UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	A.Q. Docket No. 05-0012
	)	
William Richardson,	)	
	)	
Respondent	)	**Order Denying Petition to Reconsider**

PROCEDURAL HISTORY

On September 17, 2010, William Richardson filed a letter [hereinafter Petition to Reconsider] requesting that I reconsider *In re William Richardson*, 66 Agric. Dec. 69 (2007).[1] On October 8, 2010, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter the Administrator], filed "Complainant's Response to Petition for Reconsideration of the Judicial Officer's Decision and Order Against Respondent William Richardson." On October 13, 2010, the Hearing Clerk transmitted the record to the Judicial Officer for a ruling on Mr. Richardson's Petition to Reconsider.

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[1]The Hearing Clerk served Mr. Richardson with *In re William Richardson*, 66 Agric. Dec. 69 (2007), on September 7, 2010 (United States Postal Service Domestic Return Receipt for article number 7009 1680 0001 9853 3998); therefore, I conclude Mr. Richardson's Petition to Reconsider was timely-filed.

CONCLUSIONS BY THE JUDICIAL OFFICER

Mr. Richardson raises nine issues in his Petition to Reconsider. First, Mr. Richardson asserts I erroneously found he was an "owner/shipper"[2] subject to the requirements of sections 901-905 of the Federal Agriculture Improvement and Reform Act of 1996 (7 U.S.C. § 1901 note) [hereinafter the Commercial Transportation of Equine for Slaughter Act] and the regulations issued under the Commercial Transportation of Equine for Slaughter Act (9 C.F.R. pt. 88) [hereinafter the Regulations]. Mr. Richardson asserts he was merely a buyer for Dallas Crown, Inc., the slaughtering facility involved in the instant proceeding. (Pet. to Reconsider at first unnumbered page.)

I found Mr. Richardson was the owner/shipper of horses shipped to Dallas Crown, Inc., for slaughter in the 10 commercial shipments that are the subject of the instant proceeding.[3] The Administrator introduced owner-shipper certificates that identify Mr. Richardson as the owner/shipper for the two commercial shipments on August 26, 2003, and the five commercial shipments on September 16, 2003, September 30, 2003, October 7, 2003, February 1, 2004, and June 30, 2004 (CX 5, CX 9, CX 16, CX 20,

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[2]The term "owner/shipper" means: "Any individual . . . that engages in the commercial transportation of more than 20 equines per year to slaughtering facilities, except any individual . . . who transports equines to slaughtering facilities incidental to his or her principal activity of production agriculture (production of food or fiber)." 9 C.F.R. § 88.1.

[3]*In re William Richardson*, 66 Agric. Dec. 69, 82-85 (2007).

CX 23, CX 54, CX 56).[4] The Administrator also introduced Dallas Crown, Inc., documents that identify Mr. Richardson as the vendor, requestor for payment, and payee for the two commercial shipments on August 26, 2003, and the five commercial shipments on September 16, 2003, September 30, 2003, November 24, 2003, January 27, 2004, and February 1, 2004 (CX 1-CX 2, CX 7-CX 8, CX 12-CX 14, CX 17-CX 18, CX 38-CX 41, CX 43, CX 50-CX 53, CX 55, CX 61-CX 64). In addition, Mr. Richardson, in two affidavits, admitted he shipped horses to Dallas Crown, Inc., for slaughter on August 26, 2003, September 30, 2003, October 7, 2003, November 24, 2003, January 27, 2004, and February 1, 2004 (CX 10, CX 37). In contrast, Mr. Richardson provides no support for his assertions that he was not an owner/shipper subject to the requirements of the Commercial Transportation of Equine for Slaughter Act and the Regulations and that he was merely a buyer for Dallas Crown, Inc. Therefore, I reject Mr. Richardson's unsupported assertions that he was not an owner/shipper of the horses shipped to Dallas Crown, Inc., that are the subject of the instant proceeding and that he was merely a buyer for Dallas Crown, Inc.

Second, Mr. Richardson contends I erroneously found he shipped horses to Dallas Crown, Inc., with cuts on their legs, as follows:

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[4]References to the Administrator's exhibits are designated as "CX." References to the transcript of the June 28-29, 2006, hearing conducted in the instant proceeding are designated as "Tr."

