

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	HPA Docket No. 99-0034
)	
Jackie McConnell, an individual;)	
Cynthia McConnell, an individual;)	
and Whitter Stables, a partnership or)	
unincorporated association;)	
)	
Respondents)	DECISION

Decision Summary

[1] I determine that Respondent Jackie McConnell, who presented a sore horse for inspection at a pre-show inspection area on September 3, 1998, directly participated in the prohibited act of “entering” a sore horse in violation of the Horse Protection Act within the meaning of 15 U.S.C. § 1824(2)(B). A civil monetary penalty of \$2,200 is the dollar amount I determine to be an appropriate and adequate remedy to be imposed on Respondent Jackie McConnell for “entering” a sore horse. While disqualification is discretionary, the minimum disqualification period of five (5) years for his second violation of the Horse Protection Act is an additional remedy I determine to be appropriate and adequate to be imposed on Respondent Jackie McConnell.

[2] I determine that Respondents Cynthia McConnell and Cynthia McConnell's sole proprietorship company Whitter Stables, during August and September 1998, directly participated in the prohibited acts of "shipping" a sore horse in violation of the Horse Protection Act within the meaning of 15 U.S.C. § 1824(1) and of "entering" a sore horse in violation of the Horse Protection Act within the meaning of 15 U.S.C. § 1824(2)(B). A concurrent \$2,200 civil monetary penalty for "shipping" a sore horse and a concurrent \$2,200 civil monetary penalty for "entering" a sore horse is the dollar amount (\$2,200 total) I determine to be an appropriate and adequate remedy for both the "shipping" and "entering" violations, to be imposed on Respondents Cynthia McConnell and Whitter Stables, which are collectively and severally responsible. While disqualification is discretionary, the minimum disqualification period of one (1) year for the first violation of the Horse Protection Act, for each offense, to be served concurrently (one (1) year total), is an additional remedy I determine to be appropriate and adequate to be imposed on Respondents Cynthia McConnell and Whitter Stables, which are collectively and severally responsible.

Procedural History

[3] The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture (APHIS) (Complainant), instituted this disciplinary administrative proceeding by filing a Complaint on September 7, 1999. Complainant instituted the proceeding under the Horse Protection Act, as amended (15 U.S.C. §§ 1821-1831); the Horse Protection Regulations (9 C.F.R. part 11); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. part 1, subpart H) (Rules of Practice).

[4] Complainant alleged that: (1) on September 3, 1998, Respondents Jackie McConnell, Cynthia McConnell, and Whitter Stables entered for the purpose of showing or exhibiting, a horse known as “Regal By Generator” as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration (Celebration) in Shelbyville, Tennessee, while Regal By Generator was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)); and (2) on/about August 26, 1998, Respondents Jackie McConnell, Cynthia McConnell, and Whitter Stables shipped Regal By Generator to the Celebration, while the horse was sore, for the purpose of entering, showing or exhibiting the horse at that horse show as entry number 685, in violation of section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)).

[5] The Complaint also alleged that Raymond F. Akin, Lillie Akin, Camille C. Akin, Mark A. Akin, and Akin Equine Veterinary Services (all as owners) allowed Respondents Jackie McConnell, Cynthia McConnell, and Whitter Stables to enter Regal By Generator as entry number 685 in class 110 at the Celebration, while the horse was sore, for the purpose of showing or exhibiting the horse in the horse show, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)).

[6] On May 12, 2003, I ordered the case caption amended to omit the five (5) Akin respondents, as their cases had been resolved and consent decisions had been issued. *See* 59 Agric. Dec. 831 (2000)¹; 59 Agric. Dec. 832 (2000).

[7] On September 17, 1999, Respondents filed a claim sounding in tort against the United

¹ Lillie Akin was dismissed as a respondent on August 18, 2000 (see Consent Decision as to Raymond F. Akin).

States Department of Agriculture (USDA) and certain of its employees in Federal District Court for the Western District of Tennessee - Civil Action No. 00-2434. On or about June 22, 2000, the Federal Court granted the Defendant's (USDA's) motion to dismiss.

[8] On October 1, 1999, Respondent Cynthia McConnell filed an Answer for Respondents Cynthia McConnell and Whitter Stables, denying the material allegations in the Complaint.

[9] On October 1, 1999, Respondent Jackie McConnell filed an Answer for Respondent Jackie McConnell, denying the material allegations in the Complaint and attaching a Motion to Stay (pending resolution of a Complaint for Injunctive Relief in the Federal District Court for the Northern District for Mississippi - Eastern District, Civil Action No. 1:99CV284-S-A.)

[10] Administrative Law Judge Dorothea A. Baker presided at the hearing in this case, in Memphis, Tennessee, on August 8, 9, and 10, 2000, and on March 12, 13, 14, and 15, 2002. Complainant was represented by Colleen A. Carroll, Esq., Office of the General Counsel, United States Department of Agriculture. Respondent Jackie McConnell was represented by Lee Ann Rikard, Esq., of Steen, Reynold & Dalehite of Jackson, Mississippi. Respondents Cynthia McConnell and Whitter Stables were represented by Mike R. Wall, Esq., of Oxford, Mississippi.

[11] Complainant exhibits are designated by "CX." Respondent exhibits are designated by "RX." Transcript references are designated by "Tr. I" for the hearing dates of August 8, 9, and 10, 2000, and "Tr. II" for the hearing dates of March 12, 13, 14, and 15, 2002.

[12] On July 22, 2002, Complainant filed separate Proposed Findings of Fact and Conclusions of Law and Memorandum of Points and Authorities in Support Thereof, one as to Jackie McConnell, one as to Cynthia McConnell, and one as to Whitter Stables. On July 25, 2002, Complainant filed a Motion to Correct Transcript. On October 17, 2002, Respondent Jackie

McConnell filed his proposed findings of fact and conclusions of law and brief. On October 25, 2002, Respondents Cynthia McConnell and Whitter Stables filed their Proposed Findings of Fact and Conclusions of Law and Memorandum of Points and Authorities in Support Thereof. On December 13, 2002, Respondents Cynthia McConnell and Whitter Stables filed their Reply Brief. On December 19, 2002, Complainant filed a Reply to Respondent Jackie McConnell's Proposed Finding of Facts, etc. On January 8, 2003, Complainant filed separate Replies to Respondent Cynthia McConnell's and Respondent Whitter Stable's proposed Findings of Facts, etc.

[13] Judge Dorothea A. Baker had retired, and on January 9, 2003, this case was assigned to me for decision.

[14] The following exhibits were admitted into evidence: CX 1, CX 3-CX 12, CX 13 (video tape), CX 14-16, CX 17, CX 18, CX 19a, CX 19b, CX 20-CX 29, CX 31, CX 101(a), CX 102(a) through (c); CX 103(a) through (e); CX 104(a) and (b); and CX 105(a) and (b); and RX 1-RX 4, RX 16-RX 18, RX 20-RX 23, and RX 26-RX 37.

[15] Based upon careful consideration of the evidence, in light of the Briefs, I determine that Respondent Jackie McConnell violated the Horse Protection Act section 15 U.S.C. § 1824(2)(B), and that Respondents Cynthia McConnell and Whitter Stables, collectively and severally, violated the Horse Protection Act sections 15 U.S.C. § 1824(1) and 1824(2)(B).

Statement of the Case

[16] Respondents Jackie McConnell and Cynthia McConnell are husband and wife, whose personal mailing address is 125 Valleywood, Collierville, Tennessee 38017. During all times relevant to this proceeding, those two Respondents held valid horse trainers licenses. Cynthia

McConnell is the owner of an unincorporated business known as Whitter Stables with a business mailing address of P. O. Box 205, Collierville, Tennessee 38027. Whitter Stables is a horse training facility for the care and training of Tennessee Walking Horses. Respondent Jackie McConnell and his business, Jackie McConnell Stables, are involved in the buying and selling of horses. Tr. II 728:22-25. At the time of the alleged violations, Jackie McConnell Stables and Whitter Stables were situated on the same real estate.

[17] Respondent Jackie McConnell and/or his business, Jackie McConnell Stables, have been subjected to civil monetary penalties and prior periods of disqualification related to the Horse Protection Act on three (3) occasions: as the result of two (2) consent decisions where no wrong-doing was admitted, a civil monetary penalty twice and a six-month period of disqualification twice; and, in a case heard on the merits, a \$2,000 civil monetary penalty and a two-year period of disqualification 1994-1996. CX 17. *See In re Jackie McConnell, et al.*, 44 Agric. Dec. 712 (1985), 47 Agric. Dec. 1756 (1988), 51 Agric. Dec. 312 (1992), 51 Agric. Dec. 313 (1992), 52 Agric. Dec. 1156 (1993), and 52 Agric. Dec. 1172 (1993).

