UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

HPA Docket No. 06-0004

In re: PERCY LACY

Respondent

DECISION AND ORDER

Preliminary Statement

On January 18, 2006, Kevin Shea, the Administrator of the Animal and Plant Inspection Service, United States Department of Agriculture, ("APHIS") initiated this disciplinary proceeding against the Respondent by filing a complaint alleging violations of the Horse Protection Act of 1970, as amended, (15 U.S.C. § 1821, *et seq.*) (the "Act"). On February 14, 2006, counsel for Percy Lacy (hereinafter "Lacy") filed an Entry of Appearance and Answer denying generally the material allegations of the complaint, raising certain affirmative defenses, and requesting that an oral hearing be scheduled. A telephonic pre-hearing conference was held on February 17, 2006 at which time dates were established for the exchange of witness and exhibit lists and the matter was initially set to be heard in Bowling Green, Kentucky on July 18, 2006. Due to a scheduling conflict with Respondent's counsel, the initial hearing date was continued and the matter was rescheduled for August 22, 2006.

At the oral hearing held on August 22, 2006 in Bowling Green Kentucky, the complainant was represented by Robert A. Ertman, Esquire, Office of General Counsel,

United States Department of Agriculture, Washington, DC[1] and the Respondent was represented by David F. Broderick, Esquire of Bowling Green, Kentucky. Following the hearing, proposed findings of fact, conclusions of law and briefs in support of their respective positions were submitted by both parties.

Discussion

The complaint alleges that on or about April 25, 2002, the Respondent violated §5(2)(B) of the Act (15 U.S.C. § 1824(2)(B)), by entering "Mark of Buck" as entry number 131 in class 77 at the 64th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while the horse was sore, for the purpose of showing or exhibiting the horse, and that on or about the same date, also violated §5(2)(D) of the Act (15 U.S.C. § 1824(2)(D)) by allowing "Mark of Buck" to be entered as entry number 131 in class 77 of the 64th Annual Tennessee Walking Horse National Celebration in Shelbyville Tennessee, while the horse was sore, for the purpose of showing or exhibiting the horse.[2]

In addition to denying generally the allegations of the Complaint, the Respondent raised a number of affirmative defenses, including *res judicata,* collateral estoppel, any applicable statutes of limitation, waiver, and laches. Laches, a defense based upon undue delay in asserting a legal right or privilege, has long been held to be inapplicable to actions of the government. *United States v. Kirkpatrick*, 22 U.S. (9 Wheat) 720 (1824); See also, *Gaussen v. United States,* 97 U.S. 584, 590 (1878); G*erman Bank v. United States,* 148 U.S. 573, 579 (1893); *United States v. Verdier,* 164 U.S. 213,

[1] The Complainant was initially represented by Brian Hill, Esquire, Office of General Counsel, United States Department of Agriculture, Washington, DC who participated as counsel of record up until the time of the oral hearing.
[2] Paragraph II, 1 & 2 of the Complaint. The 64th Annual Tennessee Walking Horse National Celebration was actually held from August 21 through August 31, 2002. CX 1.

219 (1896); *United States v. Mack*, 295 U.S. 480, 489 (1935). It is also well established that the United States is not bound by state statutes of limitation. *United States v. Summerlin*, 310 U.S. 414 (1940); *United States v. Merrick Sponsor Corp.*, 412 F.2d 1076 (2d Cir. 1970). Similarly, counsel's attempt to invoke the federal statute of limitations is without merit as the Complaint in this action was brought within the five years set forth in 28 U.S.C. § 2462, limiting the enforcement of civil fines, penalty, or forfeiture, pecuniary or otherwise.

