LIST OF DECISIONS REPORTED

JANUARY – JUNE 2018

AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISION

EQUAL ACCESS TO JUSTICE ACT

COURT DECISION

HORSE PROTECTION ACT

DEPARTMENTAL DECISION

SALARY OFFSET ACT

DEPARTMENTAL DECISION

--

MISCELLANEOUS ORDERS & DISMISSALS

ANIMAL HEALTH PROTECTION ACT

ANIMAL WELFARE ACT

HORSE PROTECTION ACT

--

DEFAULT DECISIONS

--

CONSENT DECISIONS

--

AGRICULTURAL MARKETING AGREEMENT ACT

COURT DECISION

BURNETTE FOODS, INC. v. U.S. DEPARTMENT OF AGRICULTURE.
No. 1:16-CV-21.
Court Decision.
Filed January 24, 2018.

AMAA – Cherries – Cherry Industry Administrative Board – Consignments – Inventory – Sales activities – Sales constituency – Tart Cherry Order.

[Cite as: No. 1:16-CV-21, 2018 WL 538583 (W.D. Mich. Jan. 24, 2018)].

United States District Court,
Western District of Michigan.

The Court held that the composition of the Cherry Industry Administrative Board ("CIAB"), which seated fourteen members of CherrCo, Inc. ("CherrCo"), violated the Tart Cherry Order. The Court reversed the decision of the Judicial Officer, finding that although there was substantial evidence to support the Judicial Officer's conclusion that CherrCo received consignments from its members, the record showed that CherrCo directed where the consigned cherries were sold. Therefore, CherrCo qualified as a sales constituency under the Tart Cherry Order, and the CIAB could have only one CherrCo member.

OPINION GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

GORDON J. QUIST, UNITED STATES DISTRICT JUDGE, DELIVERED THE OPINION OF THE COURT.

Each party has moved for summary judgment. Count III of Burnette's Complaint alleges that the composition of the Cherry Industry Administrative Board (CIAB) violates the Tart Cherry Order. Count III is Burnette's sole remaining count. (ECF No. 23).

The issue of whether the CIAB violates the Tart Cherry Order turns on whether CherrCo, Inc. is a "sales constituency" under the Tart Cherry Order. A sales constituency is a "common marketing organization or brokerage firm or individual representing a group of handlers and growers.

An organization *which receives consignments of cherries and does not direct where the consigned cherries are sold is not a sales constituency*." 7 C.F.R. § 930.16 (emphasis added). In order to take into consideration various points of view in the tart cherry business, a single sales constituency cannot have more than one board member on the CIAB. 7 C.F.R. § 930.20(g). When Burnette filed its original petition in 2011, 14 of the 18 CIAB board members were CherrCo members; all nine of the representatives from Michigan on the CIAB were CherrCo members. (ECF No. 30–4 at PageID.2528). A Judicial Officer found that CherrCo is *not* a sales constituency because it receives consignments of cherries from others and does not direct where the consigned cherries are sold. (ECF No. 30–3 at PageID.1411–34). Both parties request summary judgment; Burnette asserts that the Judicial Officer's determination is not supported by substantial evidence. USDA asserts that the record supports the Judicial Officer's findings that CherrCo is a consignee of tart cherries which does not direct where cherries are sold.

Upon consideration of the parties' briefs and the entire record, the Court will grant Burnette's motion to reverse the Judicial Officer's decision and deny USDA's cross-motion.

I. Standard of Review

"[R]eview of the [agency's] decision is limited to whether the decision is in accordance with law and whether the decision is supported by substantial evidence." *Defiance Milk Prods. Co. v. Lyng*, 857 F.2d 1065, 1068 (6th Cir. 1988). "The [agency's] decision. . . must be upheld if the record contains 'such relevant evidence as a reasonable mind might accept as adequate to support [the agency's] conclusion.'" *Lehigh Valley Farmers v. Block*, 829 F.2d 409, 412 (3d Cir. 1987) (first alteration added) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *see also Defiance Milk Prods.*, 857 F.2d at 1068 (citing *Lehigh Valley*).

II. Discussion

Despite the deference owed to the Judicial Officer's decision, the Court finds that the Judicial Officer's decision is not supported by substantial evidence.

The Judicial Officer, who affirmed an earlier decision by an administrative law judge on this issue, determined that CherrCo is not a sales constituency as defined in 7 C.F.R. § 930.16 because it receives consignments of cherries *and* does not direct where consigned tart cherries are sold. (ECF No. 1–3 at PageID.68.) The Judicial Officer made the following findings:

> • CherrCo's member-cooperatives select their own sales agents.
>
> • The sales agents agree to follow CherrCo's terms to ensure that all tart cherries sold by CherrCo's member-cooperatives meet CherrCo's minimum conditions for the sale.
>
> • When a sales agent makes a sale, the agent notifies CherrCo of the buyer's identity, the quantity of tart cherries purchased, the price, and other terms of the sale.
>
> • CherrCo authorizes the release of pooled cherries for sale if the sale meets CherrCo's minimum criteria for price and other terms.
>
> • Each member-cooperative directs where its tart cherries are sold.
>
> • CherrCo is not a sales constituency because, although it does receive consigned cherries, it does not direct where they are sold.

Id.

Burnette alleges that the Judicial Officer's conclusions are not supported by substantial evidence and relied only on the testimony of James Jensen, the President of CherrCo. (ECF No. 33 at PageID.6575.) However, the Judicial Officer was not required to specifically cite all supporting record evidence in his opinion, as long as the decision is supported by substantial evidence in the record. *See, e.g.*, *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1355–56 (6th Cir. 1994). So, with that standard

in mind, there are two issues:

A. Whether the Record Supports the Conclusion that CherrCo Is an Organization Which Receives Consignments of Cherries:

The Judicial Officer determined that CherrCo is an organization which receives consignments of cherries from its members. (ECF No. 1–3 at PageID.68). Burnette disagrees and argues that CherrCo owns the inventories of tart cherries, acts beyond consignee activities, and does not have a consignment relationship with its members. (ECF No. 33 at PageID.6577–82).

Whether CherrCo is a consignee is important because organizations that receive consignment of cherries and do not direct where they are sold are explicitly exempted from the definition of "sales constituency" under the Tart Cherry Order. 7 C.F.R. § 930.16. If CherrCo is a consignee and does not direct where the cherries are sold, then it is not a sales constituency and the CIAB can have more than one member of CherrCo. To consign a good, the consignor "transfer[s the good] to another's custody or charge" or "give[s the good] to another to sell, usually with the understanding that the seller will pay the owner for the good[ ] from the proceeds." CONSIGN, *Black's Law Dictionary* (10th ed. 2014). "[T]itle does not pass until there is action of consignee indicating sale." CONSIGN, *Black's Law Dictionary* (6th ed. 1990).

Burnette argues that CherrCo owns the inventories of tart cherries and, accordingly, cannot be a consignee. Burnette relies on the testimony of one witness stating that CherrCo owns the inventory and the fact that CherrCo's invoices make no mention of individual members. (ECF No. 30–4 at PageID.2865; ECF No. 30–7 at PageID.3518). USDA, in its response and cross-motion, cites a number of contradictory testimonies and other pieces of evidence from the administrative record to demonstrate that CherrCo acts as a consignee and receives consignment of cherries from its members and, rather than owning the inventory, simply retains custody on behalf of its members. (ECF No. 38 at PageID.6631–33). In light of this evidence, a sales invoice itself is not dispositive of ownership of the inventory. The record evidence demonstrates that the members transfer their cherries to CherrCo's custody for CherrCo to sell; even when the cherry inventory is pooled, the respective members retain title over

their fungible portion of the cherries until CherrCo indicates a sale. The members retain the risk that their portion of the cherries will not be sold.

Burnette argues that because the Judicial Officer acknowledged that CherrCo's activities "go well beyond those of a mere consignee," CherrCo cannot be a consignee. (ECF No. 30–3 at PageID.1498). Burnette asserts that this conclusion and "evidence at the May 2012 Hearing shows that CherrCo is not an organization that receives consignments of cherries because the evidence shows that its activities go well beyond a mere consignor of cherries." (ECF No. 33 at PageID.6579). This argument fails, particularly when considered in light of the other record evidence discussed and cited by USDA in its briefs. The fact that CherrCo provides many services to its members does not nullify its role as a consignee. Consignees often promote the sale of consignee products. Burnette fails to show how CherrCo and its members' relationship does not fit the definition of consignment.

There is substantial evidence in the record supporting the Judicial Officer's determination that CherrCo receives consignments of cherries from its members, and Burnette's arguments are unpersuasive and are unsupported.

B. Whether CherrCo Directs Where Tart Cherries are Sold:

Burnette argues that "the Judicial Officer completely ignored additional activities of CherrCo which are clearly sales activities. . . [and] misinterpreted the relationship between CherrCo and the sales representatives." (ECF No. 33 at PageID.6582). Burnette asserts that "overwhelming" evidence shows that the sales agents represent CherrCo, rather than the individual CherrCo members, and dismisses the argument that the arrangement between CherrCo and the sales agents is a licensing arrangement. (ECF No. 33 at PageID.6582–83). Burnette points out, for example, that CherrCo sets minimum prices for products, is listed as the seller in all orders, provides marketing tools and literature to the sales agents, has contractual relationships with the sales agents, and acts as the "exclusive" marketing agent for CherrCo members. (ECF No. 33 at PageID.6584–85).

The Judicial Officer relied on the fact that member-cooperatives select

their own sales agents and the fact that the member-cooperative requests release of pooled cherries for sale. But the Judicial Officer also acknowledged that sales are subject to the authorization of CherrCo. (ECF No. 30–3 at PageID.1421–22). The record evidences that CherrCo directs where consigned cherries are sold. As Jensen testified and under the Membership and Marketing Agreement,

> • Individual member co-ops do not sign the agreements with the sales representatives. (ECF No. 30–4 at PageID.2077).
>
> • *CherrCo*, itself, pays commissions directly to sales agents. (*Id.* at PageID.2078).
>
> • CherrCo's marketing committee composed of several CIAB members determines the sales agents' commissions. (*Id.* at PageID.2079).
>
> • Although the individual members choose who their sales agents are, CherrCo acts as the exclusive marketing agent. (*Id.* at PageID.2081).[1]
>
> • Under the Membership and Marketing Agreement, CherrCo is equipped with the authority to sell cherries itself—"Co-op may sell the Product itself or may license sales agents to sell the product." (ECF No. 30–4 at PageID.2084; ECF No. 30–6 at PageID.3348).
>
> • Whether CherrCo sells cherries itself or licenses sales agents to do so is determined by CherrCo's Board of Directors. (ECF No. 30–4 at PageID.2084).
>
> • CherrCo Members transfer cherries as CherrCo directs—"Member shall transfer the Product to Co-op, customers of Co-op, or agents of Co-op, as Co-op shall

[1] The Court could not find how many sales representatives CherrCo had. But if not every member of CherrCo had its own sales representative, then the obvious question would be, who was selling the cherries for those who did not have a sales representative.

> direct." (*Id.* at PageID.2086; ECF No. 30–6 at PageID.3349).
>
> • CherrCo "is engaged in the processing, preparing for market, marketing, handling, packing, storing, drying, manufacturing, and selling of tart cherries." (ECF No. 30–6 at PageID.3347).
>
> • CherrCo also must approve all orders, and can "reject any order or any part thereof for any reason," and is listed as the seller for all orders. (ECF No. 30–10 at PageID.3822).
>
> • CherrCo is listed as the seller for all orders. (*Id.*).

This is substantial evidence that CherrCo "directs where the consigned cherries are sold" and therefore qualifies as a sales constituency under 7 C.F.R. § 930.16. The Judicial Officer's conclusion was not supported by substantial evidence. Therefore, CherrCo, as a sales constituency, cannot have more than one seat on the CIAB. 7 C.F.R. § 930.20.

Burnette's Remaining Arguments

In its reply and response to USDA's cross-motion, Burnette argues that the Tart Cherry Order has not improved the economic welfare of growers, and that CherrCo inappropriately dominates the CIAB. These assertions are beyond the scope of Burnette's remaining claim, *i.e.*, that CherrCo is a sales constituency. Therefore, they need not be addressed.

III. Conclusion

Burnette has demonstrated that the Judicial Officer's decision was not supported by substantial evidence in the record. Burnette's motion for summary judgment will be granted, and USDA's cross-motion for summary judgment will be denied.

A separate order will issue.

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EQUAL ACCESS TO JUSTICE ACT

COURT DECISION

ANIMAL LEGAL DEFENSE FUND, INC. v. PERDUE.
No. 16-914 (CRC).
Court Decision.
Filed February 16, 2018.

EAJA – Attorneys' fees and expenses – Degree of success, adjustment for – Hourly rate – Hours, number of – Prevailing party – Reasonableness of fees – Substantial justification – Third-party participation – Timeliness.

[Cite as: F. Supp. 3d 315 (D.C. Cir. 2018)].

United States District Court
District of Columbia Circuit.

The Court granted the plaintiff's motion for attorneys' fees and costs in the amount of $12,169.14, reduced from the requested $20,359.60 in attorneys' fees, $605 in costs, and additional $3,988.68 in attorneys' fees for time spent litigating its fee petition. The Court found that the plaintiff was a prevailing party in a civil action against USDA, wherein the plaintiff alleged that the Judicial Officer arbitrarily and capriciously denied its appeal of an Administrative Law Judge's order denying third-party intervention. The Court held that, because the plaintiff did not prevail on all its claims and the action was ultimately remanded to USDA, a fifty-percent reduction in the fee award was appropriate. Finally, the Court ruled that the plaintiff's request for $605 in costs was untimely because it was filed more than twenty-one days after final judgment.

OPINION AND ORDER

CHRISTOPHER R. COOPER, UNITED STATES DISTRICT JUDGE, DELIVERED THE OPINION OF THE COURT.

For the reasons set forth below, Plaintiff's motion for attorneys' fees and costs is granted in the amount of $12,169.14.

I. Background

In July 2015, the U.S. Department of Agriculture's ("USDA") Animal and Plant Health Inspection Service ("APHIS") filed an enforcement action against the owner of the Cricket Hollow Zoo in Manchester, Iowa. The plaintiff in this case, Animal Legal Defense Fund ("ALDF"), moved

to intervene in that administrative proceeding but its motion was denied by the presiding administrative law judge. ALDF then appealed that decision to the agency's Judicial Officer. The Judicial Officer denied the appeal on three grounds: *first*, that ALDF's "stated interests . . . [were] beyond the scope of [the] proceeding" and thus its intervention "would disrupt the orderly conduct of public business" under section 555(b) of the Administrative Procedure Act ("APA"); *second*, that ALDF was not an "interested party" as required for intervention under APA section 554(c); and *third*, that the USDA's Rules of Practice do not provide for intervention. February 15, 2017 Memorandum Opinion ("Mem. Op.") at 4.

