

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

HPA Docket No. 01-0023

In re:

MIKE TURNER and
SUSIE HARMON

Respondents

DECISION AND ORDER

Preliminary Statement

This is a disciplinary proceeding under the Horse Protection Act of 1970, as amended, (15 U.S.C. § 1821, *et seq.*) (the “Act”). This action was instituted by a complaint filed by the Administrator of the Animal and Plant Inspection Service, United States Department of Agriculture (“APHIS”) charging Respondent Mike Turner, the trainer, with entering a horse for the purpose of showing or exhibiting while it was sore at the May 26, 2000 Annual Spring Fun Show at Shelbyville, Tennessee. The complaint also charges Respondent Susie Harmon with entering and allowing the horse to be entered at the same show for the purpose of showing or exhibiting it while it was sore.

The Respondents filed answers denying the material allegations of the complaint. An oral hearing was held on March 29, 2005 in Shelbyville, Tennessee. The Complainant was represented by Robert A. Ertman, Esq., Office of General Counsel, United States

Department of Agriculture, Washington, DC and the Respondents were represented by Brenda S. Bramlett, Esq., Bramlett & White, Shelbyville, Tennessee.

Upon consideration of the evidence of record and the proposed findings, conclusions and the brief filed by the Complainant,¹ I conclude that the Complainant failed to prove that either of the Respondents violated the Act and that the Complaint should therefore be dismissed.

Any proposed finding or conclusion not included as part of those that follow are rejected as not in accordance with the credible, relevant, and material evidence of record.

Findings of Fact

1. Respondent Mike Turner is an individual whose mailing address is 2225 Liberty Valley Road, Lewisburg, Tennessee 37091.

2. Respondent Susie Harmon, whose full name is Molly Sue Harmon (TR p. 60),² is an individual whose mailing address is 42 Riverside, Fort Thompson, South Dakota 57339.

3. At all times relevant to this proceeding, Mike Turner was the trainer of the horse known as “The Ultra Doc”. (TR p. 54). Mike Turner determined that “The Ultra Doc” would be entered in the Annual Spring Fun Show held at Shelbyville, Tennessee on May 26, 2000, and entered the horse by completing the entry form, paying the entry fee and transporting the horse to the show grounds. Id.

¹ The transcript was filed with the Hearing Clerk on April 21, 2005. As announced at the hearing, briefs were to be submitted within 30 days of the filing of the transcript. (TR p. 101-103) The Complainant’s proposed findings, conclusions and brief were filed on May 23, 2005. On May 26, 2005, the Respondents’ counsel sought a 30 day extension, indicating that she had just received her copy of the transcript on May 25, 2005. No explanation was given as to whether she had inquired as to whether the transcript had been filed prior to that time; however, given the separate extensions granted in filing answers for each of the Respondents, the continuance of the hearing set for September 28, 2004, her tardiness in appearing for the hearing (TR p. 4-5), further delay in issuing a decision appeared unwarranted.

² References to the Transcript will be abbreviated as TR.

4. At all times relevant to these proceedings, Susie Harmon was the owner of “The Ultra Doc” and acquiesced in the decision to enter the horse in the May 26, 2000 show. (Answer of Susie Harmon, ¶ID; TR p. 61, 69).

5. Respondent Mike Turner presented “The Ultra Doc” for pre-show inspection in Class No. 21 at the 30th Annual Spring Fun Show at Shelbyville, Tennessee on May 26, 2000 where the horse was inspected first by Charles Thomas, a “Designated Qualified Person” (“DQP”) and then by two USDA Veterinary Medical Officers (“VMOs”) John Michael Guedron, DVM and Clement A. Dussault, VMD. (TR p. 15-21, 22-24, 50-52, 94-96; Government Ex. 12, 14).

