

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	HPA Docket No. 06-0001
)	
Derwood Stewart, an individual)	
d/b/a Stewart Farms, a sole)	
proprietorship,)	
)	
Respondent)	Decision and Order

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 December 5, 2005. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the 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) [hereinafter the Rules of Practice].

Complainant alleges that on February 26, 2005, Derwood Stewart [hereinafter Respondent] knowingly failed to obey an order of disqualification issued by the Secretary of Agriculture by managing, judging, or otherwise participating in a horse show, horse

exhibition, horse sale, or horse auction held at Respondent's farm.¹ On January 3, 2006, Respondent filed an Answer denying the material allegations of the Complaint.

On September 7, 2006, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] presided at a hearing in Chattanooga, Tennessee. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, represented Complainant. L. Thomas Austin, Austin, Davis & Mitchell, Dunlap, Tennessee, represented Respondent. The ALJ issued a decision orally at the close of the hearing in which the ALJ: (1) found that on February 26, 2005, Respondent knowingly failed to obey an order of disqualification by managing a horse exhibition; (2) concluded that Respondent violated section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)); and (3) assessed Respondent a \$500 civil penalty.²

The ALJ excerpted from the transcript the decision orally announced at the close of the hearing, and on September 14, 2006, filed the written excerpt.³ On October 27, 2006, Complainant appealed to the Judicial Officer.⁴ On November 27, 2006,

¹Compl. ¶ 9.

²Tr. 167-79.

³Confirmation of Oral Decision and Order.

⁴Complainant's Petition for Appeal of Oral Decision and Order [hereinafter Complainant's Appeal Petition].

Respondent filed a response to Complainant's Appeal Petition.⁵ On November 29, 2006, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ's finding that Respondent knowingly failed to obey an order of disqualification by managing a horse exhibition; however, I disagree with the amount of the civil penalty assessed against Respondent by the ALJ. Therefore, I affirm the ALJ's September 7, 2006, oral decision,⁶ except for the amount of the civil penalty assessed against Respondent.

Complainant's exhibits are designated by "CX." Respondent's exhibits are designated by "RX." Transcript references are designated by "Tr."

⁵Response to Petition for Appeal of Oral Decision and Order [hereinafter Respondent's Response to Appeal Petition].

⁶Tr. 167-79.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

15 U.S.C.:

TITLE 15—COMMERCE AND TRADE

.....

CHAPTER 44—PROTECTION OF HORSES

.....

§ 1825. Violations and penalties

.....

(c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than \$3,000 for each violation.

15 U.S.C. § 1825(c).

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

....

PART 3—DEBT MANAGEMENT

....

Subpart E—Adjusted Civil Monetary Penalties

§ 3.91 Adjusted civil monetary penalties.

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties—*

....

(2) *Animal and Plant Health Inspection Service. . . .*

....

(viii) Civil penalty for failure to obey Horse Protection Act disqualification, codified at 15 U.S.C. 1825(c), has a maximum of \$3,300 and exhibition of disqualified horse, codified at 15 U.S.C. 1825(c), has a maximum of \$3,300.

7 C.F.R. § 3.91(a), (b)(2)(viii) (2005).

DECISION

Decision Summary

Except for the amount of the civil penalty assessed against Respondent, I affirm the ALJ's September 7, 2006, oral decision in which the ALJ found that on February 26, 2005, Respondent knowingly failed to obey an order of disqualification by managing a

horse exhibition and the ALJ concluded that Respondent violated section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)).⁷ Neither Complainant nor Respondent appeals the ALJ's finding or conclusion. The only issue before me is the amount of the civil penalty to be assessed against Respondent for his failure to obey an order of disqualification. Complainant urges that I assess Respondent a \$3,300 civil penalty,⁸ the maximum civil penalty for Respondent's February 26, 2005, knowing failure to obey the order of disqualification.⁹ Respondent urges that I sustain the ALJ and assess Respondent a \$500 civil penalty for Respondent's February 26, 2005, knowing failure to obey the order of disqualification.¹⁰ After reviewing the factors required under the Horse Protection Act to be considered when determining the amount of the civil penalty and in light of the United States Department of Agriculture's sanction policy, I assess Respondent a \$3,300 civil penalty for his February 26, 2005, knowing failure to obey an order of disqualification.