In May 2016, ALDF filed this lawsuit, arguing that the Judicial Officer's decision was arbitrary and capricious and contrary to law under APA section 706(2). The complaint consisted of two counts. In the first count, ALDF alleged that the Judicial Officer's interpretation of the agency's Rules of Practice amounted to a "blanket prohibition" on third-party participation in administrative proceedings in violation of sections 554(c) and 555(b) of the APA. Compl. ¶¶ 90–95. In the second count, ALDF alleged that it was an "interested person" under APA section 555(b), and that the Judicial Officer erred in finding otherwise on the ground that its participation would disrupt the orderly conduct of public business. Compl. ¶ 97. ALDF also argued in count two that the Judicial Officer incorrectly applied the APA's definition of "party" in concluding that ALDF could not intervene as an "interested party" under APA section 554(c). Compl. ¶ 98.

The Court granted ALDF's motion for summary judgment in a February 15, 2017 Memorandum Opinion. The Court rejected the Judicial Officer's finding that ALDF's interests were beyond the scope of the proceeding. And because the Judicial Officer did not otherwise address how ALDF's participation might impede the proceeding, the Court remanded the case "for a more thorough consideration of ALDF's motion in light of the factors relevant to third-party participation in agency proceedings under [APA] Section 555(b)." Mem. Op. at 2. ALDF had abandoned its "interested party" claim under APA section 554(c), and the Court rejected ALDF's argument that the Judicial Officer's finding constituted an unlawful blanket prohibition on third-party participation in USDA proceedings. Mem. Op. at 12–13.

Plaintiff now seeks $20,359.60 in attorneys' fees and $605 in costs as a prevailing party in this action, plus an additional $3,988.68 in attorneys' fees for time spent litigating its fee petition.

II. Legal Standard

The Equal Access to Justice Act ("EAJA") directs courts to award attorneys' fees and expenses to parties who prevail in civil actions against the United States if the government's position was not "substantially justified." 28 U.S.C. §§ 2412(a)(1), (d)(1)(A). If the government's position was not "substantially justified," *see Role Models Am., Inc. v. Brownlee*, 353 F.3d 962 (D.C. Cir. 2004), the prevailing party is entitled to a reasonable fee award. The "most useful starting point for determining the amount of a reasonable fee," *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), is the "lodestar figure, which is the number of hours reasonably expended multiplied by a reasonable hourly rate," *Murray v. Weinberger*, 741 F.2d 1423, 1427 (D.C. Cir. 1984). However, if a plaintiff prevails on only some of its claims, a court can adjust the fee award to reflect the relative degree of the plaintiff's success. *See George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 1535 (D.C. Cir. 1992).

III. Analysis

A. Prevailing Party

The government acknowledges that ALDF is a prevailing party within the definition of 28 U.S.C. § 2412(a)(1). Defendant's Opposition to Plaintiff's Motion for Attorney's Fees ("Def. Opp.") at 5. The Court therefore need not address this requirement.

B. Substantial Justification

The government argues that ALDF is not eligible for a fee award because the government's position was "substantially justified." Def. Opp. at 5–10. In order to meet this standard, the government must demonstrate the reasonableness of both its litigation position and the agency position being challenged. *Role Models Am., Inc. v. Brownlee*, 353 F.3d 962 (D.C. Cir. 2004). A position is "substantially justified" if it has "a reasonable

basis in law and fact." Pierce v. Underwood, 487 U.S. 552 (1988).

While it may have been reasonable for the Justice Department to continue defending the agency's position in this case, that position was not itself reasonable. The Judicial Officer found that ALDF's participation in the proceeding would "disrupt the orderly conduct of public business" because ALDF's interests were "beyond the scope of the proceeding." Mem. Op. at 4. But, as the Court held, ALDF's "*obvious* alignment of interests"—a general interest in animal welfare and a specific interest in the treatment of animals at Cricket Hollow Zoo—fell "*squarely within* the scope of the USDA enforcement proceeding." Mem. Op. at 1, 9–10 (emphasis added). Especially given section 555(b)'s low threshold for third party participation, the agency's position did not have a "reasonable basis in both fact and law." *Pierce*, 487 U.S. at 565. As a result, the government has not met its burden of demonstrating that *both* its position and the underlying agency action were justified, and a fee award is warranted.

C. Reasonableness of Fees

1. Reasonable Hourly Rate

The EAJA imposes a cap of $125 on the hourly rate for which an attorney may be compensated unless an increase in the cost of living in the relevant jurisdiction justifies a higher fee. *See* 28 U.S.C. § 2412(d)(2)(A). Here the government agrees that ALDF's requested hourly rates—$197.13 for Washington D.C. lawyers in 2016, $198.20 for Washington, D.C. lawyers in 2017, and $192.68 for San Francisco, California lawyers in 2016—are "consistent with what is permitted under EAJA." Def. Opp. at 18 n.5.

2. Reasonable Number of Hours

The Court must next determine the "numbers of hours reasonably expended." *Hensley*, 461 U.S. at 433. ALDF's counsel claim 103.26 hours spent on the case and 20.25 hours spent litigating the fee petition. After carefully reviewing Plaintiff's affidavits and time records, the Court finds that this time was reasonably expended.

Although five attorneys worked on this case, the Court finds that the tasks they performed were appropriate for the litigation. The Court also discerns no instances of unrelated or duplicative work, unnecessary pleadings, manufactured disputes, or excessive time spent on tasks. In fact, it appears that counsel is seeking fewer hours than the billing records account for.[1] *See Hensley*, 461 U.S. at 434 ("Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary . . . .").

The government objects to hours spent by attorneys while they did not formally appear in the case. In particular, the government argues that attorney Daniel Lutz's hours should be reduced to reflect only the time he was counsel of record in this case, as opposed to time spent after he left ALDF for other employment. However, the government cites no persuasive authority to support this proposition. Legal staff need not formally appear in a case in order to claim time for purposes of a fee petition. Indeed, prevailing parties can recover paralegal fees, *see Richlin Sec. Serv. Co. v. Chertoff*, 553 U.S. 571 (2008), and associates often bill time for cases in which they are not counsel of record. *See Curry v. A.H. Robins Co.*, 101 F.R.D. 736, 738 (N.D. Ill. 1984) ("For purposes of recovering attorneys' fees, there is no principled distinction between attorneys who are counsel of record and those who are not."). The fact that Mr. Lutz changed employers and was no longer counsel of record while continuing to work on the case is not dispositive of whether he rendered legal services to ALDF that are subject to the fee shifting provision of the EAJA. His uncontested declaration states that he continued to represent ALDF, and his contemporaneous time records support that assertion. Mot. for Attorneys' Fees, Ex. A, Attachment 1 (Lutz Decl.).

Finally, ALDF seeks fees for time spent litigating its fee application. The government counters that some of the time entries could have been filed in the initial application, and are thus untimely. The Court concludes that Plaintiff is entitled to reasonable fees for time spent litigating its fee application, and those hours were properly included in Plaintiff's

[1] Mr. Lutz, for instance, excised many entries from his billing records, while Katherine Meyer requests only 7.66 hours of the 15.83 hours she spent on the matter, presumably only including time spent on the federal court case (rather than the administrative proceeding) and successful motions.

supplemental application. *See Cinciarelli v. Reagan*, 729 F.2d 801, 809 (D.C. Cir. 1984).

D. Adjustment for Degree of Success

The government argues that Plaintiff's fee should be reduced to reflect Plaintiff's "limited degree of success" in the case. Def. Opp. at 18–20. The Court agrees, and will reduce the fee award by fifty percent.

Where, as here, a plaintiff does not prevail on all of its claims, the Court must allocate fees based on the relative degree of the plaintiff's success. *Hensley* "provided for a two-step inquiry" to guide this determination: "First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" *George Hyman Constr. Co. v. Brooks*, 963 F.2d 1532, 1535 (D.C. Cir. 1992) (quoting *Sierra Club v. EPA*, 769 F.2d 796, 801 (D.C. Cir. 1985)).

ALDF's complaint included two distinct claims: (1) that the Judicial Officer's decision amounted to a "blanket prohibition" on interested person participation and (2) that it was entitled to intervene in the proceeding as either an "interested party" or an "interested person" whose participation would not interfere with the orderly conduct of public business. Compl. ¶¶ 89–99. The Court found that the Judicial Officer erred in denying intervention as an interested person under section 555(b). The Court did not, however, agree with Plaintiff that the Judicial Officer's opinion imposed a "flat ban" on third-party participation—an argument that consumed a significant portion of summary judgment briefing—and ALDF abandoned its "interested party" claim. Nor, stepping back, did the Court award ALDF the ultimate ruling it sought: participation as an intervenor in the underlying proceeding. *See* Compl. Prayer for Relief ¶ 3. Rather, the Court simply remanded the action to the agency for further consideration of the "interested person" intervention factors. Based on both of these considerations, the Court finds that a fifty percent reduction in the fee award, to $12,169.14, fairly accounts for Plaintiff's overall level of success in the litigation.

E. Timeliness of Costs Motion

Finally, the government argues that ALDF's request for $605 in costs is untimely. Def. Opp. at 20–21. The Court agrees. The EAJA sets a 30–day limit for filing a "fees and expenses" application, with "expenses" meaning the reasonable expenses of expert witnesses. 28 U.S.C. §§ 2412(d)(1)(b), 2412(d)(2)(a). Applications for costs, on the other hand, are governed by 28 U.S.C. § 2412(d)(1)(a), which does not specify a deadline. And the D.C. Circuit has explicitly held that in the absence of a statutory deadline, the deadline to request costs is governed by the applicable procedural rule. *Haselwander v. McHugh*, 797 F.3d 1, 2 (D.C. Cir. 2015). Here, the applicable rule is Local Rule 54.1(a), which states that a "bill of costs must be filed within 21 days after entry of judgment . . . unless the time is extended by the court." D.D.C. Local Rule 54.1(a). Therefore, the Court must deny ALDF's application for costs as untimely because it was filed more than 21 days after the final judgment, and ALDF neither requested nor received an extension of that deadline.[2]

IV. Conclusion

For the foregoing reasons, it is hereby

ORDERED that Plaintiff's Motion for Attorneys' Fees and Costs be GRANTED IN PART AND DENIED IN PART. It is further

ORDERED that Plaintiff be awarded $12,169.14 in fees and $0 in costs.

This is a final, appealable order.

SO ORDERED.

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[2] To be sure, Plaintiff filed a motion for extension of time, but that motion only asked for an extension related to "fees and *expenses*." In any case, the extension request itself was filed after the deadline to file a bill of costs.

HORSE PROTECTION ACT

DEPARTMENTAL DECISION

In re: PHILIP TRIMBLE.
Docket No. 15-0097.
Decision and Order.
Filed June 8, 2018.

HPA.

Thomas N. Bolick, Esq., and Lauren C. Axley, Esq., for APHIS.
Jan Rochester, Esq., for Respondent Philip Trimble.
Initial Decision and Order by Channing D. Strother, Acting Chief Administrative Law Judge.

DECISION AND ORDER

SUMMARY OF DECISION

The Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("USDA"), Complainant, instituted this administrative enforcement proceeding under the Horse Protection Act, as amended ("HPA" or "Act")[1], by filing a Complaint alleging that the Respondent, Philip Trimble, violated section 5(2)(B) of the HPA by entering a horse known as "Main Sweetie" in a horse show, while the horse was sore.

The record shows that Respondent has an extensive background and experience in the training and showing of horses and appears to be hardworking and to genuinely care about the horses he trains and manages. The record also shows that Respondent has trained and exhibited many horses, has known of the HPA throughout his career, and has one prior finding of violating the HPA fifteen years ago, which was entered by default for Respondent's failure to file a timely answer.

This case is generally straightforward. Complainant brought forward testimony and other evidence, based on the USDA Veterinary Medical Officer's ("VMO") digital palpation examination at the pertinent show,

[1] 15 U.S.C. §§ 1821-1831.

showing that Respondent violated the HPA because he entered the horse, Main Sweetie, in the March 30, 2013 horse show while that horse was sore. In response, Respondent has attempted to challenge Complainant's evidence as insufficient to find a violation under the HPA.

Respondent has contended that USDA policies determining HPA violations should differ from what they are. For instance, Respondent contends that more than one VMO inspection or inspector should be required to corroborate results, that reaction to digital palpation alone should not be sufficient to find soring, that additional pain reactions aside from withdrawal should be evoked before determining soreness can be made, there should be a set number of times palpation should be repeated, and there should either be a clear pattern of soreness or that soreness should be in identical places on each limb to be considered bilateral abnormal sensitivity within the meaning of the HPA. Respondent also contends that the Atlanta Protocol[2] standards should determine whether a horse is sore. In addition, Respondent has challenged the credibility of the VMO, and has offered evidence related to Main Sweetie's temperament and health to rebut the presumption that arose from the VMO's findings.

However, Respondent's arguments to propose alternative protocol and requirements under the HPA are not supported under current law, regulations, policy, or precedent. Complainant demonstrated by a preponderance of the evidence that Main Sweetie was sore within the meaning of the HPA, and Respondent did not convincingly rebut the presumption. Therefore, based on a careful consideration of the record, I find that the Respondent, Philip Trimble, violated section 5(2)(B) of the HPA by entering a horse known as Main Sweetie in a horse show, while the horse was sore. Complainant requested a penalty of $2,200.00 and a five-year disqualification period. I find that under the HPA criteria, the amount of the civil penalty and period of disqualification requested is appropriate, and that I have no discretion to order a shorter or otherwise limited disqualification period.

[2] RX 1.

JURISDICTION AND BURDEN OF PROOF

The HPA was promulgated to prevent the cruel and inhumane soring of horses. The HPA prohibits sored horses from being entered into, participating in, or being transported to or from any horse show, exhibition, sale, or auction. Congress provided for enforcement of the HPA by the Secretary of Agriculture, USDA.[3] Regulations promulgated under the HPA are in the Code of Federal Regulations, Part 9, Section 11.