> [T]hose horses arrived on Saturday night and they inspected them on Monday morning or maybe Tuesday morning, after being penned for over 48 to 72 hours on a concrete and pipe fence with other 50 horses. As you can see in the pictures it is fresh blood not dry blood, they were not unloaded with cuts on their legs.

Pet. to Reconsider at first unnumbered page. Only one picture attached to Mr. Richardson's Petition to Reconsider depicts a horse with a fresh injury (CX 21 at 3). The picture, taken on September 30, 2003, by Joseph Astling, an Animal and Plant Health Inspection Service animal health technician, depicts a paint mare that has a fresh cut on her left-hind tendon. However, the paint mare in question had two injuries: a cut on her left-hind tendon and a more serious left-hind ankle injury (CX 19, CX 21; Tr. 120). The left-hind ankle injury caused the paint mare's hoof to flop forward at a right-angle to the leg so that the weight of the horse was effectively on the back of the horse's ankle rather than her foot (Tr. 442-43). Both Dr. Cordes, an Animal and Plant Health Inspection Service veterinarian, and Mr. Astling characterized the ankle injury as an old one (Tr. 117, 442-45). Dr. Cordes testified "this horse should never have been loaded" (Tr. 443), the paint mare would have had difficulty maintaining her equilibrium while traveling, and the fresh cut on her left-hind tendon likely resulted from an injury while in transit. Shipping this horse was "not safe and humane" (Tr. 445). Therefore, even if I were to find the paint mare was cut on her left-hind tendon after she was unloaded at Dallas Crown, Inc. (which I do not so find), based upon the left-hind ankle injury alone, I would not modify my conclusion that, on or about September 30, 2003, Mr. Richardson

failed to handle a horse in commercial transportation as expeditiously and carefully as possible in a manner that did not cause unnecessary discomfort, stress, physical harm, or trauma to the horse, in violation of 9 C.F.R. § 88.4(c).

Third, Mr. Richardson contends I erroneously found an Appaloosa horse that Mr. Richardson shipped to Dallas Crown, Inc., on January 27, 2004, was blind. In support of his contention, Mr. Richardson states:

> This horse was purchased in Montana, at the sale, he never hit the walls in the sale ring, he loaded perfectly, and he had no scrapes in his face where it would show that he couldn't see. The horse could see and there was not a licensed veterinary to declare this horse blind and I find it very hard to believe that without special equipment blindness can be determined.

Pet. to Reconsider at first unnumbered page. The record contains no evidence to support Mr. Richardson's assertions. In contrast, Mr. Astling testified that the manager of Dallas Crown, Inc., told him that Mr. Richardson had delivered a horse that was blind in both eyes (Tr. 277-78; CX 44). Mr. Astling further testified he observed the Appaloosa horse walking into pipes or fences and he had to move out of the horse's way because the horse was not reacting to Mr. Astling's presence (Tr. 423). Mr. Astling photographed each of the Appaloosa's eyes and testified the Appaloosa did not have clearly defined pupils (Tr. 276-78; CX 46). Dr. Cordes testified that the photographs of the Appaloosa's eyes indicate the horse suffered from periodic ophthalmia or moon blindness, that the pupils were "completely locked shut," and that the horse was "functionally blind." (Tr. 452-55.) Based upon the record, I reject Mr. Richardson's contention that my finding that the

Appaloosa horse, which Mr. Richardson shipped to Dallas Crown, Inc., on January 27, 2004, was blind, is error.

Fourth, Mr. Richardson contends I erroneously found he was the owner of horses shipped to Dallas Crown, Inc., on October 21, 2003. Mr. Richardson asserts Norman Franklin was the owner of the horses. In support of his assertion, Mr. Richardson attached to the Petition to Reconsider a portion of an affidavit in which Mr. Franklin is referred to as the truck driver who transported the horses to Dallas Crown, Inc., on October 21, 2003 (CX 32 at 1-2) and three pictures, each of which contains a caption in which Mr. Franklin is referred to as the consignor of the October 21, 2003, shipment of horses to Dallas Crown, Inc. (CX 33 at 2-4). (Pet. to Reconsider at first unnumbered page.) In addition, I note the owner-shipper certificate, which accompanied the horses shipped to Dallas Crown, Inc., on October 21, 2003, identifies "Norman Franklin" as the "consignor (owner/shipper)" (CX 30).

