UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 13-0308

USDA
RECEIVED
JUL 29 2014
OALJ / HCO
WASH, DC

In re:

JUSTIN JENNE,

Respondent.

Before: Administrative Law Judge Janice K. Bullard

Appearances:

Thomas Bolick, Esq., for Complainant

Justin Jenne, pro set

DECISION AND ORDER

I. INTRODUCTION

The above captioned matter involves administrative disciplinary proceedings initiated by the Administrator of the Animal and Plant Health Inspection Service ("APHIS"), an agency of the United States Department of Agriculture ("USDA"; "Complainant"), against Justin Jenne ("Respondent"; "Jenne"). Complainant alleges that Respondent violated the Horse Protection Act, as amended, 15 U.S.C. §§ 1821-1831 ("the Act"; "HPA"), and the Regulations and Standards issued under the Act, 9 C.F.R. §§ 11.1-11.40; a2.1-12.10. ("Regulations"; Standards").

The instant decision[1] is based upon consideration of the record evidence; the pleadings, arguments and explanations of the parties; and controlling law.

[1]In this Decision & Order, the transcript of the hearing shall be referred to as "Tr. at [page number]. Complainant's evidence shall be denoted as "CX-[exhibit #]"and Respondents' evidence shall be denoted as "RX-[exhibit number]". Exhibits admitted to the record sua sponte shall be denoted as "ALJX-[exhibit number]".

II. ISSUE

Did Respondent violate the HPA, and if so, what sanctions, if any, should be imposed because of the violations?

III FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural History

In a complaint filed on August 2, 2013, ("the Complaint") Complainant alleged that Respondent willfully violated the Act and the Regulations on or about August 27, 2012, when he entered the horse "Led Zeppelin" at a show while the horse was sore. Respondent timely filed an Answer and the parties exchanged evidence and filed submissions.

A hearing was held on March 11, 2014[2], by means of an audio-visual connection between Washington, DC and Nashville, Tennessee. Respondent appeared at the Nashville site, and I presided at the Washington site, where Complainant's counsel and witnesses appeared. I admitted to the record the exhibits proffered by Complainant (CX-1B through CX-8B). Respondent did not proffer any documentary evidence[3]. I heard the testimony of Respondent and witnesses for Complainant. Complainant's counsel timely filed written closing argument and Respondent did not file closing argument. The record is closed and this matter is ripe for adjudication.

B. Summary of Factual History

Dr. Bart Sutherland is a veterinarian who is employed by APHIS as a veterinary medical officer ("VMO"). Tr. at 113-114. He was hired in the fall of 2010 to attend horse shows and

---

[2] The hearing in this matter was held after a hearing on a complaint also alleging violations of the Act by Mr. Jenne, Docket No. 13-0080. The instant Decision and Order refers to Mr. Jenne's testimony pertaining to both cases.

[3] I held the record open for the receipt of a report of examination by Respondent's veterinarian, but that report was not submitted. A report by a different veterinarian pertaining to the examination of the horse involved in Docket No. 13-0080 was received and admitted to the record in that matter.

enforce the HPA. Tr. at 114-115. Before he came to work for APHIS, Dr. Sutherland operated a general large animal veterinarian practice for approximately sixteen years. Tr. at 116.

Dr. Sutherland attended the 74th Annual Tennessee Walking National Celebration ("the Celebration") in Shelbyville, Tennessee in August and September of 2010. Tr. at 117. Dr. Sutherland examined Respondent's horse, Led Zeppelin, who was being led by an individual other than Mr. Jenne. Tr. at 119. Dr. Sutherland viewed a videotaped recording of his examination of the horse, and pointed out that the horse "starts pulling his leg forward right off the bat. . ." Tr. at 120. The horse reacted consistently to Dr. Sutherland blanching his thumb along the horse's foot. Tr. at 120-121. Dr. Sutherland also described how he believed that the person who was leading the horse was trying to distract it from the palpations, and had to be instructed not to pet the horse's head. Tr. at 122; 124-126.