The burden of proof is on Complainant, APHIS.[4] The standard of proof applicable to adjudicatory proceedings under the Administrative Procedure Act,[5] such as this one, is the preponderance of the evidence.[6] Under the HPA, a presumption that a horse is "sore" within the meaning of the HPA arises where it is shown that the horse was abnormally, bilaterally sensitive or inflamed on both of its forelimbs or both of its hind limbs.[7] The burden of proof remains with the Complainant ("APHIS"), and the presumption is rebuttable.[8]

APPLICABLE STATUTORY PROVISIONS

The Congressional finding under the HPA, 15 U.S.C. § 1822, is that "1) the soring of horses is cruel and inhumane; [and] 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 . . . ."

The HPA defines the term "sore":

> **§ 1821 Definitions**
>
> As used in this chapter unless the context otherwise requires:

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[3] 15 U.S.C. §§ 1821-1831.
[4] 5 U.S.C. § 556(d).
[5] 5 U.S.C. §§ 551 *et seq.*
[6] *See Herman & Maclean v. Huddleston*, 459 U.S. 375, 387-91 (1983) (holding the standard of proof in administrative proceedings is preponderance of evidence).
[7] 15 U.S.C. § 1825(d)(5). The term "sore" is defined at 15 U.S.C. § 1821(3).
[8] *Martin v. U.S. Dep't of Agric.*, 57 F.3d 1070 (6th Cir. 1995) (citation limited under 6th Circuit Rule 24, published at 54 Agric. Dec. 198) (quoting *Martin*, 53 Agric. Dec. 212 (U.S.D.A. 1994) (citing *Landrum v. Block*, 40 Agric. Dec. 922 (U.S.D.A. 1981)).

> (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.[9]

The HPA creates a presumption that a horse is sore if it is bilaterally and abnormally sensitive or inflamed:

> **§ 1825. Violations and penalties**
>
> (d)(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests

[9] 15 U.S.C. § 1821(3).

> abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.[10]

The HPA prohibits certain conduct, including:

> **§ 1824 Unlawful acts**
>
> (2) The (A) showing or exhibiting, in any horse show or horse exhibition, of any horse which is sore, (B) entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore, (C) selling, auctioning, or offering for sale, in any horse sale or auction, any horse which is sore, and (D) allowing any activity described in clause (A), (B), or (C) respecting a horse which is sore by the owner of such horse.[11]

Further, violation of the HPA can result in either criminal penalties for "knowingly" violating the act,[12] or these civil penalties:

> **§ 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

[10] 15 U.S.C. § 1825(d).
[11] 15 U.S.C. § 1824(2).
[12] 15 U.S.C. § 1825(a).

> 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.
>
> (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) or who paid a civil penalty assessed under subsection (b) 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.[13]

The maximum civil penalty for violations after May 7, 2010, but before March 14, 2018, is $2,200.[14]

PROCEDURAL HISTORY

The Complaint was filed on April 9, 2015, alleging that the Respondent, Philip Trimble, violated section 5(2)(B) of the HPA by entering a horse known as "Main Sweetie" in a horse show, while the horse was sore. Respondent filed an answer on April 23, 2015, (1) admitting that in 2003 a previous Decision and Order was issued finding, by default, that Respondent violated the HPA; (2) admitting that Respondent entered Main Sweetie at the 2013 Mississippi Charity Horse Show on March 30, 2013,

[13] 15 U.S.C. § 1825(b)-(c).
[14] 7 C.F.R. § 3.91(b)(2)(viii). Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture, by regulation, is authorized to adjust the civil monetary penalty that may be assessed under 15 U.S.C. § 1825(b)(l) for each violation of 15 U.S.C. § 1824.

to show or exhibit; and (3) denying that Main Sweetie was entered into the 2013 Mississippi Charity Horse Show while sore. On May 8, 2015, Jan Rochester, Esquire, filed a Notice of Appearance on behalf of the Respondent.

On April 30, 2015, Administrative Law Judge Janice K. Bullard issued an Order Setting Deadlines for Submissions. The Order directed the parties to file their respective lists of exhibits and witnesses with the Hearing Clerk and stated that "all dispositive motions shall be entertained if filed." Both parties exchanged their exhibits, witness lists, and exhibit lists. On August 23, 2016, then Chief Judge Bobbie J. McCartney issued an Order, reassigning the case to the undersigned Administrative Law Judge Channing D. Strother.

On October 7, 2016, all parties participated in a Telephone Conference and it was ordered that a hearing would be set for a future date. Complainant filed a motion for Summary Judgment, exhibits in support, a Memorandum of Points and Authorities, and a proposed Decision and Order on October 21, 2016. Respondent filed a Response to the Motion for Summary Judgement accompanied by a Memorandum of Facts and Law in Support of the Response, exhibits in opposition, and proposed Decision and Order on November 15, 2016. The Motion for Summary Judgment was denied on December 23, 2016.

On February 23, 2017, all parties participated in a Telephone Conference and it was ordered that a hearing would be set for March 21 through 23, 2017. Respondent filed a Motion to Dismiss, or in the alternative, Motion to Stay Proceedings, on March 10, 2017. On March 10, 2017, it was ordered that Respondent's Motions will be held in abeyance and both parties will be provided a full opportunity to brief the issues after the scheduled hearing. Respondent filed a Motion to Dismiss on March 13, 2017, which was denied on March 15, 2017.

Complainant filed a Motion in Limine on March 10, 2017, to exclude various exhibits, portions of exhibits referencing the Atlanta Protocol, and any testimony regarding the Atlanta Protocol. On March 13, 2017, Respondent filed a Response to Complainant's Motion in Limine; a Respondent's Motion in Limine No.1 to exclude Complainant's evidence and testimony as it relates to pads and action devices; Respondent's

Motion in Limine No. 2 to exclude Dr. Johnson testimony, both written and oral; Respondent's Motion in Limine No. 3 to exclude CX 13 and CX 14; and Respondent's Motion in Limine No. 4 to exclude Dr. Clement Dussault from testifying. On March 14 and 15, 2017 respectively, Respondent's Motion in Limine No. 1, Respondent's Motion in Limine No. 2, and Respondent's Motion in Limine No. 4 were denied.[15] On March 16, 2017, an Order was issued requesting that Complainant address the Respondent's Motion in Limine No. 3 in writing before the scheduled hearing, or orally during the hearing.

A hearing was held on March 21 through 23, 2017, in Nashville, Tennessee. Complainant's Motion in Limine and Respondent's Motion in Limine No. 3 were addressed.[16] Complainant presented these witnesses: Jennifer Wolf,[17] Animal Care inspector, USDA; Michael Pearson,[18] Farm Loan Officer, USDA (formerly Animal Care Inspector, USDA, APHIS); Dr. Ronald Johnson,[19] VMO, USDA, APHIS, Animal Care, presented as examining VMO and an expert witness in equine veterinary care and detection of horse soring under the HPA; and Dr. Clement Dussault,[20] Senior Staff Veterinarian, National Veterinary Accreditation Program (formerly Field Veterinary Officer, USDA), presented as a rebuttal

[15] At the time of Respondent's Motion in Limine No. 4 Dr. Dussault had not yet been identified as a Complainant witness, and on that basis the motion was denied. Dr. Dussault was added to the Complainant's witness list by the time of the hearing, and Respondent renewed his Motion in Limine. Tr. 10-11. Dr. Dussault was permitted to testify as Complainant's "wrap-up" or "rebuttal" witness, as well as an expert in detection of horse soring under the HPA, although he did not address penalties. Tr. 13-14, 652-717.

[16] Tr. 9-12, 20-22. Complainant's Motion in Limine was a request to exclude the Atlanta Protocol, and any materials or testimony pertaining to the Atlanta Protocol, such as the testimony of Dr. Mullins, from the record. Tr. 20-22. I denied that motion ruling that while "there was case law o[n] the Atlanta Protocol that I'm not going to ignore"—that is, Judicial Officer precedents rejecting the Atlanta protocols as establishing standards to be applied in HPA proceedings—"it's of interest to me what respondent thinks should be done instead of what was done," and any flaws in the testimony of Dr. Mullin could be explored during cross examination. Respondent's Motion in Limine No. 3 sought to preclude Complainant's introduction of certain letters of warning into the record. At the beginning of the hearing, Tr. 10, Complainant agreed not to introduce those materials into evidence and stipulated that it would not rely upon them for any purpose. This resolution of that motion was acceptable to Respondent. *Id.*

[17] Tr. 33-56.

[18] Tr. 57-74.

[19] Tr. 75-353.

[20] Tr. 652-717.

witness and an expert witness in detection of horse soring under the HPA. Respondent presented these witnesses: Rachel Reed,[21] employee, SHOW, Inc.; Clay Sanderson,[22] Respondent's assistant horse trainer; Philip Trimble (Respondent);[23] Amy Trimble,[24] wife of Respondent and the individual who presented the horse for inspection; Dr. Michael Harry,[25] private treating veterinarian for Main Sweetie, and presented as an expert witness in equine veterinary medicine; and Dr. Stephen Mullins,[26] private veterinarian, and presented as an expert in equine veterinary medicine. Parties were allowed an opportunity to *voir dire* before expert witnesses were accepted to testify regarding expertise.

Admitted to the record were Complainant's exhibits identified as CX 1 through CX 7, and CX 10 through CX 13; and Respondent's exhibits, identified as RX 1, RX 2, RX 5, RX 6, RX 8 through RX 12, RX 20 through RX 23, RX 25, RX 30 through RX 32, RX 42, RX 43, RX 50, and RX 54 through RX 59. A Joint Notice of Errata and Proposed Corrections in relation to the hearing transcripts, signed by both parties, was filed on April 25, 2017. The corrections have been accepted by a separate Order Approving Proposed Transcript Corrections, issued on June 8, 2018.

Respondent filed a Post Hearing Brief ("Respondent's PHB") on June 1, 2017. Complainant filed a proposed Findings of Fact, Conclusions of Law, Order, and Brief in support thereof ("Complainant's PHB") on June 2, 2017. Respondent filed a Post Hearing Reply Brief ("Respondent's PHRB") on June 21, 2017.[27] Complainant filed a Brief in Reply to the Respondent's Post Hearing Brief ("Complainant's PHRB"), and an Addendum to Complainant's Post-Hearing Reply Brief ("Complainant's Addendum"), on June 22, 2017. As noted above, my March 10, 2017 Order provided that the parties would have the opportunity to address the issues in Respondent's March 10, 2017 Motion post hearing. Neither Respondent's nor Complainant's Post Hearing Briefs, nor Post Hearing

[21] Tr. 355-67.
[22] Tr. 447-58.
[23] Tr. 459-99.
[24] Tr. 598-650.
[25] Tr. 368-446.
[26] Tr. 512-96.
[27] The pages of Respondent's PHRB are not numbered. The pinpoint citations in this Decision to pages of that brief are based upon my count of pages from its first page.

Reply Briefs, addressed the issues in Respondent's March 10, 2017 Motion to Dismiss, or in the alternative, Motion to Stay Proceedings.

The record is now closed.

ANALYSIS

It is uncontested that Respondent entered the horse known as Main Sweetie, for the purpose of showing or exhibiting, in the 2013 Mississippi Charity Horse Show in Jackson, Mississippi.[28] During pre-show inspection, the USDA, APHIS VMO, Dr. Ronald Johnson ("VMO Johnson"), determined that the horse was bilaterally and abnormally sensitive on both of its forelimbs. There is no question that the Complainant bears the burden to show, by a preponderance of the evidence, that the HPA was violated. Evidence showing that the horse was abnormally, bilaterally sensitive or inflamed on both of its forelimbs or both of its hind limbs creates a presumption that the horse is "sore".[29] The basis of this presumption is that abnormal bilateral sensitivity or inflammation cannot be due to an "accidental kind of strange injury"[30] such as stepping on a rock.

In defense, Respondent makes two main contentions: (1) that Complainant has not met the evidentiary burden to establish the statutory presumption that the horse was sore within the meaning of the HPA by challenging the credibility of VMO Johnson, and that withdrawal responses elicited by digital palpation alone are not enough to establish abnormal sensitivity or soreness within the meaning of the HPA; and (2) that if it is found that the presumption was met under the HPA due to a finding abnormal, bilateral sensitivity, the horse was not sore within the meaning of the HPA because the horse's sensitivity was not abnormal and was due to other natural causes.[31] Besides Respondent's two main

[28] Answer at 1.
[29] *See* 15 U.S.C. § 1821(3).
[30] *Horse Protection Act of 1976: Hearing on H.R. 6155 Before the Subcomm. on Health and the Environment of the Comm. on Interstate and Foreign Commerce*, 94th Cong. at 52 (1975) (statement of Christine Stevens, Secretary, Society for Animal Protective Legislation).
[31] I note that Respondent's Briefs are unconventional and lengthy. Respondent's PHB offers over one hundred pages of excerpted material from case law and comments in contending the Department should conduct its horse protection program differently from

contentions, Respondent has also raised issues regarding Administrative Law Judge authority in adjudicating this case, and has requested consideration of reduced penalties if a violation is determined.

I. Presumption of Soring

I find that the Complainant showed, by a preponderance of the evidence, that the horse known as "Main Sweetie" was sore on March 30, 2013, under the statutory presumption, due to bilateral, abnormal sensitivity elicited during a digital palpation examination.