Although previous adjudicatory proceedings and/or determinations were alluded to in the Respondent's Answer, no evidence of such proceedings was introduced by the Respondent. The general rule is that the federal government may not be equitably estopped from enforcing public laws, even though private parties may suffer hardship as a result in particular cases. *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990); *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984); *INS v. Miranda*, 459 U.S. 14 (1982); *Schweiker v. Hansen*, 450 U.S. 785 (1981); *Federal Crop Insurance Corporation v. Merrill*, 332 U.S. 380 (1947). Even were all the requisite threshold elements present necessary to trigger the defenses, which they are not, a detailed discussion of the doctrines of *res judicata*, collateral estoppel and waiver is not necessary as the issue of whether disciplinary proceedings instituted by entities other than the Secretary bar a subsequent enforcement action by the Department for the same event has been previously considered and answered adversely to the Respondent by both the Judicial Officer and the Court of Appeals for the Sixth Circuit in *In re Jackie McConnell, et al.*, 64 Agric. Dec. 436 (2005), *petition for review denied sub nom. McConnell v. U.S.*

Department of Agriculture, WL 2430314 (6th Cir. 2006) (unpublished) (not to be cited except pursuant to Rule 28(g)).

At the hearing, the Respondent moved for dismissal of the Complaint as the date the violations were alleged to have occurred was April 25, 2002,[3] rather than August 25, 2002 as indicated by the testimony and exhibits introduced at the hearing. Tr. 47-8. As it was clear that the Respondent was not misled as to the actual date of the alleged violations, the Complainant was allowed to amend the Complaint to conform to the proof. Tr. 49.

The term "sore" is defined in both the Act and the regulations as:

> 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. 15 U.S.C. § 1821(3); 9 C.F.R. §11.1

In this case, the Complainant relies heavily upon the statutory presumption found in 15 U.S.C. § 1825(d)(5) which provides:

> In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be horse which is sore if it manifests

[3] In actuality, both dates were contained in the Complaint as Paragraph I did contain the correct date; however, the allegations of violations contained in paragraph II 1 & 2 specified April 25, 2002 as the date of the violations.

> abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.

In *Landrum v. Block*, No. 81-1035 (M.D. Tenn. June 25, 1981), 40 Agric. Dec. 922 (1981), the Court ruled that in order to be constitutional, the §1825(d)(5) presumption must be interpreted in accordance with Rule 301 of the Federal Rules of Evidence, even though that rule does not directly apply to this type of administrative proceeding. Fed. R. Evid. 301, **Presumptions in General in Civil Actions and Proceedings**, reads:

> In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Because the presumption in most cases does have a direct connection between the presence of bilateral sensitivity and the ultimate fact of soreness, an inference may well be drawn from evidence of bilateral sensitivity, even if the presumption is ignored. *Thornton v. U.S. Department of Agriculture*, 715 F.2d 1508, 1511 (11th Cir. 1983). While the case law is replete with examples of affidavits and testimony from examining veterinarians concerning a horse's reaction to palpation alone being sufficient to constitute substantial evidence of violations of the Act, **if not meaningfully controverted,** (*See, In re Sparkman*, 50 Agric. Dec. 602, 612-3 (1991), and the cases cited therein), the statutory presumption is not irrebuttable, *Vlandis v. Kline*, 412 U.S. 441 (1972) and cannot be used to shift the ultimate burden of persuasion. *In re Edwards*, 49 Agric. Dec. 188, 198 (1990).

While consideration of the presence of West Nile Virus in a horse may not have been previously considered in Departmental proceedings, evidence of other ailments has been used in the past to successfully rebut the presumption. In the case of *In re Horenbein*, 41 Agric. Dec. 2148 (1982), convincing evidence was introduced that the horse suffered from thrush[4] and contracted heels which overcame the presumption of soreness inferred solely from evidence of bilateral sensitivity. At the oral hearing in this action, the Respondent introduced testimony from John Louis O'Brien, Jr., DVM, a horse practitioner experienced in the treatment of horses with West Nile Virus, that "Mark of Buck" had contracted West Nile Virus and that the sensitivity in the horse's front limbs found by both the Designated Qualified Persons ("DQPs") and the Veterinary Medical Officers ("VMOs") was not the result of being "sored" (he found no indication of that),[5] but rather was consistent with the effects of the virus.[6] Tr. 148-150, RX 1. Dr. O'Brien's diagnosis was supported by serological testing performed by an independent laboratory. Tr. 138-140, RX 2. No rebuttal testimony as to the effects of West Nile Virus was offered by the Complainant.

[4] A suppurative disorder of the feet of animals, including horses.

