UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	HPA Docket No. 01-0008
	)	
Beverly Burgess, an individual; Groover Stables, an unincorporated association; and Winston T. Groover, Jr., a/k/a Winky Groover, an individual,	)	
	)	**Decision and Order as to**
Respondents	)	**Winston T. Groover, Jr.**

PROCEDURAL HISTORY

Bobby R. Acord, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a "Complaint" on November 6, 2000. Complainant instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]; and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [hereinafter the Rules of Practice].

Complainant alleges that: (1) on or about July 7, 2000, Respondent Groover Stables and Respondent Winston T. Groover, Jr., transported a horse known as "Stocks Clutch FCR" to the Cornersville Lions Club 54th Annual Horse Show, Cornersville,

Tennessee, while the horse was sore, for the purpose of showing or exhibiting Stocks Clutch FCR in that show, in violation of section 5(1) of the Horse Protection Act (15 U.S.C. § 1824(1)); (2) on July 7, 2000, Respondent Groover Stables and Respondent Winston T. Groover, Jr., exhibited Stocks Clutch FCR as entry number 43 in class number 20 in the Cornersville Lions Club 54th Annual Horse Show, Cornersville, Tennessee, while Stocks Clutch FCR was sore, in violation of section 5(2)(A) of the Horse Protection Act (15 U.S.C. § 1824(2)(A)); and (3) on or about July 7, 2000, Respondent Beverly Burgess allowed Respondent Groover Stables and Respondent Winston T. Groover, Jr., to exhibit Stocks Clutch FCR as entry number 43 in class number 20 in the Cornersville Lions Club 54th Annual Horse Show, Cornersville, Tennessee, while Stocks Clutch FCR was sore, in violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) (Compl. ¶¶ 5-7).

On December 21, 2000, Beverly Burgess, Groover Stables, and Winston T. Groover, Jr. [hereinafter Respondents], filed an "Answer" denying the material allegations of the Complaint (Answer ¶¶ 6-8).

On June 26 and 27, 2002, Administrative Law Judge Dorothea A. Baker presided at a hearing in Shelbyville, Tennessee. Donald A. Tracy, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Brenda S. Bramlett, Bramlett & Durard, Shelbyville, Tennessee, represented Respondents.

On November 15, 2002, Complainant filed "Complainant's Proposed Findings, Conclusions, Order, and Brief." On February 20, 2004, Respondents filed "Respondents' Proposed Findings, Conclusions of Law, Brief and Order."

On April 21, 2004, Administrative Law Judge Victor W. Palmer[1] [hereinafter the ALJ] issued a "Decision and Order" [hereinafter Initial Decision and Order]: (1) concluding that on July 7, 2000, Respondent Winston T. Groover, Jr., and Respondent Groover Stables exhibited Stocks Clutch FCR as entry number 43 in class number 20 in the Cornersville Lions Club 54th Annual Horse Show, Cornersville, Tennessee, while Stocks Clutch FCR was sore, in violation of section 5(2)(A) of the Horse Protection Act (15 U.S.C. § 1824(2)(A)); (2) dismissing the Complaint against Respondent Beverly Burgess; (3) assessing Respondent Winston T. Groover, Jr., a $2,200 civil penalty; and (4) disqualifying Respondent Winston T. Groover, Jr., from showing, exhibiting, or entering any horse and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction for 1 year (Initial Decision and Order at 12-13, 19).

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[1]Administrative Law Judge Dorothea A. Baker retired from federal service effective January 1, 2003. On January 10, 2003, former Chief Administrative Law Judge James W. Hunt reassigned this proceeding to himself (Notice of Case Reassignment). On July 15, 2003, former Chief Administrative Law Judge James W. Hunt, who retired from federal service effective August 1, 2003, reassigned this proceeding to Administrative Law Judge Leslie B. Holt (Order). On March 10, 2004, Chief Administrative Law Judge Marc R. Hillson reassigned this proceeding to Administrative Law Judge Victor W. Palmer (Order).

On June 28, 2004, Respondent Winston T. Groover, Jr., appealed to the Judicial Officer. On July 16, 2004, Complainant filed "Complainant's Opposition to Respondents' [sic] Appeal of Decision and Order." On July 20, 2004, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision and Order. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt, with minor modifications, the Initial Decision and Order as the final Decision and Order as to Winston T. Groover, Jr.[2] Additional conclusions by the Judicial Officer follow the ALJ's discussion as restated.

Complainant's exhibits are designated by "CX." Respondents' exhibits are designated by "RX." The transcript is divided into two volumes, one volume for each day of the 2-day hearing. Each volume begins with page 1 and is sequentially numbered. References to "Tr. Vol. I" are to the volume of the transcript that relates to the June 26,

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[2]The Initial Decision and Order relates to Respondent Beverly Burgess, Respondent Groover Stables, and Respondent Winston T. Groover, Jr. Only Respondent Winston T. Groover, Jr., appealed the ALJ's Initial Decision and Order. Therefore, in accordance with section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)), the ALJ's Initial Decision and Order became final and effective as to Respondent Beverly Burgess and Respondent Groover Stables 35 days after the Hearing Clerk served them with the ALJ's Initial Decision and Order. The Hearing Clerk served Respondent Beverly Burgess and Respondent Groover Stables with the Initial Decision and Order on April 26, 2004 (United States Postal Service Domestic Return Receipt for Article Number 7000 1670 0003 5453 1228), and the Initial Decision and Order became final as to Respondent Beverly Burgess and Respondent Groover Stables on May 31, 2004. Therefore, this decision and order only relates to Respondent Winston T. Groover, Jr.

2002, segment of the hearing. References to "Tr. Vol. II" are to the volume of the transcript that relates to the June 27, 2002, segment of the hearing.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

15 U.S.C.:

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.

§ 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, sold, auctioned, or offered for sale, in any horse show, horse exhibition, 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 the 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. Any person who knowingly fails to obey an order of disqualification shall be subject to a civil penalty of not more than $3,000 for each violation. Any horse show, horse exhibition, or horse sale or auction, or the management thereof, collectively and severally, which knowingly allows any person who is under an order of disqualification to show or exhibit any horse, to enter for the purpose of showing or exhibiting any horse, to take part in managing or judging, or otherwise to participate in any horse show, horse exhibition, or horse sale or auction in violation of an order shall be subject to a civil penalty of not more than $3,000 for each violation. The provisions of subsection (b) of this section respecting the assessment, review, collection, and compromise, modification, and remission of a civil penalty apply with respect to civil penalties under this subsection.

§ 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), 1824(1)-(2), 1825(b)(1)-(2), (c), 1828.