Findings of Fact

1. Respondent is an individual doing business as Stewart Farms (Answer Introductory Paragraph).

⁷Tr. 167-79.

⁸Complainant's Appeal Pet. at 2-8.

⁹15 U.S.C. § 1825(c); 7 C.F.R. § 3.91(b)(2)(viii) (2005).

¹⁰Respondent's Response to Appeal Pet. at 2.

2. Respondent's mailing address is 674 Gath Lucky Road, McMinnville, Tennessee 37110 (CX 2, CX 4, CX 5 at 1).
3. On September 6, 2001, the Judicial Officer issued a decision concluding that, on October 28, 1998, Respondent violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) when Respondent entered a horse for the purpose of showing or exhibiting the horse in the 30th Anniversary National Walking Horse Trainers Show, while the horse was sore (CX 1 at 1-22; Answer ¶ II).¹¹
4. On September 6, 2001, the Judicial Officer issued an order disqualifying Respondent 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 (CX 1 at 19-20).¹²
5. On February 22, 2002, Respondent filed a motion to stay the September 6, 2001, order issued by the Judicial Officer pending appeal (CX 8 at 2-4).
6. On March 4, 2002, the Judicial Officer issued an order staying the September 6, 2001, order pending the outcome of proceedings for judicial review, as follows:

¹¹*In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. 570 (2001), *aff'd*, 64 F. App'x 941 (6th Cir. 2003).

¹²*Id.* at 609.

ORDER

The Order issued in *In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. [570] (. . . 2001), is stayed pending the outcome of proceedings for judicial review. This Stay Order as to Derwood Stewart shall remain in effect until it is lifted by the Judicial Officer or vacated by a court of competent jurisdiction.

CX 8 at 7.¹³

7. On May 15, 2003, the United States Court of Appeals for the Sixth Circuit denied Respondent's petition for review of the Judicial Officer's September 6, 2001, decision (RX 1; Answer ¶ 4).¹⁴

8. On July 9, 2003, the United States Court of Appeals for the Sixth Circuit denied Respondent's petition for rehearing of the Court's May 15, 2003, decision (RX 2).

9. On May 21, 2004, the Judicial Officer issued an order lifting the March 4, 2002, stay order stating the disqualification of Respondent shall become effective on the 60th day after service of the order lifting stay on Respondent, as follows:

ORDER

. . . .

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. . . .

¹³*In re Derwood Stewart* (Stay Order as to Derwood Stewart), 61 Agric. Dec. 291 (2002).

¹⁴*Stewart v. United States Dep't of Agric.*, 64 F. App'x 941 (6th Cir. 2003).

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

CX 1 at 23-24.¹⁵

10. The Hearing Clerk served Respondent with the Judicial Officer's May 21, 2004, Order Lifting Stay Order as to Derwood Stewart on May 26, 2004 (CX 1 at 25-26).

11. Respondent was disqualified for a period of 1 year beginning July 25, 2004, 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 (CX 1 at 23-26).

12. Respondent advertised that he would hold a horse review and barn party at his farm, Stewart Farms, 674 Gath Lucky Road, McMinnville, Tennessee, on February 26, 2005, and invited the public to participate. On the advertisement for the horse review and barn party, Respondent identified himself as the owner of the facility at which the horse review and barn party was to be held. (CX 2.)

13. Numerous individuals attended Respondent's February 26, 2005, horse review and barn party and displayed horses (CX 3-CX 6).

14. Some of the horses at Respondent's February 26, 2005, horse review and barn party were for sale (CX 6; Tr. 54-55, 58-61, 64-66, 103-09, 136-37).

¹⁵*In re Derwood Stewart* (Order Lifting Stay Order as to Derwood Stewart), 63 Agric. Dec. 268 (2004).

15. Respondent participated in the February 26, 2005, horse review and barn party (CX 3 at 3, CX 4 at 2, CX 5 at 2, CX 6; Tr. 73, 84-85, 96, 119, 136-37).

16. On February 26, 2005, Respondent knowingly failed to obey an order of disqualification by managing a horse exhibition (CX 2-CX 6).

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. On February 26, 2005, Respondent knowingly failed to obey an order of disqualification in violation of section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)).

