

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	HPA Docket No. 04-0001
)	
Kim Bennett,)	
)	Order Denying Petition
Respondent)	for Reconsideration

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on April 15, 2004. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; the regulations issued under the Horse Protection Act (9 C.F.R. pt. 11) [hereinafter the Horse Protection Regulations]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that on August 26, 2002, Kim Bennett [hereinafter Respondent] refused to permit Animal and Plant Health Inspection Service officials to inspect a horse known as “The Duck,” entry number 784 in class number 104 in the 64th

Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee, in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)) and section 11.4(a) of the Horse Protection Regulations (9 C.F.R. § 11.4(a)) (Compl. ¶ II.1). On May 17, 2004, Respondent filed an answer denying the material allegations of the Complaint.

On May 17-18, 2005, Administrative Law Judge Victor W. Palmer presided at a hearing in Nashville, Tennessee. Frank Martin, Jr., Office of the General Counsel, United States Department of Agriculture, represented Complainant. David F. Broderick, Broderick & Thornton, Bowling Green, Kentucky, represented Respondent. After the hearing, the parties filed post-hearing briefs.

On September 23, 2005, the ALJ issued a “Decision and Order” [hereinafter Initial Decision] concluding Complainant failed to prove by a preponderance of the evidence that Respondent violated the Horse Protection Act and the Horse Protection Regulations and dismissing the Complaint (Initial Decision at 2, 12).

On October 20, 2005, Complainant appealed to the Judicial Officer. On November 15, 2005, Respondent filed a response to Complainant’s appeal petition. On November 25, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision. On January 13, 2006, I issued a Decision and Order reversing the ALJ and concluding Respondent refused to permit a United States Department of Agriculture veterinary medical officer, displaying appropriate credentials, to complete inspection of The Duck, entry number 784 in class number 104, at the 64th Annual

Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee, in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)).¹

On January 31, 2006, Respondent filed a “Petition for Reconsideration of Decision and Order of January 13, 2006” [hereinafter Petition for Reconsideration]. On February 6, 2006, Complainant filed “Complainant’s Opposition to Respondent’s Petition for Reconsideration of the Judicial Officer’s Decision and Order.” On February 6, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Respondent’s Petition for Reconsideration.

APPLICABLE STATUTORY PROVISIONS

15 U.S.C.:

TITLE 15—COMMERCE AND TRADE

.....

CHAPTER 44—PROTECTION OF HORSES

.....

§ 1823. Horse shows and exhibitions

.....

(e) Inspection by Secretary or duly appointed representative

For purposes of enforcement of this chapter (including any regulation promulgated under this chapter) the Secretary, or any representative of the Secretary duly designated by the Secretary, may inspect any horse show, horse exhibition, or horse sale or auction or any

¹*In re Kim Bennett*, 65 Agric. Dec. ____ (Jan. 13, 2006).

horse at any such show, exhibition, sale, or auction. Such an inspection may only be made upon presenting appropriate credentials. Each such inspection shall be commenced and completed with reasonable promptness and shall be conducted within reasonable limits and in a reasonable manner. An inspection under this subsection shall extend to all things (including records) bearing on whether the requirements of this chapter have been complied with.

§ 1824. Unlawful acts

The following conduct is prohibited:

-
- (9) The failure or refusal to permit access to or copying of records, or the failure or refusal to permit entry or inspection, as required by section 1823 of this title.

15 U.S.C. §§ 1823(e), 1824(9).

CONCLUSIONS BY THE JUDICIAL OFFICER ON RECONSIDERATION

Respondent raises two issues in his Petition for Reconsideration. First, Respondent contends a respondent cannot be proven to have refused inspection in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)) unless the inspection is conducted reasonably in accordance with section 4(e) of the Horse Protection Act (15 U.S.C. § 1823(e)) (Respondent's Pet. for Recons. at 2).

I disagree with Respondent's contention that a respondent cannot be proven to have refused inspection in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)) unless the inspection is conducted reasonably in accordance with section 4(e) of the Horse Protection Act (15 U.S.C. § 1823(e)). Section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)) prohibits the failure or refusal to permit inspection as required by section 4 of the Horse Protection Act (15 U.S.C. § 1823). Section 4(e) of

the Horse Protection Act (15 U.S.C. § 1823(e)) provides that any representative of the Secretary of Agriculture may, upon presenting appropriate credentials, inspect any horse at any horse show. A respondent's belief that a representative of the Secretary of Agriculture is not conducting an inspection in a reasonable manner is not relevant to the respondent's violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)). The failure of a representative of the Secretary of Agriculture to conduct an inspection in a reasonable manner, as required by section 4(e) of the Horse Protection Act (15 U.S.C. § 1823(e)), may be used to challenge the results of the inspection, but may not be used as a basis to refuse to permit completion of the inspection.