28 U.S.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

SEC. 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

SEC. 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

SEC. 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

SEC. 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.

28 U.S.C. § 2461 note.

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).

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."

. . . .

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 of diagnose horses which are sore or to otherwise inspect horses and any records pertaining to such horses for the purposes of enforcing the Act.

. . . .

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, 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 of inflammation.

9 C.F.R. §§ 11.1, .3 (footnote omitted).

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION AND ORDER (AS RESTATED)

Decision Summary

Upon consideration of the record evidence and the briefs and arguments by the parties, I decide Respondent Winston T. Groover, Jr., violated the Horse Protection Act by exhibiting Stocks Clutch FCR while the horse was sore and that a $2,200 civil penalty should be assessed against him. Moreover, Respondent Winston T. Groover, Jr., should

be disqualified for 1 year from horse industry activities as provided in the Horse Protection Act. The findings of fact, conclusions of law, and discussion that follow explain the reasons for the Order. In reaching these findings and conclusions, I have fully considered the briefs, motions, and arguments by the parties and, if not adopted or incorporated within the findings of fact and conclusions of law, they have been rejected as not in accord with the relevant and material facts in evidence or controlling law.

Findings of Fact

1. Respondent Winston T. Groover, Jr., also known as Winky Groover, is an individual whose mailing address is Post Office Box 1435, Shelbyville, Tennessee 37162. At all times material to this proceeding, Respondent Winston T. Groover, Jr., was the sole proprietor of Respondent Groover Stables. (Answer ¶¶ 1-2.)

2. Respondent Beverly Burgess is an individual whose mailing address is 351 Highway 82 East, Bell Buckle, Tennessee 37020. At all times material to this proceeding, Respondent Beverly Burgess was the owner of a horse known as "Stocks Clutch FCR." (Answer ¶ 3.)

3. On or about July 7, 2000, Respondent Winston T. Groover, Jr., transported Stocks Clutch FCR to the Cornersville Lions Club 54th Annual Horse Show, in Cornersville, Tennessee, for the purpose of showing or exhibiting the horse as entry number 43 in class number 20 (Answer ¶ 4).

4. The United States Department of Agriculture, Animal and Plant Health Inspection Service, assigned personnel to monitor the Cornersville Lions Club

54th Annual Horse Show. They included Dr. David Smith and Dr. Sylvia Taylor, employed by the Animal and Plant Health Inspection Service as veterinary medical officers, and Michael Nottingham, employed by the Animal and Plant Health Inspection Service as an investigator. (Tr. Vol. I at 18-22, 50; CX 5 at 1, CX 6 at 1.)

5. The duties of the veterinary medical officers at the Cornersville Lions Club 54th Annual Horse Show were to detect sore horses, to document any findings of sore horses, and to ensure the Designated Qualified Persons employed by the organization certified by the Animal and Plant Health Inspection Service to manage the Cornersville Lions Club 54th Annual Horse Show, were effectively enforcing the Horse Protection Act (Tr. Vol. I at 44).

6. The veterinary medical officers examined the second and third place horses post show. The Designated Qualified Persons examined all first place horses. (Tr. Vol. I at 43-44.)

7. On July 7, 2000, Stocks Clutch FCR, after being exhibited at the Cornersville Lions Club 54th Annual Horse Show by Respondent Winston T. Groover, Jr., was designated by the horse show as the second place horse in its class and for that reason was examined post show by Dr. David Smith (CX 5).

8. Dr. Smith did not have any present recollection of Stocks Clutch FCR or his examination of the horse on July 7, 2000, when he testified at the hearing on June 26, 2002. The Cornersville Lions Club 54th Annual Horse Show had taken place on the night of July 7, 2000, and Dr. Smith prepared his affidavit the next morning based on his

notes and his memory from the night before. He no longer had the notes when he testified at the hearing and his reading of his affidavit did not refresh his recollection. Dr. Smith's testimony about Stocks Clutch FCR's condition when he examined the horse consists entirely of his affidavit (CX 5) and APHIS Form 7077 (CX 4), which he helped prepare. (Tr. Vol. I at 45-48.)

9. Dr. Smith observed, as set forth in his affidavit (CX 5 at 1), that:

> . . . [T]he horse was slow to lead as the custodian walked it. When I examined the horse's forefeet I found an area painful to palpation along the lateral aspect of the left forefoot just above the coronary band. The pain was indicated as the horse tried to pull its foot away each time I applied gentle pressure with the ball of my thumb to this location. It was consistent and repeatable. I indicated the position of the painful area in the drawings at the bottom of the APHIS Form 7077 corresponding to this case. The palmar aspect of the left fore pastern had many deep folds, corrugations, and nodular areas consistent with a scar rule violation. Although the skin in this area was pigmented, I could see reddening and swelling consistent with a scar rule violation. I found reddened, swollen corrugations on the palmar aspect of the right forefoot.

10. After his examination of Stocks Clutch FCR, Dr. Smith asked Dr. Taylor to examine the horse. Dr. Smith did not tell Dr. Taylor what he had found and did not observe her examination. (CX 5 at 2.)

11. At the hearing on June 26, 2002, Dr. Taylor did not have a present memory, and her recollection could not be refreshed, respecting her examination of Stocks Clutch FCR on July 7, 2000 (Tr. Vol. I at 162-63).

12. Dr. Taylor prepared her affidavit at 11:50 p.m., on July 7, 2000, shortly after the end of the Cornersville Lions Club 54th Annual Horse Show and her

examination of Stocks Clutch FCR. Dr. Taylor also contemporaneously helped prepare APHIS Form 7077. (CX 4, CX 6 at 3; Tr. Vol. I at 164.)

13. Dr. Taylor recorded in her affidavit (CX 6 at 1-2) that:

> On July 7, at approximately 8:50 PM, Dr. Smith examined a black stallion, Stocks Clutch, entry 43, in Class 20, after placing 2nd. I observed that the horse walked and completed a turn around the cone normally, but as it went straight after the turn it was reluctant to go and the rein was pulled taut to continue leading it. I observed Dr. Smith approach the left side of the horse and lift the foot and palpate it in the customary manner. I noticed that the horse flinched its shoulder and neck muscles and shifted its weight while he palpated the left pastern, but I did not observe whether this response was consistently localized to palpation of any particular part of the pastern, other than that it was not the posterior pastern. He then palpated the right pastern, and I did not see a similar response. Dr. Smith then asked me to examine the horse.
>
> I observed the horse walk and turn again. It walked and turned around the cone normally, but as it left the turn it was reluctant to lead and the custodian had to pull the horse along on a tight rein. I approached the horse on the left, established contact and began palpating the left posterior pastern. I noticed that there was very pronounced, severe scarring of the skin of the posterior pastern. There were thickened ropes of hairless skin medial and lateral to the posterior midline, bulging into even thicker, hard corrugations and oval nodules along the medial-posterior aspect. This epithelial tissue was non-uniformly thickened and could not be flattened or smoothed out. Grooves and cracks on the lateral and midline area above the pocket were reddened. When I palpated the lateral and anterio-lateral pastern, the horse attempted to withdraw its foot and I could feel its shoulder and neck muscles tighten and pull away. I obtain this response consistently and repeatedly three times, always when palpating that same spot.
>
> When I palpated the right posterior pastern, I observed that it was also very scarred. There were non-uniformly thick cords of epithelial tissue with hairloss, that also could not be flattened or smoothed, some of which were also reddened. I noticed that the horse flinched and twitched several times while I palpated the posterior pastern over these scars, but the

> response was not consistently localizable to a particular area. I then palpated the anterior right pastern and did not detect a pain response.