This evidence including testimony on the record shows that Main Sweetie was bilaterally and abnormally sensitive when presented for inspection:

1. APHIS VMO Johnson was presented by Complainant and accepted as an expert witness, after *voir dire* by the Respondent, to testify regarding his March 30, 2013 visual and physical inspection of Main Sweetie. VMO Johnson testified regarding his experience,

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its current practice. Respondent also makes certain statements without supporting citations. For example, parts of a study are quoted in Respondent's PHB at 144-146 without proper page citation, including insertion of personal commentary. Respondent quotes case text and testimony out of context (*see* Respondent's PHB at 97), and cites to documents not proffered for the record, much less admitted into evidence, as exhibits. *See id.* at 154 (where Respondent refers to an exhibit that was never admitted into evidence during hearing). Further, Respondent's PHRB, pages 8-9, contains photographs captioned "USDA Photo 8-29-1972" and "USDA Photo published 2001 in Understanding the Scar Rule." Respondent "suggest[s]" that being on the USDA website these photos should be "subject to judicial notice." PHRB at 9. The former photograph was apparently taken at a horse show in August 1972, more than forty years before the HPA violation at issue here. It is apparently provided as an example of one of types of soring— "scar formation" and "hair loss from chemical blistering"—the HPA was intended to address. *See* Respondent's PHRB at 7-8. Neither scar formation nor chemical blistering is alleged by the Complainant in this proceeding. Respondent states as to the second photo, without providing a specific citation to the transcript, but apparently meaning to reference Tr. 319-322, "[c]ontrary to Johnson's testimony at the hearing, redness is visible even though the horse is black." PHRB at 9. The second photo's caption indicates that it shows a "scar rule" violation, which is not the type of the violation at issue in this proceeding. Dr. Johnson testified that there were no scars on horse at issue. Tr. 316. Thus, the second photograph does not undermine Dr. Johnson's testimony, which was that redness from "inflammation" would not be seen on a "black horse with black pigmentation." Tr. 319. For those reasons, I find that neither photograph should be given any probative weight.

his typical examination techniques,[32] and his examination of Main Sweetie and findings.[33] VMO Johnson explained that he introduced himself to the horse to ensure that she was comfortable with him, then picked up and examined the left front limb. VMO Johnson testifies that the horse was calm when he digitally palpated the back of her left front pastern, but the horse tried to "come away" from him when he palpated specific spots on the front of the pastern.[34] VMO Johnson states that this type of reaction is not normal and indicates "too much sensitivity."[35] VMO Johnson testified that he felt the horse start to back away, allowed her to back away, then pick up her foot again to palpate and found the same spots of sensitivity.[36] VMO Johnson also testifies that, when examining the right front limb, and the horse "wanted to lift its leg away" from him when he palpated certain areas. [37] VMO Johnson testified that he found the horse to be bilaterally sore.[38] VMO Johnson was subsequently cross-examined by Respondent's counsel and he continued to testify that Main Sweetie's sensitivity to his digital palpation of specific areas on both forelimbs was abnormal.[39]

2. The APHIS Form 7077, Summary of Alleged Violations, signed by VMO Johnson, contains VMO Johnson's observations, recorded partially on the same day and partially two days later, and indicates that the horse was bilaterally sore.[40] The form also indicates the points on each of the horse's pasterns where sensitivity was detected.

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[32] Tr. 134-42.
[33] Tr. 148, 158-60.
[34] Tr. 158-59.
[35] *Id.*
[36] *Id*.
[37] Tr. 159.
[38] Tr. 160, 163:21-24.
[39] Tr. 329-30, 331-32.
[40] CX 1. Here when considering the probative value of Form 7077, I recognize Departmental precedent that "'past recollection recorded is considered reliable, probative and substantial evidence, which fulfills the requirements of the Administrative Procedure Act, if the events were recorded while fresh in the witnesses' minds.'" *Bobo*, 53 Agric. Dec. 176, 189 (U.S.D.A. 1994) (quoting *Jordan*, 51 Agric. Dec. 1229, 1229 (U.S.D.A. 1992)).

3. The video of the inspection performed by VMO Johnson[41] shows the horse, Main Sweetie, walking around the cones, shows VMO Johnson approaching the horse and the horse allowing VMO Johnson to pick up her left forelimb. The video then shows VMO Johnson's digital palpation of Main Sweetie's left forelimb, where the horse reacts by trying to withdraw its leg in response to palpation in pin-point spots and attempts to back away. The video then shows VMO Johnson wait for Main Sweetie to stop backing up and take up her left forelimb to palpate once more, eliciting the same reactions. Last, the video shows VMO Johnson palpate Main Sweetie's right forelimb, eliciting a withdrawal reaction during the pin-point palpation. The video corroborates VMO Johnson's testimony at hearing, Form 7077, and both VMO Johnson's April 1, 2013 Declaration and January 22, 2014 Affidavit.[42]

4. VMO Johnson's April 1, 2013 Declaration explained that he observed Main Sweetie being examined by two DQPs on March 30, 2013. He observed that Main Sweetie had a normal gait. He thereafter describes his digital palpation examination of Main Sweetie. On the left foot he found no evidence of scarring or sensitivity and the posterior surface, but "found areas of sensitivity along the lateral, middle, and medial areas [of] the pastern."[43] VMO Johnson notes that the horse tried to withdraw its leg consistently and repeatedly. On the right foot, there was no evidence of scarring on the posterior pastern, but the horse reacted to the pressure of the palpation "over the medial and lateral mid pastern area."[44] Again VMO Johnson notes that the horse tried to withdraw her leg in response to the palpation consistently and repeatedly. VMO Johnson also observed that the horse tried to withdraw its leg in response to palpation on anterior surface of the right front pastern "along the coronet band from medial to lateral" in a consistent and repeatable way.[45]

[41] CX 4.
[42] TR. 153-63; CX 2.
[43] CX 3 at 3.
[44] *Id.*
[45] *Id.*

5. The affidavit of VMO Johnson, dated January 22, 2014, states that, when examining Main Sweetie on March 30, 2013, he "found areas of sensitivity along the lateral, middle, and medial areas of the pastern" on the left front pastern, that the horse tried to withdraw its foot in reaction to the palpation, and that VMO Johnson determined that the horse's response was consistent and repeatable.[46] VMO Johnson also states that when examining Main Sweetie's right front pastern, the horse reacted by trying to withdraw its foot when palpitated on the "medial and lateral mid pastern area."[47] In this affidavit, VMO Johnson explains that the sensitivity he observed during the digital palpation exam of Main Sweetie was abnormal sensitivity because horses will not generally pull away or withdraw their legs when he palpates or touches their pasterns. He considered Main Sweetie's reactions to be pain responses within his experience and professional opinion.[48] This affidavit was provided ten months after the examination, but I find it to be consistent with other oral testimony, with documents drafted contemporaneous to the event, and with the video.

6. The "SHOW DQP" ticket,[49] completed by DQP Mitchell Butler and DQP Keith Davis after their inspection of Main Sweetie states that the horse was unilaterally sore on the left foot. It is not contested that at least one DQP detected a pain response on the right foot as well.[50] I assign less weight to this exhibit documenting the findings of the DQPs, who were not presented to testify, than to the testimony and exhibits documenting VMO Johnson's findings because the extent of the DQPs' training and experience is unknown. Further, USDA has determined that, generally, the opinions of VMOs are entitled to greater weight than DQPs.[51]

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[46] CX 2 at 3.
[47] *Id.* at 4.
[48] *Id.*, ¶ 3.4.
[49] CX 7. The SHOW DQP ticket indicates that the inspection was filmed, but the video from this inspection was not proffered by either party.
[50] Respondent's PHB at 6; Complainant's PHB at 8-9; CX 2 at 3.
[51] While DQPs must be certified by the USDA to be hired by a SHOW HIO, they do not necessarily have to be licensed veterinarians and are generally trained by VMOs when seeking certification. *See* 9 C.F.R. § 11.7; *see also Fields*, 54 Agric. Dec. 215, 219 (U.S.D.A. 1995); *Oppenheimer*, 54 Agric. Dec. 221 (U.S.D.A. 1995); *Elliott*, 51 Agric. Dec. 334 (U.S.D.A. 1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993);

Respondent contends that the above Complainant evidence does not establish the statutory presumption that the horse was sore and contends that Complainant's evidence did not meet Complainant's overall burden show by a preponderance of the evidence that Main Sweetie was sore within the meaning of the HPA. I find to the contrary on both points, as follows.

A. VMO Qualifications and Credibility

Respondent attacks the credibility, qualifications, and examination technique of VMO Johnson. Based on the record, I find the VMO to be credible, qualified, and to have used and properly executed appropriate USDA-approved examination techniques. The evidence presented confirmed that VMO Johnson is qualified: VMO Johnson maintains a high-level of education and over twenty-six years of experience in equine veterinary medicine, had valid credentials and licensure at the time of the inspection, has been trained and trained others regarding Horse Protection Act compliance procedures and USDA protocols for inspection, has performed many examinations, and is well-regarded among his colleagues.[52]

Regarding credibility, Respondent argues that VMO Johnson was biased and prejudiced against Tennessee Walking Horse owners and trainers in general, against the DQPs, and against Main Sweetie specifically.[53] The record is contrary to Respondent's accusation of bias. Although Respondent suggests that VMO Johnson's experience with Tennessee Walking Horses is limited and negative,[54] the record reflects that VMO Johnson has extensive experience as an equine veterinarian, has examined gaited horses under the HPA multiple times (having been employed by USDA intermittently since 2010), and there is no other evidence to suggest a general bias against Tennessee Walking Horse

Sparkman, 50 Agric. Dec. 602 (U.S.D.A. 1991); *Edwards*, 49 Agric. Dec. 188 (U.S.D.A. 1990), *aff'd per curiam*, 943 F.2d 1318 (11th Cir. 1991), *cert. denied*, 503 U.S. 937 (1992)).
[52] Tr. 78-87; CX 2 at 1-2; CX 3 at 1; Complainant's PHB at 15-16.
[53] Respondent's PHB at 109-11, 113, 118.
[54] *Id.* at 108.

trainers or owners.[55] Further, Respondent's expert witness, Dr. Mullins, testified that he thinks highly of VMO Johnson as an equine veterinarian.[56]

Respondent also avers that VMO Johnson was biased in choosing to examine Main Sweetie because the choice was not random but because he was "convinced in his mind" that Main Sweetie was sore.[57] VMO Johnson testified that he had no vested interest in overturning the DQPs' examination results or in choosing Main Sweetie specifically to inspect, either for personal satisfaction or monetary compensation.[58] A conclusion of bias does not follow simply because VMO Johnson followed up on the DQPs' examinations with a separate examination.

Respondent challenges the probative value of Form 7077 and VMO Johnson's April 1, 2013 Declaration because completing each was reliant on review of the inspection video and "d[id] not rely on his first hand inspection of Main Sweetie."[59] It is established Department precedent to consider Form 7077 as probative if recorded while fresh in the witness' mind.[60] VMO Johnson testified that he partially completed the Form 7077 on March 30, 2013, maintained his own notes, and completed both the Form 7077 and his Declaration when he returned home on April 1, 2013.[61] VMO Johnson testified that it is his standard practice to complete his records away from the distractions of the show.[62] While it is preferable

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[55] Respondent argues that, because VMO Johnson testified to treating sored gaited horses, he had a greater propensity or bias to find a horse sored. I find that the fact that VMO Johnson has treated sored gaited horses was not shown to indicate any bias on his part. Moreover, the record does not show that VMO Johnson has demonstrated bias throughout his career as a USDA VMO.

[56] Tr. 566:23 ("I consider Dr. Johnson a horseman, one of the few VMOs who I consider a horseman. He knows horses.").

[57] Respondent's PHB ¶ 118.2 at 132.

[58] Tr. 99-100.

[59] Respondent's PHB ¶ 8.1, at 130-31. Additionally, Respondent's PHRB, ¶ 49.3, states that there was a "historical requirement" to "timely" prepare the Form 7077 but does not cite the requirement nor define "timely."

[60] *See Bobo*, 53 Agric. Dec. 176, 189 (U.S.D.A. 1994) (quoting *Jordan*, 51 Agric. Dec. 1229, 1229 (U.S.D.A. 1992)).

[61] Tr. 168-69.

[62] *Id.* VMO Johnson testified that he usually waits until the next day to complete the Form 7077 during horse shows. Dr. Dussault also testified that he sometimes waits until the next day, or even two days later, to complete the form fully and avoid additional distractions. Tr. 711-12. Respondent proffered no other testimony as to standard procedure for completing the Form 7077 or time requirements for completion. Respondent also did not

that forms used as recorded recollection be completed promptly, precedent does not suggest, and I do not find, a significant loss of probative value if completed in the immediate days following the event, as long as the event is "fresh" in the witness' mind. I find nothing about VMO Johnson's review of the video at the time he completed this documentation to diminish their probative value.

Respondent attempts to discredit VMO Johnson by claiming that he failed or refused to follow proper protocol under 9 CFR, Part 11, Section 11.7, because he disagreed with the inspection outcome of two DQPs but did not reprimand them or issue a warning to them.[63] Respondent's contention is a misinterpretation of the protocol outlined in the regulations, which do not require VMOs to reprimand or issue a warning to a DQP when the VMO disagrees with the outcome of an examination.[64] While the Department ultimately regulates the certification of Sound Horses, Honest Judging, Objective Inspections, Winning Fairly ("SHOW") Horse Inspection Organizations ("HIOs") and the licensure of DQPs, the SHOW HIO sets rules for reprimand and cancellation of DQP licenses and this is not a responsibility of the VMO.[65]

B. Proposed Standards and Protocol

Respondent contends that the USDA regulations, policies, and precedents under the HPA should be different in many respects than those in force. Specifically, Respondent requests this court "hold that the USDA should rely on scientific objective testing to detect and prosecute offenders; that where more than one VMO is present, the diagnosis of sore can only be made after a second VMO reaches that finding independently of the first; and that in matters where scientific objective testing and more

provide any evidence that would indicate that VMO Johnson did not complete the Form while the examination was "fresh" in his mind.

[63] Respondent's PHB at 116; Respondent's PHRB ¶¶ 3.2, 4.1 (noting incomplete citation of authority).

[64] 9 C.F.R. § 11.7. DQPs are certified/licensed through the Department and appointed by the management of a horse show, exhibition, sale, or auction. Reprimand, in the form of license cancellation, is determined by the horse industry organization or association having a Department certified DQP. 9 C.F.R. § 11.7(7).

[65] *See* RX 11 (SHOW Rule Book – HPA Compliance, Section V(A)(3) at 5 (*also available* at http://showhio.com/documents/hpa%20section.feb%202016.pdf) (last visited Oct. 4, 2018).

than one VMO is not possible, that the Atlanta Protocol should be implemented."[66]

First, Respondent misplaces much emphasis on the intent to sore and proof of soring instrumentality. At issue here is simply whether (1) respondent *entered* for the purpose of showing or exhibiting in any horse show and (2) the entry took place while the horse was sore.[67] Respondent argues that, due to the advancement of medical technology, there should be a requirement that USDA VMOs utilize chemical testing, positively detecting illegal chemicals, and that palpation alone should not be utilized as a diagnostic tool.[68] VMO Johnson testified that chemical testing during inspection would not necessarily reveal any chemical used to sore the horse,[69] providing insight on why chemical testing does not provide definitive proof that a horse was sored by chemical means. In addition, Respondent implies there must be a "reasonable expectation or presumption" that Main Sweetie would have worn "any type of legal action device."[70] However, it is well established there is no requirement for proof of soring device or agent.[71] With these contentions, Respondent wishes to impose a greater burden of proof on the Department. Respondent's contentions are policy arguments not supported, and not properly enforceable, under current regulations, policy, or case law.

