UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	HPA Docket No. 06-0004
	)	
Perry Lacy,	)	
	)	
Respondent[1]	)	**Decision and Order**

PROCEDURAL HISTORY

On January 18, 2006, the Administrator of the Animal and Plant Health Inspection Service [hereinafter APHIS], an agency of the United States Department of Agriculture [hereinafter USDA], filed a complaint alleging that Perry Lacy violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [hereinafter the Horse Protection Act]. The complaint specifically alleges that, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) on August 25, 2002, Mr. Lacy entered, for the purpose of showing or exhibiting, a horse named "Mark of Buck" in the 64th Annual Tennessee Walking Horse National Celebration [hereinafter the Celebration] in

[1]Administrative Law Judge Peter M. Davenport's [hereinafter the ALJ] decision indicates the caption of this case is "*In re: Percy Lacy*." The complaint and all other documents identify the respondent as "Perry Lacy." When identifying himself during his testimony at the hearing, Mr. Lacy spelled his name "P-e-r-r-y L-a-c-y" (Transcript [hereinafter Tr.] 101). Therefore, I use the caption "*In re: Perry Lacy*."

Shelbyville, Tennessee, while the horse was sore. The complaint also alleges that Mr. Lacy allowed the entry of Mark of Buck in the Celebration while the horse was sore, a violation of section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)).[2]

In his answer, Mr. Lacy admitted that he owned Mark of Buck and that he entered the horse in the Celebration. Mr. Lacy denied that Mark of Buck was sore and denied that he entered Mark of Buck in the Celebration while the horse was sore.

On August 22, 2006, in Bowling Green, Kentucky, the ALJ conducted a hearing. Robert A. Ertman, Office of the General Counsel, USDA, represented APHIS. David F. Broderick, Broderick & Associates, Bowling Green, Kentucky, represented Mr. Lacy. APHIS entered nine exhibits into evidence identified as "CX." These exhibits included APHIS Form 7077, Summary of Alleged Violations (CX 2); National Horse Show Commission DQP[3] Ticket (CX 4); National Horse Show DQP examination forms summarizing the findings of both DQPs who examined Mark of Buck (CX 5, CX 7); and affidavits of the two DQPs and one of the two USDA veterinarians who examined Mark

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[2]APHIS did not present evidence on this allegation, the ALJ did not discuss this allegation, and APHIS did not raise this allegation on appeal to the Judicial Officer. Therefore, I find the question of whether Mr. Lacy violated section 5(2)(D) of the Horse Protection Act (15 U.S.C. § 1824(2)(D)) by allowing the entry of a sore horse waived, and I do not address the issue.

[3]Designated Qualified Person. DQPs are employed by the management of horse shows, and USDA veterinarians monitor their performance (9 C.F.R. §§ 11.7, .21). The Horse Protection Act provides that the management of a horse show may be held liable if it fails to utilize a DQP and a sore horse participates in the show (15 U.S.C. § 1824(3); 9 C.F.R. § 11.20).

of Buck (CX 6, CX 8, CX 9). The ALJ refused to enter into the record a copy of a videotape showing the August 25, 2002, examinations of Mark of Buck (Tr. 6-7). Mr. Lacy entered two exhibits into evidence identified as "RX." These exhibits were a report by Dr. John O'Brien and a lab report, each indicating that Mark of Buck had contracted West Nile virus (RX 1, RX 2).

APHIS called three witnesses during the hearing. First called was Fernando Gattorno, who was objected to by Mr. Lacy and dismissed by the ALJ (Tr. 9-11). Next, APHIS called Timothy Jones, an APHIS investigator, and Lynn P. Bourgeois, a USDA veterinarian, who examined Mark of Buck on August 25, 2002, during the Celebration. Mr. Lacy testified on his own behalf and he also called John L. O'Brien, a veterinarian who diagnosed and treated Mark of Buck for West Nile virus. Prior to the hearing, on August 10, 2006, the ALJ denied an APHIS request to allow Michael Guedron, the other USDA veterinarian who examined Mark of Buck on August 25, 2002, to testify telephonically.

On October 23, 2006, the ALJ issued a Decision and Order [hereinafter ALJ Dec.] dismissing the complaint. The ALJ relied exclusively on the Horse Protection Act's statutory presumption (15 U.S.C. § 1825(d)(5))[4] to determine if Mark of Buck was sore. The ALJ found that "the sensitivity in the horse's front limbs found by both the

[4]"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."