14. In the professional opinions of both Dr. Smith and Dr. Taylor, Stocks Clutch FCR was both unilaterally sore and in violation of the scar rule. In the professional opinion of both Dr. Smith and Dr. Taylor, Stocks Clutch FCR was sore due to the use of chemical and/or mechanical means, in violation of the Horse Protection Act. (CX 5, CX 6.)

15. Dr. Smith and Dr. Taylor documented Stocks Clutch FCR as being in violation of the Horse Protection Act and completed APHIS Form 7077, Summary of Alleged Violations (CX 4).

16. Dr. Smith and Dr. Taylor testified they do not document a horse as being in violation of the Horse Protection Act unless they both agree that the horse is sore and in violation of the Horse Protection Act (Tr. Vol. I at 136, 168).

17. After the examination by Dr. Smith and Dr. Taylor, the Horse Show's Designated Qualified Persons, Charles Thomas and Andy Messick, examined Stocks Clutch FCR (Tr. Vol. II at 17-18, 36-38).

18. A Designated Qualified Person is a person meeting the requirements in section 11.7 of the Horse Protection Regulations (9 C.F.R. § 11.7), who is delegated authority under section 4 of the Horse Protection Act (15 U.S.C. § 1823) to detect horses which are sore (RX 7 at 30). The National Horse Show Commission's Designated Qualified Person program, which employs Mr. Thomas and Mr. Messick as Designated

Qualified Persons, is certified by the United States Department of Agriculture (Tr. Vol. I at 86, 228). The training of Designated Qualified Persons is akin to that of United States Department of Agriculture veterinary medical officers in that they attend annual training programs together that are given by the Animal and Plant Health Inspection Service (Tr. Vol. I at 86-87). Mr. Thomas and Mr. Messick are both highly qualified and experienced Designated Qualified Persons, but neither is a veterinarian as are the likewise highly qualified and experienced Animal and Plant Health Inspection Service veterinary medical officers. The duties of Designated Qualified Persons are not full time; Mr. Messick is principally employed as an attorney and Mr. Thomas is retired (Tr. Vol. II at 3, 29-30).

19. After the examinations by the veterinary medical officers, Mr. Messick was the first Designated Qualified Person to examine Stocks Clutch FCR. After reviewing his examination sheet, Mr. Messick had a present recollection of his examination of Stocks Clutch FCR some 2 years before the hearing. Mr. Messick was the same Designated Qualified Person who had passed Stocks Clutch FCR for exhibition and showing based on his pre-show inspection in which he found the horse met the industry standards. Mr. Messick did not watch the veterinary medical officers examine Stocks Clutch FCR post show. Mr. Messick's post show examination of Stocks Clutch FCR occurred approximately 5 or 10 minutes after the examinations by Dr. Smith and Dr. Taylor. Mr. Messick testified that, as was the case pre-show, the horse still had soft, uniformly thickened tissue and he did not get any withdrawal response on his palpation on the left

or right foot. Mr. Messick did not observe swelling or redness of the posterior pastern of either foot. (Tr. Vol. II at 8-20; RX 8, RX 12.)

20. Mr. Thomas next examined Stocks Clutch FCR. Mr. Thomas and Mr. Messick were asked to do so by Respondent Winston T. Groover, Jr., who told them that Dr. Smith and Dr. Taylor had "taken information on him on the scar rule." Since Andy Messick was the first one to check Stocks Clutch FCR pre-show, he also checked the horse first post show. (Tr. Vol. II at 37.) Mr. Thomas' predominant concern appeared to be whether Stocks Clutch FCR was in violation of the scar rule. He did not believe it was, "He did have some raised places... but they were soft and pliable. That's what we were -- in our training, what we were required -- as long as they were soft, we could take our thumb and stretch them and flatten them out or press them and they flatten out, and they were only in the back. Nothing though, around the edge." (Tr. Vol. II at 39.)

21. In Mr. Thomas' opinion, Stocks Clutch FCR was not in violation of the scar rule and he did not find abnormal reactions when he palpated the horse's front pasterns (Tr. Vol. II at 40; RX 10, RX 11).

22. At 10:40 p.m., on July 7, 2000, approximately 2 hours after the examinations of Stocks Clutch FCR by the veterinary medical officers, Dr. Randall T. Baker examined the horse. Dr. Baker is a veterinarian in private practice for 25 years who is licensed in Tennessee and is a member of the American Association of Equine Practitioners. (RX 13; Tr. Vol. I at 297-98, 305-06.) At the hearing, Dr. Baker had

present recollection of his examination of Stocks Clutch FCR which was videotaped and requested by Respondents. Dr. Baker did not find Stocks Clutch FCR's front pasterns to be sore and believed the scars on the pasterns did not violate the scar rule. Although he found some hair loss and thickened epithelial tissue on both posterior pasterns, Dr. Baker concluded that the scar rule was not violated because when he put his palm on the back of Stocks Clutch FCR's foot, he did not have excess tissue coming out from there and the tissue was pliable and not real firm granulation type tissue; it would spread around and cleave under his thumb. Dr. Baker saw no evidence of scarring or redness on either the left or right posterior pasterns. (Tr. Vol. I at 309-27.)

23. Respondent Beverly Burgess watched Dr. Smith and Dr. Taylor inspect Stocks Clutch FCR and in her opinion Dr. Taylor "was not 'a horse person'" because she appeared to have trouble picking up the horse's foot and went at it in an awkward way (Tr. Vol. II at 52). Respondents also presented testimony from Mr. Lonnie Messick, the executive vice president and Designated Qualified Person coordinator for the National Horse Show Commission, and Designated Qualified Person Andy Messick's father, that he had once seen Dr. Taylor hold a horse's foot in an improper manner that caused the horse to jerk its foot away from her. However, he further testified that he had been with Dr. Taylor at other horse shows and she seemed competent. (Tr. Vol. I at 223, 227, 265-66, 271-73.)