6. The DQP, Charles Thomas, first visually inspected, and then performed a physical examination of the horse by palpation, noting the horse’s reaction to the procedure. Based upon the reactions to his palpation of the horse,³ he excused the horse from competition, finding no problem with locomotion (evidenced by a rating of 1), but gave “The Ultra Doc” ratings of 2 (defined as “suspect, but meeting minimum standards”) in the categories of physical examination and appearance. (Government Exhibit 6; TR p. 94-96⁴). Using his ratings, the total rating of 5 precluded competition for the day, but failed to rise to the level of an Act violation. (Government Ex. 5).⁵

7. John Michael Guedron, DVM and Clement A. Dussault, VMD, veterinarians employed by the USDA were assigned to the show for evaluating the performance of the DQP and examining horses to enforce the Act. Both veterinarians separately inspected

³ The video tapes reflect that after conducting his initial inspection, Mr. Thomas examined the horse a second time.

⁴ The ratings are found in the National Horse Show Commission Official Rule Book. (RX 2 at page 118).

⁵ The ratings and the DQP Ticket and NHSC DQP Examination Form were discussed in some detail in Lonnie Messick’s testimony. (TR. p. 73-78). Mr. Messick is the Executive Vice President of the National Show Horse Commission and has responsibility for the daily operation of the organization as well as the assignment and training of DQPs.

“The Ultra Doc” after the inspection performed by the DQP and checked the box indicating that the horse was sore as defined by the Act.⁶ As the “secondary” veterinarian, Dr. Dussault did not complete the government form designated as APHIS Form 7077 (Government Ex. 2), but merely added his signature to the form after it had been completed by others⁷ and that evening at his motel executed an affidavit prepared by Michael Nottingham (Government Ex. 10)⁸. Although Dr. Dussault acknowledged signing the APHIS Form 7077 and his affidavit, at the time of the hearing, in response to repeated questions, he stated he had no present recollection of the events on the date in question.⁹

8. The APHIS Form 7077 (Government Ex. 2) submitted in connection with this case has significant omissions and errors which are inconsistent with actual facts, including characterizing the horse as a gelding rather than a stallion and misstating the owner of the horse as being John Harmon rather than Susie Harmon, the individual against whom the complaint was brought.

⁶ Apparently this portion of the form was completed by Dr. Guedron as Dr. Dussault testified that he only signed his name to the form.(TR p.40).

⁷ Dr. Dussault’s testimony at the hearing was unequivocal on this point:

Q What portion of this form did you actually complete?

A. I did not complete, except for my signature....(TR. p.40)

⁸ Dr. Dussault’s affidavit, while more informative than his testimony at the hearing is problematic in that it characterizes the reaction to his palpation as being “mild” on the left foot. This is consistent with the examination of Charles Thomas, the DQP who while noting the reaction did not feel that it rose to the level of a Horse Protection Act violation.

⁹ Dr. Dussault denied having any present recollection of his inspection of the horse in question on May 26, 2000 (TR. p.38), indicated that he did not complete any portion of the APHIS Form 7077 except to sign it (TR. p.40), did not remember when the form was completed (TR. p.41) and limited his testimony to what his affidavit stated as he didn’t have any present day recollection of the show even after reviewing the tapes which were admitted as evidence. (TR. p. 44) He went on to state that it was his practice to destroy any notes that he had made once his affidavit was prepared. (TR. p. 45-47)

Conclusion

Complainant failed to prove that “the Ultra Doc” was sore when entered at the May 26, 2000 Spring Fun Show in Shelbyville, Tennessee.

The evidence in this case against the Respondents is based upon two video tapes of the inspection of the horse at the show, the affidavit of one of the two USDA veterinarians attending the show and the APHIS violation form which was signed by, but not prepared by the veterinarian.¹⁰ The veterinarian testified that he has no present recollection of the events that took place on the day of the show. The threshold question is thus whether this evidence supports a prima facie case under the Act and the Administrative Procedures Act, 5 U.S.C. §556(d).

The APHIS violation form as completed lacks probative force. The veterinarian who testified at the hearing indicated that he did not complete the form, but merely added his signature to what had been prepared by others. Given the errors which appear in the preparation of the form, it is evidence more of sloppiness and inaccuracy than it is of any violation. Compounding the problems with the APHIS Form 7077 is the affidavit of Dr. Dussault which recounts only a “mild” response to palpation on the left side. 15 U.S.C. § 1825(d)(5) requires the manifestation of “abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs”¹¹ to trigger a presumption of soreness.