[18] Whitter Stables employed several professional trainers to train the horses under its care. Tr. II 419:18-21, 420:20-25. Jackie McConnell was one of the persons Whitter Stables employed as a trainer. Tr. II 422:13-15. In 1998, Whitter Stables boarded and trained a horse known as "Regal By Generator." The horse is female and was nine years old (born after October 1, 1975) at the time of the alleged violations. CX 9. The owners of Regal By Generator wanted to have her entered in the 1998 Tennessee Walking Horse National Celebration (horse show) in Shelbyville, Tennessee. CX 7.

[19] Cynthia McConnell engaged an independent contractor on August 23, 1998, to transport

horses, including Regal By Generator, to the Celebration horse show. Tr. II 124:20-25, 125:1-11, 130:11-14, 180:19, and CX 4.

[20] Cynthia McConnell entered Regal By Generator as entry number 685 in class number 110 on or about September 2, 1998. CX 7, Tr. I 284:11. In addition to the evidence presented by Complainant, Cynthia McConnell stipulated that she personally participated in the act of entering Regal By Generator in the 1998 Tennessee Walking Horse National Celebration. Tr. II 141:4 through 142:4.

[21] Cynthia McConnell testified that her business, Whitter Stables, was a sole proprietorship. Tr. II 113:15, 116:7, 125:20. She testified that her husband, Jackie McConnell, had no business interest in Whitter Stables. Tr. II 125:21-23. She testified that Jackie McConnell was merely a salaried employee of Whitter Stables. Tr. II 138:24. Cynthia McConnell, on direct examination by Mr. Wall, testified as follows:

Q. Before we proceed on with any other documents, let me ask some questions about Whitter Stables.

A. Yes, sir.

Q. It was formed in 1994?

A. Yes, sir.

Q. Why did you form Whitter Stables at that time?

A. Jackie was going on suspension and I decided to go in and take over the business and run it myself.

Q. How long have you been in the walking horse business?

A. Probably 31 or 32 years.

Q. All right. So in 1994 it would have been 23 or 24 years you had been in the business in some form or fashion?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. When you opened up Whitter Stables, did you in fact take over the business?

A. Yes, sir.

Q. Have you maintained that business to this day?

A. Yes, sir.

...

Q. What's entailed in running Whitter Stables? What are your job responsibilities just for running Whitter Stables?

A. Well, we take care of Tennessee walking horses for show, but when a horse is brought to me, I am solely responsible for the shoeing, the bedding, the feeding, the grooming, the employees. Anything that has to be done with them, I do it.

Q. You being Cyndi McConnell?

A. Cyndi McConnell.

Q. Do you have employees that work for you?

A. Yes, sir.

Q. Do you have trainers that work for you?

A. Yes, sir.

Q. There's been a document – I don't know that the deed was introduced into

evidence where you and Jackie purchased some land in Fayette County.

A. Yes, sir.

Q. Who is paying that bill?

A. I am.

Q. And what account do you use to pay that bill?

A. Whitter Stables.

Q. And once again, does Jackie McConnell have any interest at all in Whitter Stables?

A. No, sir.

...

Q. How is Jackie McConnell compensated by Whitter Stables?

A. I pay him.

Q. Do you pay him a commission, do you pay him a monthly salary, how do you pay him?

A. I pay him a monthly salary.

Q. All right. Are you all in any type of partnership?

A. It's Whitter Stables. I'm the sole proprietor.

Q. Other than Whitter Stables, are you and Jackie in a partnership?

A. No, sir.

Q. Okay. Did Jackie McConnell have anything to do with hauling Regal By Generator to the 1998 Celebration?

A. No, sir.

...

Q. What activities did Jackie McConnell have to do with getting Regal by Generator from Fayette County, Tennessee to the celebration?

A. He didn't.

Q. What activities or responsibilities did Jackie McConnell have in getting Regal by Generator eligible to show at the celebration?

A. He didn't.

Tr. II 135:24 through 140:9.

[22] Complainant offered evidence in an attempt to show that Whitter Stables was not a sole proprietorship but was, in fact, a general partnership between Cynthia McConnell and Jackie McConnell. Complainant offered the affidavit of Camile Akin tending to show that people who do business with Whitter Stables had a belief that Jackie McConnell was part owner of Whitter Stables. CX 10. Complainant offered a paid advertisement in a horse show magazine showing Sarah Akin riding Regal By Generator which also indicated that Jackie McConnell was a "manager" at Whitter Stables. CX 11. Complainant offered a paid advertisement in a horse show magazine indicating that Jackie McConnell was getting the major credit for work done by Whitter Stables. CX 24. Complainant offered a "newsy" article from a horse show magazine which mentioned "Jackie McConnell's Whitter Stables" tending to show that Jackie McConnell was believed by the horse show industry to be more than just an employee. CX 25.

Complainant offered a recorded Warranty Deed from Fayette County, Tennessee dated June 19, 1991, showing the land occupied by Whitter Stables was titled in joint ownership by Jackie and Cynthia McConnell, and also a copy of a Fayette County, Tennessee real property tax receipt

dated November 28, 1998 for the same property tending to show that the tax was paid by check by Jackie McConnell. CX 1. APHIS investigator James Odle tried to recall at the hearing the basis for his opinion that Jackie McConnell “owned” the Whitter Stables business. Tr. I 560:23 through 561:19, 453:5 through 454:3, 450:10-19. Complainant contends that during the time of the alleged offense, Jackie McConnell had an ownership stake (a general partnership interest) in Whitter Stables because Whitter Stables occupied the same real estate, used the same physical facilities, inherited possibly 7 of 10 former clients, and employed some of the same employees as Jackie McConnell Stables. Tr. II 437:5 through 439:1, 415:5-11, 416:23 through 417:1. APHIS investigator James Odle stated that he “knew” that Whitter Stables was owned by both Jackie and Cynthia McConnell. Tr. I 607:15, 608:14. Mr. Odle stated he had known Jackie McConnell for over 20 years. Tr. I 706:5-24. He stated he was “convinced” that Mr. McConnell was the trainer [of Regal By Generator]. Tr. I 684:4.

[23] Jackie McConnell led Regal By Generator to the pre-show inspection area (to present her for inspection) on September 3, 1998. Tr. I 50:25 through 51:3, Tr. I 82:14 through 86:6, Tr. I 373:21-22, Tr. II 150:22-23, Tr. II 205:8-11, and CX 13 at 6:37 p.m. Additionally, Jackie McConnell stipulated that he led the horse through the inspection station. Tr. I 237:19-22, Tr. I 373:21-23.

[24] At the pre-show inspection on September 3, 1998, John Michael Guedron, DVM (Doctor of Veterinary Medicine), APHIS VMO (Veterinary Medical Officer), and an experienced examiner of walking horses, inspected Regal By Generator. Dr. Guedron observed Regal By Generator's movements and examined the horse's front legs and feet. Dr. Guedron testified that he prepared a report of his examination that same day (by completing portions of the APHIS

Form 7077) and prepared an affidavit the following day. Tr. I 52:3 through Tr. I 54:18, CX 5, and CX 9.

[25] In their Affidavits and on the APHIS Form 7077, Dr. Guedron and Dr. Kirsten, also an experienced Doctor of Veterinary Medicine and APHIS VMO, described Regal By Generator's pain responses during their inspections. CX 9.

[26] Dr. Guedron stated in his Affidavit (CX 9 at 2-3):

I began my physical exam on the left leg and foot and elicited strong, consistent, and repeatable pain responses - as evidenced by the horse forcefully withdrawing its foot and rearing its head - to digital palpation of the anterior aspect of the pastern, approximately 1-2 inches above the coronary band, and the lateral aspect just above the coronary band . . . I continued with the right leg and foot and elicited the same consistent and repeatable pain responses to digital palpation of the medial, anterior, and lateral aspects of the pastern above the coronary band. I also noted several thick, firm, abraded ridges of tissue on the posterior pastern that extended onto the medial and lateral aspects of the pastern. I continued with the right leg and foot and elicited the same consistent and repeatable pain response to digital palpation of the medial, anterior, and lateral aspects of the pastern above the coronary band. In addition, there were several firm, raised red "button" lesions noted in the sulcus or "pocket" of the posterior pastern.

CX 9 at 2-3.