Designated Qualified Persons and the Veterinary Medical Officers was not the result of being 'sored,' but rather was consistent with the effects of [West Nile] virus." (ALJ Dec. at 6 (footnotes and parenthetical statements omitted).) The ALJ concluded that Mr. Lacy rebutted the presumption.

On January 23, 2007, APHIS appealed the ALJ's decision.

FINDINGS OF FACT

The Celebration took place in Shelbyville, Tennessee, from August 21, 2002, through August 31, 2002 (CX 1). On August 25, 2002, Perry Lacy entered a horse named "Mark of Buck" as entry number 131 in class number 77 of the Celebration (CX 3). Don Campbell, Mark of Buck's trainer, presented the horse for inspection (CX 6, CX 8). Two DQPs examined the horse (CX 5, CX 7). Each DQP found the horse "led slow" and reacted strongly to palpation on the front feet (CX 5-CX 8). Each DQP found Mark of Buck was "bilateral sore" in his front feet (CX 6, CX 8). DQP Ticket number 23383, signed by both DQPs, states Mark of Buck was "bilateral sore," in violation of the Horse Protection Act (CX 4). The DQPs excused Mark of Buck from showing (CX 4).

Two USDA veterinarians next examined the horse. First, Dr. Michael Guedron examined Mark of Buck (Tr. 60) eliciting "strong, repeatable, reproducible pain responses[.]" (CX 9 at 2.) Next, Dr. Lynn P. Bourgeois examined the horse. He noted the horse "led slowly and reluctantly." *Id.* Dr. Bourgeois approached the horse from the left side, patted the horse's neck, ran his hand down the left front leg, picked up Mark of

Buck's foot and palpated the posterior pastern. *Id.* Mark of Buck's reactions were normal. *Id.* Then, Dr. Bourgeois palpated the left anterior pastern where he observed "strong, repeatable, reproducible pain responses" including severe clenching of abdominal muscles and attempts by the horse to withdraw that limb and to redistribute his weight to the hind limbs. *Id.* Dr. Bourgeois moved to Mark of Buck's right side, examining the horse, finding normal reactions until he palpated the anterior of the horse's right pastern. When Dr. Bourgeois palpated the anterior right pastern, Mark of Buck demonstrated "strong, repeatable, reproducible pain responses[.]" (CX 9 at 3.)

Dr. Guedron and Dr. Bourgeois conferred, agreeing that Mark of Buck was sore as defined in the Horse Protection Act. *Id.* Dr. Guedron completed the bottom portion of APHIS Form 7077, Summary of Alleged Violations, noting the locations on each foot where each veterinarian found "[a]reas of consistent, repeatable pain responses[.]" (CX-2.) Dr. Guedron and Dr. Bourgeois each signed the form indicating agreement with the findings noted on the form (Tr. 37). Dr. Bourgeois concluded that Mark of Buck "was sored with caustic chemicals and/or overwork in chains." (CX 9 at 3.)

Dr. Bourgeois testified that he knew of no naturally occurring condition, disease, or injury, "other than the deliberate application of caustic chemicals or the use of chains" that "would cause a horse to exhibit consistent pain responses on the anterior surfaces of the pasterns of its forefeet but to exhibit no pain responses elsewhere." (Tr. 80-81.)

After the show, the trainer transported Mark of Buck back to his stables (Tr. 115-16). On September 5, 2002, Mark of Buck's trainer took the horse to Dr. John O'Brien's clinic because there was "something wrong with this horse." (Tr. 116, 131.) Dr. O'Brien observed that Mark of Buck was "somewhat ataxic." (Tr. 134, 142.) The horse was not "stumbling or falling down, but that he was just off." (Tr. 134.) The doctor described the horse as acting as if his skin was "tingling" and he did not want to be touched. *Id.* Dr. O'Brien took a blood sample from Mark of Buck and had it tested for numerous conditions including West Nile virus (Tr. 138-39). The test results confirmed that Mark of Buck had West Nile virus (Tr. 139; RX 2).

DISCUSSION

The Horse Protection Act prohibits "entering for the purpose of showing or exhibiting in any horse show or horse exhibition, any horse which is sore[.]" (15 U.S.C. § 1824(2)(B).) To demonstrate an individual violated this provision of the Horse Protection Act, APHIS must prove two elements. First, APHIS must show that the individual entered a horse in a horse show or horse exhibition for the purpose of showing or exhibiting that horse. Next, APHIS must show that the horse was sore.