Complainant's Appeal Petition

Complainant raises one issue in Complainant's Appeal Petition. Complainant contends the ALJ erroneously failed to assess Respondent the maximum civil penalty of \$3,300 for Respondent's knowing failure to obey an order of disqualification.¹⁶

The ALJ declined to assess Respondent the maximum civil penalty for Respondent's knowing failure to obey an order of disqualification and, instead, assessed Respondent a \$500 civil penalty.¹⁷ The ALJ stated, prior to the commencement of the September 7, 2006, hearing, she had been prepared to assess Respondent the maximum civil penalty of \$3,300 if Complainant proved Respondent knowingly failed to obey an

¹⁶Complainant's Appeal Pet. at 2-7.

¹⁷Tr. 177; Confirmation of Oral Decision and Order ¶ 10.

order of disqualification.¹⁸ While the ALJ concluded Respondent knowingly failed to obey an order of disqualification, she found the maximum civil penalty too harsh.¹⁹ The ALJ cited four reasons for declining to assess the maximum civil penalty as requested by Complainant: (1) Respondent's knowing failure to obey an order of disqualification "was very small," was not "flagrant," and was not "intended to flaunt the authority of the United States Government"; (2) Respondent's knowing failure to obey an order of disqualification "was not the typical violation which we confront when horses have been intentionally soled"; (3) Respondent's knowing failure to obey an order of disqualification "happened in winter"; and (4) the event at which Respondent knowingly failed to obey an order of disqualification "was not what normally we would think of when we think of horse show, horse sale, horse auction, and horse exhibition[.]"²⁰

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) authorizes the assessment of a civil penalty of not more than \$3,000 for each knowing failure to obey an order of disqualification. In 1997, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture increased the maximum civil penalty that may be assessed under section 6(c)

¹⁸Tr. 175-76.

¹⁹Tr. 176.

²⁰Tr. 176-77.

of the Horse Protection Act (15 U.S.C. § 1825(c)) from \$3,000 to \$3,300.²¹ Complainant seeks an order assessing Respondent the maximum civil penalty of \$3,300.²²

The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (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 recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) provides that the provisions of section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)) respecting assessment of a civil penalty shall apply with respect to civil penalties under section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)). Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) provides, in 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

²¹7 C.F.R. § 3.91(b)(2)(viii) (2005).

²²Tr. 161; Complainant's Appeal Pet.

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.

I agree with the ALJ that Respondent's failure to obey an order of disqualification was not "intended to flaunt the authority of the United States Government." However, I disagree with the ALJ's finding that Respondent's knowing failure to obey an order of disqualification was "very small" and not "flagrant." Instead, I find the nature, extent, and gravity of Respondent's prohibited conduct are great. Respondent knew that he was subject to an order disqualifying him from managing a horse exhibition during the period July 25, 2004, through July 24, 2005. Nonetheless, Respondent advertised that he would hold a horse review and barn party at his farm, Stewart Farms, 674 Gath Lucky Road, McMinnville, Tennessee, on February 26, 2005, and invited the public to participate.²³ On the advertisement for the horse review and barn party, Respondent identified himself as the owner of the facility at which the horse review and barn party was to be held.²⁴ Numerous individuals attended Respondent's February 26, 2005, horse review and barn party and displayed horses.²⁵ Some of the horses at Respondent's horse review and barn

²³CX 2.

²⁴CX 2.

²⁵CX 3-CX 6.

party were for sale.²⁶ Respondent participated in the horse review and barn party.²⁷

Weighing all the circumstances, I find Respondent highly culpable for his knowing failure to obey an order of disqualification.

Moreover, Respondent has a history of a prior violation of the Horse Protection Act.²⁸ Further still, Respondent presented no argument that he is unable to pay a \$3,300 civil penalty or that a \$3,300 civil penalty would affect his ability to continue to do business.

In most Horse Protection Act cases, the maximum civil penalty per violation has been warranted.²⁹ This policy of assessing the maximum civil penalty in most Horse

²⁶CX 6; Tr. 54-55, 58-61, 64-66, 103-09, 136-37.

²⁷CX 3 at 3, CX 4 at 2, CX 5 at 2, CX 6; Tr. 73, 84-85, 96, 119, 136-37.