[27] Dr. Guedron testified that the lesions and sensitivity to pain by Regal By Generator would have existed prior to the pre-show examination. Dr. Guedron, on direct examination by

Ms. Carroll, testified as follows:

- Q. Now, in paragraph 4 of page 2, it states: "As evidenced by the horse forcefully withdrawing its foot and rearing its head.." What does rearing its head indicate, if anything, to you?
- A. The rearing of the head was in conjunction with withdrawal of the foot which would indicate that the horse was trying to remove its foot and leg from my grasp to avoid the painful sensations that I was eliciting through palpation.
- Q. At the end of that paragraph which continues on page 3 of Exhibit 9, it says: "I continued with the right leg and foot and elicited the same consistent and repeatable pain response to digital palpation of the medial, anterior, and lateral aspects of the pastern above the coronary band." Are those depicted anywhere else in this exhibit?
- A. Yes, they are depicted in the schematics under block 31 on the APHIS Form 7077.
- Q. And what were those consistent and repeatable pain responses you are describing in here?
- A. There was a forcible withdrawal of the leg in conjunction with the rearing of the head.
- Q. And the last sentence of that paragraph says: "There were several firm, raised, red 'button lesions' noted in the sulcus or 'pocket' of the posterior pastern." Where, if anywhere, are those noted on the documentation?
- A. Again, they are noted under block 31 on the APHIS Form 7077.

- Q. What is the sulcus or pockets?
- A. That is the posterior or back of the pastern, that area in the center is commonly referred to as the sulcus or the pocket pastern.
- Q. Do you have an opinion whether this horse was in pain during your examination?
- A. Yes, I do.
- Q. What is that opinion?
- A. My opinion is the horse was in pain.
- Q. And what is the basis for that opinion?
- A. The locomotion of the horse as well as the response to digital palpation.
- Q. What did the locomotion tell you that led you to believe that the horse was in pain?
- A. Locomotion indicates to me that the horse didn't want to place the normal amount of weight carried by the front feet on its front feet due to the painful condition.
- Q. How was that indicated?
- A. By the horse being back on its rear feet, having its weight back on its rear feet, its rear feet further up underneath the horse's body to support more of the weight.
- Q. And in locomotion?
- A. As it walked and as it stood, yes.
- Q. And did you note that anywhere in your documentation?
- A. I noted under block 31 on the APHIS Form 7077 a description to the right that the horse led and turned around the cone and that same description is in my affidavit,

paragraph 4.

Q. What does that say?

A. That the horse led slowly and had difficulty turning around the cone.

Q. Do you have an opinion as to whether this horse would have been in pain if it had been exhibited after your examination?

A. Yes, I do.

Q. And what is that opinion?

A. I believe it would have been in pain.

Q. And what is the basis for that opinion?

A. Again, the basis for that opinion is the painful responses that I elicited upon my physical exam through digital palpation in conjunction with my observation of its locomotion and its stance would indicate to me that if this horse under saddle was forced to suffer concussive forces on its front feet that he would indeed experience pain.

Q. Do you have an opinion as to whether the conditions of this horse's posterior pasterns would have existed previously? That is before the date of your examination.

A. Yes, I believe these conditions would have taken, as I stated before, **weeks** to become that severe. [Emphasis added].

Tr. I 70:1 through 73:7

[28] At the conclusion of his examination of Regal By Generator, Peter R. Kirsten, DVM, completed a portion of APHIS Form 7077. CX 9, Tr. I 302:16-22.

[29] In his Affidavit (CX 9 at 4-5), Dr. Kirsten described both his inspection and Dr. Guedron's:

I then observed Dr. Guedron examine the horse. He elicited a painful response to palpation, evidenced by a strong leg withdrawal, when he palpated the lateral bulb of the left foot extending around the lateral aspect to the anterior of the pastern. There was also a response to palpation on the right foot from medial to lateral extending across the anterior of the pastern, evidenced by a strong leg withdrawal. I then palpated the horse and got a strong leg withdrawal when I palpated the lateral and anterior aspect of the left pastern, and a mild leg withdrawal when I palpated the anterior and medial aspect of the right pastern. These responses were consistent and repeatable. I also observed that this horse had his rear legs tucked under. I also observed button lesions on the posterior of the right pastern and raised and thickened ridges on the posterior of the left pastern. . . . Dr. Guedron and I conferred and agreed on our findings. Dr. Guedron notified the custodian that we intended to write a government case on the horse.

CX 9 at 4-5.

[30] Dr. Kirsten, on direct examination by Ms. Carroll, testified that the lesions and sensitivity to pain by Regal By Generator would have existed prior to the pre-show examination.

Q. What is your opinion, Dr. Kirsten, as to the length of time that it would take for a normal pastern to develop the abraded ridges and button lesions that you have just described?

A. My opinion is that it would occur chronically over a longer period of time. This

is not, in my opinion, an acute suddenly onset lesion. It would be chronic and I would not give you a length of time. I don't have an opinion on that.

Q. It would not have occurred overnight?

A. It would not.

...

Q. And what is the basis for your opinion?

A. The granulomatous lesion is, in my opinion, the response to chronic inflammation, chronic irritation.

Q. And is that the same for -- are you speaking of the button lesions or the ridges?

A. To both.

Q. And how does a granulomatous condition occur?

A. As a result of chronic, repeated inflammation or irritation.

Q. Do you have an opinion as to what the cause was of this condition on this horse?

...

Q. Do you have an opinion?

A. That these lesions were caused by chemicals and/or mechanical devices.

Q. What is the basis for your opinion?

...

A. This is my professional opinion as an inspector with the U. S. Department of Agriculture, Animal and Plant Health Inspection Service, Animal Care.

Q. Dr. Kirsten, do you have an opinion as to whether this horse would have been in pain?

...

Q. If it had been exhibited following your examination?

...

A. My opinion is that the horse would have been in pain if exhibited following my inspection, yes.

Q. What is the basis for your opinion?

A. The basis for my opinion is based upon my inspection of the horse, my observation of its movements and appearance and the results of my digital palpation.

Q. Dr. Kirsten, do you have an opinion as to a cause of the pain you elicited on the areas marked as X's in item 31?

...

Q. Do you have an opinion?

A. Could you repeat the question, please?

Q. Do you have an opinion as to the cause of the responses of this horse that you elicited in the areas identified on item 31 in Exhibit 9, page 1?

A. My opinion is that a person applied chemicals and/or mechanical devices to the pasterns of this horse's feet in order to inflict pain and distress to this animal.

Q. What is the basis for your opinion?

A. The basis for my opinion is my professional experience as a veterinarian and my training and experience as an animal care VMO working the Horse Protection Act program for 11 years. Nine years at the time of this inspection.

Tr. I 316:3 through 319:6.

[31] APHIS investigator James Odle was present in the pre-show inspection area at the Celebration. He completed a portion of APHIS form 7077. Tr. I 429:7-13. Mr. Odle told Jackie McConnell that Regal By Generator was “excused” from the horse show and that further information would be required. Tr. I 430:2-16. Mr. Odle testified on direct examination:

A. Well, I remember on the evening that Mr. McConnell presented the horse for inspection and upon completion of the DQP examination and inspection by the USDA veterinarians, they alleged that the horse was sore in violation of the Horse Protection Act and we had this form prepared and I approached Mr. Jackie McConnell for the information to complete the form, explained the allegations and told him that he could excuse the horse and come back and give me the information at which time he told me that Cyndi would come, his wife, Mrs. McConnell would come and give me the information.

Tr. I 430:2-12

[32] Cynthia McConnell was not present when Regal By Generator was inspected on September 3, 1998. Tr. II 150:24 through 151:12.

[33] Respondents presented no evidence to refute the testimony and documentation of Drs. Guedron and Kirsten, except to show that Regal by Generator had successfully completed three pre-show inspections and at least one post-show inspection during the 1998 Celebration (same horse show).

Applicable Statutory and Regulatory Provisions

[34] Applicable statutory and regulatory provisions are included as appendices to this Decision. Appendix A is relevant portions of the Horse Protection Act, 15 U.S.C. Title 15,

Chapter 44 (15 U.S.C. §§ 1821-1831). Appendix B is relevant portions of the Horse Protection Regulations, 9 C.F.R., part 11. Appendix C is 28 U.S.C. § 2461. Appendix D is 7 C.F.R. § 3.91(a) & (b)(2)(vii), increasing the Civil Monetary Penalties. Appendix E is 7 C.F.R. § 1.145 of the Rules of Practice.

Discussion

DISCUSSION OF CONSTITUTIONAL AND ADMINISTRATIVE LAW ISSUES

[35] Respondents alleged but did not prove the existence of an “Agreement” or “Understanding” between Acting Administrator of APHIS, Dr. Ron DeHaven, and persons representing the National Horse Show Commission (NHSC) in the nature of a “interim plan” between the 1998 and 1999 Strategic Plans for implementing the Horse Protection Act.