¹⁰ In addition to Dr. Dussault’s testimony, Government Exhibits 2, 5,6, 7, 10, 12 and 14 were admitted into evidence. Significantly, there was no testimony from the primary veterinarian who had left USDA employment and is now private veterinary practice or from the investigator who prepared the affidavits and presumably assembled the other exhibits which were not admitted.

¹¹ In his testimony, Dr. Dussault noted that the responses were mild on the left side and noted that his examination was the fourth time that the horse had been subjected to being palpated. (TR p.23)

Charles Thomas, the DQP¹² who examined the horse not once, but twice, testified that he observed no difficulty with the horse's locomotion, an observation confirmed by the viewing of the two video tapes that were shown at the hearing, but noted reaction upon palpation, with the left side being "lighter" than on the right. (TR p. 94-96) The DQP's opinion that the horse was "suspect, but met minimum standards" excused the horse from showing, but did not result in the DQP's receiving a letter of warning for any deficiency in the performance of his duties despite the presence of USDA officials at the show whose duties included evaluating his performance¹³. The DQP's testimony was forthright and credible, his notes were more detailed than those of the USDA veterinarians and his findings were consistent with all but the conclusion found in Dr. Dussault's affidavit.

While Dr. Dussault's affidavit and the APHIS Form 7077 might establish a prima facie case of a violation, it is not conclusive or binding upon the trier of fact as to the ultimate issue of whether the horse was "sore" and in violation of the Act. *Elliott v. Administrator*, 990 F.2d 140, 145-146 (4th Cir. 1993). While probative, such evidence is well recognized to be subjective and must be considered along with all of the other relevant and material evidence presented at the hearing. *Fleming v. USDA*, 713 F.2d 179, 186 (6th Cir. 1983) Given the serious nature of civil proceedings under the Horse Protection Act, due process precludes the presumption of section 1825(d)(5) from shifting the burden of persuasion to the Respondents. *Landrum v. Block*, 40 Agric. Dec.

¹² Mr. Thomas testified that he had been a DQP since 1983 and has been around horses all his life and has inspected over 100,000 horses. Significantly, in all of his tenure as a DQP, he has never received a letter of warning from USDA concerning his work as a DQP. (TR p.90-91)

¹³ Dr. Dussault testified that his duties at the show were to monitor the performance of the DQPs as well as to examine horses. (TR. p.12)

922 (1981) The burden of persuasion that the horse was artificially sored remains with the Secretary throughout the administrative process. Id.

In order to accept the opinion of Dr. Dussault that the horse was “sore” within the meaning of the Act as is recited in his affidavit, I must totally discount the opinion and findings of a highly qualified and experienced DQP with a lengthy tenure, whose memory of his examination was far superior to that of the VMO testifying at the hearing, who has undergone the same USDA sponsored training relating to the Act and who was not called to task for failing to perform his duties satisfactorily at this particular show or any other show as of the date of the hearing in this case.

Complainant seeks to bolster the affidavit and violation form by introducing testimony of their usual examination and documentation practices. In this case, given lack of recollection of facts on the part of the USDA veterinarian, such general testimony about “usual procedures” is not a sufficient basis for making a determination as to what occurred in this case. As was suggested in *In re William Jackson, et al.*, 57 Agric. Dec. 1145 (1992), it would be fundamentally unfair to allow the complainant to create a case from the general testimony of one of the very individuals whose entries (or absence of them) cast doubt upon the reliability of the documents being used to seek sanctions in this case.

As I conclude that the complainant has failed to offer sufficient proof to support a violation of the Act, it is unnecessary to decide whether the Respondent Susie Harmon’s oral and written instructions to her trainer together with the other precautionary actions taken by her, including the periodic unannounced visits by a number of different

veterinarians would insulate her from liability consistent with the holding of *Baird v. USDA*, 39 F. 3d 131 (6th Cir. 1994).

For the above reasons, the following Order is entered.

Order

The Complaint is dismissed as to all respondents with prejudice.

Done at Washington, D.C.

June 2, 2005

PETER M. DAVENPORT

Administrative Law Judge

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