Regulations do not require for the examination to be performed by more than one APHIS representative or VMO.[72] Without direct citation to authority, Respondent asserts that two VMOs with corroborated findings of soreness were "historically required" for enforcement and that "historically speaking two VMOs were required to make this differential diagnosis, between nervous and sore, not one." [73] Respondent relies on cases involving instances where two VMOs examined a horse. But historical Departmental *practice* does not equate to a *requirement*, and Respondent's proffered collection of case law where the facts include two

[66] Respondent's PHRB ¶ 24.3.
[67] 15 U.S.C. § 1824(2)(B).
[68] Respondent's PHB at70-71, ¶¶ 76.2, 86.2.
[69] Tr. 119: 15-19.
[70] Respondent's PHRB at 10-12.
[71] *Bobo*, 53 Agric. Dec. 176, 184 (U.S.D.A. 1994) (citing *Gray*, 41 Agric. Dec. 253, 254-55 (U.S.D.A. 1982); *Holcomb*, Agric. Dec. 1165, 1167 (U.S.D.A. 1976)).
[72] 9 C.F.R. § 11.4.
[73] Respondent's PHB ¶ 12.2 (case law analysis at 12-106); Respondent's PHRB ¶¶ 1.2, 6.1.

examining VMOs does not show precedent. Further, Respondent heavily relies on specific language from *Fleming v. USDA* ("*Fleming*")[74] to assert that "no one opinion of any examining veterinarian serves as the sole evidentiary basis for decision."[75] In citing the discussion in *Fleming*, Respondent omits the words "in the present case," taking the quote out of context and distorting the holding by suggesting that the court in *Fleming* holds there is requirement for two VMOs to determine a horse is sore.[76] The text Respondent cites is specific only to the facts of *Fleming*. Contrary to Respondent's contentions, under HPA regulations and USDA policy the determination of one VMO will establish the presumption that a horse is sore. Unless that presumption is rebutted through evidence on the record, a VMO determination will support the finding of an HPA violation.

Respondent also alludes to there being no additional VMO inspection despite Main Sweetie being stabled onsite during the show.[77] While a VMO may have had authority to perform another inspection at any time,[78] there is no requirement to do so. Respondent presented no testimony or other evidence that it is customary for "the USDA" to remove horses from stables and inspect them in the current circumstances—however those circumstances might be defined—and provides no citation to support any such assertion in his PHB. I give the fact that there was no additional VMO inspection during the show no weight in determining whether there was an HPA violation. Respondent contends that the conclusion of one VMO based on his inspection, without additional corroboration, does not meet the Complainant's burden of proof. In the present case however, Complainant has proffered other evidence to corroborate VMO Johnson's opinion such as the video of the examination and evidence as to the immediately preceding DQP examination that resulted in disqualification from participation in the horse show. Further, the record includes no contemporaneous evidence that counters VMO Johnson's findings of sensitivity and, based on the record, Respondent did not have Main

[74] *Fleming v. U.S. Dep't of Agric.*, 713 F.2d 179 (6th Cir. 1983).
[75] Respondent's PHB at 97.
[76] *See Fleming*, 713 F.2d at 185 (holding "there is no denial of due process through alleged lack of uniform examination procedures and standards for determining soreness").
[77] Respondent's PHB ¶ 94:5, at 192-93.
[78] *See* 9 C.F.R. § 11.4.

Sweetie immediately inspected by a private veterinarian despite his criticism of the examination at the hearing.[79]

Respondent and Complainant have briefed the issues regarding the Atlanta Protocol[80] and Respondent requests that the Protocol be applied to determine when a horse is "sore" under the HPA. As Complainant points out,[81] use of the Atlanta Protocol to determine examination procedures and evidence needed to find a horse sore under the HPA is an issue of law. If the Department adopted the standards and requirements outlined in the Atlanta Protocol, the result and effect on future enforcement proceedings would be that digital palpation alone would not be sufficient to detect soreness of a horse; inspectors would be required to determine gait disfunction combined with pain responses, increasing the burden of proof on the Department. But as the Judicial Officer in *Bennett* states, these suggested requirements for determining whether a horse is sore are "squarely contrary to the explicit language of the Horse Protection Act" and its regulations.[82]

The USDA Judicial Officer has deemed the Atlanta Protocol "devoid of merit."[83] I recognize there is a split among the circuit courts on whether digital palpation alone is sufficient to determine whether a horse is sore. However, the USDA Judicial Officer held that the case of *Young v. USDA* ("*Young*"),[84] in which the Court relied on the testimony of expert witnesses and the Atlanta Protocol to find that digital palpation alone could not

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[79] *See* Tr. 471-72 (where respondent explains the events following the disqualification of Main Sweetie on March 30, 2013). RX 20 (where Dr. Harry, the treating veterinarian for Main Sweetie, stated that he was recovering from surgery and unable to perform an examination).

[80] RX 1. Note that the admission of RX 1 into evidence was expressly for informational purposes and admission of RX 1 did not allude to the weight it would be given nor did admission amount to judicial notice. *See* Tr. 521:7-8. *See* Respondent's Response to Complainant's Motion in Limine; Complainant's Motion in Limine, 2-7; Complainant's PHB, 18-25.

[81] Complainant's PHB at 18-25.

[82] *See Bennett*, 55 Agric. Dec. 176, 181-82 (U.S.D.A. 1996).

[83] *Id.* at 205. *See also* Complainant's PHB at 18-25. Respondent states that the "devoid of merit" statement was "made in reference" to a Fifth Circuit finding that "the USDA veterinarians were discredited because their forms and affidavits were prepared in anticipation of litigation." Respondent's PHB ¶ 70.3. However, no pinpoint citation to any order is provided for this assertion and this assertion is not substantiated upon review of the JO Decision.

[84] *Young v. U.S. Dep't of Agric.*, 53 F.3d 728 (5th Cir. 1995).

determine a violation of the HPA, is not strong precedent in any circuit court, including the Fifth Circuit, and "the decision by the majority of the Court in *Young v. USDA* will not be followed by this Department in any future case, including cases in which an appeal would lie to the Fifth Circuit."[85]

Regarding controlling authority here, due to both Respondent's place of residence and his place of business, appeal of this case would properly be restricted to either the Sixth Circuit or the District of Colombia Circuit.[86] I note that Respondent appealed the 2003 default Decision and Order finding he violated the HPA to the Sixth Circuit.[87] The Sixth Circuit has held "a finding of 'soreness' based upon the results of digital palpation alone is sufficient to invoke the rebuttable presumption of 15 U.S.C. § 1825(d)(5)."[88] The District of Columbia Circuit has also held palpation is an effective method for concluding that a horse is sore.[89]

As the Judicial Officer stated in *Reinhart*:[90]

> The United States Department of Agriculture has long held that palpation is a highly reliable method for determining whether a horse is "sore," as defined in the Horse Protection Act [footnote omitted]. The United States Department of Agriculture's reliance on palpation to determine whether a horse is sore is based upon the experience of a large number of veterinarians, many of whom have had 10 to 20 years of experience in examining

[85] *Bennet*, 55 Agric. Dec. at 181-82. *But see Bradshaw v. U.S. Dep't of Agric.*, 254 F.3d 1081 (5th Cir. 2001) (unpublished opinion in the Fifth Circuit) (published at 60 Agric. Dec. 145 (U.S.D.A. 2001) (citing *Young*, 53 F.3d at 731) (stating that digital palpation was not substantial evidence to support a violation of the HPA and reversing judgment in favor of the petitioner)).
[86] *See* 15 U.S.C. § 1825. Respondent erroneously states that the HPA does not address the appeals process and that the jurisdiction for appeal is expressed in the federal regulations. Respondent's PHB at 154. Whether Respondent wishes to challenge the statute by appealing to the Fifth Circuit does not change the weight of controlling authority in this case.
[87] *Trimble v. U.S. Dep't of Agric.*, 87 F. App'x 456 (6th Cir. 2003).
[88] *Bobo v. U.S. Dep't of Agric.*, 52 F.3d 1406, 1413 (6th Cir. 1995).
[89] *Crawford v. U.S. Dep't of Agric.*, 50 F.3d 46, 49-50 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 824 (1995).
[90] *Reinhart*, 59 Agric. Dec. 721 (U.S.D.A. 2000).

> many thousands of horses as part of their efforts to enforce the Horse Protection Act. Moreover, the Horse Protection Regulations (9 C.F.R. pt. 11), issued pursuant to the Horse Protection Act, explicitly provides for digital palpation as a diagnostic technique to determine whether a horse complies with the Horse Protection Act.[91]

Despite Respondent's wish to see a change in law, including the adoption of different approaches to inspections than are undertaken by USDA VMOs, and a different definition of "sore" as outlined in the Atlanta Protocol, I am bound by the HPA, current regulations, and controlling precedent. Because the Atlanta Protocol and its recommendation that digital palpation alone is not adequate to support a finding of soring has been rejected in precedents that govern my actions, I must also reject it, and take the rationales as expressed in those precedents governing here.

Respondent also makes other arguments regarding policy and protocol based on analysis of case law, such as: "a pattern of soreness or having soreness in the same location on both feet is an important element,"[92] there

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[91] *Id.* at 751-52 (citing in omitted footnote 12: *Bradshaw*, 59 Agric. Dec. 228 (U.S.D.A. 2000), *rev'd*, 254 F.3d 1081 (5th Cir. 2001); *Gray*, 55 Agric. Dec. 853, 878 (U.S.D.A. 1996) (Decision as to Glen Edward Cole); *Thomas*, 55 Agric. Dec. 800, 836 (U.S.D.A. 1996); *Bennett*, 55 Agric. Dec. 176, 180-81, 236-37 (U.S.D.A. 1996); *Oppenheimer*, 54 Agric. Dec. 221, 309 (U.S.D.A. 1995) (Decision as to C.M. Oppenheimer Stables); *Armstrong*, 53 Agric. Dec. 1301, 1319 (U.S.D.A. 1994), *aff'd per curiam*, 113 F.3d 1249 (11th Cir. 1997) (unpublished); *Tuck*, 53 Agric. Dec. 261, 292 (U.S.D.A. 1994) (Decision as to Eddie C. Tuck); *Bobo*, 53 Agric. Dec. 176, 201 (U.S.D.A. 1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *Kelly*, 52 Agric. Dec. 1278, 1292 (U.S.D.A. 1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *Sims*, 52 Agric. Dec. 1243, 1259-60 (U.S.D.A. 1993) (Decision as to Charles Sims); *Jordan*, 52 Agric. Dec. 1214, 1232-33 (U.S.D.A. 1993) (Decision as to Sheryl Crawford), *aff'd sub nom*. *Crawford v. U.S. Dep't of Agric.*, 50 F.3d 46 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 824 (1995); *Watlington*, 52 Agric. Dec. 1172, 1191 (U.S.D.A. 1993); *Crowe*, 52 Agric. Dec. 1132, 1151 (U.S.D.A. 1993); *Gray*, 52 Agric. Dec. 1044, 1072-73 (U.S.D.A. 1993), *aff'd*, 39 F.3d 670 (6th Cir. 1994); *Callaway*, 52 Agric. Dec. 272, 287 (U.S.D.A. 1993); *Brinkley*, 52 Agric. Dec. 252, 266 (U.S.D.A. 1993) (Decision as to Doug Brown); *Holt*, 52 Agric. Dec. 233, 246 (U.S.D.A. 1993) (Decision as to Richard Polch and Merrie Polch), *aff'd per curiam*, 32 F.3d 569 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24)).

[92] Respondent's PHB ¶ 20.5. Respondent also argues that the case law, which he fails to directly cite, demonstrates that a horse should "exhibit pain reactions in almost identical places." Respondent's PHB at 124. Although some of the cases provided include facts

should be a set number of times palpation must be repeated, that scarring must be present, or that the palpation should elicit a certain type of pain response.[93] There is no support under current policy or precedent for these proposed requirements. In each instance where Respondent uses the facts recited in a previous case to support these contentions, Respondent fails to consider that the recitation of the facts in specific cases cited were not legal rulings resulting in applicable precedent. The law, regulations, policies, and precedents regarding each contention are simply not what Respondent argues they should be and Respondent has not presented bases for me to make rulings contrary to them or to find they should be changed from what they are.

Further, Respondent cites to a task force formed by the American Association of Equine Practitioners ("AAEP") in December 2007, and a White Paper titled "Putting the Horse First: Veterinary Recommendations for Ending the Soring of Tennessee Walking Horses" published in July 2008.[94] Respondent contends:

> Page 2 of that White Paper states "Continued reliance on the use of traditional techniques dependent upon the **subjective response of the horse** would appear a wasted effort and funding for the development of objective methodology for use by qualified veterinary inspectors must be provided." (emphasis added) Page 3 and Page 4 contain "Improved Methods of Evaluation" wherein the AAEP recommends specific objective methods for evaluation such as immediate drug testing, thermographic screening, and swabbing of the limbs for foreign substances. Regarding palpation of the limbs, it is noted that palpation should be done for a routine evaluation of the limbs, assessment of digital pulses, and critical assessment of specific areas suggested to be abnormal on thermographic examination. The AAEP Task Force further recommends adding a corp[s] of veterinarians and states "Training of both VMOs and this additional corps

where horses exhibited pain responses in similar areas on each leg, there is no precedent requiring such.

[93] Respondent's PHB ¶¶ 13.2, 20.4, 24.8, 25.3, 27.4-5, 30.3, 44.2, 48.5, 75.6, 92.3.

[94] Respondent's PHRB at 12-13.

> of veterinarians must include more objective measures of detection such as thermography and digital radiography."[95]

Respondent likewise cites to a booklet titled "Horse Soring" that the American Veterinary Medical Association published in July 2015, contending that the AVMA booklet contains the AAEP's 2008 White Paper, and a study entitled *Thermography in Diagnosis of Inflammatory Processes in Horses in Response to Various Chemical and Physical Factors* (Summary of Research from September 1978 to December 1982), which was purportedly commissioned by the USDA and conducted by a veterinarian who also co-authored the Atlanta Protocol.[96] Respondent goes on to contend that:

> Neither the AVMA nor AAEP are on record in support of the use of palpation alone by one sole VMO to properly detect soring. The AVMA and AAEP support the eradication of soring by objective methods, as does the Respondent.[97]

In response, Complainant contends:

> These publications were not entered into evidence and no hearing testimony concerning these documents or the AAEP's December 2007, task force was proffered during the hearing, and complainant had no opportunity to review and respond to either of the aforementioned documents. Accordingly, none of respondent's statements about these documents and the AAEP task force should be given any probative weight, and his arguments based upon the same should be found to be without merit.[98]

Complainant's contentions that these publications are not a part of the record and were not proffered at hearing as evidence – or, for that matter, were not listed in Respondent's September 17, 2015 list of proposed

[95] *Id*. at 13.
[96] *Id.* at 13-14.
[97] *Id.* at 14.
[98] Complainant Addendum at 1-2.

exhibits – and have not been subject to review and cross examination at hearing are well-taken. Respondent's citation to these documents seems to be for the proposition that AVMA and AAEP oppose the use of palpation alone to detect soring and believe that "Improved Methods of Evaluation," including drug testing, digital radiography, thermographic screening, swabbing of the limbs for foreign substances, and examinations by more than one VMO, should be adopted, which would cause a greater burden on the Department to prove soring. As discussed regarding the Atlanta Protocol, the precedents and the record, including the testimony of VMO Johnson, palpation by a single VMO is sufficient to determine abnormal sensitivity and soring under established USDA policy.[99] Further, there is no contemporaneous report by another veterinarian in the record, much less one inconsistent with VMO Johnson's testimony and reports. Respondent has offered no results of his own contemporaneous digital radiography and thermographic screening he claims contradict VMO Johnson's findings based on his examination.