[36] A significant portion of the testimony was devoted to an alleged “Agreement” or “Understanding” between the Acting Administrator for APHIS, Dr. Ron DeHaven, and various representatives of the National Horse Show Commission (NHSC). The Respondents adamantly state that there was an “Agreement” or “Understanding” known throughout the Walking Horse industry that . . . [I]f the HIO’s . . . and the National Horse Show Commission (NHSC) was the HIO . . . gave the appropriate penalty for a Horse Protection Act violation such as a sore horse of eight months and the trainer took that through the National Horse Show Commission, the Department of Agriculture would not pursue a federal case. Tr. II 370:16-23, RX 17, RX 18.

[37] Cynthia McConnell, listed on the entry form (CX 7) as Trainer, believed that if she accepted an eight-month suspension plus paid a \$500 fine to the NHSC that there would be no case initiated by APHIS for the same violation. Tr. II 156:13-23.

[38] Cynthia McConnell testified that she completed the NHSC suspension on May 5, 1999, and paid the \$500.00 fine. Tr. II 171:18-20.

[39] Respondents provided evidence of the “Agreement” or “Understanding” between APHIS and NHSC through NHSC Executive Vice President, Lonnie Messick (Tr. II 362:1-2, Tr. II 389:1-4, Tr. II 396:1-15) and through NHSC attorney, Craig Evans (Tr. II 297:11-18).

[40] Lonnie Messick stated that he . . . “heard, Dr. [Ron] DeHaven as Deputy Administrator of APHIS, talk to owners and trainers about this particular agreement. . .” [between APHIS and NHSC regarding the alternate HIO penalty in lieu of the APHIS penalty]. Tr. II 403:13-25.

[41] Respondents agreed that the “Agreement” or “Understanding” between Ron DeHaven and NHSC was not in writing. Tr. II 297:19-21. To demonstrate the parameters of the oral “Agreement,” Respondent’s witness, Craig Evans, described one occasion where another Trainer, “. . . Bill Barnett, asked [Ron DeHaven if he] could have that [the Agreement] in writing that if he accepted . . . [the NHSC] penalty . . . that there would be no Federal initiation of a complaint. And I carried that to Dr. DeHaven and he responded that **what he said was enough**. And it was.” Tr. II 298:1-6. [Emphasis added].

[42] Complainant’s witness, Dr. Ron DeHaven, testified that he did not speak at any of the three public meetings announced by the Federal Register concerning the Horse Protection Act Strategic Plan. Tr. II 957:16-18. He stated that “there was no specific agreement between APHIS, the agency, and any of the HIOs . . .” Tr. II 962:4-6. Dr. DeHaven’s version of APHIS’s position was that “I made it known through discussions and meetings with industry, that included the National Horse Show Commission, but as well as others, that we would certainly consider

penalties imposed by a HIO in exercising our prosecutorial discretion.² There was no agreement per se.” Tr. II 963:11-16. Dr. DeHaven stated that the proposed “Strategic Plan” did include terms concerning non-enforcement of APHIS penalties if certain criteria were met, however he also stated that “ [The proposed Strategic Plan] was rejected by all but one of the certified HIOs. So that constituted no agreement. . . there was nothing official put out by [APHIS] that would have made that kind of commitment.” Tr. II 964:7-13. Dr. DeHaven believed that he committed APHIS to the extent that “[APHIS] would in its exercising prosecutorial discretion . . . certainly take such an industry penalty into consideration. And that would be a significant factor.” Tr. II 966:11-15. He stated that “I had no specific agreement with Craig Evans (the NHSC attorney).” Tr. II 968:18-22. In response to a hypothetical developed by Respondent’s counsel, Dr. DeHaven described the various factors that would have been considered as to whether APHIS would have instituted a Federal case instead of allowing the HIO to administer a penalty for a violation of the Horse Protection Act. Dr. DeHaven said the factors would be: “The timing of the penalty. . . **Were there other parties who might or might not have been involved?** Was the suspension backdated . . .” Tr. II 1028:9-16. (Emphasis added).

[43] Proof of an “Agreement” or “Understanding” between APHIS and the NHSC is lacking, even accepting all the testimony as credible, because there was no meeting of the minds.

[44] Even if I were to assume *arguendo* that there was an oral agreement, APHIS retained prosecutorial discretion to pursue Federal cases based on several factors, including, most relevant here - Were there other parties involved?

² discussion corrected to discretion, *see* Complainant’s Motion to Correct Transcript

[45] Jackie McConnell is a party well known to APHIS and believed by the APHIS investigator to have been involved with the soring of horses on other occasions over a long period of time. When APHIS found the evidence of the soring of Regal By Generator during the 1998 Celebration pre-show inspection, it is reasonable that APHIS would not be content to forego pursuing a Federal case against Jackie McConnell as one of the alleged offenders, but would instead present a case against all alleged offenders.

[46] During cross-examination, Dr. Guedron stated that he told Jackie McConnell at the pre-show inspection area that “A Federal case would be initiated.” Tr. I 205:3-4. There was no evidence that Cynthia McConnell or Jackie McConnell received assurances from APHIS that APHIS would retract its stated intent to pursue a Federal case in this matter as a result of Cynthia McConnell taking an eight-month suspension and paying a \$500 fine through the NHSC. Respondents did not carry their burden of persuasion (preponderance of the evidence) for their affirmative defense that APHIS filed this case contrary to an “Agreement” or “Understanding” between APHIS and the NHSC.

[47] Respondents alleged but did not prove that there was selective enforcement of the Horse Protection Act against the Respondents (with a view to target Jackie McConnell) since no other “mere custodian(s)” of a sored horse have been found to have “entered” the horse in violation of Section 5(2)(B) of the Act.

[48] Other Horse Protection Act cases have been decided where the custodian of the horse has been found to have “entered” a sore horse. *See* paragraphs [86] and [87] below.

[49] Respondents alleged but did not prove that there was malicious prosecution by APHIS in the enforcement of the Horse Protection Act against the Respondents (with a

view to target Cynthia McConnell) since no other alleged violator of the Horse Protection Act in 1998 or 1999 who accepted a NHSC suspension and fine has been subsequently charged with a violation of the Horse Protection Act.

[50] Respondent filed a Freedom of Information Request (FOIA) with APHIS on/about October 5, 2000, requesting the disclosure of other HPA cases with fact patterns similar to this case. Respondent then proposed that the charging of these Respondents with a Federal case was unique because no response was supplied by APHIS satisfying their FOIA search criteria. Tr. II 802:14 through 804:4. Respondent's confidence in the inference to be drawn from a nonresponse to a FOIA search is misplaced. The lack of a search result cannot be conclusive. Further, even if Respondent Cynthia McConnell is the only alleged violator to face both a private NHSC sanction and a Federal civil action, it may be that this was the only case that warranted a Federal civil action where a private NHSC sanction had been imposed. The totality of the circumstances must be considered. There has been no showing that APHIS's discretion in choosing what civil actions to pursue was waived or blocked by any "Agreement" or "Understanding," or that APHIS in any way abused its discretion. See also paragraphs [42] through [46].

[51] Respondents alleged but did not prove that an APHIS authorized mechanism existed whereby all Respondents are shielded from a Federal civil action and the penalties of the Horse Protection Act if Cynthia McConnell accepted and served an eight-month suspension and accepted and paid a \$500 fine through the NHSC.

[52] A review of the chronology seems to show that APHIS and Respondents were each pursuing their own agendas without an intersecting relationship until the APHIS Federal case

was filed. When Regal By Generator was found to have been sore at the pre-show inspection on September 3, 1998, the horse's custodian, Jackie McConnell, was informed that a Federal case would be initiated. Tr. I 205:3-4. On/about September 4, 1998, Cynthia McConnell accepted an eight-month NHSC suspension and \$500 fine with the belief that she could end APHIS's process of bringing a Federal case. Cynthia McConnell received the official NHSC suspension Notice on/about September 16, 1998. RX 18. APHIS's investigator did not complete his work on this case until at or near the date he left employment at APHIS in May of 1999. Cynthia McConnell paid her \$500 fine in December 1998. Tr. II 307:18-22. Her eight-month NHSC suspension period ended in May 1999, and APHIS could not have been known until then, even if APHIS had been considering forbearance in filing a Federal case, whether Cynthia McConnell satisfied all the NHSC suspension criteria. (Such a suspension, by a private organization, is not the same as a disqualification under the Horse Protection Act. *See* the testimony of Craig Evans, who said, "And recognize that there was a difference in 1998 between NHSC suspension versus a USDA suspension." Tr. II 209:15 through 210:13.) As the Federal case evolved, violations of the Horse Protection Act were alleged not only against Cynthia McConnell, but also against others for "entering" a sore horse, including the custodian of the horse during the September 3, 1998 pre-show inspection, against those responsible for shipping a sore horse, and against the owners for allowing a sore horse to be shipped and entered. Dr. DeHaven explained the lengthy process involved in the preparation of a Federal case, together with the multiple levels of review. Tr. II 998:15 through 999:12. The Complaint in this case was filed on September 7, 1999. APHIS's case development process appears to have been rigorous and reasonable in nature and implemented with a view toward meeting its agency

objectives. Respondents did not carry their burden of persuasion (preponderance of the evidence) for their affirmative defense that APHIS relinquished its prosecutorial discretion to pursue this matter as a Federal case. Cynthia McConnell was mistaken in her belief that she was finished with the matter, when she complied with NHSC requirements.