Dr. Sutherland testified that Led Zeppelin was randomly selected for examination at the Celebration, where he examined between 100 and 200 horses. Tr. at 141. He found between ten and twenty horses sore during the seven day event. Tr. at 142. Dr. Sutherland considered palpation an objective test that is performed uniformly by inspectors. Tr. at 142-143. In Dr. Sutherland's experience, most sore horses are not so sore that their gait would be affected. Tr. at 143-144.

Dr. Sutherland explained that he found soreness where other inspectors did not because the other inspectors had not performed their examinations properly. Tr. at 161. Dr. Sutherland and other APHIS VMO were concerned about the performance of inspectors and had advised his supervisor of those concerns. Tr. at 160. The inspectors, known as Designated Qualified Persons ("DQP"), were not employees of USDA, but worked for Horse Industry Organizations ("HIO") who were certified by USDA. Tr. at 168.

Justin Jenne started riding horses when he was four years old and started competing in shows of Tennessee Walking Horses when he was six. Tr. at 73. Mr. Jenne testified that "horses are [his] life" and that "[he] would never engage in any type of soring or potentially hurt a horse in anyway or allow anyone that works for [him] to do so." Id. Mr. Jenne trains horses, and specializes in training two and three year old horses, which are usually brought to his facility. Tr. at 73. Most of the horses he trains have not been ridden before, and Mr. Jenne and his staff teach the horses all that they know. Id.

Mr. Jenne brought a two year old stallion named Led Zeppelin to the Celebration on August 27, 2012. Tr. at 146-147. Mr. Jenne had shown the horse five times throughout the show season and he passed USDA inspection each time. Tr. at 147. USDA inspectors complimented Mr. Jenne on the horse's condition at one post-show inspection. Id.

Mr. Jenne described the inspection process at the Celebration as a "gauntlet" that involved several stations where the horse was swabbed by individual DQPs and then inspected by USDA at another location. Tr. at 148. After the swabbing, the horse was thermographed and "then he had to lead around the cones for the show DQPs to examine his locomotion." Tr. at 148. Led Zeppelin's feet were palpated by DQPs, and the DQPs passed the horse on both the locomotion and palpation tests. Id. USDA required the horse to go around the cones, and he passed that test. Tr. at 148. Mr. Jenne testified that the inspection of the horse at the Celebration took longer than usual, and that horses were lined up for a long time waiting for inspection. Tr. at 149; 152.

Mr. Jenne disagreed with Dr. Sutherland's conclusions, noting that he observed very little movement of his horse during the doctor's palpation, considering its age. Tr. at 149. Mr. Jenne

compared Led Zeppelin to "a thirteen year old adolescent boy" (Tr. at 146-147), explaining "it's very easy for them to become agitated and bored and ready to move on." (Tr. at 153).

Mr. Jenne observed the entire testing of Led Zeppelin, which was led by his employee, Mr. Ricardo. Tr. at 149. He did not believe that Mr. Ricardo was attempting to distract the horse during the inspection, and explained that Mr. Ricardo is "a fellow that spent some time with that horse, loves him and he's just trying to assure him everything's all right." Tr. at 128. Mr. Jenne regretted that the video did not show the horse's locomotion and how well he presented himself. Tr. at 128. Mr. Jenne maintained that USDA always filmed horses walking around the cones, but the video omitted that part of the inspection. Tr. at 128-129.

Mr. Jenne had no documentation of the passing locomotion and palpation tests performed by the DQPs, who are licensed by USDA. Tr. at 153-154. He conjectured that DQPs document only horses that are found in violation, and explained that you needed to pass DQP inspection to get to USDA inspection. Tr. at 154. Many horses were inspected that night and the percentage of horses that failed inspection was high. Tr. at 149-150. After the show, Mr. Jenne's veterinarian, Dr. Richard Wilhem, inspected the horse and found no problems.