24. Respondent Winston T. Groover, Jr., has been a professional horse trainer since 1975. He has attended Designated Qualified Person clinics and read various

publications on determining whether a horse is in compliance with the Horse Protection Act. Respondent Winston T. Groover, Jr., testified that on July 7, 2000, he transported Stocks Clutch FCR to the Cornersville Lions Club 54th Annual Horse Show, entered Stocks Clutch FCR in the Cornersville Lions Club 54th Annual Horse Show, and exhibited Stocks Clutch FCR at the Cornersville Lions Club 54th Annual Horse Show, where the horse was awarded second place in class number 20. (Tr. Vol. II at 91-95.) No evidence has been entered and no argument has been made to show any prior violations of the Horse Protection Act by Respondent Winston T. Groover, Jr.

Conclusions of Law

1. Stocks Clutch FCR was a sore horse when exhibited by Respondent Winston T. Groover, Jr., on July 7, 2000, as entry number 43 in class number 20 in the Cornersville Lions Club 54th Annual Horse Show, Cornersville, Tennessee. On July 7, 2000, Respondent Winston T. Groover, Jr., violated section 5(2)(A) of the Horse Protection Act (15 U.S.C. § 1824(2)(A)) when he exhibited Stocks Clutch FCR as entry number 43 in class number 20 in the Cornersville Lions Club 54th Annual Horse Show, Cornersville, Tennessee.

2. Respondent Winston T. Groover, Jr., should be assessed a civil penalty of $2,200 and made subject to a 1-year disqualification from horse industry activities, as provided in the Horse Protection Act.

Discussion

Stocks Clutch FCR Was Sore When Exhibited

Two competent, experienced, highly qualified veterinary medical officers employed by the United States Department of Agriculture inspected Stocks Clutch FCR after the horse was awarded second place in class number 20 at the Cornersville Lions Club 54th Annual Horse Show, Cornersville, Tennessee, on July 7, 2000. The veterinary medical officers each examined Stocks Clutch FCR separately and independently. Each independently concluded that Stocks Clutch FCR was sore. Only after the two veterinary medical officers agreed on their findings was Respondent Winston T. Groover, Jr., the trainer of Stocks Clutch FCR, charged with violating the Horse Protection Act. Neither veterinary medical officer can be said to have any reason to have made a false or frivolous accusation. The accusation that one of them, Dr. Taylor, was not "a horse person" and did not know how to handle a horse's feet is not supported by the record. Dr. Taylor has been a veterinarian since 1986 and for some 12 years, her exclusive duties for the Animal and Plant Health Inspection Service concerned enforcement of the Horse Protection Act. The only witness offered in corroboration of the charge made by Respondent Beverly Burgess, admitted on cross-examination that Dr. Taylor was indeed competent. Dr. Taylor and Dr. Smith, the other Animal and Plant Health Inspection Service veterinary medical officer who found Stocks Clutch FCR sore, were considered by the Animal and Plant Health Inspection Service to possess such special competence in this field that another veterinarian was with them at the horse show for training.

Dr. Taylor and Dr. Smith found Stocks Clutch FCR to be sore on two separate bases. First, they each found an area painful to palpation along the lateral aspect of the left forefoot. Stocks Clutch FCR pulled his foot away from the veterinary medical officers each time thumb pressure was applied to palpate this area. Each veterinary medical officer palpated the area repeatedly and the horse's pain response was consistent and repeatable.

Second, both veterinary medical officers observed scars on the posterior of both of Stocks Clutch FCR's front pasterns which each veterinary medical officer found to be in the violation of the scar rule. In an attempt to make the scar rule generally understandable to all who inspect Tennessee Walking Horses for evidence of soring, the Animal and Plant Health Inspection Service has issued various publications illustrating its proper application. Respondents' Exhibit 2 is one of those publications. It was used as an aid in the cross-examinations of Dr. Smith and Dr. Taylor. Pages 16 and 17 of Respondents' Exhibit 2 show horse pasterns that have ridges and furrows present that do not appear to be "uniformly thickened" as required for a horse not to be considered sore under the scar rule. However, the caption beneath figure 11A on page 16 of Respondents' Exhibit 2 states, "[i]f these can be smoothed out with the thumbs (see fig. 8), these would not be violations." And here lies the whole of Respondent Winston T. Groover, Jr.'s defense.

Both of the Designated Qualified Persons and Dr. Baker who examined Stocks Clutch FCR subsequent to the veterinary medical officers, believed the horse's scars

came within these exemptions. Each of them testified that the scars were pliable and could be flattened. But to be considered "flattened" and therefore the "uniformly thickened epithelial tissue" that may be allowed under the scar rule, all bumps, grooves, and ridges must, as shown in figure 8 on page 13 of Respondents' Exhibit 2, completely disappear when outward pressure is being applied to the site by an examiner's two thumbs. Apparently, the Designated Qualified Persons and the private veterinarian were using a less exacting standard.

Moreover, since the Designated Qualified Persons had not spoken to the veterinary medical officers before their examinations, they erroneously thought the violation was confined to the scar rule. This mistaken belief probably led the Designated Qualified Persons to concentrate their examinations of Stocks Clutch FCR's pasterns to the scarred posterior areas and to not fully palpate the horse's left anterior pastern where the veterinary medical officers had elicited pain responses.

Additionally, when Dr. Baker examined Stocks Clutch FCR some 2 hours later, the pain in the left anterior pastern may have by then sufficiently subsided so as to be no longer detectable.

Designated Qualified Person examinations generally have less probative value and are entitled to less credence than examinations by veterinary medical officers employed by the United States Department of Agriculture. Similarly, a later examination by a

private veterinarian is not given as much weight as the more immediate examination by two United States Department of Agriculture veterinarians.[3]

For these reasons, I conclude Stocks Clutch FCR was sore when Respondent Winston T. Groover, Jr., exhibited the horse in the Cornersville Lions Club 54th Annual Horse Show, Cornersville, Tennessee, on July 7, 2000.

Respondent Winston T. Groover, Jr., Should be Assessed
A $2,200 Civil Penalty and Disqualified for 1 Year

The Horse Protection Act provides for the assessment of a civil penalty of up to $2,200 for each violation of its provisions and authorizes disqualification from participating in specified horse industry activities for not less than 1 year for the first violation and not less than 5 years for any subsequent violation.[4]

When determining the appropriate civil penalty, the Horse Protection Act requires consideration of 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.[5]

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[3]*In re Larry E. Edwards*, 49 Agric. Dec. 188, 200 (1990), *aff'd per curiam*, 943 F.2d 1318 (11th Cir. 1991) (unpublished), *cert. denied*, 503 U.S. 937 (1992).

