UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	HPA Docket No. 15-0097
Philip Trimble,	)	
	)	
Respondent.	)	

DECISION AND ORDER

Appearances:

Thomas N. Bolick, Esq. and Lauren C. Axley, Esq. of the Office of the General Counsel, United States, Department of Agriculture, Washington, D.C., for Complainant, the Administrator of the Animal and Plant Health Inspection Service; and

Jan Rochester, Esq., Magnolia, Kentucky, for Respondent, Philip Trimble.

Before Acting Chief Administrative Law Judge, Channing D. Strother.

SUMMARY OF DECISION

The Administrator, Animal and Plant Health Inspection Service ("APHIS"), United States Department of Agriculture ("USDA"), Complainant, instituted this administrative enforcement proceeding under the Horse Protection Act, as amended ("HPA" or "Act")[1], by filing a Complaint alleging that the Respondent, Philip Trimble, violated section 5(2)(B) of the HPA by entering a horse known as "Main Sweetie" in a horse show, while the horse was sore. The record shows that Respondent has an extensive background and experience in the training and showing of horses, and appears to be hardworking and to genuinely care about the horses he trains and manages. The record also shows that Respondent has trained and exhibited many horses, has known of the HPA throughout his career, and has one prior finding of violating the HPA 15 years ago, which was entered by default for Respondent's failure to file a timely answer.

[1] 15 U.S.C. §§ 1821-1831.

This case is generally straightforward. Complainant brought forward testimony and other evidence, based on the USDA Veterinary Medical Officer's ("VMO") digital palpation examination at the pertinent show, showing that Respondent violated the HPA because he entered the horse, Main Sweetie, in the March 30, 2013 horse show while that horse was sore. In response, Respondent has attempted to challenge Complainant's evidence as insufficient to find a violation under the HPA.

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

However, Respondent's arguments to propose alternative protocol and requirements under the HPA are not supported under current law, regulations, policy, or precedent. Complainant demonstrated by a preponderance of the evidence that Main Sweetie was sore within the meaning of the HPA, and Respondent did not convincingly rebut the presumption. Therefore, based on a careful consideration of the record, I find that the Respondent, Philip

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[2] RX 1.

Trimble, violated section 5(2)(B) of the HPA by entering a horse known as Main Sweetie in a horse show, while the horse was sore. Complainant requested a penalty of $2,200.00 and a five-year disqualification period. I find that under the HPA criteria, the amount of the civil penalty and period of disqualification requested is appropriate, and that I have no discretion to order a shorter or otherwise limited disqualification period.

JURISDICTION AND BURDEN OF PROOF

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

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

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[3] 15 U.S.C. §§ 1821-1831.

[4] 5 U.S.C. § 556(d).

[5] 5 U.S.C. §§ 551 *et seq.*

[6] *See Herman & Maclean v. Huddleston,* 459 U.S. 375, 387-91 (1983) (holding the standard of proof in administrative proceedings is preponderance of evidence).

[7] 15 U.S.C. § 1825(d)(5). The term "sore" is defined at 15 U.S.C. § 1821(3).

[8] *Martin v. U.S. Dep't of Agric.*, 57 F.3d 1070 (6th Cir. 1995) (citation limited under 6th Circuit Rule 24, published at 54 Agric. Dec. 198) (quoting *In re Martin,* 53 Agric. Dec. 212 (1994),

APPLICABLE STATUTORY PROVISIONS

The Congressional finding under the HPA, 15 U.S.C. § 1822, is that "1) the soring of horses is cruel and inhumane; [and] 2) horses shown or exhibited which are sore, where such soreness improves the performance of such horse, compete unfairly with horses which are not sore . . . ."

The HPA defines the term "sore":

> **§ 1821 Definitions**
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> 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.[9]

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

1994 WL 102618 (U.S.D.A.), citing *Landrum v. Block,* 40 Agric. Dec. 922 (1981), 1981 WL 31848 (U.S.D.A.)).

[9] 15 U.S.C. § 1821(3).

§ 1825. Violations and penalties

(d)(5) In any civil or criminal action to enforce this chapter or any regulation under this chapter a horse shall be presumed to be a horse which is sore if it manifests abnormal sensitivity or inflammation in both of its forelimbs or both of its hindlimbs.[10]

The HPA prohibits certain conduct, including:

§ 1824 Unlawful acts

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

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

§ 1825 Violations and penalties

(b) Civil penalties; review and enforcement

(1) Any person who violates section 1824 of this title shall be liable to the United States for a civil penalty of not more than $2,000 for each violation. No penalty shall be assessed unless such person is given notice and opportunity for a hearing before the Secretary with respect to such violation. The amount of such civil penalty shall be assessed by the Secretary by written order. In determining the amount of such penalty, the Secretary shall take into account all factors relevant to such determination, including the nature, circumstances, extent, and gravity of the prohibited conduct and, with respect to the person found to have engaged in such 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.

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[10] 15 U.S.C. § 1825(d).

[11] 15 U.S.C. § 1824(2).

[12] 15 U.S.C. § 1825(a).

> (c) Disqualification of offenders; orders; civil penalties applicable; enforcement procedures
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> In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) or who paid a civil penalty assessed under subsection (b) or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than five years for any subsequent violation.[13]

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

PROCEDURAL HISTORY

The Complaint was filed on April 9, 2015, alleging that the Respondent, Philip Trimble, violated section 5(2)(B) of the HPA by entering a horse known as "Main Sweetie" in a horse show, while the horse was sore. Respondent filed an answer on April 23, 2015, 1) admitting that in 2003 a previous Decision and Order was issued finding, by default, that Respondent violated the HPA, 2) admitting that Respondent entered Main Sweetie at the 2013 Mississippi Charity Horse Show on March 30, 2013, to show or exhibit, and 3) denying that Main Sweetie was

[13] 15 U.S.C. § 1825(b)-(c).

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

entered into the 2013 Mississippi Charity Horse Show while sore. On May 8, 2015, Jan Rochester, Esquire, filed a Notice of Appearance on behalf of the Respondent.

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

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

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

Complainant filed a Motion in Limine on March 10, 2017, to exclude various exhibits, portions of exhibits referencing the Atlanta Protocol, and any testimony regarding the Atlanta

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

A hearing was held on March 21 through 23, 2017, in Nashville, Tennessee. Complainant's Motion in Limine and Respondent's Motion in Limine No. 3 were addressed.[16] Complainant presented these witnesses: Jennifer Wolf,[17] Animal Care inspector, USDA; Michael

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

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

[17] Tr. 33-56.