Veterinarian members of AVMA and AAEP, and the authors of the Atlanta protocol, may believe that additional examination methods should be utilized in determining soring because current methods can yield inaccurate results. But here there is no evidence of inconsistent results between digital palpation and other examination methods. That some veterinarians opine a need for additional methods of testing to provide more accurate results does not undercut the preponderance of the evidence here showing that the horse was sore based upon palpation.

I am bound to apply the statutes, regulations, and USDA policy. Extra record AVMA nor AAEP documents could not provide a basis for me to do otherwise. Even if I were not so bound, the record here would not support requiring USDA to provide additional testing or mandate methods of testing to support a finding that a horse was sore.

II. Rebuttal of Presumption

Although the Complainant has shown, by a preponderance of the evidence, that the horse known as "Main Sweetie" was sore under the statutory presumption due to the detection of bilateral, abnormal

[99] *See supra* notes 72, 91, and accompanying text.

sensitivity on March 30, 2013, Respondent can rebut the presumption established by VMO Johnson's findings.[100] It is recognized that the "presumption of soreness must be rebutted by more proof than speculation about other natural causes."[101] Respondent presents multiple contentions to rebut the presumption, each addressed below. Based on a careful review of the record, I find the evidence proffered by Respondent insufficient to rebut the presumption.

A. Rebuttal: VMO Examination Technique

Based on a review of the Respondent's following contentions and evidence, I find that Respondent did not clearly establish that Main Sweetie's pain reactions were due to any other factor aside from abnormal sensitivity detected by the digital palpation examination. I also find that the examination technique used by VMO Johnson when examining Main Sweetie was sufficient and sound. Respondent argues that VMO Johnson's examination technique was inappropriate and caused a "false positive" outcome.[102] VMO Johnson utilized visual and digital palpation examination techniques. It is well recognized "that palpation is a highly reliable method of determining soreness within the meaning of the Act."[103] Further, regulations under the HPA state that the USDA may use "whatever means are deemed appropriate and necessary" to inspect a horse for compliance with the HPA, including digital palpation.[104]

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[100] *See Zahnd v. U.S. Dep't of Agric.*, 479 F.3d 767, 772 (11th Cir. 2007); *Martin v. U.S. Dep't of Agric.*, 57 F.3d 1070 (6th Cir. 1995) (citation limited under 6th Circuit Rule 24, published at 54 Agric. Dec. 198); *see also Landrum v. Block*, No. 81-1035, 40 Agric. Dec. 922, 925, 1981 WL 31848, at *4 (M.D. Tenn. June 25, 1981) (holding that the § 1825(d)(5) presumption must be interpreted in accordance with FED. R. EVID. 301, even though the Federal Rules do not directly apply to administrative hearings).

[101] *Jenne*, 73 Agric. Dec. 501, 507-08 (U.S.D.A. 2014) (citing *Beltz*, 64 Agric. Dec. 1438 (U.S.D.A. 2005), *rev.*, 64 Agric. Dec. 1487 (U.S.D.A. 2005); *mot. for recons. denied*, 65 Agric. Dec. 281 (U.S.D.A. 2006), *aff'd sub nom. Zahnd v. Sec'y of Dep't of Agric.*, 479 F. 3d 767 (11th Cir. 2007)).

[102] Respondent's PHRB at 162.

[103] *Bobo*, 53 Agric. Dec. 176, 192 (U.S.D.A. 1994) (citing 52 Agric. Dec. 233, 243-46 (U.S.D.A. 1993) (Decision as to Richard Polch & Merrie Polch), *aff'd*, 32 F.3d 569 (6th Cir. 1994)). Palpation is also expressly approved by Department regulations as an examination technique. 9 C.F.R. § 11.1.

[104] 9 C.F.R. § 11.1.

Based on the record, there was no clear showing that the way in which VMO Johnson performed his exam was improper, nor that the horse's withdrawal reactions resulted from how VMO Johnson held the horse's limbs while palpating. "There is a presumption of regularity with respect to the official acts of public officers and, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'"[105] Although Respondent contends that the way in which VMO Johnson held or gripped Main Sweetie's legs during the examination likely caused the horse's withdrawal reactions,[106] two out of the three expert witnesses (Dr. Harry for Respondent[107] and Dr. Dussault for Complainant[108]) testified and agreed, while reviewing the video of the examination, that the horse's withdrawal reactions were due to the pinpoint digital palpation. Although Dr. Harry, for Respondent, provided testimony to the effect that VMO Johnson's style of holding the horse's leg may have caused discomfort due to pressure on the ligament and tendon, his explanation was hypothetical and unconvincing that how VMO Johnson held the horses leg was the actual cause of the withdrawal reactions or caused the horse to back away from the palpation.[109]

Respondent suggests that Main Sweetie's reactions to the palpation were merely the mare "moving her feet" and were not "pain responses."[110] Respondent claims that "there was no pattern of Main Sweetie's feet movement and no localization identified on the video during VMO

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[105] *Bennett*, 55 Agric. Dec. 176, 210 (U.S.D.A. 1996) (quoting *United States v. Chem. Found.*, 272 U.S. 1, 14-15) (citing *Panno v. United States*, 203 F.2d 504, 509 (9th Cir. 1953); *Reines v. Woods*, 192 F.2d 83, 85 (Emer. Ct. App. 1951); *Nat'l Labor Relations Bd. v. Bibb Mfg. Co.*, 188 F.2d 825, 827 (5th Cir. 1951); *Woods v. Tate*, 171 F.2d 511, 513 (5th Cir. 1948); *Pasadena Research Labs. v. United States*, 169 F.2d 375, 381 (9th Cir. 1948), *cert. denied*, 335 U.S. 853 (1948); *Laughlin v. Cummings*, 105 F.2d 71, 73 (D.C. Cir. 1939)).

[106] Respondent's PHRB ¶ 10.2.

[107] Tr. 390:10-11. I note that Dr. Harry, later in his testimony, says that the repeated reaction was due to the hold of the leg rather than the palpation, Tr. 391, but as discussed was unclear in his explanation of the causation.

[108] Tr. 694-695.

[109] Dr. Harry recommended performing the examination by draping the horse's leg over the examiner's forearm, but then explained that his recommended examination procedure may also place pressure on the same ligament and tendon. *See* Tr. 393-94.

[110] Respondent's PHRB ¶¶ 5.2, 5.3 (Respondent argues that "the movement [meaning reaction seen in the video] is absent any signs of even the slightest indication of pain"), 10.2 (Respondent also states, "Main Sweetie did not exhibit signs of abnormal sensitivity, she merely moved her feet.").

Johnson's inspection."[111] However, the video of the examination shows Main Sweetie reacting to the digital palpation by jerking and trying to withdraw her leg when VMO Johnson palpates only certain spots. VMO Johnson testified that the horse was calm when he started the digital palpation and did not react when he palpated the back of Main Sweetie's front left pastern, but that the horse tried to "come away" from him when he palpated certain spots on the front of the pastern.[112] VMO Johnson testified that Main Sweetie's withdrawal reactions elicited by the pinpoint palpations were abnormal within his experience.[113] Likewise, Dr. Johnson testified that the horse reacted to his digital palpation only on certain spots on the front and back of the right pastern.[114] The video corroborates Dr. Johnston's testimony and shows that Main Sweetie does not have the same withdrawal reaction to each pinpoint digital palpation further up her limbs or on the back of the left forelimb.[115] The video also shows VMO Johnson move his thumb to palpate different areas of the pastern and coronet band, and return to the areas where Main Sweetie responds with the withdrawal reaction. VMO Johnson determined that the horse's reactions were due to pain experienced during the digital palpation, and his findings appear consistent with regulation standards where palpation to detect such responses is acceptable.[116] Further, withdrawal reactions due to palpation are traditionally accepted as pain responses under APHIS policy.[117]

B. Rebuttal: Reaction Caused by Temperament or Natural Ailment

Although it is unclear whether Respondent is arguing that Main Sweetie's reactions were due to natural temperament, to temperament caused by ailments, to residual pain from ongoing ailments, or all of the above, Respondent failed to provide adequate evidence supporting these

[111] Respondent's PHB ¶ 18.8.
[112] Tr. 167:15-16, Tr. 159:2-3.
[113] Tr. 159.
[114] Tr. 159: 13-25, 160:1-4. *See also* Tr. 161-62.
[115] CX 4.
[116] CX 2 at 3-4. *See Bobo*, 53 Agric. Dec. 176, 192 (U.S.D.A. 1993) (citing *Holt*, 52 Agric. Dec. 233, 243-46 (U.S.D.A. 1993) (Decision as to Richard Polch & Merrie Polch), *aff'd*, 32 F.3d 569 (6th Cir. 1994)).
[117] RX 9. *See also* USDA ANIMAL & PLANT HEALTH INSPECTION SERVICE, *USDA Horse Protection - Inspection Process*, USDA.GOV (Feb. 3, 2018), https://www.aphis.usda.gov/animal_welfare/hp/downloads//hio/usda-hpa-hio_presentations_2018.pdf (showing, on the twenty-third unnumbered slide, that the Department process policy still includes withdrawal reactions as a pain response).

assertions to rebut the presumption. The preponderance of the evidence is that the horse's withdrawal reactions to the digital palpation on both forelimbs resulted from abnormal sensitivity and were not the result of any other natural cause.

As support for his contentions that Main Sweetie was hypersensitive due to existing ailments, Respondent presented a letter dated October 21, 2013, seven months after the event at issue, from a private veterinarian, Dr. Mike Harry, which describes diagnoses of a depressed appetite, gastric ulcers, lameness on the left foot, a wart on the left foot, and cystic ovaries.[118] Aside from the depressed appetite that was "resolved right away with minor treatment,"[119] all other ailments were diagnosed and treated after March 30, 2013. In his affidavit, Dr. Harry states that Main Sweetie's cystic ovaries and gastric ulcers caused pain and "directly contributed to and produced Main Sweetie's behavior exhibited during the inspection,"[120] providing no further evidence or detailed explanation. To say that Main Sweetie's ovary and gastric health issues "produced" Main Sweetie's reactions to the pinpoint palpations, without more explanation, is speculative. As in *Lacy v. USDA* ("*Lacy*"),[121] where the evidence presented failed to provide a clear connection showing that West Nile Virus could have produced pinpoint pain responses solely on the "front surfaces of the pasterns,"[122] here RX 20 and testimony by its author, Dr. Harry, and similar testimony by Respondent's expert witness Dr. Muller,[123] does specifically and directly explain causation regarding the

[118] RX 20. Respondent suggests that Dr. Harry's testimony and opinion should be given equal to, or greater, weight that VMO Johnson's testimony. Respondent's PHRB ¶ 17.2. Respondent states that the Sixth Circuit has precedence "allow[ing] treating physicians in matters outside Social Security cases" but fails to cite this precedent and demonstrate relevance. Respondent's PHB at 167. Complainant clearly lays out precedent that private veterinarian examinations are entitled to less weight than the examining APHIS representative. Complainant's PHB at 37 (citing *Thornton*, 41 Agric. Dec. 870, 878-79, 890-94 (U.S.D.A. 1982), *aff'd*, 715 F.2d 1508 (11th Cir. 1983); *Sparkman*, 50 Agric. Dec. 602, 610 (1991); *Edwards*, 55 Agric. Dec. 892, 922 (U.S.D.A. 1996)).
[119] RX 20.
[120] RX 43 at 3. *See also* Tr. 423 (Dr. Harry's testimony that Main Sweetie "*could be* just experiencing pain all over") (emphasis added).
[121] *Lacy v. U.S. Dep't of Agric.*, 278 F. App'x 616 (6th Cir. 2008).
[122] *Id*. at 621-22.
[123] I note that Respondent's PHB ¶ 13.3 states that RX 42 provides a clear connection of Main Sweetie's medical diagnosis and her reaction during inspection. However, RX 42 does not speak directly to Main Sweetie's medical diagnosis and Dr. Mullins does not

ailments and the horse's reaction to digital palpation to rebut the presumption. I give this testimony little weight.

Contrary to evidence presented, Respondent implies that Main Sweetie should be defined as a "silly horse" and that she is naturally sensitive therefore making her reactions during the examination normal. [124] However, while Respondent's witnesses, Amy Trimble and Clay Sanderson, both testified that Main Sweetie was a nervous or irritable horse, they also testified that they observed no agitated or odd behavior prior to the inspection on March 30, 2013.[125] VMO Johnson also testified that he observed no signs of agitation prior to the inspection.[126] The video of the examination corroborates VMO Johnson's testimony, showing the horse approaching and standing still, allowing VMO Johnson to pick up her left front foot, and after backing away, calming and allowing VMO Johnson to pick up and examine the left front foot a second time.[127]

Even though Respondent contended throughout this proceeding this horse's temperament and various medical conditions could have made it prone to give false positive responses to palpation, when specifically asked why he would take a chance showing a horse that posed a risk to his livelihood, Respondent testified that he thought the mare was talented and he was getting paid to do so.[128] There is no question that this Respondent faced serious penalties if this horse was determined to be sore; penalties of which he was aware based on his previous violation and experience with showing Tennessee Walking Horses. The lack of evidence demonstrating any Respondent's concerns pre-inspection this horse was irritable or temperamental, and prone to false positives, undercuts and contradicts post hoc contentions that the horse was so prone.

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appear to have any direct experience examining Main Sweetie and otherwise was unable to testify as to Main Sweetie's medical condition at the time of the event at issue.

[124] Respondent's PHB ¶ 34.3. *See also id.* ¶ 8.3, 123 (Respondent claims that Main Sweetie reacted to the palpation examination due to "nervousness and anxiety" or other factors such as the presence of other horses).