§ 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,
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> 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.

15 U.S.C. § 1821(3). In addition, any horse that "manifests abnormal sensitivity or inflamation in both of its forelimbs or both of its hindlimbs" shall be presumed to be sore (15 U.S.C. § 1825(d)(5)).

Regarding the first element of the violation – entry of the horse – Mr. Lacy admitted he entered Mark of Buck at the Celebration on August 25, 2002. The complaint, filed by APHIS alleging that Mr. Lacy violated the Horse Protection Act, states "[o]n August 25, 2002, respondent Perry Lacy entered 'Mark of Buck' as entry number 131 in class number 77, in the 64th Annual Tennessee Walking Horse National Celebration, in Shelbyville, Tennessee, for the purpose of showing or exhibiting the horse." (Compl. ¶ I.2.) In his answer, Mr. Lacy responded, "Respondent admits the facts contained in Paragraphs 1 and 2 in Section I of the Complaint." Therefore, I find Mr. Lacy entered Mark of Buck in the Celebration for the purpose of showing or exhibiting the horse.

The remaining question is whether Mark of Buck was sore as that term is defined in the Horse Protection Act. For the reasons set forth below, I find Mark of Buck was sore.

On the evening of August 25, 2002, Mark of Buck was examined by two DQPs and two USDA veterinarians. Each of them found the horse had significant pain reactions when palpated on his front feet. The two DQPs stated in their affidavits that Mark of Buck "was bilateral sore in both front feet." (CX 6, CX 8.) Dr. Guedron completed the bottom portion of APHIS Form 7077, Summary of Alleged Violations, concluding that Mark of Buck was sore. Dr. Guedron marked on the drawing in Block 31 of the form the four spots on each foot that were "[a]reas of consistent, repeatable pain responses[.]" (CX 2.) Dr. Bourgeois discussed his examination of the horse in his affidavit describing Mark of Buck's strong responses to palpation of his feet (CX 9). He noted that he and Dr. Guedron consulted regarding their examinations of the horse, concluding that Mark of Buck was sore. *Id.* Dr. Bourgeois then stated that, in his professional opinion, Mark of Buck "was sored with caustic chemicals and/or overwork in chains." *Id.* This evidence is sufficient to meet the statutory definition of a sore horse (15 U.S.C. § 1821(3)).

Mr. Lacy argues that West Nile virus, diagnosed by Dr. O'Brien after he examined Mark of Buck on September 5, 2002, caused the reactions to digital palpation observed by both USDA veterinarians and both DQPs on the evening of August 25, 2002. However,

Dr. O'Brien does not identify a clear connection between his diagnosis on September 5, 2002, that Mark of Buck contracted West Nile virus and the observations of USDA veterinarians and the DQPs 11 days earlier.

Dr. O'Brien acknowledges that he "wasn't privy to the initial examine that was done on the 25th" and he has "little knowledge of what happened at that particular point in time." (Tr. 164.) Although he admits that "it's hard to comment" (*id.*) on the examinations of Mark of Buck at the Celebration, he still offers his view that Mark of Buck was not sore when examined at the Celebration (Tr. 150, 170). Dr. O'Brien concluded that the horse was not reacting to the soring of his feet, but rather was reacting to the hypersensitivity associated with the encephalitis, resulting from the West Nile virus.

> [BY MR. BRODERICK:]
>
> Q. Assuming that he was reacting to digital palpations that night, would that be consistent with his hypersensitivity in having West Nile virus?
>
> [BY DR. O'BRIEN:]
>
> A. It could be, yes.

> Q. Within terms of your medical probability, that is more likely than not, do you think his reaction was because of his West Nile virus?
>
> A. I feel confident that it was.

Tr. 150. Dr. O'Brien does not explain how the encephalitis caused hypersensitivity[5] in Mark of Buck that was limited to pinpoint spots on the front of the horse's feet. As Dr. Bourgeois found, Mark of Buck "only exhibited pain in certain places. He didn't have pain in the back of his pasterns. He only had pain in certain pinpoint places." (Tr. 57.)