Mr. Jenne posited that Horse Industry Organizations who produce horse shows make money by disqualifying horses for a show and fining trainers and owners. Tr. at 183. He believed that a lot of revenue was generated by writing citations, and disagreed that DQPS have an incentive to pass horses belonging to friends. Tr. at 183-184.

Beverly Hicks has been employed by APHIS as an animal care inspector since November, 2006. Tr. At 104-105. Her primary duties are to inspect facilities where animals subject to APHIS' jurisdiction are housed, including horses subject to the HPA. Tr. at 105. Ms. Hicks attended the Celebration in August and September, 2012, and filmed inspections of horses,

including the horse named Led Zeppelin on August 27, 2012. Tr. at 107-109. Ms. Hicks made copies of her audio-visual film onto CD, which was admitted to the record as CX-4B. Tr. at 109.

C. Prevailing Law and Regulations

In passing the Horse Protection Act, Congress observed that the practice of deliberately injuring show horses to improve their performance was "cruel and inhumane." 15 U.S.C. § 1823. The Act defines the deliberate injuring of show horses as "soring", and includes the practice of applying an irritating or blistering agent to any limb of a horse; of injecting any tack, nail, screw or chemical agent on any limb of a horse; or using any practice on a horse that reasonably can be expected to cause the animal suffering, pain, distress, inflammation or lameness when "walking, trotting, or otherwise moving". 15 U.S.C. § 1821(3)(A)(B)(D).

The HPA is administered by USDA through APHIS. A 1976 amendment to the Act led to the establishment of the Designated Qualified Person ("DPQ") program by regulations promulgated in 1979. 15 U.S.C. § 1823(c); see, also, 9 C.F.R. § 11.7. A DQP is a person who may be appointed and delegated authority by the management of a horse show to enforce the Act by inspecting horses for soring. DQPs must be licensed by a Horse Industry Organization (HIO) certified by the Department.

The HPA mandates that "[i]n any civil or criminal action to enforce this Act or any regulation under this Act, a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs and both of its hindlimbs." 15 U.S.C. § 1825(d)(5). In *Landrum v. Block*, No. 81-1035 (M.D. Tenn. June 25, 1981), 40 Agric. Dec. 922 (1981), the Court held that the §1825(d)(5) presumption must be interpreted in accordance with Rule 301 of the Federal Rules of Evidence, even though that Federal Rules do

not directly apply to administrative hearings. Fed. R. Evid. 301, **Presumptions in General in Civil Actions and Proceedings**, provides:

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

In 1992, Congress manifested its desire to require greater proof than merely failure of a Veterinary Medical Officer (VMO) digital palpation test by setting limits on appropriated funds to enforce the HPA. Congress directed "that none of these funds shall be used to pay the salary of any Departmental veterinarians or Veterinary Medical Officer who, when conducting inspections at horse shows, exhibitions, sales, or auctions under the Horse Protection Act, as amended (15 U.S.C. 1821-1831), relies solely on the use of digital palpation as the only diagnostic test to determine whether or not a horse is sore under such Act." *See,* Pub. L No. 101-341, 105 Stat. 873, 881-82 (1992).

In applying the statutory presumption, the Department's Judicial Officer ("JO") and Administrative Law Judges ("ALJs") have consistently observed that "it is the Secretary's belief that the opinions of its veterinarians as to whether a horse is sore are more persuasive than the opinion of DQPs." *In re: Timothy Fields, et al.,* 54 Agric. Dec. 215 at 219 (1995); *In re: C. M. Oppenheimer,* 54 Agric. Dec. 221 (1995); *In re: William Dwaine Elliott,* 51 Agric. Dec. 334 (1992), *aff'd.* 990 F.2d 140 (4th Cir.), *cert. den.* 510 U.S. 867 (1993); *In re: Pat Sparkman,* 50 Agric. Dec. 602 (1991); *In re: Larry Edwards,* 49 Agric. Dec. 188 (1990), *aff'd. per curiam,* 943 F. 2d 1318 (11th Cir. 1991), *cert.den. 503 U.S. 937 (1992).* Although the *Landrum* case held that the presumption may be rebutted by a Respondent, the history of Decisions by the JO and ALJS

strongly suggests that rebutting the presumption is difficult to achieve in any case where a Veterinary Medical Officer employed by the Department opines that the horse is sore after being palpated.[4]

