

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	HPA Docket No. 04-0001
)	
Kim Bennett,)	
)	
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 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.

On June 30, 2005, Complainant filed “Complainant’s Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof.” On August 5, 2005, Respondent filed “Respondent’s Proposed Findings of Fact, Conclusions of Law, Order and Brief in Support Thereof.” On August 12, 2005, Complainant filed “Complainant’s Reply Brief.”

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.

Based upon a careful consideration of the record, I disagree with the ALJ’s conclusion that Complainant failed to prove by a preponderance of the evidence that Respondent violated the Horse Protection Act. Therefore, I do not adopt the ALJ’s Initial Decision as the final Decision and Order.

Complainant’s exhibits are designated by “CX.” Respondent’s exhibits are designated by “RX.” Transcript references are designated by “Tr.”

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

15 U.S.C.:

TITLE 15—COMMERCE AND TRADE

....

CHAPTER 44—PROTECTION OF HORSES

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

-
- (3) The term “sore” when used to describe a horse means that—
 - (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
 - (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,
 - (C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or

(D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse,

and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

§ 1822. Congressional statement of findings

The Congress finds and declares that—

- (1) the soring of horses is cruel and inhumane;
- (2) horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore;
- (3) the movement, showing, exhibition, or sale of sore horses in intrastate commerce adversely affects and burdens interstate and foreign commerce;
- (4) all horses which are subject to regulation under this chapter are either in interstate or foreign commerce or substantially affect such commerce; and
- (5) regulation under this chapter by the Secretary is appropriate to prevent and eliminate burdens upon commerce and to effectively regulate commerce.

§ 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 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.

§ 1825. Violations and penalties

....

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than \$2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary 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.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record

upon which such violation was found and such penalty assessed, as provided in section 2112 of title 28. The findings of the Secretary shall be set aside if unsupported by substantial evidence.

....

(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.

§ 1828. Rules and regulations

The Secretary is authorized to issue such rules and regulations as he deems necessary to carry out the provisions of this chapter.

15 U.S.C. §§ 1821(3), 1822, 1823(e), 1824(9), 1825(b)(1)-(2), (c), 1828.

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

**CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE,
DEPARTMENT OF AGRICULTURE**

SUBCHAPTER A—ANIMAL WELFARE

....

PART 11—HORSE PROTECTION REGULATIONS

....

§ 11.4 Inspection and detention of horses.

For the purpose of effective enforcement of the Act:

(a) Each horse owner, exhibitor, trainer, or other person having custody of, or responsibility for, any horse at any horse show, horse exhibition, or horse sale or auction, shall allow any APHIS representative to reasonably inspect such horse at all reasonable times and places the APHIS representative may designate. Such inspections may be required of any horse which is stabled, loaded on a trailer, being prepared for show, exhibition, or sale or auction, being exercised or otherwise on the grounds of, or present at, any horse show, horse exhibition, or horse sale or auction, whether or not such horse has or has not been shown, exhibited, or sold or auctioned, or has or has not been entered for the purpose of being shown or exhibited or offered for sale or auction at any such horse show, horse exhibition, or horse sale or auction. APHIS representatives will not generally or routinely delay or interrupt actual individual classes or performances at horse shows, horse exhibitions, or horse sales or auctions for the purpose of examining horses, but they may do so in extraordinary situations, such as but not limited to, lack of proper facilities for inspection, refusal of management to cooperate with Department inspection efforts, reason to believe that failure to immediately perform inspection may result in the loss, removal, or masking of any evidence of a violation of the Act or the regulations, or a request by management that such inspections be performed by an APHIS representative.

9 C.F.R. § 11.4(a).

DECISION

Decision Summary

I conclude Respondent refused to permit completion of an inspection of a horse by a representative of the Secretary of Agriculture 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)). I assess Respondent a \$2,200 civil penalty and disqualify Respondent for a period of 1 year from showing, exhibiting, or entering any horse, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.

Discussion

Complainant proved by a preponderance of the evidence¹ that on August 26, 2002,

¹Complainant, 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), *appeal docketed sub nom. Winston T. Groover, Jr. v. United States Dep't of Agric.*, No. 04-4519 (6th Cir. Dec. 13, 2004); *In re Robert B. McCloy*, 61 Agric. Dec. 173, 195 n.6 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (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*

(continued...)