Dr. O'Brien's observation of Mark of Buck's presentation when he examined the horse on September 5, 2002, which pointed him to a neurological condition such as West Nile virus,[6] is significantly different from Mark of Buck's presentation on August 25, 2002, at the Celebration. As Dr. O'Brien testified:

> A. . . . This horse was noticeably off. You could tell that it was off. And by that I mean it had a bit of ataxia to it. And it wasn't dramatic.
>
> The basic thing was this hypersensitivity to touch that you would notice and this scared appearance, this anxious appearance that the horse had.

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[5]Dr. O'Brien explains hypersensitivity as: "Hypersensitivity would be a situation such that when you would touch a horse that was not hypersensitive he would allow you to touch him, rub him, whatever. The hypersensitive individual would act nervous about that touch, such that he just didn't want to be touched." (Tr. 134.)

[6]West Nile virus can only be confirmed by a blood test (Tr. 141). Dr. O'Brien had Mark of Buck's blood tested which confirmed the diagnosis of West Nile virus (RX 2).

[BY MR. BRODERICK:]

Q. When you talk about a horse being anxious, sometimes does that mean its ears would be laid back?

A. Well, that means that you would see an expression about its face such that it had a scared look to it. It would be apprehensive to touch. And it might tend to want to move away from you. It might flare its nostrils a little bit, might breathe a little bit more rapidly, and actually present fear.

Q. Would that mean it might move back from you?

A. It might move away.

Tr. 142-43.

During the examination on August 25, 2002, Dr. Bourgeois found none of the ataxia, hypersensitivity, or anxiousness described by Dr. O'Brien.[7] Dr. Bourgeois' testimony included the following partial description of his examination of Mark of Buck:

[BY MR. ERTMAN:]

Q. . . . When you noted that there was abdominal tucking, when did this abdominal tucking occur?

[BY DR. BOURGEOIS:]

A. When?

Q. When?

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[7]Both Mr. Lacy and the ALJ make a point that Dr. Bourgeois had no training or experience with West Nile virus (Respondent's Reply to Complainant's Appeal at 5-6; ALJ Dec. at 6 n.6). Neither Mr. Lacy nor the ALJ mention that Dr. O'Brien and Dr. Bourgeois each testified that the symptomatology of West Nile virus includes encephalitis (Tr. 84-85, 129-30, 140) and that Dr. Bourgeois testified that he had studied and was familiar with encephalitis (Tr. 85-86).

A. In response to digital palpation.

Q. To what part of the digital palpation?

A. What part? Digital palpation of the anterior pastern.

Q. Did this horse display any abdominal tucking when the posteriors of the pasterns were palpated?

A. No.

Q. Did it display abdominal tucking when the shoulder was touched as you moved around the horse?

A. No.

Q. When you had the horse pick up its foot?

A No.

Q. When you put down the foot and moved to examine the anterior portion of the pastern but before you had begun to palpate the pastern?

A. No.

Q. Is this the same for the rocking back on the hind limbs?

A. Yes.

Q. So, Dr., when you say "other responses," you mean responses in addition to attempting to withdraw its foot?

A. Yes. The pain reactions go from just pulling the foot all the way to abdominal tucking and flinching in the shoulder muscles and laying ears back and there's a -- it's kind of a progression of pain signs.

Q. Dr., you testified that the horse was reluctant to walk and was led on a tight rein?

A. Yes.

Q. Did you observe any wobbliness when the horse walked?

A. No.

Q. Dr., are you aware of any naturally occurring condition which would cause a horse to exhibit consistent pain responses on the anterior surfaces of the pasterns of its forefeet but to exhibit no pain responses elsewhere?

A. Naturally, no.

Q. Are you aware of any disease condition which would do this?

A. No.

Q. Are you aware of any kind of injury which would do this other than the deliberate application of caustic chemicals or the use of chains?

A. No.

Tr. 78-81.

Dr. O'Brien testified that the symptoms of West Nile virus "may be varied. It's a neurological disease. Therefore, it can mimic a lot of other neurological diseases." The symptoms could "be all the way from asymptomatic to a sudden death syndrome. But most cases would be in between that, such that you might see simple ataxia of a horse. You might see a gait that might be off." (Tr. 129-30.) The symptoms described by Dr. O'Brien that point towards West Nile virus are not the symptoms seen in sore horses. Further, the symptoms found by Dr. Bourgeois during his examination of Mark of Buck are not consistent with how Dr. O'Brien described West Nile virus.