Pearson,[18] Farm Loan Officer, USDA (formerly Animal Care Inspector, USDA, APHIS); Dr. Ronald Johnson,[19] VMO, USDA, APHIS, Animal Care, presented as examining VMO and an expert witness in equine veterinary care and detection of horse soring under the HPA; and Dr. Clement Dussault,[20] Senior Staff Veterinarian, National Veterinary Accreditation Program (formerly Field Veterinary Officer, USDA), presented as a rebuttal witness and an expert witness in detection of horse soring under the HPA. Respondent presented these witnesses: Rachel Reed,[21] employee, SHOW, Inc.; Clay Sanderson,[22] Respondent's assistant horse trainer; Philip Trimble (Respondent);[23] Amy Trimble,[24] wife of Respondent and the individual who presented the horse for inspection; Dr. Michael Harry,[25] private treating veterinarian for Main Sweetie, and presented as an expert witness in equine veterinary medicine; and Dr. Stephen Mullins,[26] private veterinarian, and presented as an expert in equine veterinary medicine. Parties were allowed an opportunity to *voir dire* before expert witnesses were accepted to testify regarding expertise.

Admitted to the record were Complainant's exhibits identified as CX 1 through CX 7, and CX 10 through CX 13; and Respondent's exhibits, identified as RX 1, RX 2, RX 5, RX 6, RX 8 through RX 12, RX 20 through RX 23, RX 25, RX 30 through RX 32, RX 42, RX 43, RX

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[18] Tr. 57-74.

[19] Tr. 75-353.

[20] Tr. 652-717.

[21] Tr. 355-67.

[22] Tr. 447-58.

[23] Tr. 459-99.

[24] Tr. 598-650.

[25] Tr. 368-446.

[26] Tr. 512-96.

50, and RX 54 through RX 59. A Joint Notice of Errata and Proposed Corrections in relation to the hearing transcripts, signed by both parties, was filed on April 25, 2017. The corrections have been accepted by a separate Order Approving Proposed Transcript Corrections, issued on June 8, 2018.

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

The record is now closed.

ANALYSIS

It is uncontested that Respondent entered the horse known as Main Sweetie, for the purpose of showing or exhibiting, in the 2013 Mississippi Charity Horse Show in Jackson, Mississippi.[28] During pre-show inspection, the USDA, APHIS VMO, Dr. Ronald Johnson ("VMO Johnson"), determined that the horse was bilaterally and abnormally sensitive on both of

[27] The pages of Respondent's PHRB are not numbered. The pinpoint citations in this Decision to pages of that brief are based upon my count of pages from its first page.

[28] Answer at 1.

its forelimbs. There is no question that the Complainant bears the burden to show, by a preponderance of the evidence, that the HPA was violated. Evidence showing that the horse was abnormally, bilaterally sensitive or inflamed on both of its forelimbs or both of its hind limbs creates a presumption that the horse is "sore".[29] The basis of this presumption is that abnormal bilateral sensitivity or inflammation cannot be due to an "accidental kind of strange injury"[30] such as stepping on a rock.

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

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[29] *See* 15 U.S.C. § 1821(3).

[30] *Horse Protection Act of 1976: Hearing on H.R. 6155 Before the Subcomm. on Health and the Environment of the Comm. on Interstate and Foreign Commerce*, 94th Cong. at 52 (1975) (statement of Christine Stevens, Secretary, Society for Animal Protective Legislation).

[31] I note that Respondent's Briefs are unconventional and lengthy. Respondent's PHB offers over one hundred pages of excerpted material from case law and comments in contending the Department should conduct its horse protection program differently from its current practice. Respondent also makes certain statements without supporting citations. For example, parts of a study are quoted in Respondent's PHB at 144-146 without proper page citation, including insertion of personal commentary. Respondent quotes case text and testimony out of context (*see* Respondent's PHB at 97), and cites to documents not proffered for the record, much less admitted into evidence, as exhibits. *See id.* at 154 (where Respondent refers to an exhibit that was never admitted into evidence during hearing). Further, Respondent's PHRB, pages 8-9, contains photographs captioned "USDA Photo 8-29-1972" and "USDA Photo published 2001 in Understanding the Scar Rule." Respondent "suggest[s]" that being on the USDA website these photos should be "subject to judicial notice." PHRB at 9. The former photograph was apparently taken at a horse show in August 1972, more than forty years before the HPA violation at issue

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

A. Presumption of Soring

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

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

1) APHIS VMO Johnson was presented by Complainant and accepted as an expert witness, after *voir dire* by the Respondent, to testify regarding his March 30, 2013 visual and physical inspection of Main Sweetie. VMO Johnson testified regarding his experience, his typical examination techniques,[32] and his examination of Main Sweetie and findings.[33] VMO Johnson explained that he introduced himself to the horse to ensure that she was comfortable with him, then picked up and examined the

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here. It is apparently provided as an example of one of types of soring—"scar formation" and "hair loss from chemical blistering"—the HPA was intended to address. *See* Respondent's PHRB at 7-8. Neither scar formation nor chemical blistering is alleged by the Complainant in this proceeding. Respondent states as to the second photo, without providing a specific citation to the transcript, but apparently meaning to reference Tr. 319-322, "[c]ontrary to Johnson's testimony at the hearing, redness is visible even though the horse is black." PHRB at 9. The second photo's caption indicates that it shows a "scar rule" violation, which is not the type of the violation at issue in this proceeding. Dr. Johnson testified that there were no scars on horse at issue. Tr. 316. Thus, the second photograph does not undermine Dr. Johnson's testimony, which was that redness from "inflammation" would not be seen on a "black horse with black pigmentation." Tr. 319. For those reasons, I find that neither photograph should be given any probative weight.

[32] Tr. 134-42.

[33] Tr. 148, 158-60.

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

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

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[34] Tr. 158-59.

[35] *Id.*

[36] *Id.*

[37] Tr. 159.

[38] Tr. 160, 163:21-24.

[39] Tr. 329-30, 331-32.