Second, Respondent contends I erroneously failed to make findings regarding Dr. Michael Guedron's prior conduct and reputation and I erroneously failed to address Dr. Guedron's failure to testify or to prepare a written statement regarding Respondent's alleged violation (Respondent's Pet. for Recons. at 3).

Complainant proved by a preponderance of the evidence² that on August 26, 2002,

²Complainant, as the proponent of an order, has the burden of proof in this proceeding (5 U.S.C. § 556(d)). The standard of proof by which this burden is met is the preponderance of the evidence standard. See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981). The standard of proof in administrative proceedings conducted under the Horse Protection Act is preponderance of the evidence. *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. ___, slip op. at 8 (Dec. 28, 2005); *In re Jackie McConnell*, 64 Agric. Dec. ___, slip op. at 39 (June 23, 2005), *appeal docketed*, No. 05-3919 (6th Cir. July 20, 2005); *In re Beverly Burgess* (Decision as to Winston T. Groover, Jr.), 63 Agric. Dec. 678, 712 (2004), *aff'd sub nom. Groover v. United States Dep't of Agric.*, No. 04-4519 (6th Cir. Oct. 31, 2005); *In re Robert B. McCloy*, 61 Agric. Dec. 173, 195 n.6 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004); *In re William J. Reinhart*, 60 Agric. Dec. 241, 258 n.7 (2001) (Order Denying William J. Reinhart's Pet. for Recons.); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 539 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892, 903 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 857 n.2 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 850 n.2 (1996); *In re Keith Becknell*, 54 Agric. Dec. 335, 343-44 (1995); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 245-46 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 285 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 197 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1286 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-54 (1993); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1186-87 (1993); *In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156, 1167 (1993), *aff'd*, 23 F.3d 407, 1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 242-43 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re Steve Brinkley*, 52 Agric. Dec. 252, 262 (1993); *In re John Allan Callaway*, 52 Agric. Dec. 272, 284 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 307 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Pat Sparkman*

(continued...)

Respondent refused to permit Dr. Guedron to complete an inspection of The Duck at the 64th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee, in violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)). While Dr. Guedron's testimony and written statement regarding the issue of Respondent's refusal to permit completion of inspection of The Duck may have been helpful, Dr. Guedron's testimony and written statement are not necessary to Complainant's case. Moreover, Dr. Guedron's conduct prior to August 26, 2002, and Dr. Guedron's reputation on August 26, 2002, are not relevant to the issue of whether Respondent refused to permit completion of inspection of The Duck on August 26, 2002. Therefore, I do not find my failure to make findings regarding Dr. Guedron's prior conduct and reputation or my failure to address Dr. Guedron's failure to testify or to prepare a written statement, is error.

For the foregoing reasons and the reasons set forth in *In re Kim Bennett*, 65 Agric. Dec. ____ (Jan. 13, 2006), Respondent's Petition for Reconsideration is denied.

Section 1.146(b) of the Rules of Practice (7 C.F.R. § 1.146(b)) provides that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider. Respondent's Petition for Reconsideration was timely filed and automatically stayed *In re Kim Bennett*, 65 Agric.

²(...continued)
(Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602, 612 (1991); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Steve Beech*, 37 Agric. Dec. 1181, 1183-85 (1978).

Dec. ____ (Jan. 13, 2006). Therefore, since Respondent's Petition for Reconsideration is denied, I hereby lift the automatic stay, and the Order in *In re Kim Bennett*, 65 Agric.

Dec. ____ (Jan. 13, 2006), is reinstated; except that the effective date of the Order is the date indicated in the Order in this Order Denying Petition for Reconsideration.

For the foregoing reasons, the following Order should be issued.

ORDER

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

Frank Martin, Jr.
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building, Stop 1417
Washington, DC 20250-1417

Respondent's payment of the civil penalty shall be forwarded to, and received by, Mr. Martin within 60 days after service of this Order on Respondent. Respondent shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 04-0001.

2. Respondent is disqualified for a period of 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, 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: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Respondent shall become effective on the 60th day after service of this Order on Respondent.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to obtain review of the Order in this Order Denying Petition for Reconsideration in the court of appeals of the United States for the circuit in which he resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Respondent must file a notice of appeal in such court within 30 days from the date of the Order in this Order Denying Petition for

Reconsideration and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture.³ The date of the Order in this Order Denying Petition for Reconsideration is February 8, 2006.

Done at Washington, DC

February 8, 2006

William G. Jenson
Judicial Officer

³15 U.S.C. § 1825(b)(2), (c).