I found Mr. Richardson was the owner/shipper of 14 horses shipped to Dallas Crown, Inc., on October 21, 2003.[5] I have reviewed the record and conclude that my finding is supported by the record. Mr. Richardson admitted that 14 horses were sent to slaughter at Dallas Crown, Inc., in the name of Norman Franklin on October 21, 2003; that he (Mr. Richardson) had told one of his truck drivers, Harold McCord, to complete the papers that were to accompany the shipment using Mr. Franklin's name; and that

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[5] *In re William Richardson*, 66 Agric. Dec. 69, 82, 84 (2007).

Mr. McCord had put the horses in Mr. Franklin's name because Mr. Richardson had already sent Dallas Crown, Inc., the maximum number of horses he was allowed to send to Dallas Crown, Inc., for the week. Mr. Richardson also admitted that Dallas Crown, Inc., paid him for the 14 horses delivered on October 21, 2003. (CX 37; Tr. 178-81.) In a telephone interview with Mark Kurland, an Animal and Plant Health Inspection Service investigator, Mr. McCord acknowledged that he had transported the horses in question for Mr. Richardson to Dallas Crown, Inc., and that Mr. Richardson had instructed him to put the horses in Mr. Franklin's name (Tr. 217-19; CX 36). Based on Mr. Richardson's admissions and Mr. McCord's hearsay statement, which corroborates Mr. Richardson's admissions, I reject Mr. Richardson's contention that Mr. Franklin was the owner/shipper of the horses shipped to Dallas Crown, Inc., on October 21, 2003.

Fifth, Mr. Richardson advanced reasons for his failures to apply United States Department of Agriculture backtags to horses, which he shipped to Dallas Crown, Inc. In particular, Mr. Richardson states he did not apply United States Department of Agriculture backtags to the horses in the November 24, 2003, shipment to Dallas Crown, Inc., because of a last-minute change in his plans for the shipment. On other occasions, Mr. Richardson states he could not apply United States Department of Agriculture backtags to horses prior to shipment to Dallas Crown, Inc., because the horses were loaded in conveyances during storms. (Pet. to Reconsider at first unnumbered page.)

The Regulations require that an owner/shipper apply a United States Department of Agriculture backtag to each equine prior to the commercial transportation of equines to a slaughtering facility (9 C.F.R. § 88.4(a)(2)). This provision contains no exception for equines loaded during storms or for situations in which plans for shipment are altered, and I do not find Mr. Richardson's reasons for his violations of 9 C.F.R. § 88.4(a)(2) a basis for reducing or eliminating the civil penalty assessed against Mr. Richardson for his violations of 9 C.F.R. § 88.4(a)(2).

Sixth, Mr. Richardson argues "[t]here is a case where Dale Gilbreath signs my name and he sent an Affidavit confirming it and they still fined me for it." (Pet. to Reconsider at first unnumbered page.)

I am not certain I understand this argument advanced by Mr. Richardson. However, based on my review of Mr. Gilbreath's affidavit (CX 6), I infer Mr. Richardson contends that Mr. Gilbreath was the owner/shipper of the horses shipped to Dallas Crown, Inc., on August 26, 2003, and September 16, 2003. Mr. Gilbreath states in his affidavit that he bought and owned the horses which he transported to Dallas Crown, Inc., on August 26, 2003, and that he bought the horses shipped to Dallas Crown, Inc., on September 16, 2003 (CX 6). Mr. Richardson admitted he authorized Mr. Gilbreath to use his (Mr. Richardson's) name when selling horses to Dallas Crown, Inc., and charged Mr. Gilbreath a commission for doing so (Tr. 71, 99, 381-83, 400-01; CX 10). Mr. Richardson testified he entered this agreement with Mr. Gilbreath because he

(Mr. Richardson) could sell horses to Dallas Crown, Inc., for 40 cents per pound, while Mr. Gilbreath would have only received 25 cents per pound for the same horses (Tr. 71, 374-75, 381-82). Under these circumstances, I concluded Mr. Richardson was, at the very least, a partner or joint venturer and, thus, an owner/shipper.[6] I find nothing in Mr. Richardson's Petition to Reconsider that convinces me that my conclusion is error. Therefore, I reject Mr. Richardson's apparent assertion that Mr. Gilbreath was the sole owner/shipper of the horses shipped to Dallas Crown, Inc., on August 26, 2003, and September 16, 2003.