DISCUSSION OF SUBSTANTIVE LAW ISSUES

[53] Cynthia McConnell did ship, transport, move, or deliver a horse which is sore with reason to believe that such horse while it is sore, may be shown or exhibited in a horse show, in violation of section 5(1) of the Horse Protection Act.

[54] The applicable portion of the Horse Protection Act (see Appendix A for full text) states: The following conduct is prohibited: (1) The shipping, transporting, moving, delivering, or receiving of any horse which is sore with reason to believe that such horse while it is sore may be shown, exhibited, entered for the purpose of being shown or exhibited . . . in any horse show, [or] horse exhibition. . .

15 U.S.C. § 1824 (1).

[55] Cynthia McConnell stated that on/about August 23, 1998, she contracted with an independent contractor to haul horses, including Regal By Generator, to the 1998 Celebration for \$300.00. Tr. II 124:20 through 125:1-11, Tr. II 130:11-14, Tr. II 180:11 through 181:15, and CX 4.

[56] VMO Guedron testified that the condition of the posterior pasterns of Regal By Generator on September 3, 1998, would have taken weeks to become that severe. Tr. I 72:15 through 73:7. VMO Kirsten testified that the button lesions (round, raised, granulomatous,

hairless lesions) on the posterior of the right pastern and the raised and thickened ridges on the posterior of the left pastern would occur chronically over a longer period of time, in response to chronic, repeated inflammation or irritation. Tr. I 309:7 through 316:25. The period of time (August 23 through September 3) from the arrangements for shipping/transporting Regal By Generator until the pre-show inspection was only 11 days.

[57] Neither an intent to sore – nor knowledge that a horse is sore – is required for a finding of a civil violation. *In re Jackie McConnell, et al.*, 44 Agric. Dec. 712, 724 (1985), *In re Sparkman*, 50 Agric. Dec. 602, 609 (1991). Cynthia McConnell is charged with knowledge that the horse was sore at the time it was shipped.

[58] Respondent argues that the evidence shows that Regal By Generator had already passed through the inspection process at the 1998 Celebration (the same horse show event) with three pre-show inspections and at least one post-show inspection without being found in violation of the Horse Protection Act. Tr. I 123:19-22. Respondent argues that the USDA inspection process is inherently unreliable since the Complainant's evidence that the horse's condition would have developed "over weeks," conflicts with the evidence that Regal By Generator passed both pre-show and post-show inspections within a few days of September 3, 1998. Even so, evidence of prior uneventful inspections is not worthy of great weight. *See In re Joe Fleming*, 41 Agric. Dec. 38, 44 (1982); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1939 (1981); *In re Richard L. Thornton*, 41 Agric. Dec. 870, 876 (1982).

[59] Whitter Stables did ship, transport, move, or deliver a horse which is sore with reason to believe that such horse while it is sore, may be shown or exhibited in a horse show, in violation of section 5(1) of the Horse Protection Act.

[60] Whitter Stables is a “person” under the Horse Protection Act (*see* the definition of “person” in Appendix B) which may be held accountable for the acts of its agents. *See In re Jackie McConnell, et al.* 44 Agric. Dec. 712, 729 (1985).

[In] determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words “person” and “whoever” include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.

1 U.S.C. § 1.

[61] *See* paragraphs [53] through [58].

[62] Jackie McConnell did not ship, transport, move, or deliver a horse which is sore with reason to believe that such horse while it is sore, may be shown or exhibited in a horse show, and he was not in violation of section 5(1) of the Horse Protection Act.

[63] Complainant argues that Jackie McConnell is a partner with his wife, Cynthia McConnell, and that he is consequently personally liable for the acts of the partnership. I have found that the business entity Whitter Stables is collectively and severally liable with Cynthia McConnell for shipping, transporting, moving or delivering Regal By Generator, a sore horse. The Complainant urges that I find Jackie McConnell to be a general partner with Cynthia McConnell in the business entity known as Whitter Stables and thus liable under the Horse Protection Act for acts of the partnership. For reasons stated below, I find otherwise. Further, as shown below, precedent seems to require that Jackie McConnell had directly participated in the act of shipping or transporting or moving or delivering of a sore horse in order to hold him in violation of section 5(1) of the Horse Protection Act.

[64] Despite the firmly held conviction of APHIS investigator James Odle that Jackie McConnell was the trainer of Regal By Generator, the Complainant's effort to prove that Jackie McConnell was in partnership did not succeed in rising above suspicion. Tr. I 684:4. The evidence presented by Complainant is relevant and material to the partnership question, but does not reach the level of a preponderance of the evidence to show that Jackie McConnell was a general partner of Whitter Stables or that he personally participated in any conduct prohibited by section 5(1) of the Horse Protection Act.

[65] Complainant urges that I apply partnership common law, Tennessee Partnership law, or "family partnership" law as it has been interpreted in IRS cases to arrive at a determination as to who is and who is not a general partner. See Complainant's Proposed Findings of Fact and Conclusions of Law at footnotes 9, 14, and 15. In his brief, Complainant attached a copy of a consent order involving *In re Carl Edwards and Sons, et al.* filed August 21, 1997. While the attached copy has no relevance to the general partnership question, the predecessor *Carl Edwards* case is on point. There the Judicial Officer stated, "Complainant may be correct on the state law of Georgia [regarding partnership], but it is of no moment, because it is axiomatic that state law cannot control a federal regulatory statute." *In re Carl Edwards & Sons Stables, et al.*, 56 Agric. Dec. 529, 559 (1997). In that case, the other general partners, Larry E. Edwards and Etta Edwards, were not shown to have directly participated and thus were not found to have violated the Act by transporting a sore horse "since the issue . . . is one of presumed guilt through association." See *Carl Edwards, supra* at 558-559 and *In re Gary R. Edwards*, 55 Agric. Dec. 892, 929-930 (1996). In contrast, the Judicial Officer has found co-owners of a sore horse in a partnership status equally liable regardless of degree of participation for "allowing" a violation of

section 2(A) or (B) of the Act. *See In re Jackie McConnell, et al.*, 44 Agric. Dec. 712, 728-31 (1985).

[66] During her eight or more hours of cross-examination (*see* Tr. II 735:5), Cynthia McConnell steadfastly maintained that she alone owned and controlled Whitter Stables. Her testimony is credible. Additionally, there is no evidence that Jackie McConnell acted individually or directed any person to ship, transport, move, or deliver Regal By Generator to the 1998 Celebration.

[67] APHIS Investigator James Odle had left the USDA employment some 15 months prior to the hearing. Tr. I 467:19-21. He had not seen the case file since May 1999. Tr. I 499:24-25. He did not have contemporaneous notes or tape recordings of his conversation with Jackie McConnell wherein Jackie McConnell was alleged to have acknowledged ownership of Whitter Stables. Tr. I 478:9-21, Tr. I 491:12-22, Tr. I 493:4-11, 20-25, Tr. I 494:1 through 495:2, Tr. I 503:4-12, Tr. I 521:8-13.

[68] Complainant's CX 10 (affidavit of Whitter Stables customer Camile Akin) is not dispositive as to the form of ownership of the entity of Whitter Stables in August and September 1998. Ms. Akin's affidavit does not reveal the time period covered by the alleged partnership status. Ms. Akin's business relationship with the McConnells spanned 8 years prior to the time of her affidavit and covers the time period where Jackie McConnell Stables was in operation training Tennessee Walking Horses (into 1994) and also the period where Jackie McConnell Stables was conducting a horse buying and selling business (in 1996 and after) at the same location as Whitter Stables. Tr. II 728:13 through 729:4. APHIS investigator James Odle agreed that he may have been the one to have inserted "(Cyndi and Jackie McConnell)" for clarity

during his preparation of the affidavit for Ms. Akin to sign. Tr. I 567:2-7.

[69] Complainant's CX 11 was offered through APHIS investigator James Odle to show that Jackie McConnell was more than just an employee, and was in fact a manager. But Mr. Odle did not know who paid for the advertisement, directed the placement of the advertisement, or who approved the advertisement. Tr. I 703:21 through 704:8, Tr. I 707:25 through 708:6. Mr. Odle also did not know how the advertisement got into the file. Tr. I 705:3-5.