D. Discussion

Precedent dictates that for purposes of the HPA, Led Zeppelin must be presumed to have been sore based upon the findings of a USDA veterinarian.. The USDA JO has routinely concluded that the opinions of USDA veterinarians as to whether a horse is sore are more persuasive than the opinions of DQPs. *In re: C. M. Oppenheimer*, 54 Agric. Dec. 221 (1995); *In re: William Dwaine Elliott*, 51 Agric. Dec. 334 (1992), aff'd. 990 F.2d 140 (4th Cir.), cert. den. 510 U.S. 867 (1993); *In re: Pat Sparkman*, 50 Agric. Dec. 602 (1991); *In re: Larry Edwards*, 49 Agric. Dec. 188 (1990), aff'd. per curiam, 943 F. 2d 1318 (11th Cir. 1991), cert. den. 503 U.S. 937 (1992).

Once the presumption of soreness is established, the burden of persuasion shifts to Respondent to provide proof that the horse was not sore, or that its soreness was due to natural causes. Although I credit the evidence that DQPs passed Led Zeppelin, their test results have little validity where, as here, an APHIS VMO finds soreness through palpation. Further, the case law suggests that the presumption of soreness must be rebutted by more proof than speculation about other natural causes, even when the evidence proffered to rebut the presumption consists of a reasoned medical opinion by a licensed veterinarian with experience in an equine practice.

---

[4] *See: In re: Ronald Beltz and Christopher Jerome Zahnd,* 64 Agric. Dec. 1438 (2005), *rev.,*64 Agric. Dec. 1487 (2005); *Motion for reconsideration denied,* 65 Agric. Dec. 281 (2006); *Aff'd. sub nom. Zahnd v. Sec'y of the Dep't of Agric.,* 479 F. 3d 767 (11th Cir. 2007).

See, *In re: Perry Lacy*, 66 Agric. Dec. 488 (2007); aff'd, *Lacy v. U.S.*, 278 Fed. Appx. 616 (6th Cir. 2008)[5].

I credit Mr. Jenne's testimony that the horse passed inspections at other events before the Celebration. However, it has been held that it is not unusual for a horse to be found sore at one examination and not sore at another. *In re: Timothy Fields and Lori Fields*, 54 Agric. Dec. 215, 219 (1995).

Accordingly, I find that the evidence is not sufficient to rebut the presumption that Led Zeppelin was sore for purposes of compliance with the HPA. As a matter of law, I must find that Respondent violated the HPA when he entered a sore horse at the Celebration in 2012.

E. Sanctions

The purpose of assessing penalties is not to punish actors, but to deter similar behavior in others. *In re David M. Zimmerman*, 56 Agric. Dec. 433 (1997). In assessing penalties, the Secretary must give due consideration to the size of the business, the gravity of the violation, the person's good faith and history of previous violations. *In re: Lee Roach and Pool Laboratories*, 51 Agric. Dec. 252 (1992). Any person who violates the HPA shall be subject to a civil penalty of not more than $2,200 for each violation. 15 U.S.C. § 1825(b)(1); 28 U.S.C. § 2461; 7 C.F.R. § 3.91(b)(2)(vii). In addition to any fine or civil penalty assessed under the HPA, any person who violates the Act may be disqualified from showing or exhibiting any horse, judging or managing

---

[5] In In re: Perry Lacy, 65 Agric. Dec. 1157 (2006), the ALJ found that evidence from a veterinarian with equine experience who opined that the horse suffered from West Nile virus was sufficient to rebut the findings of the DQPs and VMOs that the horse was sore. On appeal, the JO reversed the ALJ's findings, on the grounds that the statutory presumption was not rebutted. On appeal, the Sixth Circuit affirmed the decision of the JO, relying upon Chevron doctrine of giving agency determinations deference. (Chevron, USA, Inc. v. Nat'l Resources Defense Council , Inc., 467 U.S. 837 (1984)).