[40] CX 1. Here when considering the probative value of Form 7077, we recognized Departmental precedent that "'past recollection recorded is considered reliable, probative and substantial evidence, which fulfills the requirements of the Administrative Procedure Act, if the events were recorded while fresh in the witnesses' minds.'" *In Re: William Earl Bobo & Jack Mitchell.*, 53 Agric. Dec. 176, 189 (U.S.D.A. 1994) (quoting *In re Jordan*, 51 Agric. Dec. 1229, HPA Docket No. 91-23 (Remand Order issued October 22, 1992) (citing *In re Rowland*, 40 Agric. Dec. at 1942)).

also indicates the points on each of the horse's pasterns where sensitivity was detected.

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

4) VMO Johnson's April 1, 2013 Declaration explained that he observed Main Sweetie being examined by two DQPs on March 30, 2013. He observed that Main Sweetie had a normal gait. He thereafter describes his digital palpation examination of Main Sweetie. On the left foot he found no evidence of scarring or sensitivity and the posterior surface, but "found areas of sensitivity along the lateral, middle, and medial areas [of] the pastern."[43] VMO Johnson notes that the horse tried to withdraw its leg

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[41] CX 4.

[42] TR. 153-63; CX 2.

[43] CX 3 at 3.

consistently and repeatedly. On the right foot, there was no evidence of scarring on the posterior pastern, but the horse reacted to the pressure of the palpation "over the medial and lateral mid pastern area."[44] Again VMO Johnson notes that the horse tried to withdraw her leg in response to the palpation consistently and repeatedly. VMO Johnson also observed that the horse tried to withdraw its leg in response to palpation on anterior surface of the right front pastern "along the coronet band from medial to lateral" in a consistent and repeatable way.[45]

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

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[44] *Id.*

[45] *Id.*

[46] CX 2 at 3.

[47] *Id.* at 4.

[48] *Id.*, ¶ 3.4.

the examination, but I find it to be consistent with other oral testimony, with documents drafted contemporaneous to the event, and with the video.

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

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

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[49] CX 7. The SHOW DQP ticket indicates that the inspection was filmed, but the video from this inspection was not proffered by either party.

[50] Respondent's PHB at 6; Complainant's PHB at 8-9; CX 2 at 3.

[51] While DQPs must be certified by the USDA to be hired by a SHOW HIO, they do not necessarily have to be a licensed veterinarian and are generally trained by VMOs when seeking certification. *See* 9 C.F.R. § 11.7. *See also In Re: Justin Jenne*, 73 Agric. Dec. 501, 507 (U.S.D.A. 2014) (stating that the "USDA JO has routinely concluded that the opinions of USDA veterinarians as to whether a horse is sore are more persuasive than the opinions of DQPs.") (citing *In Re: Timothy Fields & Lori Fields.*, 54 Agric. Dec. 215, 219 (U.S.D.A. 1995); *In Re: C.M. Oppenheimer.*, 54 Agric. Dec. 221 (U.S.D.A. 1995); *In Re: William Dwaine Elliott, Bernice Elliott, David D. Smith, & Mr. & Mrs. Farrell Hughes. In Re: William Dwaine Elliott & Scott Lambert.*, 51 Agric. Dec. 334 (U.S.D.A. 1992), *aff'd*, 990 F.2d 140 (4th Cir.) (cert. den. 510 U.S. 867 (1993)); *In Re: Pat Sparkman, Bill Mccook & Susan Jenkinson.*, 50 Agric. Dec. 602 (U.S.D.A. 1991); *Edwards*, 49 Agric. Dec. 188 (U.S.D.A. 1990), *aff'd per curiam*, 943 F. 2d 1318 (11th Cir. 1991) (cert. den. 503 U.S. 937 (1992)).

I. VMO Qualifications and Credibility

Respondent attacks the credibility, qualifications, and examination technique of VMO Johnson. Based on the record, I find the VMO to be credible, qualified, and to have used and properly executed appropriate USDA-approved examination techniques. The evidence presented confirmed that VMO Johnson is qualified: VMO Johnson maintains a high-level of education and over 26 years of experience in equine veterinary medicine, had valid credentials and licensure at the time of the inspection, has been trained and trained others regarding Horse Protection Act compliance procedures and USDA protocols for inspection, has performed many examinations, and is well-regarded among his colleagues.[52]

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

[52] Tr. 78-87; CX 2 at 1-2; CX 3 at 1; Complainant's PHB at 15-16.

[53] Respondent's PHB at 109-11, 113, 118.

[54] *Id.* at 108.

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

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

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

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

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

[57] Respondent's PHB ¶ 118.2 at 132.

[58] Tr. 99-100.

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

[60] *See Bobo, supra* note 40, at 189.

returned home on April 1, 2013.[61] VMO Johnson testified that it is his standard practice to complete his records away from the distractions of the show.[62] While it is preferable that forms used as recorded recollection be completed promptly, precedent does not suggest, and I do not find, a significant loss of probative value if completed in the immediate days following the event, as long as the event is "fresh" in the witness' mind. I find nothing about VMO Johnson's review of the video at the time he completed this documentation to diminish their probative value.

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

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[61] Tr. 168-69.

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

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

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

Inspection Organizations ("HIOs") and the licensure of DQPs, the SHOW HIO sets rules for reprimand and cancellation of DQP licenses and this is not a responsibility of the VMO.[65]

II. Proposed Standards and Protocol

Respondent contends that the USDA regulations, policies, and precedents under the HPA should be different in many respects than those in force. Specifically, Respondent requests this court "hold that the USDA should rely on scientific objective testing to detect and prosecute offenders; that where more than one VMO is present, the diagnosis of sore can only be made after a second VMO reaches that finding independently of the first; and that in matters where scientific objective testing and more than one VMO is not possible, that the Atlanta Protocol should be implemented."[66]

First, Respondent misplaces much emphasis on the intent to sore and proof of soring instrumentality. At issue here is simply whether 1) respondent *entered* for the purpose of showing or exhibiting in any horse show, and 2) the entry took place while the horse was sore.[67] Respondent argues that, due to the advancement of medical technology, there should be a requirement that USDA VMOs utilize chemical testing, positively detecting illegal chemicals, and that palpation alone should not be utilized as a diagnostic tool.[68] VMO Johnson testified that chemical testing during inspection would not necessarily reveal any chemical used to sore the horse,[69] providing insight on why chemical testing does not provide definitive proof that a horse

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[65] *See* RX 11: SHOW Rule Book – HPA Compliance Section V(A)(3) at 5 (also available at http://showhio.com/documents/hpa%20section.feb%202016.pdf, last visited April 23, 2018).