APHIS presented evidence that showed Mark of Buck met the statutory definition of being sore (15 U.S.C. § 1821(3)). In an effort to rebut the finding that the horse was sore, Mr. Lacy presented evidence that Mark of Buck contracted West Nile virus. Other than a conclusive statement by Dr. O'Brien, nothing presented by Mr. Lacy supports his position that Mark of Buck's reactions to palpation were a result of encephalitis associated with West Nile virus. Therefore, the evidence presented by Mr. Lacy does not overcome the statutory presumption that Mark of Buck was sore because the horse manifested an abnormal sensitivity in both front feet.

Based on the evidence before me, I conclude Mark of Buck was sore when entered in the Celebration in Shelbyville, Tennessee, on August 25, 2002. Because Mark of Buck was sore when entered in the Celebration and because Mr. Lacy admitted he entered Mark of Buck in the Celebration, I conclude Mr. Lacy violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) on August 25, 2002, when Mr. Lacy entered, for the purpose of showing or exhibiting, Mark of Buck in the Celebration.

SANCTION

The Horse Protection Act (15 U.S.C. § 1825(b)(1)) authorizes a civil penalty of not more than $2,000 for each violation of section 5 of the Horse Protection Act (15 U.S.C. § 1824).[8] The Horse Protection Act also authorizes the disqualification of any person

[8]Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), the Secretary of Agriculture adjusted the civil penalty that may be assessed under 15 U.S.C. § 1825(b)(1) for each violation of 15 U.S.C. § 1824 (continued...)

assessed a civil penalty from showing or exhibiting any horse or judging or managing any horse show, horse exhibition, horse sale, or horse auction. The minimum disqualification is not less than 1 year for a first violation and not less than 5 years for any subsequent violation (15 U.S.C. § 1825(c)).

USDA's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under the 9th Circuit Rule 36-3), as follows:

> [T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The Horse Protection Act provides guidance in determining the amount of the civil penalty to be assessed as follows:

> [T]he 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.

15 U.S.C. § 1825(b)(1).

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[8](...continued)
by increasing the maximum civil monetary penalty from $2,000 to $2,200 (7 C.F.R. § 3.91(b)(2)(vii) (2005)).

APHIS recommends that I assess Mr. Lacy a $2,200 civil penalty (Complainant's Proposed Findings of Fact, Conclusions of Law, Proposed Order and Brief in Support Thereof and Proposed Order at 4). The Horse Protection Act guides me regarding the appropriate sanction. Both DQPs and both USDA veterinarians elicited "strong" pain responses from Mark of Buck (CX 5, CX 7, CX 9). These pain responses indicate that the level of the violation was severe. Neither APHIS nor Mr. Lacy presented evidence indicating Mr. Lacy previously violated the Horse Protection Act. In addition, neither party presented evidence addressing Mr. Lacy's ability to pay a civil penalty or the effect of a civil penalty on Mr. Lacy's ability to continue to do business. The Horse Protection Act further instructs me to take into account "the degree of culpability" that the violator had in relation to the violation (15 U.S.C. § 1825(b)(1)). Again, neither Mr. Lacy nor APHIS addressed Mr. Lacy's culpability for Mark of Buck being sore when entered at the Celebration. Because Mr. Lacy admitted he entered the horse, I conclude that Mr. Lacy has some culpability for the violation.

In most Horse Protection Act cases, the maximum civil penalty per violation has been warranted. *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. 1487, 1504 (2005), *aff'd sub nom. Zahnd v. Sec'y of Agric.*, 479 F.3d 767 (11th Cir. 2007). I have considered all the factors that are required to be considered when determining the amount of the civil penalty to be assessed and, based on these factors and the recommendation of administrative officials charged with responsibility for achieving

the congressional purpose of the Horse Protection Act, I find no basis for an exception to USDA's policy of assessing the maximum civil penalty for Mr. Lacy's violation of the Horse Protection Act. Therefore, I assess Mr. Lacy a $2,200 civil penalty.