Respondent refused to permit Dr. Michael Guedron, a United States Department of Agriculture veterinary medical officer, to complete an inspection of The Duck at the 64th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee (CX 3, CX 4A, CX 4B; RX 31; Tr. 102-05, 184-87, 248-53, 284, 290-91, 300-01, 313, 382, 453-60, 463-65). Complainant also proved by a preponderance of the evidence that, at all times relevant to this proceeding, Dr. Guedron displayed appropriate credentials indicating that he was a representative of the Secretary of Agriculture authorized to inspect horses at the 64th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee (CX 4A, CX 4B; Tr. 247).

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)) authorizes the Secretary of Agriculture's representatives, upon presentation of appropriate credentials, to inspect any horse at any horse show, horse exhibition, horse sale, or horse auction. Respondent's belief that Dr. Guedron was not conducting the inspection of The Duck in a reasonable manner is not relevant to 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

¹(...continued)

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* (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).

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.

Findings of Fact

1. Respondent is an individual whose mailing address is 636 Mt. Lebanon Road, Alvaton, Kentucky 42122 (Answer ¶ I.1).
2. Respondent earned a degree in equine science from Middle Tennessee State University in 1976 and has been a trainer and breeder of Tennessee Walking Horses since 1980. Respondent has a horse trainer's license with the Walkers Training Association and an AAA judge's license with the National Horse Show Commission. Both licenses are in good standing. Respondent has judged horse shows throughout the United States and twice judged the Tennessee Walking Horse National Celebration Show. Respondent has served on the National Board of the Tennessee Walkers Breeders and Exhibitors Association for approximately 18 years. Respondent served on the License Enforcement Committee of the Walking Horse Owners Association until its merger with the Trainers Association and Breeders Association to form the National Horse Show Commission. Respondent is a voting member of the National Horse Show Commission and has represented the Tennessee Walking Horse Owners Association on the National Horse Show Commission for approximately 15 years. (Tr. 392-95.)

3. Respondent and his wife, Leigh Bennett, who also has a horse trainer's license and an AAA judge's license, keep more than 50 horses on their farm in Alvaton, Kentucky (Tr. 315-16).

4. In February 2002, Respondent and Leigh Bennett began training The Duck after he had been purchased, based on their advice, for \$100,000 by Elizabeth and Dwight Ottman of Owensboro, Kentucky (Tr. 317, 400-02).

5. The Duck is a stallion and a past world grand champion. The Duck was used exclusively for breeding at the time of his purchase by the Ottmans. In 2002, The Duck was bred with 32 mares for which a \$900 stud fee was charged for each breeding. Respondent undertook to restore The Duck's form to win another championship at the 64th Annual Tennessee Walking Horse National Celebration Show to increase The Duck's value. The Duck is an unusually nervous and aggressive horse that is sensitive to his environment, can get excited fairly easily, and is not very fond of strangers. (Tr. 14-15, 295, 317, 319, 402-04.)

6. On August 26, 2002, Respondent entered The Duck as entry number 784 in class number 104 in the 64th Annual Tennessee Walking Horse National Celebration Show for the purpose of showing or exhibiting The Duck (CX 1, CX 2, CX 4A, CX 4B; RX 31).

7. On August 26, 2002, Respondent knew Dr. Guedron was a United States Department of Agriculture veterinary medical officer authorized by the Secretary of Agriculture to inspect horses for compliance with the Horse Protection Act. At all times

relevant to this proceeding, Dr. Guedron displayed appropriate credentials indicating that he was a representative of the Secretary of Agriculture authorized to inspect horses at the 64th Annual Tennessee Walking Horse National Celebration Show in Shelbyville, Tennessee. (CX 4A, CX 4B; RX 31; Tr. 247, 457.)

8. On August 26, 2002, at approximately 11:00 p.m., Respondent led The Duck into the inspection area of the Calsonic Arena in Shelbyville, Tennessee, where the 64th Annual Tennessee Walking Horse National Celebration Show was being held, and presented The Duck for pre-show inspection (CX 3, CX 4A; Tr. 408).

9. As a stallion recently used for breeding, The Duck became very agitated and easily aroused when near other horses. Because of The Duck's unsteady temperament and the possibility that The Duck might become excited and difficult to handle and mount, Respondent had waited until the inspection area was clear of other horses that might distract The Duck before leading him to the inspection area. (Tr. 321-22, 405-08.)

