

**In re: TIM GRAY, AN INDIVIDUAL.
HPA Docket No. 01-D022.
Order Denying Petition to Reconsider or for a Stay Pending Judicial
Review.
Filed November 15, 2005.**

HPA – Horse protection – Petition to reconsider – Petition for stay order.

The Judicial Officer denied Respondent's petition to reconsider *In re Tim Gray* (Order Denying Late Appeal), 64 Agric. Dec. ____ (Oct. 17, 2005). The Judicial Officer concluded that, under 7 C.F.R. § 1.146(a)(3), a party may file a petition to reconsider the Judicial Officer's decision, but that an order denying a late-filed appeal petition is not a *decision* as that word is defined in 7 C.F.R. § 1.132. Moreover, the Judicial Officer denied Respondent's petition for a stay pending judicial review stating an order denying late appeal is not a final decision of the Judicial Officer upon appeal and the matter should not be considered by a reviewing court since, under 7 C.F.R. § 1.142(c)(4), no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

Colleen A. Carroll, for Complainant.

Ted W. Daniel, Murfreesboro, TN, for Respondent.

Decision issued by Jill S. Clifton, Administrative Law Judge.

Order issued by William G. Jenson, Judicial Officer.

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 June 28, 2001. 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 on or about May 27, 2000, Tim Gray [hereinafter Respondent] entered a horse known as "JFK All Over" in the 30th Annual Spring Fun Show, in Shelbyville, Tennessee, as entry number 252 in class number 34, while the horse was sore, for the purpose of showing the horse, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Compl. ¶ 8). On

July 27, 2001, Respondent filed an Answer admitting he entered JFK All Over in the horse show as alleged in the Complaint, but denying that JFK All Over was entered while sore, in violation of section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) (Answer ¶ 8).

On March 7, 2005, Administrative Law Judge Jill S. Clifton [hereinafter the ALJ] presided at a hearing in Shelbyville, Tennessee. Colleen A. Carroll, Office of the General Counsel, United States Department of Agriculture, represented Complainant. Respondent appeared pro se.¹ At the close of the hearing, the ALJ issued a decision orally pursuant to section 1.142(c)(1) of the Rules of Practice (7 C.F.R. § 1.142(c)(1)): (1) concluding Respondent violated section 5(2)(B) of the Horse Protection Act (15 U.S.C. § 1824(2)(B)) as alleged in the Complaint; (2) assessing Respondent a \$2,200 civil penalty; (3) disqualifying Respondent 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 2 years; and (4) ordering Respondent to cease and desist from violating the Horse Protection Act and the regulations issued under the Horse Protection Act (Transcript at 190-93).

On March 10, 2005, the ALJ filed a Confirmation of Oral Decision and Order, and on March 21, 2005, the Hearing Clerk served Respondent with the ALJ's Confirmation of the Oral Decision and Order.² On May 27, 2005, Respondent appealed the ALJ's March 7, 2005, decision to the Judicial Officer. On June 27, 2005, Complainant filed a response to Respondent's appeal petition. On September 13, 2005, Respondent filed a reply to Complainant's response to Respondent's appeal petition. On September 19, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

On October 17, 2005, I issued an Order Denying Late Appeal stating

¹On May 27, 2005, Ted W. Daniel, The Daniel Law Firm, Murfreesboro, Tennessee, filed an appearance on behalf of Respondent (Notice of Appearance, filed May 27, 2005).

²United States Postal Service Domestic Return Receipt for Article Number 7004 1160 0001 9221 4585.

the ALJ's March 7, 2005, decision became final prior to Respondent's filing his appeal petition and concluding I have no jurisdiction to hear Respondent's appeal petition.³ On November 3, 2005, Respondent filed a "Petition to Reconsider the Decision of the Judicial Officer or, Alternatively, for a Stay Pending Appeal." On November 10, 2005, Complainant filed "Complainant's Reply to 'Petition to Reconsider the Decision of the Judicial Officer or, Alternatively, for a Stay Pending Appeal.'" On November 14, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and a ruling on Respondent's petition to reconsider or, alternatively, for a stay pending judicial review.

CONCLUSIONS BY THE JUDICIAL OFFICER

Section 1.146(a)(3) of the Rules of Practice provides that a party to a proceeding may file a petition to reconsider the Judicial Officer's decision, as follows:

§ 1.146 Petitions for reopening hearing; for rehearing or reargument of proceeding; or for reconsideration of decision of the Judicial Officer.