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.

It has been held that most cases involving violation of the HPA warrant the imposition of the maximum civil penalty per violation. *In re: Jackie McConnell, Cynthia McConnell, and Whitter Stables*, 64 Agric. Dec. 436, 490 (2005), aff'd 198 F. App'x 417 (6th Cir. 2006). It further has been held that disqualification is appropriate in almost every HPA case, in addition to civil penalties, including cases involving a first-time violator of the Act. *In re: Kimberly Copher Back*, et al., 69. Agric. Dec. 448 (2010).

Respondent has not presented any argument or evidence to assess when considering the penalty. In the absence of evidence supporting a lesser penalty, I find that Respondent is liable to pay a civil money penalty in the amount of $2,200.00. I also find that the circumstances warrant Respondent Justin Jenne's disqualification from participating in any manner in the exhibition, transportation, or managing of any horse for a period of one year.

Complainant requested that any disqualification of Respondent be imposed consecutive to any sanction imposed in the other case that involved an incident earlier to the instant matter. Because the HPA requires a longer disqualification for subsequent offenses, I find it appropriate that the disqualification of one year in this matter be consecutive to the one year disqualification imposed in Docket No. 13-0080. See, *In re: William Earl Bobo and Jack Mitchell*, 53 Agric. Dec. 176 (1994).

F. Findings of Fact

1. Justin R. Jenne is an individual whose mailing address is in [redacted]

2. APHIS VMO Dr. Bart Sutherland inspected horses participating in the 74th Annual Tennessee Walking National Celebration in Shelbyville, Tennessee in August and September of 2012, for compliance with the HPA.

6. On August 27, 2012, Justin Jenne entered a horse known as "Led Zeppelin" as Entry No. 542, Class No. 110 A, at the 74th Annual Tennessee Walking National Celebration.

7. The horse was led to inspection by Mr. Jenne's employee Roberto Ricardo.

8. Dr. Sutherland examined Led Zeppelin before the show.

9. Dr. Sutherland's examination was videotaped.

10. Dr. Sutherland concluded that the horse was sore within the meaning of the HPA.

G. Conclusions of Law

1. The Secretary has jurisdiction in this matter.

2. On August 27, 2012, Respondent Justin Jenne violated the Act when he entered the horse known as Led Zeppelin into a show while the horse was sore.

3. Because Respondent knowingly entered the horse in an exhibition, and the horse was deemed sore, Respondent's actions were willful.

4. Sanctions are warranted in the form of a civil money penalty and disqualification from participating in any manner in exhibitions for a period of time.

ORDER

Respondent Justin Jenne shall pay a civil money penalty twenty two hundred dollars ($2,200.00) for the instant violation of the HPA. Within thirty (30) days from the effective date of this Order, Respondent shall send a certified check or money order in that amount made payable to the Treasurer of the United States to the following address:

USDA APHIS GENERAL
P.O. Box 979043
St. Louis, MO 63197-9000

Respondent's payment shall include a notation of the docket number of this proceeding.

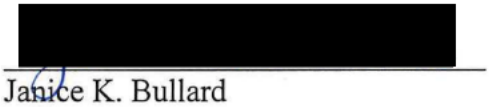
Respondent Justin Jenne also is disqualified for one uninterrupted year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction. "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.

The disqualification associated with the instant action shall begin consecutively to, and immediately upon, the completion of the disqualification period imposed in Docket No. 13-0080, and shall continue until the civil penalty assessed is paid in full.

This Decision and Order shall become effective and final 35 days from its service upon Respondent unless an appeal is filed with the Judicial Office pursuant to 7 C.F.R. § 1.145.

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

Entered this 29th day of July at Washington, DC.



Janice K. Bullard
Administrative Law Judge