Seventh, Mr. Richardson contends Mr. Astling was biased against him. Mr. Richardson asserts Mr. Astling "was always finding something to charge me for . . . but he helped his friends and was obviously against me." (Pet. to Reconsider at first unnumbered page.)

I find nothing in the record to support Mr. Richardson's assertion that Mr. Astling was biased against him or that Mr. Astling selectively enforced the Commercial Transportation of Equine for Slaughter Act and the Regulations. Mr. Richardson bears the burden of proving he is the target of selective enforcement. One claiming selective enforcement must demonstrate that the enforcement policy had a discriminatory effect and that it was motivated by a discriminatory purpose.[7] In order to prove a selective

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[6] *In re William Richardson*, 66 Agric. Dec. 69, 74-75 (2007).

[7] *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *Wayte v. United States*,

(continued...)

enforcement claim, Mr. Richardson must show one of two sets of circumstances. Mr. Richardson must show: (1) membership in a protected group; (2) prosecution; (3) that others in a similar situation, not members of the protected group, would not be prosecuted; and (4) that the prosecution was initiated with discriminatory intent.[8] Mr. Richardson has not shown that he is a member of a protected group, that no disciplinary proceeding would be instituted against others in a similar situation that are not members of the protected group, or that the instant proceeding was initiated with discriminatory intent. In the alternative, Mr. Richardson must show: (1) he exercised a protected right; (2) the Administrator's stake in the exercise of that protected right; (3) the unreasonableness of the Administrator's conduct; and (4) that this disciplinary proceeding was initiated with intent to punish Mr. Richardson for exercise of the protected right.[9] Mr. Richardson has not shown any of these circumstances. The record establishes that Mr. Astling directly assisted Mr. Richardson with the proper completion of owner-shipper certificates and otherwise educated Mr. Richardson on various aspects of the Regulations

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[7](...continued)
470 U.S. 598, 608 (1985).

[8]*See Futernick v. Sumpter Twp.*, 78 F.3d 1051, 1056 n.7 (6th Cir.), *cert. denied sub nom. Futernick v. Caterino*, 519 U.S. 928 (1996); *United States v. Anderson*, 923 F.2d 450, 453 (6th Cir.), *cert. denied*, 499 U.S. 980 (1991) and *cert. denied sub nom. McNeil v. United States*, 500 U.S. 936 (1991).

[9]*See Futernick v. Sumpter Twp.*, 78 F.3d 1051, 1056 n.7 (6th Cir.), *cert. denied sub nom. Futernick v. Caterino*, 519 U.S. 928 (1996); *United States v. Anderson*, 923 F.2d 450, 453-54 (6th Cir.), *cert. denied*, 499 U.S. 980 (1991) and *cert. denied sub nom. McNeil v. United States*, 500 U.S. 936 (1991).

(Tr. 39-40, 46-49). In the absence of clear evidence to the contrary, public officers are presumed to have properly discharged their duties.[10] Therefore, I reject Mr. Richardson's unsupported assertion that Mr. Astling was biased against him and that Mr. Astling selectively enforced the Commercial Transportation of Equine for Slaughter Act and the Regulations.

Eighth, Mr. Richardson asserts, in the last few years, he has had a stroke, he has had heart bypass surgery, and he has faced business difficulties resulting from having to ship horses to Mexico; therefore, he cannot pay the $77,825 civil penalty assessed against him in *In re William Richardson*, 66 Agric. Dec. 69 (2007), and the assessment of a $77,825 civil penalty would put him out of business. Mr. Richardson suggests he could pay $7,500. (Pet. to Reconsider at second unnumbered page.)