Section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) authorizes the Secretary of Agriculture to impose a disqualification on any person that is assessed a civil penalty under section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)). The disqualification bars the violator from showing or exhibiting any horse, and from judging or managing any horse show, horse exhibition, horse sale, or horse auction. The disqualification runs for not less than 1 year for the first violation of the Horse Protection Act and for not less than 5 years for any subsequent violation of the Horse Protection Act. Furthermore, section 6(c) of the Horse Protection Act (15 U.S.C. § 1825(c)) specifically provides that disqualification is in addition to any civil penalty assessed under section 6(b) of the Horse Protection Act (15 U.S.C. § 1825(b)).

While disqualification is discretionary with the Secretary of Agriculture, I have held that disqualification, in addition to the assessment of a civil penalty, is appropriate in almost every Horse Protection Act case, including those cases in which a respondent is found to have violated the Horse Protection Act for the first time. *In re Ronald Beltz* (Decision as to Christopher Jerome Zahnd), 64 Agric. Dec. at 1505-06.

"Unique circumstances" in a particular case might justify a departure from this policy. *In re Kathy Armstrong*, 53 Agric. Dec. 1301, 1325 (1994). However, the record

before me does not present any circumstance that would suggest an exception from the usual practice of imposing the minimum disqualification period for a violation of the Horse Protection Act, in addition to the assessment of a civil penalty, is warranted. Therefore, I impose a 1-year disqualification on Mr. Lacy for his violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) on August 25, 2002, when Mr. Lacy entered, for the purpose of showing or exhibiting, a horse named "Mark of Buck" in the Celebration in Shelbyville, Tennessee, while the horse was sore. During this disqualification, Mr. Lacy is prohibited 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.

ADMISSIBILITY OF THE VIDEOTAPE

The National Horse Show Commission, the organization running the Celebration, videotaped the examination of Mark of Buck on August 25, 2002. On August 2, 2006, APHIS applied for a subpoena duces tecum to obtain the videotape. Subsequently, the ALJ issued the subpoena and APHIS received the videotape late on Monday, August 14, 2006. (Tr. 4-6; Application for Subpoena filed August 2, 2006; Complainant's Appeal and Brief in Support Thereof at 6.) On Friday, August 18, 2006, APHIS provided a copy of the videotape to counsel for Mr. Lacy. *Id.* The hearing took place on Tuesday, August 22, 2006. Counsel for APHIS did not amend the exhibit list prior to the commencement of the hearing (Tr. 5).

The ALJ denied APHIS' request to admit the videotape into evidence.

> I'm disinclined to let it in at this time, Mr. Ertman. I just don't think the timing is sufficient. In other words, it's not really clear that that is really what's at issue in this case. The real question is whether or not this horse was sored and whether the horse was sored by mechanical or chemical means, as opposed to having some other reason for its behavior.
>
> So this eleventh hour location of evidence just I don't really feel is appropriate. So I'm not going to allow the tape to be entered, to be shown.

Tr. 6-7. At various times throughout the hearing, the ALJ again stressed his reasoning for excluding the videotape.

> Mr. Ertman, I've already indicated that that portion is not admissible. Had you -- had APHIS made this tape available in sufficient time ahead of the trial, I would have had no objection to having it shown, displayed, and let you ask all the questions you want.
>
> But when you get the tape at the very eleventh hour before this hearing -- this hearing was postponed once, by the way. And then it comes in and it's given to opposing counsel, in other words, less than a week before the hearing. I find that intolerable.

Tr. 43-44. Finally, the ALJ stated:

> You have indicated that if this witness had had the opportunity to view the videotape then he might some additional testimony to offer. What I'm telling you is that the Government's failure to amend their Witness List, get the exhibit to Counsel in proper time, in other words, precludes you from being able to go there.
>
> Now if that's what your testimony and Offer of Proof is, I have made it for you.

Tr. 168-69.

In its appeal petition, APHIS argues the ALJ erred in excluding the videotape. I agree. The Administrative Procedure Act imposes few restrictions on the admissibility of evidence in administrative proceedings. "Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence." (5 U.S.C. § 556(d).) The rules of practice applicable to this proceeding[9] equally favor admitting evidence. "Evidence which is immaterial, irrelevant, or unduly repetitious, or which is not of the sort upon which responsible persons are accustomed to rely, shall be excluded insofar as practicable." (7 C.F.R. § 1.141(h)(1)(iv).) The courts have long held that administrative fora are not bound by the strict evidentiary limitations found in judicial proceedings. *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229-30 (1938). Evidence is admissible in administrative proceedings if it is probative and "fundamentally fair." *Tun v. Gonzales,* 485 F.3d 1014, 1026 (8th Cir. 2007).