[4]15 U.S.C. § 1825(b)-(c); 28 U.S.C. § 2461 note; 7 C.F.R. § 3.91(b)(2)(vii).

[5]15 U.S.C. § 1825(b)(1).

As pointed out in *In re Kim Bennett*, 55 Agric. Dec. 176, 188 (1996), "[a]s a result of the Scar Rule, the soring that is seen today . . . is far more subtle. . . ." Therefore, even though the soring of Stocks Clutch FCR may appear less severe than the sored horses described in past cases, it is notable because it occurred while the horse was under the control of an experienced, knowledgeable horse trainer. As such, Respondent Winston T. Groover, Jr., was required to know the limitations the Horse Protection Act presently places on his training practices for a horse he exhibits not to be found in violation of the Horse Protection Act. Unless a professional horse trainer, such as Respondent Winston T. Groover, Jr., is held strictly accountable for any horse in his care that is found to have been exhibited while sore, the Horse Protection Act is without meaning.

A sanction must necessarily be assessed against Respondent Winston T. Groover, Jr., that will serve as a meaningful deterrent against his employment of excessive training techniques in the future. No one but Respondent Winston T. Groover, Jr., was responsible for the soring of the horse. Stocks Clutch FCR was in his care for about a year before the show (Tr. Vol. II at 54). Respondents admit Respondent Winston T. Groover, Jr., entered and exhibited Stocks Clutch FCR and all responsibility for Stocks Clutch FCR's condition was Respondent Winston T. Groover, Jr.'s alone (Respondents' Proposed Findings, Conclusions of Law, Brief and Order at 2). I therefore find all culpability for Stocks Clutch FCR being sore rests with Respondent Winston T. Groover, Jr.

For the reasons previously stated, whenever an experienced, knowledgeable, trainer exhibits a sored horse, it must be found that his conduct, absent a credible and meaningful excuse or explanation, is in every respect egregious. Respondent Winston T. Groover, Jr., has not contested his ability to pay the $2,200 civil penalty authorized under the Horse Protection Act for a horse soring violation and that is the appropriate civil penalty to be assessed in these circumstances.

The Horse Protection Act also authorizes the disqualification for not less than 1 year for the first violation and not less than 5 years for any subsequent violation. Complainant seeks the imposition of a 1 year disqualification. In order to have a meaningful deterrent against employing excessive training techniques in the future, I conclude Respondent Winston T. Groover, Jr.'s disqualification for 1 year is necessary and appropriate.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent Winston T. Groover, Jr., raises five issues in "Respondent's Appeal of Decision and Order; and Memorandum of Points and Authorities in Support of Respondent's Appeal" [hereinafter Appeal Petition]. First, Respondent Winston T. Groover, Jr., asserts the ALJ erroneously concluded that "a presumption of soreness was created based upon a finding of unilateral soreness" (Appeal Pet. at 2).

Respondent Winston T. Groover, Jr., does not cite, and I cannot locate, any finding, conclusion, or statement in the Initial Decision and Order indicating that the ALJ concluded that "a presumption of soreness was created based upon a finding of unilateral

soreness." Therefore, I reject Respondent Winston T. Groover, Jr.'s assertion that the ALJ erroneously concluded that "a presumption of soreness was created based upon a finding of unilateral soreness."

Second, Respondent Winston T. Groover, Jr., contends Complainant failed to prove by a preponderance of the evidence that Stocks Clutch FCR was sore when Respondent Winston T. Groover, Jr., exhibited the horse as entry number 43 in class number 20 in the Cornersville Lions Club 54th Annual Horse Show, Cornersville, Tennessee, on July 7, 2000. Respondent Winston T. Groover, Jr., contends Complainant's case is based solely on past recorded findings of Dr. Smith and Dr. Taylor neither of whom had any present recollection of their July 7, 2000, examinations of Stocks Clutch FCR during the hearing. Respondent Winston T. Groover, Jr., contends, while past recollection recorded is admissible in administrative proceedings and can constitute substantial evidence to support factual findings, it must be reliable. Respondent Winston T. Groover, Jr., contends Dr. Smith's and Dr. Taylor's affidavits (CX 5, CX 6) are not reliable because they are not accurate and fresh and APHIS Form 7077 (CX 4) is not reliable because it is not accurate. (Appeal Pet. at 2-8.)

The proponent of an order has the burden of proof in proceedings conducted under the Administrative Procedure Act,[6] and the standard of proof by which the burden of

[6]5 U.S.C. § 556(d).

persuasion is met is the preponderance of the evidence standard.[7] The standard of proof in administrative proceedings conducted under the Horse Protection Act is preponderance of the evidence.[8] Dr. Smith and Dr. Taylor testified that, at the time of the hearing, they

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[7]*Herman & MacLean v. Huddleston,* 459 U.S. 375, 387-92 (1983); *Steadman v. SEC*, 450 U.S. 91, 92-104 (1981).

[8]*In re Robert B. McCloy*, 61 Agric. Dec. 173, 195 n.6 (2002), *aff'd*, 351 F.3d 447 (10th Cir. 2003), *cert. denied*, 125 S. Ct. 38, 2004 WL 91959 (2004); *In re William J. Reinhart*, 60 Agric. Dec. 241, 258 n.7 (2001) (Order Denying William J. Reinhart's Pet. for Recons.); *In re Carl Edwards & Sons Stables* (Decision as to Carl Edwards & Sons Stables, Gary R. Edwards, Larry E. Edwards, and Etta Edwards), 56 Agric. Dec. 529, 539 (1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); *In re Gary R. Edwards* (Decision as to Gary R. Edwards, Larry E. Edwards, and Carl Edwards & Sons Stables), 55 Agric. Dec. 892, 903 (1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997); *In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 857 n.2 (1996); *In re Jim Singleton*, 55 Agric. Dec. 848, 850 n.2 (1996); *In re Keith Becknell*, 54 Agric. Dec. 335, 343-44 (1995); *In re C.M. Oppenheimer* (Decision as to C.M. Oppenheimer), 54 Agric. Dec. 221, 245-46 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 285 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re William Earl Bobo*, 53 Agric. Dec. 176, 197 (1994), *aff'd*, 52 F.3d 1406 (6th Cir. 1995); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1286 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1253-54 (1993); *In re Paul A. Watlington*, 52 Agric. Dec. 1172, 1186-87 (1993); *In re Jackie McConnell* (Decision as to Jackie McConnell), 52 Agric. Dec. 1156, 1167 (1993), *aff'd*, 23 F.3d 407, 1994 WL 162761 (6th Cir. 1994), *printed in* 53 Agric. Dec. 174 (1994); *In re A.P. Holt* (Decision as to Richard Polch and Merrie Polch), 52 Agric. Dec. 233, 242-43 (1993), *aff'd per curiam*, 32 F.3d 569, 1994 WL 390510 (6th Cir. 1994) (citation limited under 6th Circuit Rule 24); *In re Steve Brinkley*, 52 Agric. Dec. 252, 262 (1993); *In re John Allan Callaway*, 52 Agric. Dec. 272, 284 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 307 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994), *reprinted in* 53 Agric. Dec. 169 (1994); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 341 (1992), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Pat Sparkman* (Decision as to Pat Sparkman and Bill McCook), 50 Agric. Dec. 602, 612 (1991); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1941 n.5 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983); *In re Steve*