[125] Tr. 454:1-3, 638:7-9.

[126] Tr. 173, 177. *See also Lacy v. U.S. Dep't of Agric.*, 278 F. App'x 616, 622 (6th Cir. 2008) ("USDA VMOs 'follow a simple procedure to distinguish [high-strung, or nervous, or silly] horses from those that are experiencing pain . . . . '[T]hey look for . . . specific spots which were painful when palpated.'") (quoting Gray, 52 Agric. Dec. 1044, 1993 WL 308542, at *21 (U.S.D.A. 1993), *aff'd sub nom. Gray v. USDA*, 39 F.3d 670 (6th Cir.1994)).

[127] CX 4.

[128] Tr. 493-95, 649-41.

III. Administrative Law Judge Authority to Rule in This Matter

I note that on November 29, 2017, the Solicitor General, on behalf of the United States, submitted a brief before the United States Supreme Court in *Lucia v. SEC*, No. 17-130, in which the Solicitor General took the position that administrative law judges of the Securities and Exchange Commission are inferior officers under the Appointments Clause and must be appointed by heads of department, U.S. Const. Art. II, § 2, cl. 2. The court granted certiorari for the *Lucia* on January 12, 2018. Briefing has been completed and oral argument was held on April 23, 2018. The Court's opinion is expected to be issued by the end of June 2018.

On July 24, 2017, the Secretary of Agriculture ratified the United States Department of Agriculture's prior written appointment of then Chief Administrative Law Judge Bobbie J. McCartney, Administrative Law Judge Jill S. Clifton, and Administrative Law Judge Channing D. Strother and renewed their oaths of office.

In his March 10, 2017 Motion to Dismiss; or in the alternative, Motion to Stay Proceedings, pp. 1-2, Respondent contended:

> 1. The Appointments Clause. Respondent requests that this case be dismissed because a USDA ALJ cannot lawfully adjudicate the Respondents' liability for a violation of the HPA, nor can a USDA ALJ lawfully assess a penalty for a violation. The USDA ALJs cannot perform these functions because (1) only a duly appointed Inferior Officer of the United States can preside over a hearing that determines liability and assesses a penalty and (2) the USDA's delegation of enforcement authority to its ALJs contravenes the Appointments Clause of the U.S. Constitution, art. II, § 2, cl. 2. USDA ALJs act as Officers by entering final decisions, or at the least as inferior Officers, but the USDA's ALJs are not duly appointed as required by U.S. Constitution, art. 2, § 2, cl. 2, and *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991); *PHH Corp. v. CFPB*, 839 F.3d 1, 6 (D.C.

> Cir. 2016) (vacated and en banc hearing granted, Feb. 16, 2017); and *Lucia v. SEC*, 832 F. 3d 277 (D.C. Cir. 2016) (vacated and en banc hearing granted, Feb. 16, 2017. Oral Argument scheduled for May 24, 2017). The USDA cannot maintain this HPA enforcement action under the current Rules of Practice and the case should be dismissed.

My March 10, 2017 Order Holding in Abeyance Ruling on Motion to Dismiss or in the Alternative Motion to Stay Proceedings held:

> Because Respondent is raising novel issues of law which USDA has not been provided an opportunity to address, and which may not be properly before me to rule upon, Respondent's motions will be held in abeyance and both parties will be provided a full opportunity to brief the issues after the scheduled hearing.[129]

As noted previously, neither party briefed any Article II issues in post hearing briefs.

The District of Columbia *Lucia* case referenced by Respondent in his March 10, 2017 motion is the case now pending before the Supreme Court in No. 17-130. The D.C. Circuit was divided evenly *en banc*, the panel opinion that Securities and Exchange Commission Administrative Law Judges are employees and not inferior officers under Article II, and, therefore, need not be appointed by a head of a department. In any event, because the Secretary of Agriculture ratified my appointment in July 2017, I see no reason to delay further the issuance of this Decision and Order. I note, however, that Respondent, should he desire to seek review of this Decision before the Judicial Officer, may desire to postpone filing a petition to review until after the Supreme Court has issued an opinion in *Lucia.* In that event, Respondent may seek an extension of time from the Judicial Officer filing of such petition, and it will be up to the Judicial Officer as to whether to grant such an extension and any terms and conditions applicable thereto.

[129] Order Holding in Abeyance Ruling on Motion to Dismiss or in the Alternative Motion to Stay Proceedings at 2.

IV. Discussion of Penalties

Regarding penalties,[130] current regulations leave little room for discretion regarding penalties, especially regarding disqualification when there has been a prior conviction under the HPA. Respondent attempts to challenge a prior determination of soring in a default Order and Decision, when that determination is long final and not subject to challenge. The HPA is unambiguous and inflexible in the time required for disqualification if imposed:

> In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) or who paid a civil penalty assessed under subsection (b) 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.*[131]

The HPA does not allow for limitation of the disqualification to a lesser amount of time than five years for a subsequent violation – even a violation that takes place, as here, well more than a decade after the "first violation" – if disqualification is imposed, nor does it allow disqualification to be limited to a certain breed of horse.[132] It is Judicial Officer precedent to

[130] Respondent requested that, if a violation of the HPA was determined, penalties be established through a separate hearing procedure or phase. Tr. 14-20. I denied this request, ruling that penalties should be addressed at the hearing and briefs associated with this single phase of this case. Additionally, in Respondent's PHB at 205, Respondent also requests that any suspension be "limited to the breed, Tennessee Walking Horse, thus providing Mr. Trimble an alternative avenue to continue business training and exhibiting cutting horses as well as other disciplines and breeds of horses."

[131] 15 U.S.C. § 1825 (emphasis added).

[132] While legislative history supports that the HPA was implemented to protect "Gaited Horses," such as Tennessee Walking Horses, the Act specifically states "any horse" and regulations define "horse" for the purpose of the Act as "any member of the species *Equus*

impose a disqualification period where a civil penalty is assessed.[133] While I consider the gravity of the prohibited conduct, culpability of Respondent, and the impact of the penalties on Respondent when considering the civil penalty amount to be imposed, I do not have the authority to change the HPA, nor regulations thereunder, as to disqualification. Respondent has not presented an adequate argument as to why he could not pay a $2,200 civil penalty or why the civil penalty specifically would affect his ability to continue to do business.

FINDINGS OF FACT

1. Respondent Philip Trimble resides and does business in Pulaski, Tennessee.[134]

2. Respondent Philip Trimble started Trimble Stables, a horse training barn or training facility, in 2001.[135]

3. On March 27, 2003, Judicial Officer William G. Jenson issued a Decision and Order,[136] adopting the Chief Administrative Law Judge's decision: (1) finding that on April 29, 2000, respondent Philip Trimble violated section 5(2)(B) of the HPA[137] by entering a horse while the horse was sore as defined in section 1l.3(a) of the Horse Protection Regulations;[138] (2) assessing respondent Philip Trimble a $2,200 civil penalty; and (3) disqualifying respondent

caballus." 9 C.F.R. § 11.1. *See* H.R. REP. 94-1174, 4, 1976 U.S.C.C.A.N. 1696, 1699 ("The soring of a horse can produce the high-stepping gait of the well-known Tennessee Walking Horse as well as other popular gaited horse breeds . . . . The practice of soring is not only cruel and inhumane. The practice also results in unfair competition and can ultimately damage the integrity of the breed."). *But see* 9 C.F.R. § 11.1 (defining "horse show" and "horse exhibition" to exclude "events where speed is the prime factor, rodeo events, parades, or trail rides").

[133] *Beltz*, 64 Agric. Dec. 1487, 1505-06 (U.S.D.A. 2005).

[134] Tr. 460:3-4.

[135] Tr. 464:14; 613:9-10.

[136] The Judicial Officer's decision was stayed pending an appeal to the U.S. Court of Appeals for the Sixth Circuit. *McCulloch*, 62 Agric. Dec. 103 (U.S.D.A. 2003) (Stay Order as to Philip Trimble). The appellate court denied Trimble's petition for review on December 10, 2003. *Trimble v. USDA*, 87 F. App'x 456 (6th Cir. 2003). Subsequently, on March 2, 2004, the Judicial Officer lifted the stay on the March 27, 2003 Order. *McCulloch*, 63 Agric. Dec. 265 (U.S.D.A. 2004) (Order Lifting Stay as to Philip Trimble).

[137] 15 U.S.C. § 1824(2)(B).

[138] 9 C.F.R. § 1l.3(a).

Philip Trimble for one year from showing, exhibiting, or entering any horse and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.

4. In the fall of 2009, Respondent Philip Trimble was hired to train a horse known as Main Sweetie.[139] Main Sweetie was reserve world champion in 2011 and won two world championships at the Tennessee Walking Horse National Celebrations in Shelbyville, Tennessee in 2012 and 2013.[140]

5. On March 30, 2013, Respondent Philip Trimble entered the horse known as Main Sweetie as entry number 435, class number 84, for the purpose of showing or exhibiting at the 2013 Mississippi Charity Horse Show in Jackson, Mississippi.[141]

6. On March 30, 2013 Main Sweetie was presented by Amy Trimble for a pre-show inspection.[142]

7. DQP Mitchell Butler and DQP Keith Davis inspected Main Sweetie before the show. DQP Mitchell Butler and DQP Keith Davis found the horse to be unilaterally sore on the left front foot but did not agree as to the consistency of pain response on the right front foot.[143] The DQPs issued ticket #033013MB.[144] SHOW HIO disqualified the horse from showing as a result of this ticket.[145]

8. After DQP Mitchell Butler and DQP Keith Davis wrote the ticket for Main Sweetie, Main Sweetie was inspected by Dr. Ronald E. Johnson, Veterinary Medical Officer ("VMO"), Animal Care, Animal and Plant Health Inspection Service ("APHIS"), USDA.[146]

9. Dr. Johnson noted that that while digitally palpating Main Sweetie's anterior surface (lateral, middle, and medial areas) of the

[139] Tr. 603-04.
[140] Tr. 649:9-10; RX 22.
[141] Complaint at 2; Answer at 1; CX 5.
[142] Tr. 614:12.
[143] Tr. 149: 8-16.
[144] CX 7.
[145] Answer at 2.
[146] Tr. 149: 19; 150: 8-9.

left front pastern, the horse consistently and repeatedly withdrew its leg.[147]

10. Dr. Johnson noted that while digitally palpating Main Sweetie's right front posterior pastern over the medial and lateral mid pastern area, the horse consistently and repeatedly tried to withdraw its leg.[148]

11. It is Dr. Johnson's professional opinion that Main Sweetie exhibited abnormal sensitivity in both front pasterns, these consistent and repeated withdrawals of the leg were the horse's direct response to pain at those points of palpation,[149] and the pain responses he observed while palpating the horse were caused by chemical and/or action devices.[150]

12. On or about March 30, 2013, respondent entered the horse known as Main Sweetie, as entry number 435, class number 84, at the Mississippi Charity Horse Show in Jackson, Mississippi, for the purpose of showing or exhibiting the horse while the horse was sore, in violation of section 5(2)(B) of the HPA.[151]

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction over this matter.

2. I have jurisdiction to issue this Decision and Order.

3. Application of the standards for finding a horse sore recommended by the Atlanta Protocol are not required in the adjudication of HPA cases.

4. Respondent Philip Trimble entered for the purpose of showing or exhibiting the horse known as "Main Sweetie" as entry number 435, class number 84 at the 2013 Mississippi Charity Horse Show

[147] Tr. 158-159; CX 2 at 3; CX 4.
[148] Tr. 159; CX 2 at 4; CX 4.
[149] Tr. 150-60; CX 1.
[150] Tr. 163: 21-24; Tr. 172: 5-12; CX 2 at 4.
[151] 15 U.S.C. § 1824(2)(8).

in Jackson, Mississippi, while the horse was sore in violation of section 5(2)(B) of the HPA (15 U.S.C. § 1824(2)(B)).

5. If a disqualification period is imposed, the HPA requires a minimum disqualification of five years for subsequent violations that is not limitable to a specific breed of horse but does not apply to horse shows or horse exhibitions where speed is the prime factor, rodeo events, parades, or trail rides.

ORDER

By reasons of the findings of fact above, the Respondent has violated the HPA and, therefore, this Order is issued:

1. Beginning on the effective date of this Decision and Order, Respondent Philip Trimble is disqualified for five (5) years from showing, exhibiting, or entering any horse directly or indirectly through any agent, employee, or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction. [152] "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation, transporting or arranging for the transportation of horses to or from equine events, personally giving instructions to exhibitors, being present in the warm-up or inspection areas, or in any area where spectators are not allowed, and financing the participation of others in equine events.

2. Respondent Philip Trimble is assessed a civil penalty of $2,200.00. Respondent shall send a certified check or money order in the amount of two thousand and two hundred dollars ($2,200.00), payable to the Treasurer of the United States, to:

   United States Department of Agriculture
   APHIS, Miscellaneous
   P.O. Box 979043

[152] In this ordering paragraph, I adopt ordering language proffered by Complainant, which is typical language for orders such as this one. I do note that 9 C.F.R. § 11.1 defines "horse show" and "horse exhibition" to exclude "events where speed is the prime factor, rodeo events, parades, or trail rides."

St. Louis, MO 63197-9000

within sixty (60) days from the effective date of this order. The certified check or money order shall include the docket number of this proceeding in the memo section of the check or money order.

This Decision and Order shall be final and effective thirty-five (35) days after service of this Decision and Order upon the Respondent, unless there is an appeal to the Judicial Officer under section 1.145 of the Rules of Practice applicable to this proceeding.[153]

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

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[153] 7 C.F.R. § 1.145.

SALARY OFFSET ACT

DEPARTMENTAL DECISION

In re: ASHLEY N. JOHNSON.
Docket No. 17-0260.
Decision and Order.
Filed May 7, 2018.

SOA.

Joey D. Gonzalez, Esq., for Petitioner Ashley N. Johnson.
Hillary E. Clark, Esq., for ARS.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.

DECISION AND ORDER ON THE WRITTEN RECORD

This Decision and Order is based on the written record. The evidence is sufficient for me to decide the ***salary offset*** issue.

Findings & Conclusions

1. The Secretary of Agriculture has jurisdiction over the parties, Ashley N. Johnson and the USDA- Agricultural Research Service; and over the subject matter, which is ***salary offset***.

2. Petitioner Ashley N. Johnson works for the USDA- Agricultural Research Service at a location in Miami, Florida, and she was promoted to GS 09 Step 4 with an effective date of 02/05/17 and an approval date of 02/05/17.