[66] Respondent's PHRB ¶ 24.3.

[67] 15 U.S.C. § 1824(2)(B).

[68] Respondent's PHB at70-71, ¶¶ 76.2, 86.2.

[69] Tr. 119: 15-19.

was sored by chemical means. In addition, Respondent implies there must be a "reasonable expectation or presumption" that Main Sweetie would have worn "any type of legal action device."[70] However, it is well established there is no requirement for proof of soring device or agent.[71] With these contentions, Respondent wishes to impose a greater burden of proof on the Department. Respondent's contentions are policy arguments not supported, and not properly enforceable, under current regulations, policy, or case law.

Regulations do not require for the examination to be performed by more than one APHIS representative or VMO.[72] Without direct citation to authority, Respondent asserts that two VMOs with corroborated findings of soreness were "historically required" for enforcement and that "historically speaking two VMOs were required to make this differential diagnosis, between nervous and sore, not one."[73] Respondent relies on cases involving instances where two VMOs examined a horse. But historical Departmental *practice* does not equate to a *requirement*, and Respondent's proffered collection of case law where the facts include two examining VMOs does not show precedent. Further, Respondent heavily relies on specific language from *Fleming v. USDA ("Fleming")*[74] to assert that "no one opinion of any examining veterinarian serves as the sole evidentiary basis for decision."[75] In citing the discussion in *Fleming,* Respondent omits the words "in the present case," taking the quote out of context and distorting the holding by suggesting that the Court in *Fleming* holds there is requirement for two VMOs to determine a

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[70] Respondent's PHRB at 10-12.

[71] *Bobo, supra* note 40, at 184 (citing *In re Gray*, 41 Agric. Dec. 253, 254-255 (U.S.D.A. 1982); *In re Holcomb*, Agric. Dec. 1165, 1167 (U.S.D.A. 1976)).

[72] 9 C.F.R. § 11.4.

[73] Respondent's PHB ¶ 12.2 (case law analysis at 12-106); Respondent's PHRB ¶¶ 1.2, 6.1.

[74] *Fleming v. U.S. Dep't of Agric.*, 713 F.2d 179 (1983).

[75] Respondent's PHB at 97.

horse is sore.[76] The text Respondent cites is specific only to the facts of *Fleming*. Contrary to Respondent's contentions, under HPA regulations and USDA policy the determination of one VMO will establish the presumption that a horse is sore. Unless that presumption is rebutted through evidence on the record, a VMO determination will support the finding of an HPA violation.

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

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[76] *Fleming*, supra note 74, at 185 (holding "there is no denial of due process through alleged lack of uniform examination procedures and standards for determining soreness").

[77] Respondent's PHB ¶ 94:5, at 192-93.

[78] *See* 9 C.F.R. § 11.4.

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

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

The USDA Judicial Officer has deemed the Atlanta Protocol "devoid of merit."[83] I recognize there is a split among the circuit courts on whether digital palpation alone is sufficient

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

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

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

[82] *See In re Kim Bennett*, 55 Agric. Dec. 176, 181-82.

[83] *Id.* at 205. *See also* Complainant's PHB at 18-25. Respondent states that the "devoid of merit" statement was "made in reference" to a 5th Circuit finding that "the USDA veterinarians were discredited because their forms and affidavits were prepared in anticipation of litigation." Respondent's PHB ¶ 70.3. However, no pinpoint citation to any order is provided for this assertion and this assertion is not substantiated upon review of the JO Decision.

to determine whether a horse is sore. However, the USDA Judicial Officer held that the case of *Young v. USDA ("Young")*,[84] in which the Court relied on the testimony of expert witnesses and the Atlanta Protocol to find that digital palpation alone could not determine a violation of the HPA, is not strong precedent in any circuit court, including the Fifth Circuit, and "the decision by the majority of the Court in *Young v. USDA* will not be followed by this Department in any future case, including cases in which an appeal would lie to the Fifth Circuit."[85]

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

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

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

[85] *Bennet, supra* note 82. *But see Bradshaw v. U.S. Dep't of Agric*, 254 F.3d 1081 (5th Cir. 2001) (unpublished opinion in the 5th Cir, published at 60 Agric. Dec. 145 (U.S.D.A. 2001), 2001 WL 1891244) (citing *Young,* stating that digital palpation was not substantial evidence to support a violation of the HPA, and reversing judgment in favor of the petitioner).

[86] *See* 15 U.S.C. § 1825. Respondent erroneously states that the HPA does not address the appeals process and that the jurisdiction for appeal is expressed in the federal regulations. Respondent's PHB at 154. Whether Respondent wishes to challenge the statute by appealing to the Fifth Circuit does not change the weight of controlling authority in this case.

[87] *Trimble v. U.S. Dep't of Agric.,* 87 Fed. Appx. 456 (6th Cir. 2003).

[88] *Bobo v. U.S. Dep't of Agric.,* 52 F.3d 1406, 1413 (6th Cir.1995).

[89] *Crawford v. U.S. Dep't of Agric.*, 50 F.3d 46, 49-50 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995).

[90] *In Re: William J. Reinhart & Reinhart Stables*, 59 Agric. Dec. 721 (U.S.D.A. 2000).

> The United States Department of Agriculture has long held that palpation is a highly reliable method for determining whether a horse is "sore," as defined in the Horse Protection Act [footnote omitted]. The United States Department of Agriculture's reliance on palpation to determine whether a horse is sore is based upon the experience of a large number of veterinarians, many of whom have had 10 to 20 years of experience in examining many thousands of horses as part of their efforts to enforce the Horse Protection Act. Moreover, the Horse Protection Regulations (9 C.F.R. pt. 11), issued pursuant to the Horse Protection Act, explicitly provides for digital palpation as a diagnostic technique to determine whether a horse complies with the Horse Protection Act.[91]

Despite Respondent's wish to see a change in law, including the adoption of different approaches to inspections than are undertaken by USDA VMOs, and a different definition of "sore" as outlined in the Atlanta Protocol, I am bound by the HPA, current regulations, and controlling precedent. Because the Atlanta Protocol and its recommendation that digital