10. On August 26, 2002, at approximately 11:00 p.m., Mark Thomas, a Designated Qualified Person² employed by the National Horse Show Commission, conducted a pre-show inspection of The Duck (Tr. 9-10, 408-09).

11. Mr. Thomas has been a licensed Designated Qualified Person for 14 years and has inspected horses at hundreds of horse shows (Tr. 7, 13).

12. Mr. Thomas conducted a three-part inspection of The Duck, as he did other horses, consisting of observations of The Duck's (1) general appearance, (2) locomotion, and (3) reaction to palpation. Mr. Thomas gave The Duck the best score in each category. (Tr. 16-18.)

13. Mr. Thomas approved The Duck to be shown and exhibited, and Respondent, who was to be the horse's rider, then led The Duck to the warm-up area (CX 1, CX 2; Tr. 27, 410).

14. Dr. Michael Guedron and Dr. Lynn P. Bourgeois, United States Department of Agriculture veterinary medical officers assigned to the 64th Annual Tennessee Walking Horse National Celebration Show, were present in the inspection area on the evening of August 26, 2002. Dr. Bourgeois was the show veterinarian, the Animal and

²A Designated Qualified Person is defined in 9 C.F.R. § 11.1 as a person meeting the requirements specified in 9 C.F.R. § 11.7. Designated Qualified Persons are licensed by horse industry organizations or associations having a Designated Qualified Person program certified by the United States Department of Agriculture. Designated Qualified Persons may be appointed and delegated authority by the management of any horse show, horse exhibition, horse sale, or horse auction under 15 U.S.C. § 1823 to detect or diagnose horses which are sore or to otherwise inspect horses and records pertaining to horses for the purpose of enforcing the Horse Protection Act.

Plant Health Inspection Service designation for the veterinarian in charge, whose duties included inspecting horses, managing both Dr. Guedron and a team of Animal and Plant Health Inspection Service inspectors, and monitoring the Designated Qualified Persons and their performance. (Tr. 130-31, 134-36, 187, 212-13.)

15. As Respondent led The Duck into the warm-up area on the evening of August 26, 2002, he was followed by Dr. Guedron who stopped Respondent and instructed him to return The Duck to the inspection area for another inspection. Dr. Guedron did not tell Respondent why he wanted to re-inspect The Duck and did not provide a reason when asked. Respondent nonetheless agreed to the re-inspection and permitted Dr. Guedron to conduct the inspection until Respondent observed Dr. Guedron palpate The Duck's left front pastern in a way that Respondent believed to be abusive and calculated to elicit a reaction from a horse that was not sore. At that point, Respondent led The Duck away from Dr. Guedron. Dr. Guedron asked Respondent if he was refusing inspection. Respondent replied: "No, sir. I'm just asking that you inspect him properly." (Tr. 416.) Dr. Bourgeois, the show veterinarian, asked Respondent whether or not he would permit Dr. Guedron to complete his inspection and Respondent replied: "Not Dr. Guedron." (Tr. 160.) Respondent requested that Dr. Bourgeois inspect the horse instead of Dr. Guedron because Respondent believed Dr. Guedron was using the points of his thumbs rather than the balls of his thumbs to palpate The Duck's foot. Dr. Bourgeois denied Respondent's request. (CX 4A; Tr. 137, 160, 162, 199, 220-22, 328-35, 411-20.)

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.
2. On August 26, 2002, 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)).

Complainant's Appeal Petition

Complainant raises five issues in “Complainant’s Appeal of the ALJ’s Decision and Order, and Brief in Support Thereof” [hereinafter Complainant’s Appeal Petition]. First, Complainant contends the ALJ erroneously concluded that, under the Horse Protection Act, an exhibitor may refuse to permit completion of the United States Department of Agriculture’s inspection of a horse at a horse show if the exhibitor believes the inspection is not being conducted in a reasonable manner (Complainant’s Appeal Pet. at 2-5).