(continued...)

had no independent recollection of their examinations of Stocks Clutch FCR (Tr. Vol. I at 45-48, 162-63). Dr. Smith's affidavit, Dr. Taylor's affidavit, and APHIS Form 7077 (CX 4-CX 6) are Dr. Smith's and Dr. Taylor's past recorded recollections of their examinations of Stocks Clutch FCR.

Dr. Smith completed his affidavit approximately 12 hours after he examined Stocks Clutch FCR. Dr. Smith based his affidavit on notes he had taken the night of the examination and his memory of the examination. Dr. Smith testified that, when he wrote his affidavit, he had a fresh recollection of his examination of Stocks Clutch FCR. (Tr. Vol. I at 46-48; CX 5 at 2.) Dr. Taylor testified she completed her affidavit approximately 3 hours after her examination of Stocks Clutch FCR (Tr. Vol. I at 163-64; CX 6 at 3).

Respondent Winston T. Groover, Jr., asserts the time between Dr. Smith's examination of Stocks Clutch FCR and the preparation of his affidavit and the time between Dr. Taylor's examination of Stocks Clutch FCR and the preparation of her affidavit do not, by themselves, establish that Dr. Smith's affidavit and Dr. Taylor's affidavit lacked "freshness." However, Respondent Winston T. Groover, Jr., also asserts the limited written information available to refresh Dr. Smith's recollection and Dr. Taylor's recollection when they prepared their affidavits and the numerous horses

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[8](...continued)
Beech, 37 Agric. Dec. 1181, 1183-85 (1978).

Dr. Smith and Dr. Taylor examined after they examined Stocks Clutch FCR and before they prepared their affidavits affected the "freshness" of their affidavits.

I agree with Respondent Winston T. Groover, Jr.'s assertion that the 12 hours between Dr. Smith's examination of Stocks Clutch FCR and the preparation of his affidavit and the 3 hours between Dr. Taylor's examination of Stocks Clutch FCR and the preparation of her affidavit do not establish that Dr. Smith's and Dr. Taylor's affidavits lack "freshness."

I find the time between Dr. Smith's examination of Stocks Clutch FCR and the completion of his affidavit and the time between Dr. Taylor's examination of Stocks Clutch FCR and the completion of her affidavit are short, and I presume many, if not most, affiants would have a fresh recollection of significant events that occurred 3 and even 12 hours prior to the preparation of an affidavit. The likelihood of a fresh recollection of events would be enhanced by an affiant's access to writings prepared almost contemporaneously with the events that are the subject of an affidavit. When he prepared his affidavit, Dr. Smith had access to, and relied on, notes he prepared almost contemporaneously with his examination of Stocks Clutch FCR. Moreover, the likelihood of a fresh recollection of events would be enhanced by an affiant's intense focus on the events that are the subject of an affidavit during the occurrence of those events. Here, the very purpose of Dr. Smith's and Dr. Taylor's presence at the Cornersville Lions Club 54th Annual Horse Show was to detect sore horses and to document any findings of sore horses. I find nothing in the record supporting Respondent

Winston T. Groover, Jr.'s contention that Dr. Smith did not have a fresh recollection of his examination of Stocks Clutch FCR when he prepared his affidavit, and I find nothing in the record supporting Respondent Winston T. Groover, Jr.'s contention that Dr. Taylor did not have a fresh recollection of her examination of Stocks Clutch FCR when she prepared her affidavit.

The United States Department of Agriculture has long held that past recollection recorded is reliable, probative, and substantial evidence and fulfills the requirements of the Administrative Procedure Act (5 U.S.C. § 556(d)), if made while the events recorded were fresh in the witness' mind.[9] Affidavits and APHIS 7077 Forms, such as those prepared by Dr. Smith and Dr. Taylor, are regularly made as to all of the horses which are found to be sore and are kept in the ordinary course of the United States Department of Agriculture's business. There is no exclusionary rule applicable to proceedings conducted in accordance with the Rules of Practice which prevents their receipt as

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[9]*In re John T. Gray* (Decision as to Glen Edward Cole), 55 Agric. Dec. 853, 869 (1996); *In re Mike Thomas*, 55 Agric. Dec. 800, 822 (1996); *In re Big Bear Farm, Inc.*, 55 Agric. Dec. 107, 136 (1996); *In re Gary R. Edwards*, 54 Agric. Dec. 348, 351-52 (1995); *In re Eddie C. Tuck* (Decision as to Eddie C. Tuck), 53 Agric. Dec. 261, 284 (1994), *appeal voluntarily dismissed*, No. 94-1887 (4th Cir. Oct. 6, 1994); *In re Jack Kelly*, 52 Agric. Dec. 1278, 1300 (1993), *appeal dismissed*, 38 F.3d 999 (8th Cir. 1994); *In re Charles Sims* (Decision as to Charles Sims), 52 Agric. Dec. 1243, 1264 (1993); *In re Cecil Jordan* (Decision as to Sheryl Crawford), 52 Agric. Dec. 1214, 1236 (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, 1182 (1993); *In re Linda Wagner* (Decision as to Roy E. Wagner and Judith E. Rizio), 52 Agric. Dec. 298, 313 (1993), *aff'd*, 28 F.3d 279 (3d Cir. 1994); *In re John Allan Callaway*, 52 Agric. Dec. 272, 289 (1993); *In re Albert Lee Rowland*, 40 Agric. Dec. 1934, 1942 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983).

evidence, and they have been regularly received in Horse Protection Act cases. Dr. Smith's affidavit, Dr. Taylor's affidavit, and APHIS Form 7077 (CX 4-CX 6) were properly received as evidence. In fact, I would attach more weight to these affidavits and APHIS Form 7077, prepared on the day of the event and the day after the event, than to the testimony given almost 2 years after the event.