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[91] *Id.* at 751-52 (citing in omitted footnote 12: *In re David Tracy Bradshaw*, 59 Agric. Dec. ___, slip op. at 11, 18 (June 14, 2000), *appeal docketed*, No. 00-60582 (5th Cir. Aug. 21, 2000); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 878 (U.S.D.A. 1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 836 (U.S.D.A. 1996); *In re Kim Bennett*, 55 Agric. Dec. 176, 180-81, 236-37 (U.S.D.A. 1996); *In re C.M. Oppenheimer, d/b/a Oppenheimer Stables* (Decision as to C.M. Oppenheimer Stables), 54 Agric. Dec. 221, 309 (U.S.D.A. 1995); *In re Kathy Armstrong*, 53 Agric. Dec. 1301, 1319 (U.S.D.A. 1994), *aff'd per curiam*, 113 F.3d 1249 (11th Cir. 1997) (unpublished); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 292 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 201 (U.S.D.A. 1994), aff'd, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1292 U.S.D.A. (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1259-60 (U.S.D.A. 1993); *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1232-33 (U.S.D.A. 1993), *aff'd sub nom. Crawford v. United States Dep't of Agric.*, 50 F.3d 46 (D.C. Cir.), *cert. denied*, 516 U.S. 824 (1995); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1191 (1993); *In re Glen O. Crowe*, 52 Agric. Dec. 1132, 1151 (U.S.D.A. 1993); *In re Billy Gray*, 52 Agric. Dec. 1044, 1072-73 (U.S.D.A. 1993), aff'd, 39 F.3d 670 (6th Cir. 1994); *In re John Allan Callaway*, 52 Agric. Dec. 272, 287 (U.S.D.A. 1993); *In re Steve Brinkley* (Decision as to Doug Brown), 52 Agric. Dec. 252, 266 (U.S.D.A. 1993); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 246 (U.S.D.A. 1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24) (U.S.D.A. 2000)).

palpation alone is not adequate to support a finding of soring has been rejected in precedents that govern my actions, I must also reject it, and take the rationales as expressed in those precedents governing here.

Respondent also makes other arguments regarding policy and protocol based on analysis of case law, such as: "a pattern of soreness or having soreness in the same location on both feet is an important element,"[92] there should be a set number of times palpation must be repeated, that scarring must be present, or that the palpation should elicit a certain type of pain response.[93] There is no support under current policy or precedent for these proposed requirements. In each instance where Respondent uses the facts recited in a previous case to support these contentions, Respondent fails to consider that the recitation of the facts present in specific cases cited were not legal rulings resulting in applicable precedent. The law, regulations, policies, and precedents regarding each contention are simply not what Respondent argues they should be and Respondent has not presented bases for me to make rulings contrary to them or to find they should be changed from what they are.

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

> Page 2 of that White Paper states "Continued reliance on the use of traditional techniques dependent upon the **subjective response of**

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[92] Respondent's PHB ¶ 20.5. Respondent also argues that the case law, which he fails to directly cite, demonstrates that a horse should "exhibit pain reactions in almost identical places." Respondent's PHB at 124. Although some of the cases provided include facts where horses exhibited pain responses in similar areas on each leg, there is no precedent requiring such.

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

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

> **the horse** would appear a wasted effort and funding for the development of objective methodology for use by qualified veterinary inspectors must be provided." (emphasis added) Page 3 and Page 4 contain "Improved Methods of Evaluation" wherein the AAEP recommends specific objective methods for evaluation such as immediate drug testing, thermographic screening, and swabbing of the limbs for foreign substances. Regarding palpation of the limbs, it is noted that palpation should be done for a routine evaluation of the limbs, assessment of digital pulses, and critical assessment of specific areas suggested to be abnormal on thermographic examination. The AAEP Task Force further recommends adding a corp[s] of veterinarians and states "Training of both VMOs and this additional corps of veterinarians must include more objective measures of detection such as thermography and digital radiography."[95]

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

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

In response, Complainant contends:

> These publications were not entered into evidence and no hearing testimony concerning these documents or the AAEP's December 2007, task force was proffered during the hearing, and complainant had no opportunity to review and respond to either of the

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[95] *Id.* at 13.

[96] *Id.* at 13-14.

[97] *Id.* at 14.

> aforementioned documents. Accordingly, none of respondent's statements about these documents and the AAEP task force should be given any probative weight, and his arguments based upon the same should be found to be without merit.[98]

Complainant's contentions these publications are not a part of the record and were not proffered at hearing as evidence, or for matter were not listed in Respondent's September 17, 2015 list of proposed exhibits, and have not been subject to review and cross examination at hearing are well-taken. Respondent's citation to these documents seems to be for the proposition that AVMA and AAEP oppose the use of palpation alone to detect soring and believe that "Improved Methods of Evaluation," including drug testing, digital radiography, thermographic screening, swabbing of the limbs for foreign substances, and examinations by more than one VMO, should be adopted, which would cause a greater burden on the Department to prove soring. As discussed regarding the Atlanta Protocol, the precedents and the record, including the testimony of VMO Johnson, palpation by a single VMO is sufficient to determine abnormal sensitivity and soring under established USDA policy.[99] Further, there is no contemporaneous report by another veterinarian in the record, much less one inconsistent with VMO Johnson's testimony and reports. Respondent has offered no results of his own contemporaneous digital radiography and thermographic screening he claims contradict VMO Johnson's findings based on his examination.

Veterinarian members of AVMA and AAEP, and the authors of the Atlanta protocol, may believe that additional examination methods should be utilized in determining soring because current methods can yield inaccurate results. But here there is no evidence of inconsistent results between digital palpation and other examination methods. That some

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[98] Complainant Addendum at 1-2.

[99] *See*, *supra* p. 20, notes 72, 91.

veterinarians opine a need for additional methods of testing to provide more accurate results does not undercut the preponderance of the evidence here showing that the horse was sore based upon palpation.

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

B. Rebuttal of Presumption

Although the Complainant has shown, by a preponderance of the evidence, that the horse known as "Main Sweetie" was sore under the statutory presumption due to the detection of bilateral, abnormal sensitivity on March 30, 2013, Respondent can rebut the presumption established by VMO Johnson's findings.[100] It is recognized that the "presumption of soreness must be rebutted by more proof than speculation about other natural causes."[101] Respondent presents multiple contentions to rebut the presumption, each addressed below. Based on a careful

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[100] *See Martin*, 54 Agric. Dec. 198, 200, 1995 WL 633411 (6th Cir. 1995) (*supra* note 8); *Zahnd v. U.S. Dep't of Agric.*, 479 F.3d 767, 772 (11th Cir.2007). *See also Landrum v. Block*, No. 81-1035 (M.D. Tenn. June 25, 1981), 40 Agric. Dec. 922 (U.S.D.A. 1981) (holding that the § 1825(d)(5) presumption must be interpreted in accordance with Fed. R. Evid. 301, even though the Federal Rules do not directly apply to administrative hearings).