[5] On cross examination, Dr. Bourgeois indicated that he had no information upon which to base his opinion that the bilateral sensitivity was caused by either chemicals or an action device except the reaction he obtained during his examination of the horse. Tr. 65-6, 71. In Complainant's brief (at page 3), Complainant proposed that I adopt a finding that indicates the Dr. Bourgeois testified that there is no naturally occurring condition, no disease condition, and no kind of injury which would cause these reactions [bilateral sensitivity] other than the deliberate application of caustic chemicals or the use of chains. (Tr. 81-82); however, as indicated, such testimony is given no weight in view of his admitted paucity of knowledge about West Nile Virus.

[6] By way of contrast, Dr. Bourgeois candidly testified that his knowledge of West Nile Virus was limited, as West Nile Virus was essentially unknown when he was in Veterinary School, while in private practice he had never treated a case of West Nile Virus, and had not attended any seminars on the subject. Tr. 50-52, 84-5.

Upon consideration of the testimony given at the hearing[7] the evidence of record,[8] and the proposed findings, conclusions and briefs filed by the parties, I find that the allegations of violations contained in the Complaint brought against the Respondent should be dismissed. The following Findings of Fact, Conclusions of Law and Order will entered.

Findings of Fact

1. The Respondent Percy Lacy is an individual whose mailing address is 725 Davis Mill Road, Elkton, Kentucky 42220. At all times material herein, he (and his family) owned "Mark of Buck," a registered Tennessee Walking Horse that was entered by Lacy as entry number 131 in class number 77 of the 64th Annual Tennessee Walking Horse National Celebration held on August 25, 2002 in Shelbyville, Tennessee for the purpose of showing or being exhibited.

2. At the pre-show inspection on August 25, 2002, "Mark of Buck" was found to have bilateral sensitivity by both the two DQPs and the two VMOs that examined the horse, all of who concluded that the horse was "sore" within the meaning of the Act on the basis of their findings of bilateral sensitivity. A DQP ticket and an APHIS Form 7077 were completed reflecting the results of their respective examinations and the horse was excused from showing in the class as being "sore."

3. Subsequent to being disqualified at the pre-show inspection, "Mark of Buck" was taken to and treated by John Louis O'Brien, Jr., DVM, a practitioner of

[7] Three witnesses were called by the Complainant and two were called by the Respondent. References to the transcript of the proceedings are indicated as "Tr."

[8] The Complainant's exhibits CX 1-9 were admitted. CX 15, a video tape of the examinations of the DQPs and the VMOs was objected to by counsel for the Respondent and was not admitted as it was neither included on the Complainant's Exhibit List and nor provided to Respondent's counsel until only shortly before the hearing. The Respondent's exhibits RX 1 and 2 were admitted.

veterinary medicine for 35 years whose practice is limited to the treatment of horses. Upon examination, Dr. O'Brien found the horse to be somewhat ataxic and hypersensitive to touch. Tr. 134-136. A blood sample was drawn, sent to an independent laboratory, and the results confirmed the presence of West Nile Virus, a viral infection affecting the central nervous system. RX 2.

4. Given Dr. O'Brien's testimony concerning his treatment of the horse and the nature and symptoms of West Nile Virus, the bilateral sensitivity exhibited by "Mark of Buck" at the pre-show inspection on August 25, 2002 was consistent with the symptoms of West Nile Virus and was not the result of the intentional use of chemical or mechanical means and accordingly, was not "sore" as defined in the Act.

Conclusions of Law

1. As "Mark of Buck" was not "sore" within the meaning of the Act on August 25, 2002, the Respondent did not violate the Act as alleged in the Complaint.

2. The evidence of violations of the Act, while sufficient to raise the 15 U.S.C. §1825(d)(5) presumption, was adequately rebutted by the Respondent by testimony that "Mark of Buck" had contracted West Nile Virus, a condition explaining his bilateral sensitivity on the date of the pre-show inspection.

Order

For the foregoing reasons, the Complaint is dismissed on its merits.

This Decision will become final and effective 35 days after service thereof upon the Respondent unless there is an appeal to the Judicial Officer by a party to the proceeding.

Copies of this Decision and Order will be served upon the parties by the Hearing Clerk.

Done at Washington, D.C.
October 23, 2006

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PETER M. DAVENPORT
Administrative Law Judge

Copies to: Robert A. Ertman, Esquire
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