[70] Complainant's CX 28, which was published before the 1998 Celebration, tends to prove that Jackie McConnell was a trainer in 1997. Tr. II 652:19 through 657:21. That Jackie McConnell was a trainer in 1997 was not a contested issue, but it is not probative regarding whether he was a partner in Whitter Stables in August or September 1998.

[71] Complainant's CX 25, a "News & Stories" article written in May of 2000 by Tanya Hopper (who appears to live in the vicinity of Irving, Texas), is not dispositive as to whether Jackie McConnell owned any part of the entity Whitter Stables in Tennessee in August or September 1998.

[72] Complainant's CX 1 (the 1989 Warranty Deed and the 1998 property tax receipt for the property) shows joint ownership by "JACKIE McCONNELL and wife CYNDI McCONNELL" on the deed to the property where the entity Whitter Stables was situated. Complainant argues that that evidence tends to prove that Whitter Stables, which began in 1994, was a partnership, but I do not find that joint ownership of the real estate indicates joint ownership of the business entity Whitter Stables. Additionally, Cynthia McConnell testified credibly that after his suspension in the spring of 1994, Jackie McConnell re-opened Jackie McConnell Stables in 1996 in the business of buying and selling horses. Tr II 728:17 through 729:4. Regarding CX 1 at

p.7, the 1998 property tax receipt, there was no evidence of how the bank account was titled on which check number 5860 was drawn to pay the 1998 taxes, whether from an account of Jackie McConnell's or otherwise. The most definitive evidence regarding payment of the real property tax bill was Cynthia McConnell's testimony that she (Whitter Stables) paid it. There is no evidence whether Fayette County, Tennessee listed ownership or tax records in the name of the male first in a husband wife relationship, *i.e.* "McCONNELL, JACKIE ETUX CYNDI" and whether that might account for the entry "Rcv of McCONNELL, JACKIE." See CX 1 at p.7. Jackie McConnell and Cynthia (Cyndi) McConnell being husband and wife provides sufficient explanation for their joint ownership of the real property where the entity of Whitter Stables was situated. Relationships between them do not include a partnership in Whitter Stables, which has been proved to be Cynthia McConnell's sole proprietorship and a co-user of the same real estate and facilities used by Jackie McConnell Stables. Cynthia McConnell testified credibly that she and her husband were not business partners.

[73] APHIS investigator James Odle did not request or obtain, for Jackie or Cynthia McConnell, copies of State or Federal income tax returns or copies of property/liability insurance declaration pages. Tr. I 526:20-25. Mr. Odle stated that he knew how to gather information about business entities from different sources, either from the State or the Secretary of State if it is a corporation, or the IRS. Tr. I 525:9-18. Complainant did not present any such evidence to prove the existence of a partnership during August or September 1998 between Cynthia and Jackie McConnell.

[74] **Cynthia McConnell did "enter" a sore horse in a horse show, in violation of section 5(2)(B) of the Horse Protection Act.**

[75] The applicable portion of the Horse Protection Act (see Appendix A for full text) prohibits the following conduct.

The following conduct is prohibited: . . . (2)(B) entering for the purpose of showing or exhibiting in any horse show. . . any horse which is sore.

15 U.S.C. §1824(2)(B).

[76] The horse known as Regal By Generator was entered as entry number 685 in class 110 in the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee for competition in the horse show. CX 7. Cynthia McConnell admitted that she personally participated in completing the Celebration entry forms. Tr. I 284:11-13, CX 7.

[77] “Entry” or “entering” is a process that includes a variety of actions, including but not limiting to completing the entry forms, paying the entry fee, preparing the horse for exhibition, and presenting the horse for pre-show inspection to the Designated Qualified Person (“DQP”) or to the USDA’s representatives. *In re William Earl Bobo, et al.*, 53 Agric. Dec. 176, 207 (1994).

[78] The result of a horse being “sore” or “sored” is explained by the Horse Protection Act to include certain circumstances where a horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving”. 15 U.S.C. § 1821(3)(D).

[79] The testimony and affidavits of the veterinary medical officers, Drs. Guedron and Kirsten were persuasive that Regal By Generator was sore at the time of the pre-show inspection in violation of the Horse Protection Act and that she would suffer pain if exhibited in the show. CX 9. Respondents offered no evidence to refute the testimony and affidavits of Drs. Guedron and Kirsten except to show that Regal By Generator had successfully completed three pre-show

and at least one post-show inspection during the 1998 Celebration (same horse show).

[80] Whitter Stables did “enter” a sore horse into a horse show in violation of section 5(2)(B) of the Horse Protection Act.

[81] Whitter Stables is a “person” under the Horse Protection Act (*see* the definition of “person” in Appendix B) which may be held accountable for the acts of its agents. *See In re Jackie McConnell, et al.* 44 Agric. Dec. 712, 729 (1985).

[In] determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words “person” and “whoever” include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.

1 U.S.C. § 1.

[82] *See* paragraphs [74] through [79].

[83] Jackie McConnell did “enter” a sore horse into a horse show in violation of section 5(2)(B) of the Horse Protection Act.

[84] Jackie McConnell led Regal By Generator to the pre-show inspection area to present her for inspection on September 3, 1998. CX 13. Additionally, Jackie McConnell stipulated that he led Regal By Generator through the inspection station.

[85] Respondent Jackie McConnell urges that the Secretary’s policy and practice was that custodians [of the horse or leading the horse] who are not shown to have been otherwise connected with the sore horse have not been included as persons charged with “entering” a sore horse. Respondent has narrowed the issue by stating that he understands “. . . [T]he position of the USDA is that the mere fact of presenting the horse constitutes ‘entry’ for the

purposes of the HPA.” See Respondent Jackie McConnell’s Proposed Findings of Fact and Conclusions of Law at page 9.

[86] A case in which the Complainant did not urge that the “custodian” be found in violation, and the Judicial Officer granted the custodian’s Motion to Dismiss, is not persuasive here. See *In re A.P. “Sonny” Holt, et al.*, 49 Agric. Dec. 853, 861 (1990).

[87] If the remedial purpose of the Horse Protection Act is to be achieved, it must be construed liberally, so as to give effect to its provisions. “Entering,” within the meaning of the Act, is a process that begins with the completion of an entry form, payment of the entry fee and which includes pre-show examination by the DQP and/or USDA veterinarians. The entry of a horse within the meaning of the Act is also a status, such that once a person does any one or all of the steps in the process of entering a horse, it remains entered until it has finished showing or exhibiting. *In re William Dwaine Elliott, et al.*, 51 Agric. Dec. 334, 344 (1992), *aff’d*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993). “The Act was passed to end the practice of making horses sore and to quash the competitive advantage gained by cruelly making a horse ‘sore’. Congress stated that its purpose was to ‘make it impossible for persons to show sored horses in nearly all horse shows.’ See H.R. Rep. No. 91-1597, 91st Cong., 2d Sess. 2, *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871.” *In re John Allan Callaway*, 52 Agric Dec. 272, 293 (1993), citing *Elliott*. In a case contemporary to *Callaway*, the Judicial Officer found “For the same reasons, I held in *In re Callaway*, . . . that the custodian who presents a horse to the DQP for the pre-show inspection ‘enters’ the horse, within the meaning of the Act. Accordingly, Complainant proved that Respondent Roy E. Wagner also entered ‘Sir Shaker,’ as alleged in the Complaint.” *In re Roy E. Wagner et al.*, 52 Agric. Dec. 298, 316 (1993).

Findings of Fact

[88] Regal By Generator was reasonably expected to suffer pain in the pastern areas of her front legs and feet if she were shown on September 3, 1998, as entry number 685 in class number 110 at the Tennessee Walking Horse National Celebration.

[89] Regal By Generator exhibited abnormal sensitivity and lesions (scars) on September 3, 1998, which were the response to chronic inflammation and irritation from harmful chemicals and/or mechanical devices to the pasterns of the horse's front legs and feet, according to the two well-qualified, experienced APHIS Veterinary Medical Officers who observed her in motion and examined her on September 3, 1998.

[90] Regal By Generator's scars and ridges would have occurred chronically over a "longer" (unspecified) period of time, in response to chronic, repeated inflammation or irritation, according to one of those two well-qualified, experienced APHIS Veterinary Medical Officers.

[91] Regal By Generator's abnormal sensitivity and scars would have taken "weeks" to become that severe, according to the other of those two well-qualified, experienced APHIS Veterinary Medical Officers.

[92] Regal By Generator was sore, within the meaning of the Horse Protection Act, during pre-show inspection or examination on September 3, 1998.

[93] Regal By Generator's sore condition was chronic and would have taken weeks to become that severe. Thus Regal By Generator was sore on September 2, 1998, when the entry form was completed for her entry as number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration; and Regal By Generator was sore on August 23, 1998, when arrangements were made to transport and deliver her to the 1998 Celebration.