[101] *See Jenne, supra* note 51, 507-08 (citing *Beltz*, 64 Agric. Dec. 1438 (U.S.D.A. 2005), rev., 64 Agric. Dec. 1487 (U.S.D.A. 2005); *Motion for reconsideration denied*, 65 Agric. Dec. 281 (U.S.D.A. 2006), *aff'd. sub nom., Zahnd v. Secretary of Department of Agriculture*, 479 F. 3d 767 (11th Cir. 2007)).

review of the record, I find the evidence proffered by Respondent insufficient to rebut the presumption.

I. Rebuttal: VMO Examination Technique

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

Based on the record, there was no clear showing that the way in which VMO Johnson performed his exam was improper, nor that the horse's withdrawal reactions resulted from how VMO Johnson held the horse's limbs while palpating. "There is a presumption of regularity with respect to the official acts of public officers and, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'"[105] Although

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[102] Respondent's PHRB at 162.

[103] *Bobo*, *supra* note 40 at 192 (citing *In re A.P. Holt* (Decision as to Richard Polch & Merrie Polch) 52 Agric. Dec. 233, 243-46 (1993), appeal docketed, No. 93 3369 (6th Cir. Apr. 7, 1993)). Palpation is also expressly approved by Department regulations as an examination technique. 9 C.F.R. 11.1.

[104] 9 C.F.R. § 11.1.

[105] *Bennett*, *supra* note 82 at 210 (quoting *United States v. Chemical Foundation*, 272 U.S. 1, 14-15) (citing *Panno v. United States*, 203 F.2d 504, 509 (9th Cir. 1953); *Reines v. Woods*, 192 F.2d

Respondent contends that the way in which VMO Johnson held or gripped Main Sweetie's legs during the examination likely caused the horse's withdrawal reactions,[106] two out of the three expert witnesses (Dr. Harry for Respondent[107] and Dr. Dussault for Complainant[108]) testified and agreed, while reviewing the video of the examination, that the horse's withdrawal reactions were due to the pinpoint digital palpation. Although Dr. Harry, for Respondent, provided testimony to the effect that VMO Johnson's style of holding the horse's leg may have caused discomfort due to pressure on the ligament and tendon, his explanation was hypothetical and unconvincing that how VMO Johnson held the horses leg was the actual cause of the withdrawal reactions or caused the horse to back away from the palpation.[109]

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

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83, 85 (Emerg. C.A.); *National Labor Relations Board v. Bibb Mfg. Co.*, 188 F.2d 825, 827 (5th Cir. 1951); *Woods v. Tate*, 171 F.2d 511, 513 (5th Cir. 1948); *Pasadena Research Laboratories v. United States*, 169 F.2d 375, 381 (9th Cir. 1948), cert. den., 335 U.S. 853 (1948); *Laughlin v. Cummings*, 105 F.2d 71, 73 (D.C. Cir. 1939)).

[106] Respondent's PHRB ¶ 10.2.

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

[108] Tr. 694-695.

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

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

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

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[111] Respondent's PHB ¶ 18.8.

[112] Tr. 167:15-16, Tr. 159:2-3.

[113] Tr. 159.

[114] Tr. 159: 13-25, 160:1-4. *See also* Tr. 161-62.

[115] CX 4.

[116] CX 2 at 3-4. *See Bobo, supra* note 103, at 192.

[117] RX 9. *See also* USDA Horse Protection, Inspection Process (February 3, 2018) slide 23, https://www.aphis.usda.gov/animal_welfare/hp/downloads//hio/usda-hpa-

II. Rebuttal: Reaction Caused by Temperament or Natural Ailment

Although it is unclear whether Respondent is arguing that Main Sweetie's reactions were due to natural temperament, to temperament caused by ailments, to residual pain from ongoing ailments, or all of the above, Respondent failed to provide adequate evidence supporting these assertions to rebut the presumption. The preponderance of the evidence is that the horse's withdrawal reactions to the digital palpation on both forelimbs resulted from abnormal sensitivity and were not the result of any other natural cause.

As support for his contentions that Main Sweetie was hypersensitive due to existing ailments, Respondent presented a letter dated October 21, 2013, seven months after the event at issue, from a private veterinarian, Dr. Mike Harry, which describes diagnoses of a depressed appetite, gastric ulcers, lameness on the left foot, a wart on the left foot, and cystic ovaries.[118] Aside from the depressed appetite that was "resolved right away with minor treatment,"[119] all other ailments were diagnosed and treated after March 30, 2013. In his affidavit, Dr. Harry states that Main Sweetie's cystic ovaries and gastric ulcers caused pain and "directly contributed to and produced Main Sweetie's behavior exhibited during the inspection,"[120] providing no further

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hio_presentations_2018.pdf (last visited April 26, 2018) (showing that the Department process policy still includes withdrawal reactions as a pain response).

[118] RX 20. Respondent suggests that Dr. Harry's testimony and opinion should be given equal to, or greater, weight that VMO Johnson's testimony. Respondent's PHRB ¶ 17.2. Respondent states that the Sixth Circuit has precedence "allow[ing] treating physicians in matters outside Social Security cases" but fails to cite this precedent and demonstrate relevance. Respondent's PHB at 167. Complainant clearly lays out precedent that private veterinarian examinations are entitled to less weight than the examining APHIS representative. Complainant's PHB at 37 (citing *In re: Thornton*, 41 Agric. Dec. 870, 878-79, 890-94 (1982), *aff'd* 715 F.2d 1508 (11th Cir. 1983); *In re: Sparkman*, 50 Agric. Dec. 602, 610 (1991); *In re: Gary R. Edwards et al.*, 55 Agric. Dec. 892, 922 (1996)).

[119] RX 20.