3. Petitioner Ashley N. Johnson's promotion effective date was changed from 12/04/2016 to 02/05/17 at the request of a person who worked for USDA- Agricultural Research Service. The 12/04/2016 was cancelled.

4. One explanation in the written record for the two-month difference in Petitioner Ashley N. Johnson's promotion effective date is that 12/04/2016 was in the middle of a pay period. Promotion actions are typically effective at the beginning of a pay period.

5. Either Pay Period 24 or Pay Period 25 could have been used to solve

the middle-of-a-pay-period problem. Pay Period 24 began on November 27, 2016; Pay Period 25 began on December 11, 2016. A routine correction that might have been predictable would have been to change the promotion effective date to 12/11/16.

6. There are other explanations in the written record for the two-month difference in Petitioner Ashley N. Johnson's promotion effective date. I do not need to choose any particular explanation for the change from 12/04/2016 to 02/05/17 to decide this case.

7. My involvement is limited, in this ***salary offset*** case. USDA-Agricultural Research Service seeks repayment, through ***salary offset***. *See* 7 C.F.R. §§ 3.70 - 3.87 (regarding Federal Salary Offset). The issue before me is whether Petitioner Ashley N. Johnson shall reimburse USDA-Agricultural Research Service **$87.74**.

8. USDA- Agricultural Research Service explains the issue: "The subject of this Petition, **$87.84**, is the amount Petitioner was overpaid for the promotion during the period before it was cancelled and the effective date changed to 2/5/2017. Since the promotion was not effective until 2/5/2017, it is undisputed that Petitioner received an overpayment."

9. Petitioner Ashley N. Johnson MAY have been overpaid **$87.84**, but I cannot reproduce the calculation. The written record contains no calculation. I do not know what days and what dollar amounts per day were involved. I do not know why the SF-50 that shows Ashley N. Johnson's promotion effective date as 12/04/16 bears an approval date of 02/23/17.

10. USDA- Agricultural Research Service shall NOT be repaid the **$87.84**, because the amount is *de minimis* (trifling, insignificant); the written record persuades me that Petitioner Ashley N. Johnson is not at fault and had no reason to realize that she was not entitled to the **$87.84**; the debt should be cancelled and forgiven; and Ashley N. Johnson shall not be required to repay the **$87.84**.

11. USDA- Agricultural Research Service shall NOT ***offset*** Ashley N. Johnson's pay or other Federal monies payable to the order of Ashley N. Johnson to recover the **$87.84** or any portion of it. If **$87.84** or any portion

of it was taken from Ashley N. Johnson by ***salary offset*** or other means for 12/04/2016 to 02/05/17, the amount shall be returned to Ashley N. Johnson.

12. For the foregoing reasons, the following Order is issued.

ORDER

13. Petitioner Ashley N. Johnson has prevailed. USDA- Agricultural Research Service shall NOT ***offset*** Ashley N. Johnson's pay or other Federal monies payable to the order of Ashley N. Johnson to recover the **$87.84** or any portion of it. *See* ¶¶ 10 and 11.

Copies of this "Decision and Order on the Written Record" shall be sent by the Hearing Clerk to each of the parties.

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MISCELLANEOUS ORDERS & DISMISSALS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Miscellaneous Orders] with the sparse case citation but without the body of the order. Substantive Miscellaneous Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: https://oalj.oha.usda.gov/current.

ANIMAL HEALTH PROTECTION ACT

In re: SWEENY S. GILLETTE.
Docket No. 16-0024.
Order Dismissing Civil Penalty Held in Abeyance.
Filed June 22, 2018.

ANIMAL WELFARE ACT

In re: CRICKET HOLLOW ZOO, INC., an Iowa corporation; PAMELA J. SELLNER, an individual; THOMAS J. SELLNER, an individual; and PAMELA J. SELLNER TOM J. SELLNER, an Iowa general partnership, d/b/a CRICKET HOLLOW ZOO.
Docket Nos. 15-0152, 15-0153, 15-0154, 15-0155.
Order Granting Extension of Time.
Filed January 18, 2018.

AWA.

Administrative procedure – Extension of time.

Colleen A. Carroll, Esq., for APHIS.
Larry J. Thorson, Esq., for Respondents.
Initial Decision and Order by Channing D. Strother, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

ORDER GRANTING THE ADMINISTRATOR'S REQUEST TO EXTEND THE TIME FOR FILING A RESPONSE TO THE RESPONDENTS' APPEAL PETITION

On January 16, 2018, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture

[Administrator], filed a motion requesting that I extend to February 1, 2018, the time for filing the Administrator's response to the Respondents' appeal petition. The Administrator states that counsel for Respondents advised the Administrator that Respondents do not object to the Administrator's request for an extension of time.

For good reason stated, the Administrator's motion to extend the time for filing a response to the Respondents' appeal petition is granted. The time for filing the Administrator's response to the Respondents' appeal petition is extended to, and includes, February 1, 2018.[1]

—

In re: CRICKET HOLLOW ZOO, INC., an Iowa corporation; PAMELA J. SELLNER, an individual; THOMAS J. SELLNER, an individual; and PAMELA J. SELLNER TOM J. SELLNER, an Iowa general partnership, d/b/a CRICKET HOLLOW ZOO.
Docket Nos. 15-0152, 15-0153, 15-0154, 15-0155.
Order Granting Extension of Time.
Filed February 2, 2018.

AWA.

Administrative procedure – Extension of time.

Colleen A. Carroll, Esq., for APHIS.
Larry J. Thorson, Esq., for Respondents.
Initial Decision and Order by Channing D. Strother, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

ORDER GRANTING THE ADMINISTRATOR'S SECOND REQUEST TO EXTEND THE TIME FOR FILING A RESPONSE TO THE RESPONDENTS' APPEAL PETITION

On February 1, 2018, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture

[1] The Hearing Clerk's Office receives documents from 8:30 a.m. to 4:30 p.m. Eastern Time. To ensure timely filing, the Administrator must ensure that his response to the Respondent's appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, February 1, 2018.

[Administrator], by telephone, requested that I extend to February 5, 2018, the time for filing the Administrator's response to the Respondents' appeal petition.

For good reason stated, the Administrator's request to extend the time for filing a response to the Respondents' appeal petition is granted. The time for filing the Administrator's response to the Respondents' appeal petition is extended to, and includes, February 5, 2018.[1]

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In re: CRICKET HOLLOW ZOO, INC., an Iowa corporation; PAMELA J. SELLNER, an individual; THOMAS J. SELLNER, an individual; and PAMELA J. SELLNER TOM J. SELLNER, an Iowa general partnership, d/b/a CRICKET HOLLOW ZOO.
Docket Nos. 15-0152, 15-0153, 15-0154, 15-0155.
Order Granting Extension of Time.
Filed February 6, 2018.

AWA.

Administrative procedure – Extension of time.

Colleen A. Carroll, Esq., for APHIS.
Larry J. Thorson, Esq., for Respondents.
Initial Decision and Order by Channing D. Strother, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

ORDER GRANTING THE ADMINISTRATOR'S THIRD REQUEST TO EXTEND THE TIME FOR FILING A RESPONSE TO THE RESPONDENTS' APPEAL PETITION

On February 5, 2018, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], by telephone, requested that I extend to February 9, 2018, the time for filing the Administrator's response to the Respondents' appeal

[1] The Hearing Clerk's Office receives documents from 8:30 a.m. to 4:30 p.m. Eastern Time. To ensure timely filing, the Administrator must ensure that his response to the Respondent's appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, February 5, 2018.

petition.

For good reason stated, the Administrator's request to extend the time for filing a response to the Respondents' appeal petition is granted. The time for filing the Administrator's response to the Respondents' appeal petition is extended to, and includes, February 9, 2018.[1]

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In re: SIDNEY JAY YOST, an individual; and AMAZING ANIMAL PRODUCTIONS, INC., a California corporation.
Docket Nos. 12-0294, 12-0295.
Order Granting Extension of Time.
Filed February 7, 2018.

AWA.

Administrative procedure – Extension of time.

Colleen A. Carroll, Esq., for APHIS.
James D. White, Esq., for Respondents.
Initial Decision and Order by Jill S. Clifton, Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

ORDER GRANTING THE ADMINISTRATOR'S REQUEST TO EXTEND THE TIME FOR FILING A RESPONSE TO THE RESPONDENTS' APPEAL PETITION

On February 6, 2018, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed a "Request for Extension of Time to File Response to Petition for Appeal" requesting that I extend to February 13, 2018, the time for filing the Administrator's response to the Respondents' appeal petition. On February 6, 2018, counsel for the Administrator informed me, by telephone, that counsel for the Respondents informed counsel for the Administrator that Respondents have no objection to the Administrator's

[1] The Hearing Clerk's Office receives documents from 8:30 a.m. to 4:30 p.m. Eastern Time. To ensure timely filing, the Administrator must ensure that his response to the Respondent's appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, February 9, 2018.

request for an extension of time.

For good reason stated, the Administrator's request to extend the time for filing a response to the Respondents' appeal petition is granted. The time for filing the Administrator's response to the Respondents' appeal petition is extended to, and includes, February 13, 2018.[1]

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In re: STEARNS ZOOLOGICAL RESCUE & REHAB CENTER, INC., a Florida corporation d/b/a DADE CITY WILD THINGS.
Docket No. 15-0146.
Stay Order.
Filed May 4, 2018.

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HORSE PROTECTION ACT

In re: JUSTIN HARRIS.
Docket No. 17-0126.
Remand Order.
Filed January 9, 2018.

HPA.

Administrative procedure – Appointments Clause – Remand.

Colleen A. Carroll, Esq., and John V. Rodriguez, Esq., for APHIS.
Steven Mezrano, Esq., and Karin Cagle, Esq., for Respondent Justin Harris.
Initial Decision and Order by Bobbie J. McCartney, Chief Administrative Law Judge.
Order issued by William G. Jenson, Judicial Officer.

REMAND ORDER AS TO JUSTIN HARRIS

On April 11, 2017, Chief Administrative Law Judge Bobbie J. McCartney issued a "Default Decision and Order" as to Justin Harris in

[1] The Hearing Clerk's Office receives documents from 8:30 a.m. to 4:30 p.m. Eastern Time. To ensure timely filing, the Administrator must ensure that his response to the Respondent's appeal petition is received by the Hearing Clerk no later than 4:30 p.m., Eastern Time, February 13, 2018.

the instant proceeding. On May 10, 2017, Mr. Harris appealed Chief Administrative Law Judge McCartney's Default Decision and Order to the Judicial Officer; on June 30, 2017, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed "Complainant's Response to Petition for Appeal filed by Justin Harris," and on December 6, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture, transmitted the record to the Office of the Judicial Officer for consideration and decision.

On November 29, 2017, the Solicitor General, on behalf of the United States, submitted a brief in *Lucia v. SEC* (No. 17-130), in which the Solicitor General took the position that administrative law judges of the Security and Exchange Commission are inferior officers for purposes of the Appointments Clause, U.S. Const. Art II, § 2, cl. 2. On July 24, 2017, the Secretary of Agriculture ratified the United States Department of Agriculture's prior written appointment of Chief Administrative Law Judge Bobbie J. McCartney, Administrative Law Judge Jill S. Clifton, and Administrative Law Judge Channing D. Strother and renewed their oaths of office.[2]

To put to rest Mr. Harris's Appointments Clause claim, I remand this proceeding as it relates to Mr. Harris to Chief Administrative Law Judge McCartney, who shall: (1) consider the record, including all her previous substantive and procedural actions; (2) determine whether to ratify or revise in any respect all her prior actions; and (3) issue an order stating that she has completed consideration of the record and setting forth her determination regarding ratification.

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In re: JACKIE BARRON, an individual; RUSSELL "DUKE" INGRAM, an individual; SHEA SPROLES, an individual; and GARY SPROLES, an individual.
Docket Nos. 16-0070, 16-0071, 16-0072, 16-0074.
Order Postponing Further Discretionary Actions by Presiding Judge.
Filed May 24, 2018.

[2] Attach 1.

In re: JACKIE BARRON, an individual; and SHEA MCKENSIE SPROLES, an individual.
Docket Nos. 17-0032, 17-0033.
Order Postponing Further Discretionary Actions by Presiding Judge.
Filed May 24, 2018.

In re: TERRY GIVENS, an individual.
Docket No. 17-0117.
Order Postponing Further Discretionary Actions by Presiding Judge.
Filed May 24, 2018.

In re: EDGAR ABERNATHY, an individual d/b/a ABERNATHY STABLES; CARROLL COUNTS, an individual; VIRGINIA COUNTS; an individual; and DARIUS NEWSOME, an individual.
Docket Nos. 17-0081, 17-0082, 17-0083, 17-0084.
Order Denying Respondents' Motion to Strike and Exclude.
Filed May 25, 2018.

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DEFAULT DECISIONS

Editor's Note: This volume continues the new format of reporting Administrative Law Judge orders involving non-precedent matters [Default Orders] with the sparse case citation but without the body of the order. Default Orders (if any) issued by the Judicial Officer will continue to be reported here in full context. The parties in the case will still be reported in Part IV (List of Decisions Reported – Alphabetical Index). Also, the full text of these cases will continue to be posted in a timely manner at: https://oalj.oha.usda.gov/current].

No Default Decisions reported.

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CONSENT DECISIONS

ANIMAL WELFARE ACT

Debra Pratt, an individual.
Docket No. 18-0011.
Consent Decision and Order.
Filed January 30, 2018.

Arbuckle Adventures, LLC, an Oklahoma limited liability company.
Docket No. 16-0003.
Consent Decision and Order.
Filed May 2, 2018.

Wild Wilderness, Inc., an Arkansas corporation; and Freda Wilmoth, an individual.
Docket Nos. 17-0105, 17-0106.
Consent Decision and Order.
Filed June 4, 2018.

FEDERAL MEAT INSPECTION ACT

Wells Pork and Beef Slaughter, Inc.; and Victor Swinson.
Docket Nos. 18-0012, 18-0013.
Consent Decision and Order.
Filed March 14, 2018.

Cimpl's LLC, d/b/a American Foods Group, LLC.
Docket No. 18-0033.
Consent Decision and Order.
Filed May 16, 2018.

HORSE PROTECTION ACT

Brett Boyd, an individual.
Docket No. 17-0021.
Consent Decision and Order.
Filed January 10, 2018.

Charles Gleghorn, an individual.
Docket No. 17-0022.
Consent Decision and Order.
Filed January 25, 2018.

Bob Lawrence, an individual.
Docket No. 17-0035.
Consent Decision and Order.
Filed April 5, 2018.

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