Respondent Winston T. Groover, Jr., also contends Dr. Smith's affidavit, Dr. Taylor's affidavit, and APHIS Form 7077 are unreliable because they are not accurate. Specifically, Respondent Winston T. Groover, Jr., contends Dr. Smith's affidavit is unreliable because it states he examined Stocks Clutch FCR "[a]t about 9:40 p.m." (CX 5 at 1) (Appeal Pet. at 5). The record supports a finding that Dr. Smith examined Stocks Clutch FCR at approximately 8:40 or 8:50 p.m. Dr. Smith testified that the reference in his affidavit to 9:40 p.m., is a typographical error and that he "should have typed an eight instead of a nine" (Tr. Vol. I at 50-51, 110-11). I disagree with Respondent Winston T. Groover, Jr.'s contention that Dr. Smith's affidavit is unreliable based on a single typographical error regarding the time of Dr. Smith's examination of Stocks Clutch FCR.

Respondent Winston T. Groover, Jr., suggests that APHIS Form 7077 (CX 4) is unreliable because neither Dr. Smith nor Dr. Taylor could identify which one of them marked item 29, indicating that Stocks Clutch FCR was sore, or which one of them marked item 30, indicating that Stocks Clutch FCR was not in compliance with the scar rule (Appeal Pet. at 5-6). I reject Respondent Winston T. Groover, Jr.'s suggestion that

APHIS Form 7077 (CX 4) is unreliable because Dr. Smith and Dr. Taylor did not remember which of them marked item 29 and item 30. Both Dr. Smith and Dr. Taylor signed APHIS Form 7077 (CX 4) indicating that the form accurately reflected their findings that Stocks Clutch FCR was sore and was not in compliance with the scar rule (Tr. Vol. I at 54-55, 165).

Respondent Winston T. Groover, Jr., also contends Dr. Smith's affidavit, Dr. Taylor's affidavit, and APHIS Form 7077 are unreliable because Dr. Smith's affidavit and Dr. Taylor's affidavit contain an abundance of information that is not contained on APHIS Form 7077 (CX 4), which was completed "more or less contemporaneously with [Stocks Clutch FCR's] examination" (Appeal Pet. at 6-7).

I agree that Dr. Smith's and Dr. Taylor's affidavits contain detailed descriptions of their examinations of Stocks Clutch FCR, whereas APHIS Form 7077, item 31, mainly illustrates Dr. Smith's and Dr. Taylor's findings. However, I reject Respondent Winston T. Groover, Jr.'s contention that this discrepancy establishes that Dr. Smith's affidavit, Dr. Taylor's affidavit, and APHIS Form 7077 are unreliable. I infer this discrepancy is the product of the nature of an affidavit, which is a declaration of facts, and the nature of item 31 on APHIS Form 7077, which commands the examiner to "illustrate where the horse is sore" (CX 4 at item 31). The only invitation to narrative on APHIS Form 7077 is a notation between item 21 and item 22, which states: "Note for narrative continuation of any item, use reverse side of form. Cite item number referred to." Dr. Smith and Dr. Taylor were not required to, and did not, provide a narrative

description of their examinations of Stocks Clutch FCR on the reverse side of APHIS Form 7077 (CX 4).

Third, Respondent Winston T. Groover, Jr., contends Dr. Smith and Dr. Taylor did not establish the extent of their experience under the Horse Protection Act (Appeal Pet. at 7-8).

The ALJ found Dr. Smith and Dr. Taylor to be competent, experienced, highly qualified veterinary medical officers (Initial Decision and Order at 7, 13). The record supports the ALJ's findings. Dr. Smith received a veterinary degree from Colorado State University in 1988. After graduation from veterinary medical school, Dr. Smith was a equine practitioner for approximately 6 months. In 1989, the United States Department of Agriculture hired Dr. Smith, but it was not until 1997, when he joined the Animal and Plant Health Inspection Service's Animal Care staff, that Dr. Smith began examining horses to determine compliance with the Horse Protection Act. During the period 1997 to July 7, 2000, Dr. Smith attended a 2-day Horse Protection Act training course every year, and, when he initially began working in the Horse Protection Act program, he worked with veterinarians who had Horse Protection Act program experience. During the period 1997 to July 7, 2000, Dr. Smith attended between 5 and 7 horse shows each year and in each show he examined between 15 and 30 horses to determine whether they were sore. During the period 1997 to July 7, 2000, approximately 5 to 10 percent of Dr. Smith's time as a United States Department of Agriculture employee was related to the

examination of horses for violations of the Horse Protection Act. (Tr. Vol. I at 35-38, 80.)

Dr. Taylor received a veterinary degree from the University of Georgia in 1986. After graduation from veterinary medical school, Dr. Taylor was in avian practice. She was subsequently employed by the United States Department of Agriculture and began examining horses to determine compliance with the Horse Protection Act in 1988. During the entire period 1988 to July 7, 2000, Dr. Taylor attended numerous Horse Protection Act training courses and workshops. During the period 1988 to July 7, 2000, Dr. Taylor attended between 30 and 50 horse shows and examined approximately 1,000 horses to determine whether they were sore. (Tr. Vol. I at 159-62, 171-72.) Respondent Winston T. Groover, Jr., correctly points out that on cross-examination, Dr. Taylor was less certain about the number of horses she examined for compliance with the Horse Protection Act than she was on direct examination (Appeal Pet. at 8). However, I find Dr. Taylor's uncertainty relates not to the approximate total number of horses she examined during the period 1988 to July 7, 2000, but to the year-by-year number of examinations, which were the subject of Respondent Winston T. Groover, Jr.'s counsel's questions (Tr. Vol. I at 177-81).

Based on the record before me, I agree with the ALJ's finding that Dr. Smith and Dr. Taylor are experienced, competent, highly qualified veterinary medical officers.

I give Dr. Smith's affidavit (CX 5), Dr. Taylor's affidavit (CX 6), and APHIS Form 7077 (CX 4) great weight, and I conclude Complainant proved by a preponderance

of the evidence that on July 7, 2000, Respondent Winston T. Groover, Jr., violated section 5(2)(A) of the Horse Protection Act (15 U.S.C. § 1824(2)(A)) when he exhibited Stocks Clutch FCR as entry number 43 in class number 20 in the Cornersville Lions Club 54th Annual Horse Show, Cornersville, Tennessee, while the horse was sore.

Fourth, Respondent Winston T. Groover, Jr., contends he presented credible, reliable, and probative evidence that establishes that Stocks Clutch FCR was not sore on July 7, 2000, when Respondent Winston T. Groover, Jr., exhibited the horse as entry number 43 in class number 20 in the Cornersville Lions Club 54th Annual Horse Show (Appeal Pet. at 8-10).