[94] Respondent Jackie McConnell is an individual whose business mailing address is P. O. Box 490, Collierville, Tennessee 38027. At all times material to this proceeding, Respondent Jackie McConnell was a licensed horse trainer. On September 3, 1998, by presenting the horse for inspection at the pre-show inspection area, Respondent Jackie McConnell entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee.

[95] Respondent Cynthia McConnell is an individual whose business mailing address is P. O. Box 205, Collierville, Tennessee 38027. At all times material to this proceeding, Respondent Cynthia McConnell was a licensed horse trainer. On or about August 23 through 26, 1998, Respondent Cynthia McConnell shipped, transported, moved, or delivered Regal By Generator with reason to believe that such horse may be shown or exhibited in a horse show, by personally contracting with and paying an independent contractor to transport and deliver horses, including Regal By Generator, to the 1998 Tennessee Walking Horse Celebration Horse Show in Shelbyville, Tennessee.

[96] Respondent Whitter Stables is a sole proprietorship entity which has a mailing address of P. O. Box 205, Collierville, Tennessee 38027. At all times material to this proceeding, Whitter Stables was wholly owned and controlled by Respondent Cynthia McConnell. On or about August 23 through 26, 1998, through Cynthia McConnell, Respondent Whitter Stables shipped, transported, moved, or delivered Regal By Generator with reason to believe that such horse may be shown or exhibited in a horse show, by personally contracting with and paying an independent contractor to transport and deliver horses, including Regal By Generator, to the 1998 Tennessee Walking Horse Celebration Horse Show in Shelbyville, Tennessee.

[97] On September 2, 1998, by personally completing the entry form, Respondent Cynthia McConnell entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee. CX 7 at 1.

[98] On September 2, 1998, through completion of the entry form by Cynthia McConnell, Respondent Whitter Stables entered Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee. CX 7 at 1.

[99] This is the first violation of the Horse Protection Act by Cynthia McConnell and her sole proprietorship business Whitter Stables.

[100] Jackie McConnell has one (1) prior violation, found in a hearing on the merits, of the Horse Protection Act.

[101] Jackie McConnell has undergone three (3) prior disqualification periods: two (2) prior six (6)-month periods by consent with no culpability established; followed by the two (2)-year disqualification period that resulted from his one prior violation.

Conclusions of Law

[102] On September 3, 1998, Respondent Jackie McConnell entered the horse Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Regal By Generator was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)). Jackie McConnell has one prior Horse Protection Act violation.

[103] On or about August 23 through 26, 1998, Respondents Cynthia McConnell and Whitter Stables, collectively and severally, shipped, transported, moved, and delivered the horse Regal

By Generator, with reason to believe that such horse may be shown or exhibited, to a horse show while Regal By Generator was sore, in violation of section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)).

[104] On or about September 2 through 3, 1998, Respondents Cynthia McConnell and Whitter Stables, collectively and severally, entered the horse Regal By Generator as entry number 685 in class number 110 at the 1998 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while Regal By Generator was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

Order, regarding Jackie McConnell

[105] Jackie McConnell is assessed a \$2,200 civil monetary penalty for his “entering” violation. The civil monetary penalty shall be paid by cashier's check(s) or money order(s), made payable to order of the **Treasurer of the United States**, marked with HPA Docket No. 99-0034, deposited with a commercial delivery service such as FedEx or UPS, for receipt by Colleen A. Carroll, Esq., Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue SW, Room 2343 South Building Stop 1417, Washington, D.C. 20250-1417.

[106] For his “entering” violation, Jackie McConnell is disqualified for five (5) years from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, family member, or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction, directly or indirectly through any agent, employee, family member, or other device. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or

arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to any exhibitor; (c) being present in the warm-up or inspection areas, or in any area where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of anyone in any horse show, horse exhibition, horse sale, or horse auction. If the civil monetary penalty remains unpaid at the end of the five (5) year period, Jackie McConnell shall remain disqualified until the civil monetary penalty has been fully paid.

[107] The deadline for receipt of the civil monetary penalty shall be, and the effective date of the disqualification shall be, and this Decision and Order shall become final and effective, 35 days after service, unless appealed to the Judicial Officer within 30 days after service, pursuant to the Rules of Practice, 7 C.F.R. § 1.145.

Order, regarding Cynthia McConnell and Whitter Stables

[108] Cynthia McConnell and Whitter Stables are collectively and severally assessed a concurrent \$2,200 civil monetary penalty for their “shipping” violation and a concurrent \$2,200 civil monetary penalty for their “entering” violation. By concurrent, I mean that \$2,200 paid will fully satisfy both the “shipping” violation civil monetary penalty and the “entering” violation civil monetary penalty. The civil monetary penalty shall be paid by cashier's check(s) or money order(s), made payable to order of the **Treasurer of the United States**, marked with HPA Docket No. 99-0034, deposited with a commercial delivery service such as FedEx or UPS, for receipt by Colleen A. Carroll, Esq., Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue SW, Room 2343 South Building, Stop 1417, Washington, D.C. 20250-1417.

[109] For both their “shipping” and their “entering” violations, Cynthia McConnell and Whitter Stables are each disqualified for one (1) year, the year for the “shipping” violation to be served concurrently with the year for the “entering” violation, from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, family member, or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction, directly or indirectly through any agent, employee, family member, or other device. "Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation: (a) transporting or arranging for the transportation of horses to or from any horse show, horse exhibition, horse sale, or horse auction; (b) personally giving instructions to any exhibitor; (c) being present in the warm-up or inspection areas, or in any area where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and (d) financing the participation of anyone in any horse show, horse exhibition, horse sale, or horse auction. If the civil monetary penalty remains unpaid at the end of the one (1) year period, Cynthia McConnell and Whitter Stables shall remain disqualified until the civil monetary penalty has been fully paid.

[110] The deadline for receipt of the civil monetary penalty shall be, and the effective date of the disqualifications shall be, and this Decision and Order shall become final and effective, 35 days after service, unless appealed to the Judicial Officer within 30 days after service, pursuant to the Rules of Practice, 7 C.F.R. § 1.145 (*see* Appendix E).

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

Done at Washington, D.C.
this 25th day of November, 2003

Jill S. Clifton
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
1400 Independence Avenue, SW
Room 1081, South Building
Washington, D.C. 20250-9200
202-720-4443
Fax: 202-720-9776

APPENDIX A

RELEVANT PORTIONS OF THE HORSE PROTECTION ACT

TITLE 15—COMMERCE AND TRADE

CHAPTER 44—PROTECTION OF HORSES

§ 1821. Definitions

As used in this chapter unless the context otherwise requires:

.....

- (3) The term “sore” when used to describe a horse means that—
- (A) an irritating or blistering agent has been applied, internally or externally, by a person to any limb of a horse,
 - (B) any burn, cut, or laceration has been inflicted by a person on any limb of a horse,
 - (C) any tack, nail, screw, or chemical agent has been injected by a person into or used by a person on any limb of a horse, or
 - (D) any other substance or device has been used by a person on any limb of a horse or a person has engaged in a practice involving a horse, and, as a result of such application, infliction, injection, use, or practice, such horse suffers, or can reasonably be expected to suffer, physical pain or distress, inflammation, or lameness when walking, trotting, or otherwise moving, except that such term does not include such an application, infliction, injection, use, or practice in connection with the therapeutic treatment of a horse by or under the supervision of a person licensed to practice veterinary medicine in the State in which such treatment was given.

.....

§ 1822. Congressional statement of findings

The Congress finds and declares that—

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

§ 1823. Horse shows and exhibitions

(a) Disqualification of horses

The management of any horse show or horse exhibition shall disqualify any horse from being shown or exhibited (1) which is sore or (2) if the management has been notified by a person appointed in accordance with regulations under subsection (c) of this section or by the Secretary that the horse is sore.

.....
(c) Appointment of inspectors; manner of inspections

The Secretary shall prescribe by regulation requirements for the appointment by the management of any horse show, horse exhibition, or horse sale or auction of persons qualified to detect and diagnose a horse which is sore or to otherwise inspect horses for the purposes of enforcing this chapter. Such requirements shall prohibit the appointment of persons who, after notice and opportunity for a hearing, have been disqualified by the Secretary to make such detection, diagnosis, or inspection. Appointment of a person in accordance with the requirements prescribed under this subsection shall not be construed as authorizing such person to conduct inspections in a manner other than that prescribed for inspections by the Secretary (or the Secretary's representative) under subsection (e) of this section.