The ALJ found Respondent’s refusal to permit Dr. Guedron to continue inspection of The Duck did not constitute a refusal of United States Department of Agriculture inspection because Respondent believed Dr. Guedron was not conducting the inspection in a reasonable manner and Respondent sought inspection by another United States Department of Agriculture inspector, as follows:

Kim Bennett allowed Dr. Guedron, an APHIS representative, to start an inspection of the horse Mr. Bennett was about to mount and ride into the show ring, but refused to allow Dr. Guedron to continue the inspection when Mr. Bennett observed that it was not being reasonably conducted. He did not refuse the APHIS inspection per se, but he sought to assure that it would be reasonably conducted by having it performed by another APHIS inspector.

Initial Decision at 8.

I disagree with the ALJ's conclusion that Respondent's refusal to permit Dr. Guedron to continue inspection of The Duck is not a violation of the Horse Protection Act. 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 the Secretary of Agriculture, or *any* representative of the Secretary of Agriculture, duly designated by the Secretary of Agriculture, may, upon presenting appropriate credentials, inspect any horse at any horse show. The record establishes that on August 26, 2002, Dr. Guedron was a representative of the Secretary of Agriculture, duly designated to inspect horses at the 64th Annual Tennessee Walking Horse National Celebration Show. Thus, Respondent's refusal to permit Dr. Guedron to complete his inspection of The Duck constitutes a violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)). Respondent's belief that Dr. Guedron was not conducting the inspection in a reasonable manner and Respondent's request for inspection by another United States Department of Agriculture official are not relevant to 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 or as a basis to require inspection by another representative of the Secretary of Agriculture.

Second, Complainant contends the ALJ erroneously found Complainant failed to prove that Dr. Guedron conducted his inspection of The Duck in a reasonable manner (Complainant's Appeal Pet. at 6-9).

The ALJ found "[t]he preponderance of the evidence in this case fails to prove that Dr. Guedron conducted the horse's inspection in a reasonable manner." (Initial Decision at 10.) I make no finding regarding the manner in which Dr. Guedron inspected The Duck because I find the manner in which Dr. Guedron inspected The Duck is not relevant to the issue of Respondent's violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)).³ Thus, I find the issue of the manner in which Dr. Guedron inspected The Duck, moot.

³Complainant did not appeal the ALJ's conclusion that Complainant failed to prove Respondent violated section 11.4(a) of the Horse Protection Regulations (9 C.F.R. § 11.4(a)); therefore, I reach no conclusion regarding the relevance of the manner in which Dr. Guedron inspected The Duck to Respondent's alleged violation of section 11.4(a) of the Horse Protection Regulations (9 C.F.R. § 11.4(a)).

Third, Complainant contends the ALJ “effectively requires that there be evidence proving a USDA veterinarian’s inspection of a horse was reasonable before an inspection could be initiated and completed under the HPA” (Complainant’s Appeal Pet. at 9).

I disagree with Complainant’s contention that the ALJ effectively requires proof that a United States Department of Agriculture veterinary medical officer’s inspection of a horse is reasonable before an inspection may be initiated and completed. I cannot locate any part of the Initial Decision in which the ALJ even remotely suggests that, prior to initiating and completing an inspection of a horse, there must be evidence proving that the United States Department of Agriculture veterinary medical officer’s inspection is reasonable. Requiring proof that an inspection is reasonable prior to initiating the inspection would be an absurdity that, based upon my examination of the Initial Decision, I find the ALJ did not intend to suggest.

Fourth, Complainant contends the ALJ erroneously failed to address Respondent’s repeated refusals to permit Dr. Guedron to inspect The Duck (Complainant’s Appeal Pet. at 11-12).

The record establishes, after Respondent’s initial refusal to permit Dr. Guedron to complete inspection of The Duck, Respondent was given over 1 hour to permit Dr. Guedron to complete his inspection of The Duck and, on multiple occasions, Respondent refused to permit Dr. Guedron to complete his inspection (CX 4A, CX 4B; RX 31; Tr. 381-82, 455-63). The ALJ adequately addresses Respondent’s repeated refusals to permit Dr. Guedron to complete his inspection of The Duck (Initial Decision

at 6). Therefore, I reject Complainant's contention that the ALJ erroneously failed to address Respondent's repeated refusals to permit Dr. Guedron to complete his inspection of The Duck.

Fifth, Complainant contends the ALJ erroneously found Dr. Guedron's inspection unreasonable because The Duck was the last horse in the inspection area when the event in which The Duck was to participate was about to begin and because the United States Department of Agriculture typically conducts inspections at the completion of the event (Complainant's Appeal Pet. at 12-14).