²⁸*In re Derwood Stewart* (Decision as to Derwood Stewart), 60 Agric. Dec. 570 (2001), *aff'd*, 64 F. App'x 941 (6th Cir. 2003).

²⁹*In re Kim Bennett*, __ Agric. Dec. __, slip op. at 22 (Jan. 13, 2006), *appeal docketed*, No. 06-3350 (6th Cir. Mar. 9, 2006); *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), __ Agric. Dec. __, slip op. at 19 (Dec. 28, 2005), *appeal docketed sub nom. Zahnd v. Secretary of the Dep't of Agric.*, No. 06-11571-E (11th Cir. Mar. 8, 2006); *In re Mike Turner*, __ Agric. Dec. __, slip op. at 21 (Oct. 26, 2005), *appeal docketed*, No. 05-4487 (6th Cir. Nov. 23, 2005); *In re Jackie McConnell*, 64 Agric. Dec. 436, 490 (2005), *aff'd*, 2006 WL 2430314 (6th Cir. Aug. 22, 2006) (unpublished); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 208 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004); *In re Jack Stepp*, 57 Agric. Dec. 297 (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); *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 (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*

(continued...)

Protection Act cases applies to cases in which a respondent has knowingly failed to obey an order of disqualification.³⁰

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 this end 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.³¹

While disqualification is discretionary with the Secretary of Agriculture, the imposition of a disqualification period has been recommended by administrative officials

²⁹(...continued)

(Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892 (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 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298 (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 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Eldon Stamper*, 42 Agric. Dec. 20 (1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1984), *reprinted in* 51 Agric. Dec. 302 (1992).

³⁰*See In re Billy Jacobs, Sr.*, 56 Agric. Dec. 504 (1996) (assessing the respondent the then-maximum civil penalty of \$3,000 for the respondent's knowing failure to obey an order of disqualification), *appeal dismissed*, No. 96-7124 (11th Cir. June 16, 1997).

³¹*See* H.R. Rep. No. 94-1174, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1706.

charged with responsibility for achieving the congressional purpose of the Horse Protection Act and the Judicial Officer has held that disqualification is appropriate in almost every Horse Protection Act case.³²

Assessing a \$500 civil penalty for a knowing failure to obey an order of disqualification would undermine the purpose for the issuance of disqualification orders and render them ineffective. Violators of the Horse Protection Act who are disqualified may choose to run the risk of the assessment of a \$500 civil penalty in order to continue

³²*In re Kim Bennett*, __ Agric. Dec. ____, slip op. at 25 (Jan. 13, 2006), *appeal docketed*, No. 06-3350 (6th Cir. Mar. 9, 2006); *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), __ Agric. Dec. ____, slip op. at 21-22 (Dec. 28, 2005), *appeal docketed sub nom. Zahnd v. Secretary of the Dep't of Agric.*, No. 06-11571-E (11th Cir. Mar. 8, 2006); *In re Mike Turner*, __ Agric. Dec. ____, slip op. at 23 (Oct. 26, 2005), *appeal docketed*, No. 05-4487 (6th Cir. Nov. 23, 2005); *In re Jackie McConnell*, 64 Agric. Dec. 436, 492 (2005), *aff'd*, 2006 WL 2430314 (6th Cir. Aug. 22, 2006) (unpublished); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 209 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 543 U.S. 810 (2004); *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, 591 (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, 982 (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, 891 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 846 (1996); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 321-22 (1995); *In re Danny Burks* (Decision as to Danny Burks), 53 Agric. Dec. 322, 347 (1994); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 318-19 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 318 (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, 352 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

to participate in horse shows, horse exhibitions, horse sales, and horse auctions during the disqualification period. Therefore, in most Horse Protection Act cases, the maximum civil penalty for each knowing failure to obey an order of disqualification is warranted; however, the facts and circumstances of each case must be examined to determine whether an exception to this policy is warranted. An examination of the record before me does not lead me to believe that an exception from the usual practice of assessing the maximum civil penalty for Respondent's knowing failure to obey an order of disqualification is warranted.

Based on the factors that are required to be considered when determining the amount of the civil penalty to be assessed and the recommendation of administrative officials charged with responsibility for achieving the congressional purpose of the Horse Protection Act, I find no basis for an exception to the United States Department of Agriculture's policy of assessing the maximum civil penalty for Respondent's violation of the Horse Protection Act. Therefore, I assess Respondent a \$3,300 civil penalty for his February 26, 2005, knowing failure to obey an order of disqualification.