[120] RX 43 at 3. *See also* Tr. 423 (Dr. Harry's testimony that Main Sweetie "*could be* just experiencing pain all over") (emphasis added).

evidence or detailed explanation. To say that Main Sweetie's ovary and gastric health issues "produced" Main Sweetie's reactions to the pinpoint palpations, without more explanation, is speculative. As in *Lacy v. USDA* ("*Lacy*"),[121] where the evidence presented failed to provide a clear connection showing that West Nile Virus could have produced pinpoint pain responses solely on the "front surfaces of the pasterns,"[122] here RX 20 and testimony by its author, Dr. Harry, and similar testimony by Respondent's expert witness Dr. Muller, [123] does specifically and directly explain causation regarding the ailments and the horse's reaction to digital palpation to rebut the presumption. I give this testimony little weight.

Contrary to evidence presented, Respondent implies that Main Sweetie should be defined as a "silly horse" and that she is naturally sensitive therefore making her reactions during the examination normal. [124] However, while Respondent's witnesses, Amy Trimble and Clay Sanderson, both testified that Main Sweetie was a nervous or irritable horse, they also testified that they observed no agitated or odd behavior prior to the inspection on March 30, 2013.[125] VMO Johnson also testified that he observed no signs of agitation prior to the inspection.[126] The

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[121] *Lacy v. U.S. Dep't of Agric.*, 278 F. App'x 616 (6th Cir. 2008).

[122] *Id.* at 621-22.

[123] I note that Respondent's PHB ¶ 13.3 states that RX 42 provides a clear connection of Main Sweetie's medical diagnosis and her reaction during inspection. However, RX 42 does not speak directly to Main Sweetie's medical diagnosis and Dr. Mullins does not appear to have any direct experience examining Main Sweetie and otherwise was unable to testify as to Main Sweetie's medical condition at the time of the event at issue.

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

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

[126] Tr. 173, 177. *See also Lacy, supra* note 121 at 622 ("USDA VMOs 'follow a simple procedure to distinguish [high-strung, or nervous, or silly] horses from those that are experiencing pain . . . . '[T]hey look for . . . specific spots which were painful when palpated.'")

video of the examination corroborates VMO Johnson's testimony, showing the horse approaching and standing still, allowing VMO Johnson to pick up her left front foot, and after backing away, calming and allowing VMO Johnson to pick up and examine the left front foot a second time.[127]

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

C. Administrative Law Judge Authority to Rule in This Matter

I note that on November 29, 2017, the Solicitor General, on behalf of the United States, submitted a brief before the United States Supreme Court in *Lucia v. SEC*, No. 17-130, in which the Solicitor General took the position that administrative law judges of the Securities and Exchange Commission are inferior officers under the Appointments Clause and must be appointed by heads of department, U.S. Const. Art. II, § 2, cl. 2. The court granted certiorari

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when palpated.'") (quoting *In re Billy Gray*, 52 Agric. Dec. 1044, 1993 WL 308542, at 21 (July 23, 1993), aff'd sub nom. *Gray v. USDA*, 39 F.3d 670 (6th Cir.1994)).

[127] CX 4.

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

for the *Lucia* on January 12, 2018. Briefing has been completed and oral argument was held on April 23, 2018. The Court's opinion is expected to be issued by the end of June 2018.

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

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

> 1. The Appointments Clause. Respondent requests that this case be dismissed because a USDA ALJ cannot lawfully adjudicate the Respondents' liability for a violation of the HPA, nor can a USDA ALJ lawfully assess a penalty for a violation. The USDA ALJs cannot perform these functions because (1) only a duly appointed Inferior Officer of the United States can preside over a hearing that determines liability and assesses a penalty and (2) the USDA's delegation of enforcement authority to its ALJs contravenes the Appointments Clause of the U.S. Constitution, art. II, §2, cl. 2. USDA ALJs act as Officers by entering final decisions, or at the least as inferior Officers, but the USDA's ALJs are not duly appointed as required by U.S. Constitution, art. 2, §2, cl. 2, and *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), *PHH Corp. v. CFPB*, 839 F. 3d 1, 6 (D.C. Cir. 2016) (vacated and en banc hearing granted, Feb. 16, 2017); and *Lucia v. SEC*, 832 F. 3d 277 (D.C. Cir. 2016) (vacated and en banc hearing granted, Feb. 16, 2017. Oral Argument scheduled for May 24, 2017). The USDA cannot maintain this HPA enforcement action under the current Rules of Practice and the case should be dismissed.

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

> Because Respondent is raising novel issues of law which USDA has not been provided an opportunity to address, and which may not be properly before me to rule upon, Respondent's motions will

> be held in abeyance and both parties will be provided a full opportunity to brief the issues after the scheduled hearing.[129]

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

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

D. Discussion of Penalties

Regarding penalties,[130] current regulations leave little room for discretion regarding penalties, especially regarding disqualification when there has been a prior conviction under the HPA. Respondent attempts to challenge a prior determination of soring in a default Order and

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

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

Decision, when that determination is long final and not subject to challenge. The HPA is unambiguous and inflexible in the time required for disqualification if imposed:

> In addition to any fine, imprisonment, or civil penalty authorized under this section, any person who was convicted under subsection (a) or who paid a civil penalty assessed under subsection (b) or is subject to a final order under such subsection assessing a civil penalty for any violation of any provision of this chapter or any regulation issued under this chapter may be disqualified by order of the Secretary, after notice and an opportunity for a hearing before the Secretary, from showing or exhibiting ***any* horse**, judging or managing **any horse show, horse exhibition, or horse sale or auction** for a period of not less than one year for the first violation and **not less than five years for any subsequent violation**.[131]

The HPA does not allow for limitation of the disqualification to a lesser amount of time than five years for a subsequent violation—even a violation that takes place, as here, well more than a decade after the "first violation"—if disqualification is imposed, nor does it allow disqualification to be limited to a certain breed of horse.[132] It is Judicial Officer precedent to impose a disqualification period where a civil penalty is assessed.[133] While I consider the gravity of the prohibited conduct, culpability of Respondent, and the impact of the penalties on Respondent when considering the civil penalty amount to be imposed, I do not have the authority

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

[132] While legislative history supports that the HPA was implemented to protect "Gaited Horses," such as Tennessee Walking Horses, the Act specifically states "any horse" and regulations define "horse" for the purpose of the Act as "any member of the species *Equus caballus*." 9 C.F.R. 11.1. *See* H.R. REP. 94-1174, 4, 1976 U.S.C.C.A.N. 1696, 1699 ("The soring of a horse can produce the high-stepping gait of the well-known Tennessee Walking Horse as well as other popular gaited horse breeds . . . . The practice of soring is not only cruel and inhumane. The practice also results in unfair competition and can ultimately damage the integrity of the breed."). *But see*, 9 C.F.R. § 11.1 defining "horse show" and "horse exhibition" to exclude "events where speed is the prime factor, rodeo events, parades, or trail rides."