I have no reason to doubt Mr. Richardson's assertions regarding his recent unfortunate health problems and business difficulties; however, neither the Commercial Transportation of Equine for Slaughter Act nor the Regulations provide that a respondent's ability to pay a civil penalty is a factor that I must consider when

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[10] *See United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) (stating the fact that there is potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing plea negotiation; the great majority of prosecutors are faithful to their duties and absent clear evidence to the contrary, courts presume that public officers properly discharge their duties); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) (stating a presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume they have properly discharged their official duties).

determining the amount of the civil penalty to be assessed for violations of the Commercial Transportation of Equine for Slaughter Act and the Regulations.[11] Moreover, neither the Commercial Transportation of Equine for Slaughter Act nor the Regulations provide that the effect of a civil penalty on a respondent's ability to continue doing business is a factor that I must consider when determining the amount of the civil penalty to be assessed for violations of the Commercial Transportation of Equine for Slaughter Act and the Regulations. Therefore, I decline to consider Mr. Richardson's ability to pay the $77,825 civil penalty or Mr. Richardson's ability to continue doing business.

Ninth, Mr. Richardson contends he was not served with the Administrator's appeal petition; therefore, he did not have an opportunity to respond to the Administrator's appeal petition (Pet. to Reconsider at second unnumbered page).

On September 2, 2005, the Hearing Clerk mailed the Complaint by certified mail to: Mr. William Richardson, P.O. Box 647, Whitesboro, Texas 76723. Ms. Holly Jones signed the return receipt attached to the envelope containing the Complaint.[12] Mr. Richardson did not file a response to the Complaint, and, on September 28, 2005, the Hearing Clerk mailed a "no answer" letter by regular mail to Mr. Richardson at the same

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[11] *In re Leroy H. Baker, Jr.* (Order Denying Pet. to Reconsider as to Leroy H. Baker, Jr.), 67 Agric. Dec. 1259, 1261-62 (2008).

[12] United States Postal Service Domestic Return Receipt for article number 7004 1160 0001 9223 3180.

address. On October 12, 2005, Mr. Larry B. Sullivant, Mr. Richardson's counsel at the time,[13] filed a "Response" to the Complaint on Mr. Richardson's behalf. On January 29, 2007, the Hearing Clerk mailed Complainant's Appeal Petition by certified mail to: Mr. William Richardson, P.O. Box 647, Whitesboro, Texas 76723. On February 2, 2007, Ms. Alicia Ohowski signed the return receipt attached to the envelope containing Complainant's Appeal Petition.[14] Mr. Richardson's filing a Response to the Complaint that was mailed to him at P.O. Box 647, Whitesboro, Texas 76273, indicates that the Hearing Clerk properly served Mr. Richardson with Complainant's Appeal Petition at the same address.

For the foregoing reasons and the reasons set forth in *In re William Richardson*, 66 Agric. Dec. 69 (2007), Mr. Richardson's Petition to Reconsider is denied. The rules of practice applicable to the instant proceeding[15] provide that the decision of the Judicial Officer shall automatically be stayed pending the determination to grant or deny a timely-filed petition to reconsider (7 C.F.R. § 1.146(b)). Mr. Richardson's Petition to Reconsider was timely-filed and automatically stayed *In re William Richardson*, 66 Agric.

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[13]Mr. Larry B. Sullivant withdrew as Mr. Richardson's counsel effective May 19, 2006 (Letter from Larry B. Sullivant to the Hearing Clerk and the Administrator's counsel, filed May 19, 2006).

[14]United States Postal Service Domestic Return Receipt for article number 7004 2510 0003 7022 8692.

[15]The rules of practice applicable to the instant proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151).

Dec. 69 (2007). Therefore, since Mr. Richardson's Petition to Reconsider is denied, I hereby lift the automatic stay, and the Order in *In re William Richardson*, 66 Agric. Dec. 69 (2007), is reinstated; except that, Mr. Richardson's payment of the $77,825 civil penalty shall be sent to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 60 days after service of this Order Denying Petition to Reconsider on Mr. Richardson.

For the foregoing reasons, the following Order is issued.

ORDER

Mr. Richardson's Petition to Reconsider, filed September 17, 2010, is denied. This Order shall become effective upon service on Mr. Richardson.

Done at Washington, DC

October 28, 2010

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William G. Jenson
Judicial Officer