I have already addressed my reasons for my disagreement with the ALJ's findings that Respondent's knowing failure to obey an order of disqualification was "very small" and not "flagrant." In addition, when determining the amount of the civil penalty, the ALJ took into consideration the season of the year in which Respondent violated the Horse Protection Act. I find the season of the year in which a respondent violates the

Horse Protection Act irrelevant when determining the amount of the civil penalty to be assessed. Further, I find irrelevant the ALJ's finding that the event at which Respondent knowingly failed to obey an order of disqualification "was not what normally we would think of when we think of horse show, horse sale, horse auction, and horse exhibition[.]"³³ The Horse Protection Regulations (9 C.F.R. pt. 11) defines the term *horse exhibition*, as follows:

§ 11.1 Definitions.

....

Horse Exhibition means a public display of any horses, singly or in groups, but not in competition, except events where speed is the prime factor, rodeo events, parades, or trail rides.

9 C.F.R. § 11.1.

The ALJ concluded, based on this definition, the event at Respondent's premises on February 26, 2005, "was indeed a horse exhibition."³⁴ Since the term *horse exhibition* is defined in the Horse Protection Regulations and the February 26, 2005, event at Respondent's premises falls within the definition of the term *horse exhibition*, I find irrelevant the ALJ's finding that the event at which Respondent knowingly failed to obey an order of disqualification "was not what normally we would think of when we think of

³³Tr. 177.

³⁴Tr. 172.

[a] . . . horse exhibition[.]³⁵ Finally, I find no basis for the ALJ to compare Respondent's knowing failure to obey an order of disqualification with "the typical violation which we confront when horses have been intentionally soled."³⁶ Congress provided for the assessment of a distinct civil penalty for the knowing failure to obey an order of disqualification.³⁷

Respondent's Response to Appeal Petition

Respondent asserts counsel for Complainant, Colleen A. Carroll, discussed ex parte with the Judicial Officer an extension of time for filing Complainant's Appeal Petition. Respondent contends: (1) Ms. Carroll's ex parte discussion with the Judicial Officer violated Rule 3.5 of the Rules of the Supreme Court of the State of Tennessee; (2) Complainant's Appeal Petition was not timely filed, as it was error for the Judicial

³⁵Tr. 177.

³⁶Tr. 176.

³⁷Compare section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)), which provides for the assessment of a maximum civil penalty of \$2,000 for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824), with section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)), which provides for the assessment of a maximum civil penalty of \$3,000 for the knowing failure to obey an order of disqualification. (In 1997, 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 section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824) by increasing the maximum civil penalty from \$2,000 to \$2,200 (7 C.F.R. § 3.91(b)(2)(vii) (2005)) and adjusted the civil monetary penalty that may be assessed under section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) for each knowing failure to obey an order of disqualification by increasing the maximum civil penalty from \$3,000 to \$3,300 (7 C.F.R. § 3.91(b)(2)(viii) (2005)).

Officer to grant an extension of time *ex parte*; and (3) the Judicial Officer should recuse himself because he granted Complainant's request for an extension of time *ex parte*.³⁸

The ALJ issued a decision orally at the close of the September 7, 2006, hearing. Pursuant to the Rules of Practice, the parties had 30 days after issuance of the ALJ's oral decision within which to appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.³⁹ Thus, Complainant's Appeal Petition was required to be filed with the Hearing Clerk no later than October 10, 2006.⁴⁰ On October 10, 2006,

³⁸Respondent's Response to Appeal Pet. at 1-2.

³⁹7 C.F.R. § 1.145(a).

⁴⁰Thirty days after September 7, 2006, was Saturday, October 7, 2006. Section 1.147(h) of the Rules of Practice provides that when the time for filing a document or paper expires on a Saturday, the time for filing shall be extended to the next business day, as follows:

§ 1.147 Filing; service; extensions of time; and computation of time.

....

(h) *Computation of time.* Saturdays, Sundays and Federal holidays shall be included in computing the time allowed for the filing of any document or paper: *Provided*, That, when such time expires on a Saturday, Sunday, or Federal holiday, such period shall be extended to include the next following business day.