[133] *In Re: Ronald Beltz, an Individual; & Christopher Jerome Zahnd, an Individual.*, HPA Docket No. 02-0001., 2005 WL 3627254, at *11 (2005).

to change the HPA, nor regulations thereunder, as to disqualification. Respondent has not presented an adequate argument as to why he could not pay a $2,200 civil penalty or why the civil penalty specifically would affect his ability to continue to do business.

FINDINGS OF FACT

1. Respondent Philip Trimble resides and does business in (b) (6) [redacted].[134]
2. Respondent Philip Trimble started Trimble Stables, a horse training barn or training facility, in 2001.[135]
3. On March 27, 2003, Judicial Officer William G. Jenson issued a Decision and Order,[136] adopting the Chief Administrative Law Judge's decision: (1) finding that on April 29, 2000, respondent Philip Trimble violated section 5(2)(B) of the HPA[137] by entering a horse while the horse was sore as defined in section 11.3(a) of the Horse Protection Regulations;[138] (2) assessing respondent Philip Trimble a $2,200 civil penalty; and (3) disqualifying respondent Philip Trimble for one year from showing, exhibiting, or entering any horse and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.

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[134] Tr. 460:3-4.

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

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

[137] 15 U.S.C. § 1824(2)(B).

[138] 9 C.F.R. § 11.3(a).

4. In the fall of 2009, Respondent Philip Trimble was hired to train a horse known as Main Sweetie.[139] Main Sweetie was reserve world champion in 2011, and won two world championships at the Tennessee Walking Horse National Celebrations in Shelbyville, Tennessee in 2012 and 2013.[140]
5. On March 30, 2013, Respondent Philip Trimble entered the horse known as Main Sweetie as entry number 435, class number 84, for the purpose of showing or exhibiting at the 2013 Mississippi Charity Horse Show in Jackson, Mississippi.[141]
6. On March 30, 2013 Main Sweetie was presented by Amy Trimble for a pre-show inspection.[142]
7. DQP Mitchell Butler and DQP Keith Davis inspected Main Sweetie before the show. DQP Mitchell Butler and DQP Keith Davis found the horse to be unilaterally sore on the left front foot but did not agree as to the consistency of pain response on the right front foot.[143] The DQPs issued ticket #033013MB.[144] SHOW HIO disqualified the horse from showing as a result of this ticket.[145]
8. After DQP Mitchell Butler and DQP Keith Davis wrote the ticket for Main Sweetie, Main Sweetie was inspected by Dr. Ronald E. Johnson, Veterinary Medical Officer

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[139] Tr. 603-04.

[140] Tr. 649:9-10; RX 22.

[141] Complaint at 2; Answer at 1; CX 5.

[142] Tr. 614:12.

[143] Tr. 149: 8-16.

[144] CX 7.

[145] Answer at 2.

("VMO"), Animal Care, Animal and Plant Health Inspection Service ("APHIS"), USDA.[146]

9. Dr. Johnson noted that that while digitally palpating Main Sweetie's anterior surface (lateral, middle, and medial areas) of the left front pastern, the horse consistently and repeatedly withdrew its leg.[147]
10. Dr. Johnson noted that while digitally palpating Main Sweetie's right front posterior pastern over the medial and lateral mid pastern area, the horse consistently and repeatedly tried to withdraw its leg.[148]
11. It is Dr. Johnson's professional opinion that Main Sweetie exhibited abnormal sensitivity in both front pasterns, these consistent and repeated withdrawals of the leg were the horse's direct response to pain at those points of palpation,[149] and the pain responses he observed while palpating the horse were caused by chemical and/or action devices.[150]
12. On or about March 30, 2013, respondent entered the horse known as Main Sweetie, as entry number 435, class number 84, at the Mississippi Charity Horse Show in Jackson, Mississippi, for the purpose of showing or exhibiting the horse while the horse was sore, in violation of section 5(2)(B) of the HPA.[151]

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[146] Tr. 149: 19; 150: 8-9.

[147] Tr. 158-159; CX 2 at 3; CX 4.

[148] Tr. 159; CX 2 at 4; CX 4.

[149] Tr. 150-60; CX 1.

[150] Tr. 163: 21-24; Tr. 172: 5-12; CX 2 at 4.

[151] 15 U.S.C. § 1824(2)(8).

CONCLUSIONS OF LAW

1) The Secretary has jurisdiction over this matter.
2) I have jurisdiction to issue this Decision and Order.
3) Application of the standards for finding a horse sore recommended by the Atlanta Protocol are not required in the adjudication of HPA cases.
4) Respondent Philip Trimble entered for the purpose of showing or exhibiting the horse known as "Main Sweetie" as entry number 435, class number 84 at the 2013 Mississippi Charity Horse Show in Jackson, Mississippi, while the horse was sore in violation of section 5(2)(B) of the HPA (15 U.S.C. § 1824(2)(B)).
5) If a disqualification period is imposed, the HPA requires a minimum disqualification of five years for subsequent violations that is not limitable to a specific breed of horse but does not apply to horse shows or horse exhibitions where speed is the prime factor, rodeo events, parades, or trail rides.

ORDER

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

1. Beginning on the effective date of this Decision and Order, Respondent Philip Trimble is disqualified for five (5) years from showing, exhibiting, or entering any horse directly or indirectly through any agent, employee, or other device, and from judging, managing or otherwise participating in any horse show, horse exhibition, or horse sale or auction. [152]

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

"Participating" means engaging in any activity beyond that of a spectator, and includes, without limitation, transporting or arranging for the transportation of horses to or from equine events, personally giving instructions to exhibitors, being present in the warm-up or inspection areas, or in any area where spectators are not allowed, and financing the participation of others in equine events.

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

United States Department of Agriculture
APHIS, Miscellaneous
P.O. Box 979043
St. Louis, MO 63197-9000

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

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

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

Issued this 8th day of June 2018, in Washington, D.C.

[redacted]
Channing D. Strother
Acting Chief Administrative Law Judge

[153] 7 C.F.R. § 1.145.

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