I find Respondent Winston T. Groover, Jr., presented competent evidence in support of his position that Stocks Clutch FCR was not sore when he exhibited Stocks Clutch FCR as entry number 43 in class number 20 in the Cornersville Lions Club 54th Annual Horse Show on July 7, 2000. However, based upon a careful consideration of the record, I agree with the ALJ that Charles Thomas', Andy Messick's, and Dr. Baker's results of examinations of Stocks Clutch FCR have less probative value, are less credible, are less reliable, and are entitled to less weight than Dr. Smith's and Dr. Taylor's results of examinations of Stocks Clutch FCR.[10]

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[10]While the record in each case must be examined to determine the weight to be given examinations by Designated Qualified Persons, private veterinarians, and United States Department of Agriculture veterinary medical officers, generally little weight is given to examinations by Designated Qualified Persons and private veterinarians as compared to examinations by qualified, experienced, disinterested United States

(continued...)

Fifth, Respondent Winston T. Groover, Jr., asserts the ALJ erroneously based upon speculation his finding that Designated Qualified Person Charles Thomas' predominant concern appeared to be whether Stocks Clutch FCR was in violation of the scar rule (Appeal Pet. at 9).

An administrative law judge's findings must be supported by substantial evidence–not mere speculation, intuition, or conjecture.[11] "Substantial evidence" is

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[10](...continued)
Department of Agriculture veterinary medical officers. *See In re C.M. Oppenheimer*, 54 Agric. Dec. 221, 268 (1995) (stating the Judicial Officer gives little weight to the examinations by Designated Qualified Persons, compared to the weight the Judicial Officer gives to the examinations by United States Department of Agriculture veterinarians because Designated Qualified Persons are generally laymen, their examinations are short and cursory, and they frequently do not understand the meaning of the term *sore*, as defined by the Horse Protection Act); *In re William Dwaine Elliott* (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 340 (1992) (stating the opinion of laymen, even that of a Designated Qualified Person, is insufficient to outweigh the credible testimony of an Animal and Plant Health Inspection Service veterinarian), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993); *In re Pat Sparkman*, 50 Agric. Dec. 602, 610 (1991) (finding the testimony of two Animal and Plant Health Inspection Service veterinarians more credible, expert, and trustworthy than that given by the Designated Qualified Person, other owners, trainers, and a private veterinarian who examined the horse over an hour after it was shown); *In re Larry E. Edwards*, 49 Agric. Dec. 188, 200 (1990) (stating Designated Qualified Person examinations have repeatedly been found less probative than United States Department of Agriculture examinations and the Judicial Officer has accorded less credence to Designated Qualified Person examinations), *aff'd per curiam*, 943 F.2d 1318 (11th Cir. 1991) (unpublished), *cert. denied*, 503 U.S. 937 (1992).

[11]5 U.S.C. § 556(d); *Richardson v. Secretary of HHS*, 735 F.2d 962, 964 (6th Cir. 1984) (per curiam); *Cowart v. Schweiker*, 662 F.2d 731, 736 (11th Cir. 1981); *O'Banner v. Secretary of HEW*, 587 F.2d 321, 323 (6th Cir. 1978); *Dionne v. Heckler*, 585 F. Supp. 1055, 1060 (D. Me. 1984).

generally defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[12]

The ALJ found "Mr. Thomas' predominant concern appeared to be whether the horse was in violation of the scar rule."[13] I carefully reviewed Charles Thomas' testimony (Tr. Vol. II at 29-49) and Charles Thomas' description of his July 7, 2000, examination of Stocks Clutch FCR (RX 10, RX 11). I find the record contains substantial evidence that Designated Qualified Person Charles Thomas' predominate concern appears to be whether Stocks Clutch FCR was in violation of the scar rule. Therefore, I reject Respondent Winston T. Groover, Jr.'s contention that the ALJ's finding of fact regarding Charles Thomas' predominant concern is based upon mere speculation.

For the foregoing reasons, the following Order should be issued.

ORDER

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[12]*Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 619-20 (1966); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939); *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *Lee v. NLRB*, 325 F.3d 749, 754 (6th Cir. 2003); *Wright v. Massanari*, 321 F.3d 611, 614 (6th Cir. 2003); *NLRB v. V & S Schuler Engineering, Inc.*, 309 F.3d 362, 372 (6th Cir. 2002); *Van Dyke v. NTSB*, 286 F.3d 594, 597 (D.C. Cir. 2002); *JSG Trading Corp. v. Department of Agric.*, 235 F.3d 608, 611 (D.C. Cir.), *cert. denied*, 534 U.S. 992 (2001); *Corrections Corp. of America v. NLRB*, 234 F.3d 1321, 1323 (D.C. Cir. 2000); *Bobo v. United States Dep't of Agric.*, 52 F.3d 1406, 1410 (6th Cir. 1995).

[13]Findings of Fact number 21 (Initial Decision and Order at 8).

1. Respondent Winston T. Groover, Jr., is assessed a $2,200 civil penalty. The civil penalty shall be paid by certified check or money order made payable to the "Treasurer of the United States" and sent to:

Donald A. Tracy
United States Department of Agriculture
Office of the General Counsel
Marketing Division
1400 Independence Avenue, SW
Room 2343-South Building, Stop 1417
Washington, DC 20250-1417

Respondent Winston T. Groover, Jr.'s payment of the civil penalty shall be forwarded to, and received by, Mr. Tracy within 60 days after service of this Order on Respondent Winston T. Groover, Jr. Respondent Winston T. Groover, Jr., shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 01-0008.

2. Respondent Winston T. Groover, Jr., is disqualified for 1 year from showing, exhibiting, or entering any horse, directly or indirectly through any agent, employee, or device, and from managing, judging, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction. "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 exhibitors; (c) being present in the warm-up areas, inspection areas, or other areas where spectators are not allowed at any horse show, horse exhibition, horse sale, or horse auction; and

(d) financing the participation of others in any horse show, horse exhibition, horse sale, or horse auction.

The disqualification of Respondent Winston T. Groover, Jr., shall become effective on the 60th day after service of this Order on Respondent Winston T. Groover, Jr.

RIGHT TO JUDICIAL REVIEW

Respondent Winston T. Groover, Jr., has the right to obtain review of the Order in the court of appeals of the United States for the circuit in which he resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Respondent Winston T. Groover, Jr., must file a notice of appeal in such court within 30 days from the date of the Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture.[14] The date of the Order is November 15, 2004.

Done at Washington, DC

November 15, 2004

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William G. Jenson
Judicial Officer

[14] 15 U.S.C. § 1825(b)(2), (c).