7 C.F.R. § 1.147(h).

The next business day after Saturday, October 7, 2006, was Tuesday, October 10, 2006. Therefore, Complainant was required to file Complainant's Appeal Petition no later than October 10, 2006.

Complainant, by telephone, requested an extension of time within which to file Complainant's Appeal Petition, which I granted on October 11, 2006.⁴¹

As an initial matter, the Rules of the Supreme Court of the State of Tennessee are not applicable to the instant proceeding;⁴² instead, the Rules of Practice governs the instant proceeding. Section 1.151(a) of the Rules of Practice prohibits only *ex parte* discussions that concern the merits of a proceeding, as follows:

§ 1.151 *Ex parte* communications.

(a) At no stage of the proceeding between its institution and the issuance of the final decision shall the Judge or Judicial Officer discuss *ex parte* the merits of the proceeding with any person who is connected with the proceeding in an advocative or in an investigative capacity, or with any representative of such person: *Provided*, That procedural matters shall not be included within this limitation[.]

7 C.F.R. § 1.151(a). Thus, the Rules of Practice permits *ex parte* discussions as to procedural matters,⁴³ and a request for an extension of time is a procedural matter that falls outside the prohibition on *ex parte* discussions.⁴⁴ Moreover, the Rules of Practice

⁴¹Informal Order Extending Time For Filing Complainant's Appeal Petition.

⁴²The Rules of the Supreme Court of the State of Tennessee govern all matters on appeal to the Supreme Court of the State of Tennessee (Rule 1).

⁴³*In re Moore Marketing International, Inc.*, 47 Agric. Dec. 1472, 1477 (1988) (stating the Rules of Practice permits *ex parte* discussions as to procedural matters).

⁴⁴*United States v. 47 West 644 Route 38*, 190 F.3d 781, 783 (7th Cir. 1999) (stating the term *substantive motion* means those that, if granted, would result in a substantive alteration in the judgment rather than just in a correction of a clerical error or in a purely procedural order such as one granting an extension of time within which to file

only requires the Judicial Officer to provide a party with notice of a request for an extension of time and an opportunity to respond to that request, when time permits, as follows:

§ 1.147 Filing; service; extensions of time; and computation of time.

....

(f) *Extensions of time.* The time for the filing of any document or paper required or authorized under the rules in this part to be filed may be extended by the Judge or the Judicial Officer as provided in § 1.143 if, in the judgment of the Judge or the Judicial Officer, as the case may be, there is good reason for the extension. In all instances in which time permits, notice of the request for extension of the time shall be given to the other party with opportunity to submit views concerning the request.

7 C.F.R. § 1.147(f). With respect to the extension of time at issue in this proceeding, Complainant made his request for an extension of time to file an appeal petition on October 10, 2006, the date the time for filing Complainant's Appeal Petition was to expire. Under the circumstances, I find time did not permit my providing Respondent notice of Complainant's request for an extension of time and an opportunity to submit views concerning Complainant's request. Therefore, I reject Respondent's contention that I erroneously granted Complainant's October 10, 2006, request for an extension of time within which to file Complainant's Appeal Petition, and I reject Respondent's

⁴⁴(...continued)

something), *cert. denied sub nom. Accardi v. United States*, 529 U.S. 1005 (2000); *Britton v. Swift Transportation Co.*, 127 F.3d 616, 618 (7th Cir. 1997) (stating the term *substantive motion* means those that, if granted, would result in a substantive alteration in the judgment rather than just in a correction of a clerical error or in a purely procedural order such as one granting an extension of time within which to file something).

request that I recuse myself based on my issuance of the October 11, 2006, Informal Order Extending Time For Filing Complainant's Appeal Petition.

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

ORDER

Respondent is assessed a \$3,300 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:

Colleen A. Carroll
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, Ms. Carroll 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. 06-0001.

RIGHT TO JUDICIAL REVIEW

Respondent has the right to obtain review of the Order in this Decision and Order 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 Decision and Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture.⁴⁵ The date of the Order in this Decision and Order is February 6, 2007.

Done at Washington, DC

February 6, 2007

William G. Jenson
Judicial Officer

⁴⁵15 U.S.C. § 1825(b)(2), (c).