ (Appeal Pet.).

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 \$2,200.¹⁵ 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 respondent's ability to pay the civil penalty.

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.¹⁶ Mr. Essary has not introduced any evidence indicating his

of the animals); Hampton, AWA Docket No. 96-0050, 56 Agric. Dec. 301, 320 (U.S.D.A. Jan. 15, 1997) (stating the respondent's intention to dispose of animals regulated under the Animal Welfare Act is not a defense to the respondent's violation of the Animal Welfare Act).

¹⁵7 C.F.R. § 3.91(b)(2)(viii).

¹⁶Sims, HPA Docket No. 15-0150, 2016 WL 2892945, at *4 (U.S.D.A. Apr. 29, 2016); Jenne, 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,

inability to pay a \$4,400 civil penalty, and, in the absence of evidence to the contrary, I deem Mr. Essary capable of paying the \$4,400 civil penalty.

Based upon a careful consideration of the record, I find no change or modification of the ALJ's April 12, 2016, Decision and Order is warranted. The Rules of Practice provide that, under these circumstances, I may adopt an administrative law judge's decision as the final order in a proceeding, as follows:

§ 1.145 Appeal to Judicial Officer.

. . . .

(i) *Decision of the judicial officer on appeal.* If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum.

7 C.F.R. § 1.145(i).

For the foregoing reasons, the following Order is issued.

ORDER

The ALJ's April 12, 2016, Decision and Order is adopted as the final order in this proceeding.

RIGHT TO SEEK JUDICIAL REVIEW

Mr. Essary 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. Essary resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Mr. Essary must file a notice of appeal in such court within 30 days from the date of this Order

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).

and must simultaneously send a copy of any notice of appeal by certified mail to the Secretary of Agriculture.¹⁷ The date of this Order is June 15, 2016.

Done at Washington, DC

June 15, 2016

William G. Jenson
Judicial Officer

¹⁷15 U.S.C. § 1825(b)(2), (c).