.....
(e) Inspection by Secretary or duly appointed representative

For purposes of enforcement of this chapter (including any regulation promulgated under this chapter) the Secretary, or any representative of the Secretary duly designated by the Secretary, may inspect any horse show, horse exhibition, or horse sale or auction or any horse at any such show, exhibition, sale, or auction. Such an inspection may only be made upon presenting appropriate credentials. . Each such inspection shall be commenced and completed with reasonable promptness and shall be conducted within reasonable limits and in a reasonable manner. An inspection under this subsection shall extend to all things (including records) bearing on whether the requirements of this chapter have been complied with.

§ 1824. Unlawful acts

The following conduct is prohibited:

(1) The shipping, transporting, moving, delivering, or receiving of any horse which is sore with reason to believe that such horse while it is sore may be shown, exhibited, entered for the purpose of being shown or exhibited, sold, auctioned, or offered for sale, in any horse show, horse exhibition, or horse sale or auction; except that this paragraph does not apply to the shipping, transporting, moving, delivering, or receiving of any horse by a common or contract carrier or an employee thereof in the usual course of the carrier's business or employee's employment unless the carrier or employee has reason to believe that such horse is sore.

(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.

.....

§ 1825. Violations and penalties

.....

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than \$2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such conduct, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) Any person against whom a violation is found and a civil penalty assessed under paragraph (1) of this subsection may obtain review in the court of appeals of the United States for the circuit in which such person resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit by filing a notice of appeal in such court within 30 days from the date of such order and by simultaneously sending a copy of such notice by certified mail to the Secretary. The Secretary shall promptly file in such court a certified copy of the record upon which such violation was found and such penalty assessed, as provided in section 2112 of Title 28. The findings of the Secretary shall be set aside if found to be unsupported by substantial evidence.

.....

c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures

In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) of this section or who paid a civil penalty assessed under subsection (b) of this section or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation.

.....

(d) Production of witnesses and books, papers, and documents;

depositions; fees; presumptions; jurisdictions

.....

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

.....

§ 1828. Rules and regulations

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

15 U.S.C. §§ 1821(3), 1822, 1823(a), (c), (e), 1824(1), (2), 1825(b)(1)-(2), (c), (d)(5), 1828.

APPENDIX B

9 C.F.R.:

TITLE 9—ANIMALS AND ANIMAL PRODUCTS

CHAPTER I—ANIMAL AND PLANT HEALTH INSPECTION SERVICE,

DEPARTMENT OF AGRICULTURE

SUBCHAPTER A—ANIMAL WELFARE

....

PART 11—HORSE PROTECTION REGULATIONS

§ 11.1 Definitions.

For the purpose of this part, unless the context otherwise requires, the following terms shall have the meanings assigned to them in this section. The singular form shall also impart the plural and the masculine form shall also impart the feminine. Words of art undefined in the following paragraphs shall have the meaning attributed to them by trade usage or general usage as reflected in a standard dictionary, such as “Webster’s.”

....

APHIS Show Veterinarian means the APHIS Doctor of Veterinary Medicine responsible for the immediate supervision and conduct of the Department’s activities under the Act at any horse show, horse exhibition, horse sale or horse auction.

....

Designated Qualified Person or DQP means a person meeting the requirements specified in § 11.7 of this part who has been licensed as a DQP by a horse industry organization or association having a DQP program certified by the Department and who may be appointed and delegated authority by the management of any horse show, horse exhibition, horse sale or horse auction under section 4 of the Act to detect or diagnose horses which are sore or to otherwise inspect horses and any records pertaining to such horses for the purposes of enforcing the Act.

....

Horse Industry Organization or Association means an organized group of people, having a formal structure, who are engaged in the promotion of horses through the showing, exhibiting, sale, auction, registry, or any activity which contributes to the advancement of the horse.

....

Inspection means the examination of any horse and any records pertaining to any

horse by use of whatever means are deemed appropriate and necessary for determining compliance with the Act and regulations. Such inspection may include, but is not limited to, visual inspection of a horse and records, actual physical examination of a horse including touching, rubbing, palpating and observation of vital signs, and the use of any diagnostic device or instrument, and may require the removal of any shoe, pad, or action device, or any other equipment, substance or paraphernalia from the horse when deemed necessary by the person conducting such inspection.

.....

Person means any individual, corporation, company, association, firm, partnership, society, organization, joint stock company, or other legal entity.

.....

Sore when used to describe a horse means:

(1) An irritating or blistering agent has been applied, internally or externally by a person to any limb of a horse,

(2) Any burn, cut, or laceration has been inflicted by a person on any limb of a horse,

(3) 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

(4) 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.

.....

§11.3 Scar rule.

The scar rule applies to all horses born on or after October 1, 1975. Horses subject to this rule that do not meet the following scar rule criteria shall be considered to be "sore" and are subject to all prohibitions of section 5 of the Act. The scar rule criteria are as follows:

(a) The anterior and anterior-lateral surfaces of the fore pasterns (extensor surface) must be free of bilateral granulomas,³ other bilateral pathological evidence of inflammation, and, other bilateral evidence of abuse indicative of soring including, but not limited to, excessive loss of hair.

(b) The posterior surfaces of the pasterns (flexor surface), including the sulcus or "pocket" may show bilateral areas of uniformly thickened epithelial tissue if such areas are free of proliferating granuloma tissue, irritation, moisture, edema, or other evidence

³ Granuloma is defined as any one of a rather large group of fairly distinctive focal lesions that are formed as a result of inflammatory reactions caused by biological, chemical, or physical agents.

of inflammation.

§ 11.4 Inspection and detention of horses.

For the purpose of effective enforcement of the Act:

.....
(f) It shall be the policy of APHIS to inform the owner, trainer, exhibitor, or other person having immediate custody of or responsibility for any horse allegedly found to be in violation of the Act or the regulations of such alleged violation or violations before the horse is released by an APHIS representative.

9 C.F.R. §§ 11.1, 11.3, 11.4(f)

APPENDIX C

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

.....

PART VI—PARTICULAR PROCEEDINGS

.....

CHAPTER 163—FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

.....

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the “Federal Civil Penalties Inflation Adjustment Act of 1990”

FINDINGS AND PURPOSE

SECTION 2. (a) FINDINGS.—The Congress finds that—

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE—The purpose of this Act is to establish a mechanism that shall—

(1) allow for regular adjustment for inflation of civil monetary penalties;

(2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and

(3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SECTION 3. For purposes of this Act, the term—

(1) “agency” means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;

(2) “civil monetary penalty” means any penalty, fine, or other sanction that—

(A)(i) is for a specific monetary amount as provided by Federal law; or

(ii) has a maximum amount provided for by Federal law; and

(B) is assessed or enforced by an agency pursuant to Federal law; and

(C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and

(3) “Consumer Price Index” means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION

ADJUSTMENT REPORTS

SECTION 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter—

(1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 *et seq.*], the Tariff Act of 1930 [19 U.S.C. 1202 *et seq.*], the Occupational Safety and Health Act of 1970 [20 U.S.C. 651 *et seq.*], or the Social Security Act [42 U.S.C. 301 *et seq.*], by the inflation adjustment described under section 5 of this Act [bracketed material in original]; and

(2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL MONETARY PENALTIES

SECTION 5. (a) ADJUSTMENT.—The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest—

(1) multiple of \$10 in the case of penalties less than or equal to \$100;

(2) multiple of \$100 in the case of penalties greater than \$100 but less than or equal to \$1,000;

(3) multiple of \$1,000 in the case of penalties greater than \$1,000 but less than or equal to \$10,000;

(4) multiple of \$5,000 in the case of penalties greater than \$10,000 but less than or equal to \$100,000;

(5) multiple of \$10,000 in the case of penalties greater than \$100,000 but less than or equal to \$200,000; and

(6) multiple of \$25,000 in the case of penalties greater than \$200,000.

(b) DEFINITION.—For purposes of subsection (a), the term “cost-of-living adjustment” means the percentage (if any) for each civil monetary penalty by which—

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT.—The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

28 U.S.C. § 2461 note (Supp. V 1999).

APPENDIX D

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

.....

PART 3—DEBT MANAGEMENT

.....

Subpart E—Adjusted Civil Monetary Penalties

§ 3.91 Adjusted civil monetary penalties.

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties—*

.....

(2) *Animal and Plant Health Inspection Service. . . .*

.....

(vii) Civil penalty for a violation of Horse Protection Act, codified at 15 U.S.C. 1825(b)(1), has a maximum of \$2,200.

7 C.F.R. § 3.91(a), (b)(2)(vii).

APPENDIX E

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—ADMINISTRATIVE REGULATIONS

SUBPART H—RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, a party who disagrees with the decision, or any part thereof, or any ruling by the Judge or any alleged deprivation of rights, may appeal such decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in § 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the petition, and the arguments thereon, shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations of the record, statutes, regulations or authorities being relied upon in support thereof. A brief may be filed in support of the appeal simultaneously with the petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in

writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995]

7 C.F.R. § 1.145