I make no finding regarding the manner in which Dr. Guedron inspected The Duck because I find the manner in which Dr. Guedron inspected The Duck is not relevant to the issue of Respondent's violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)). Thus, I find the issue of the ALJ's basis for finding Dr. Guedron's inspection of The Duck unreasonable, moot.

Sanction

Section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) authorizes the assessment of a civil penalty of not more than \$2,000 for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824). However, 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 \$2,200.⁴ The Horse Protection Act also authorizes the disqualification of any person assessed a civil penalty, from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The Horse Protection Act provides minimum periods of disqualification of not less than 1 year for a first violation and not less than 5 years for any subsequent violation.⁵

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(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 degree of culpability, any history of prior offenses, ability to

⁴7 C.F.R. § 3.91(b)(2)(vii).

⁵15 U.S.C. § 1825(c).

pay, effect on ability to continue to do business, and such other matters as justice may require.

Complainant recommends that I assess Respondent a \$2,200 civil penalty (Complainant's Proposed Findings of Fact, Conclusions of Law, Order, and Brief in Support Thereof at 7-10). The extent and gravity of Respondent's prohibited conduct are great. Respondent's refusal to permit a United States Department of Agriculture veterinary medical officer to complete an inspection of The Duck thwarts the Secretary of Agriculture's ability to enforce the Horse Protection Act. Weighing all the circumstances, I find Respondent culpable for the violation of section 5(9) of the Horse Protection Act (15 U.S.C. § 1824(9)).

Respondent presented no argument that he is unable to pay a \$2,200 civil penalty or that a \$2,200 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.⁶ Based on the factors that are required to be considered when

⁶*In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. ____, slip op. at 19 (Dec. 28, 2005); *In re Mike Turner*, 64 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. ____, slip op. at 60 (June 23, 2005), *appeal docketed*, No. 05-3919 (6th Cir. July 20, 2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 208 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (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*

(continued...)

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 \$2,200 civil penalty.

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) provides that any person assessed a civil penalty under section 6(b) of the Horse Protection Act (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 1 year for the first violation of the Horse Protection Act and for a period of not less than 5 years for any subsequent violation of the Horse Protection Act.

⁶(...continued)

Gary R. Edwards (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).

The purpose of the Horse Protection Act is to prevent the cruel practice of soring horses. Respondent's refusal to permit a United States Department of Agriculture veterinary medical officer to complete an inspection of The Duck thwarts the Secretary of Agriculture's ability to prevent the 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.⁷

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) specifically provides that disqualification is in addition to any civil penalty assessed under section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)). While section 6(b)(1) of the Horse Protection Act (15 U.S.C. § 1825(b)(1)) requires that the Secretary of Agriculture consider certain specified factors when 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 imposition of a disqualification period, in addition to the assessment of a civil penalty, has been recommended by administrative officials charged with responsibility for

⁷See H.R. Rep. No. 94-1174, at 11 (1976), *reprinted in* 1976 U.S.C.C.A.N. 1696, 1706.

achieving the congressional purpose of the Horse Protection Act and the Judicial Officer has 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.⁸

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, it would seem necessary to impose at least the minimum disqualification

⁸*In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. ___, slip op. at 21-22 (Dec. 28, 2005); *In re Mike Turner*, 64 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. ___, slip op. at 62 (June 23, 2005), *appeal docketed*, No. 05-3919 (6th Cir. July 20, 2005); *In re Robert B. McCloy, Jr.*, 61 Agric. Dec. 173, 209 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38 (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).

provisions of the 1976 amendments on any person who violates section 5 of the Horse Protection Act (15 U.S.C. § 1824).

Circumstances in a particular case might justify a departure from this policy. Since it is clear under the 1976 amendments that intent and knowledge are not elements of a violation, there are few circumstances warranting an exception from this policy, but 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 imposing the minimum disqualification period for Respondent's violation of the Horse Protection Act, in addition to the assessment of a civil penalty, is warranted.

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 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.⁹ The date of the Order in this Decision and Order is January 13, 2006.

Done at Washington, DC

January 13, 2006

William G. Jenson
Judicial Officer

⁹15 U.S.C. § 1825(b)(2), (c).