(a) *Petition requisite—*

.....

(3) *Petition to rehear or reargue proceeding, or to reconsider the decision of the Judicial Officer.* A petition . . . to reconsider the decision of the Judicial Officer shall be filed within 10 days after the date of service of such decision upon the party filing the petition. Every petition must state specifically the matters claimed to have been erroneously decided and alleged errors must be briefly stated.

7 C.F.R. § 1.146(a)(3).

Section 1.132 of the Rules of Practice defines the word *decision*, as follows:

³*In re Tim Gray* (Order Denying Late Appeal), 64 Agric. Dec. ____ (Oct. 17, 2005).

§ 1.132 Definitions.

As used in this subpart, the terms as defined in the statute under which the proceeding is conducted and in the regulations, standards, instructions, or orders issued thereunder, shall apply with equal force and effect. In addition and except as may be provided otherwise in this subpart:

....

Decision means: (1) The Judge's initial decision made in accordance with the provisions of 5 U.S.C. 556 and 557, and includes the Judge's (i) findings and conclusions and the reasons and basis therefor on all material issues of fact, law or discretion, (ii) order, and (iii) rulings on proposed findings, conclusions and orders submitted by the parties; and

(2) The decision and order by the Judicial Officer upon appeal of the Judge's decision.

7 C.F.R. § 1.132. An order denying a late-filed appeal is not a *decision* as that word is defined in the Rules of Practice, and, under the Rules of Practice, a party may only file a petition to reconsider the Judicial Officer's decision.⁴ Therefore, Respondent's petition to reconsider *In re Tim Gray* (Order Denying Late Appeal), 64 Agric. Dec. ____ (Oct. 17, 2005), cannot be considered.

Moreover, I deny Respondent's petition for a stay pending judicial review. An order denying late appeal is not a final decision of the Judicial Officer upon appeal and the matter should not be considered by a reviewing court since, under section 1.142(c)(4) of the Rules of Practice (7 C.F.R. § 1.142(c)(4)), "no decision shall be final for purposes

⁴See *In re William J. Reinhart* (Rulings Denying: (1) Mot. to Set Aside Order Lifting Stay; (2) Mot. for Permanent Stay; and (3) Mot. for Taking Depositions), 62 Agric. Dec. 699, 701 (2003) (holding respondent's petition to reconsider the Judicial Officer's order lifting stay, ruling denying a motion for permanent stay, and ruling granting a motion to amend the case caption cannot be considered pursuant to 7 C.F.R. § 1.146 because the order and rulings are not *decisions* as that word is defined in 7 C.F.R. § 1.132); *In re Kirby Produce Co.* (Order Denying Complainant's Request for Recons. of Remand Order), 60 Agric. Dec. 855, 859 (2001) (holding complainant's petition to reconsider the Judicial Officer's remand order could not be considered because the remand order is not a *decision* as that word is defined in 7 C.F.R. § 1.132).

of judicial review except a final decision of the Judicial Officer upon appeal.”

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

ORDER

Respondent's Petition to Reconsider the Decision of the Judicial Officer or, Alternatively, for a Stay Pending Appeal, filed November 3, 2005, is denied.

**In re: MIKE TURNER AND SUSIE HARMON.
HPA Docket No. 01-0023.
Stay Order.
Filed December 8, 2005.**

Robert A. Ertman, for Complainant.
Brenda S. Bramlett, Shelbyville, Tennessee, for Respondents.
Order issued by William G. Jenson, Judicial Officer.

On October 26, 2005, I issued a Decision and Order: (1) concluding Mike Turner and Susie Harmon [hereinafter Respondents] violated the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831); (2) assessing each Respondent a \$2,200 civil penalty; and (3) disqualifying each Respondent for 1 year from showing, exhibiting, or entering any horse and from judging, managing, or otherwise participating in any horse show, horse exhibition, horse sale, or horse auction.¹

On November 30, 2005, Respondents filed a Motion for Stay of Judgment stating Respondents had filed a timely petition for review of *In re Mike Turner*, 64 Agric. Dec. ____ (Oct. 26, 2005), with the United States Court of Appeals for the Sixth Circuit and requesting a stay of the Order in *In re Mike Turner*, 64 Agric. Dec. ____ (Oct. 26, 2005), pending the outcome of proceedings for judicial review. On December 2, 2005, the Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], filed a

¹*In re Mike Turner*, 64 Agric. Dec. ____ (Oct. 26, 2005).