Considering the few restrictions on admissibility imposed by the Administrative Procedure Act and the Rules of Practice, as well as the recognition by the judiciary that admissibility of evidence in administrative proceedings is favored over exclusion, administrative law judges generally should exclude only evidence that is immaterial, irrelevant, or unduly repetitious, or not of the sort upon which responsible persons are

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[9]Subpart H—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].

accustomed to rely. (7 C.F.R. § 1.141(h)(1)(iv).) Here, the ALJ excluded a videotape of the examination of Mark of Buck on August 25, 2002, at the Celebration. This evidence had the potential to demonstrate the horse's reaction to touch and to clarify whether Mark of Buck was sensitive to all touching or whether the horse reacted only to the palpation of his front feet – an indication the sensitivity resulted from soring rather than West Nile virus encephalitis. The videotape falls into the category of evidence that should have been admitted during the hearing.

While I do not condone delay and I acknowledge that counsel for APHIS could have applied for the subpoena for the videotape earlier than he did, the appropriate action was not to exclude the evidence but rather to ensure that counsel for Mr. Lacy had a reasonable time to prepare for its admission.[10] The preparation delay should have been minimal. Considering the ALJ indicated in his original scheduling order the hearing was anticipated to take 2 days, allowing Mr. Lacy's counsel an additional day to prepare Mr. Lacy and Dr. O'Brien for their testimony regarding what they observed on the videotape would not have taken the hearing beyond its scheduled time.

Over 60 years ago, the United States Court of Appeals for the Second Circuit discussed the preference for admitting evidence in administrative proceedings.

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[10]The ALJ stated that, in cases where the non-government party produces evidence that is not on the exhibit list, "the Government has moved to strike that exhibit." (Tr. 5.) While that statement is true, administrative law judges usually admit such evidence into the record.

> Even in criminal trials to a jury it is better, nine times out of ten, to admit, than to exclude, evidence and in such proceedings as these the only conceivable interest that can suffer by admitting any evidence is the time lost, which is seldom as much as that inevitably lost by idle bickering about irrelevancy or incompetence. In the case at bar it chances that no injustice was done, but we take this occasion to point out the danger always involved in conducting such a proceeding in such a spirit, and the absence of any advantage in depriving either the Commission or ourselves of all evidence which can conceivably throw any light upon the controversy.

Samuel H. Moss, Inc. v. FTC, 148 F.2d 378, 380 (2d Cir.), *cert. denied*, 326 U.S. 734 (1945). Still today, the preference in administrative proceedings is for admitting all evidence that is not "irrelevant, immaterial, or unduly repetitious." Therefore, the ALJ erred in excluding the videotape of the examination of Mark of Buck at the Celebration on August 25, 2002. However, even though I find the exclusion of the videotape was erroneous, I do not find the exclusion was unduly prejudicial and I find I can reach a conclusion without viewing the videotape. Therefore, in this case, I do not find necessary remand of the case to the ALJ to include the videotape in the record.

CONCLUSION OF LAW

On August 25, 2002, Perry Lacy entered Mark of Buck as entry number 131 in class number 77 at the 64th Annual Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, for the purpose of showing or exhibiting Mark of Buck while Mark of Buck was sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)).

For the foregoing reasons, the following Order is issued.

ORDER

1. Perry Lacy 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:

Robert A. Ertman
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

Mr. Lacy's payment of the civil penalty shall be forwarded to, and received by, Mr. Ertman within 60 days after service of this Order on Mr. Lacy. Mr. Lacy shall indicate on the certified check or money order that payment is in reference to HPA Docket No. 06-0004.

2. Perry Lacy is disqualified for a period of 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 Mr. Lacy shall become effective on the 60th day after service of this Order on Mr. Lacy.

RIGHT TO JUDICIAL REVIEW

Perry Lacy has the right to obtain review of the Order in this Decision and Order in the United States Court of Appeals 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. Mr. Lacy must file a notice of appeal in such court within 30 days from the date of the Order in this Decision and Order and must simultaneously send a copy of such notice by certified mail to the Secretary of Agriculture. (15 U.S.C. § 1825(b)(2), (c).) The date of the Order in this Decision and Order is June 29, 2007.

Done at Washington, DC

June 29, 2007

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William G. Jenson
Judicial Officer