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September 19, 2016

BY EMAIL & U.S. MAIL

Lee Fink, Esq.
Principal Deputy General Counsel
United States Department of Agriculture
1400 Independence Ave., S.W.
Washington DC 20250

Re: Your September 2, 2016 Letter

Dear Counselor Fink:

Your September 2, 2016 letter to me reiterates the USDA position that General Counsel Prieto espoused in his August 23rd letter to me, *i.e.*, it is horse show management, not APHIS, that is responsible for deciding to disqualify a horse from a show.

My client, the Tennessee Walking Horse National Celebration Association (the "Association"), understands that the USDA has taken that position, but disagrees with it. The HPA makes it unlawful – under pain of civil and criminal penalties – for show management to fail to disqualify a horse after having been notified by USDA that the horse is sore. *See* 15 U.S.C. § 1824(5). Therefore, as a real and practical matter, show management has no choice but to disqualify a horse from a show if an APHIS VMO informs it that the horse is sore (in contrast to the VMO advising management of his belief that the horse may be sore). In these circumstances, the inescapable conclusion is that it is not show management's decision, but APHIS's, to disqualify the horse.

Your letter notes that USDA "disagrees with [the Association's] concern that occasional variance in VMO inspection results demonstrates a lack of reliability" and that what is important is that VMOs agree in their finding on whether the horse is sore and not on their findings of "the indicia of soreness." As to inconsistencies regarding "indicia of soreness," the Association recognizes that some, perhaps, could have a reasonable explanation, such as, the horse became more or less sensitive in the time between the examination and re-examination. Such an explanation, however, should be few and far between, given the brief time period between the examination and the re-examination. Furthermore, it appears that many of the inconsistencies could not be explained away, at least not reasonably. For example, scars do not grow or disappear in a matter of minutes, but there were several instances where a VMO identified an alleged scar on re-examination that was not identified on the first examination, and vice versa.

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The Association’s data shows the following rate of VMO inconsistency between examination and re-examination for this year’s Celebration to be:

A	B	C	D	E
Total Re-exams by VMOs:	Total Horses Found Compliant on Re-Exam:	% Found Compliant on Re-Exam:	Total Inconsistencies (includes those in Col. B):	Inconsistencies as % of Total Re-Exams:
75	17	22.67%	39	52.00%

In your letter, USDA takes the position that the rate of inconsistencies is not problematic because, in most instances, the examining VMO and re-examining VMO both arrived at the belief that the horse was non-compliant, regardless of whether the basis for their respective beliefs, *i.e.*, their findings as to the “indicia” of soreness, differed.

The USDA’s position does not refute the Association’s point that the high rate of inconsistencies demonstrates that the current examination process is unscientific and unlawful because it results in a high rate of inconsistencies, among other reasons. Even under USDA’s meaning of an “inconsistency,” which we believe is more correctly defined as an “error rate, the rate is still a shocking 22.67%, which is contrary to USDA’s position that this is “the occasional variance.” The inconsistency rate is even higher – 52% – when accounting for inconsistencies in addition to conflicting compliance calls. Contrary to USDA’s position, inconsistent findings aside from those as to compliance/non-compliance are still substantively significant. That is because what the particular basis is for a charge of non-compliance can affect the potential number of alleged violations for which an alleged violator is charged and the nature of the alleged non-compliance can be a factor that is considered by ALJs in the sanction to be issued.

These already high rates do not even take into account the inherent bias in the VMO examination process in favor of arriving at a belief of non-compliance. Only horses that the first VMO examiner believed to be non-compliant were re-examined at the Celebration. Thus, the VMO re-examiner knew that his APHIS co-worker, the first VMO examiner, found the horse to be non-compliant. The VMO examiner and re-examiner are team members, work for the same employer and, due to human nature, will have a strong and natural inclination not to disagree with each other. As such while we think the above-noted rates alone demonstrate a defective examination protocol we also believe that a true blind re-examination process would have shown substantially higher rates of inconsistencies, including a high error rate of non-compliance to compliance calls.

Based on APHIS’s USDA Horse Program Activity Report for the Celebration posted the week of September 12th, one hundred four horses were disqualified at the Celebration following an APHIS VMO’s statement that s/he believed the horse was non-compliant with the HPA. Applying the error rate for conflicting VMO compliance/non-compliance calls of 22.67% to the number of horses that APHIS VMOs did not re-examine (29) means that another approximately 7 horses were improperly disqualified because of VMO error. Table 1 in APHIS’s notice of proposed rulemaking for the pending proposed amendments to the horse protection regulations (*see* 81 Fed. Reg. 49112, July 26, 2016) states that APHIS detected 3,355 instances of noncompliance at horse shows that VMOs attended from FY 2010-FY 2015. Applying the 22.67% error rate to this number means that APHIS wrongly disqualified approximately 761 horses during that time period.

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In the end, there is only one reasonable conclusion that can be reached: the examination process is unreliable, unscientific and unlawful. If the process were scientific and reliable, it would not result in a 52% rate of inconsistencies and conflicting results or a 22.67% error rate of compliance to non-compliance calls between APHIS's own VMOs.

Mr. Prieto's August 23rd letter states that USDA is "committed to using scientifically sound methods and lawful processes to effectively enforce the HPA." Thus, we hope that USDA seriously considers the data outlined above, including the rate of inconsistent VMO findings, and the miscarriage of justice by the government in enforcing the HPA that this data indicates.

The Association remains committed to protecting the welfare of horses, as well as committed – as we hope that USDA is – to protecting the due process rights of exhibitors and owners. These are complementary, not conflicting, objectives. Both goals would be advanced by the adoption of a scientifically sound and reliable examination process based on an objective examination protocol that is repeatable, peer reviewed and approved, and can be consistently and objectively applied. Such a protocol would facilitate the accurate identification of those who are truly soring horses, which would benefit horses, and safeguard the due process rights of those involved with TWH shows.

The Association looks forward to continuing to work with APHIS and appreciates your consideration of the matters set forth above. You may contact me should you have any questions about them.

Sincerely,

/s/ Joseph D. Wilson

Joseph D. Wilson

*Counsel To The Tennessee Walking Horse
National Celebration Association*

ccs (by U.S. mail only):

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