IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

KEITH McSWAIN and DAN McSWAIN,	:	
Plaintiffs,	:	
v.	:	CIVIL ACTION NO. 1:16-CV-01234-RWS
TOM VILSACK, THE UNITED STATES SECRETARY OF AGRICULTURE, and UNITED STATES DEPARTMENT OF AGRICULTURE,	:	
Defendants.	:	

ORDER

This case comes before the Court on Plaintiffs' Motion for Preliminary Injunction. After a review of the record, and with the benefit of oral argument, the Court enters the following Order.

Background

This case arises out of the United States Department of Agriculture's (the "USDA") enforcement of the Horse Protection Act, 15 U.S.C. § 1821 et seq. (the "HPA"). Plaintiffs Keith McSwain and Dan McSwain (collectively, the "McSwains") own and train Tennessee Walking Horses. These horses are

known and prized for their "high-step gait," which can be created through breeding and training. (Am. Compl., Dkt. [5] ¶ 2.) In the 1950s and 1960s, however, some trainers developed a practice of injuring or "soring" their horses to artificially produce the desired gait. (Id.) According to the USDA's Animal and Plant Health Inspection Service ("APHIS"), "soring" is the practice of "injuring [] show horses to improve their performance in the show ring. The pain caused by soring accentuates the gait of show horses." 43 Fed. Reg. 14778, 14778 (Apr. 26, 1988). In 1970, Congress responded to the practice of soring by enacting the HPA. (Id. ¶ 4.) The HPA prohibits not only soring horses, but also the showing, sale, and transportation of sored horses. (Id.)

In 1979, the Secretary of the USDA promulgated a regulation commonly referred to as the "Scar Rule." (Id. ¶ 5.) A horse is "sore" under the Scar Rule if it shows signs of previous soring. (Id.) As such, a horse may be disqualified from a competition even when it is not presently exhibiting signs of pain. (Id.) Soring often produces "tell-tale signs of scar tissue on [the horse's] pasterns, the ankle area above the hoof." (Id. ¶ 9.) The Scar Rule sets forth criteria for an examiner to determine whether any scar tissue on the horse is a result of impermissible soring rather than the result of "normal wear and tear – much

like a worker's hands become calloused." (Id.)

The USDA has delegated enforcement of the HPA to APHIS, the USDA's component entity. (Id. ¶ 21.) For enforcement purposes, APHIS employs its own Veterinary Medical Officers ("VMOs") and also delegates its authority to private inspectors known as Designated Qualified Persons ("DQPs"). (Id. ¶¶ 27-28.) DQPs are licensed by private Horse Industry Organizations ("HIOs"). (Id. ¶ 28.) USDA regulations provide that HIOs are certified by the USDA to train and license DQPs. (Id. ¶ 29.) VMOs also train DQPs. (Id.) Both VMOs and DQPs examine horses at competition in pre- and post-show inspections. (Id. ¶ 7.) DQPs are the primary inspectors and therefore the primary enforcement mechanism for the HPA. (Id. ¶ 30.) Defendants–through their VMOs–"selectively" appear at competitions to oversee DQP enforcement and to inspect horses. (Id. ¶ 31.) Plaintiffs allege that Defendants only attend "select" competitions, at which their enforcement conduct varies. (Id. ¶ 50.) Plaintiffs suggest that Defendants tend to attend high-profile competitions, such as the Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, while relying on DQPs for enforcement at smaller events. (Id.)

DQPs are private veterinarians who do not have a contractual relationship with the USDA. (Id. ¶ 44.) Most inspections at horse shows are done by DQPs. At many competitions, both VMOs and DQPs will be present to inspect horses for HPA compliance. (Id. ¶ 47.) Plaintiffs allege that it is common practice for a DQP to determine that a horse complies with the HPA only to have the USDA's VMOs disqualify the same horse for purported Scar Rule Violations. (Id. ¶ 48.) This has been the pattern each time Honors has been disqualified for a Scar Rule violation. (Id.) On at least three occasions, Honors has been disqualified by Dr. Jeff Baker, APHIS's lead VMO. (Id. ¶ 46.)

VMOs and DQPs inspect horses pursuant to the USDA's regulations. (Id. ¶¶ 56-57.) Inspectors look for *current* soreness by "palpating" the horse, physically examining the horse's front legs and hooves. 9 C.F.R. § 11.21. Inspectors use different tests and criteria to determine whether the horse has *ever* been sored. (Id. ¶ 59.) The Scar Rule, found at 9 C.F.R. § 11.3, provides distinct criteria for violations in the horse's posterior regions versus the anterior regions. (Id. ¶ 61.) The anterior and anterior-lateral surfaces of the horse's fore pasterns–the part of the leg between the fetlock and the top of the

hoof–must be free of bilateral granulomas, evidence of inflammation, and other evidence of abuse. 9 C.F.R. § 11.3. In contrast, the posterior surfaces of the pastern *may* show bilateral areas of uniformly thickened epithelial tissue, if those areas are free of proliferating granuloma tissue, irritation, moisture, edema, or other evidence of inflammation. Id. Plaintiffs allege that Defendants "mix and match" the different criteria in order to find soring and therefore a violation of the Scar Rule. (Am. Compl., Dkt. [5] ¶ 64.) Plaintiffs claim that this conduct violates the Administrative Procedure Act. (Id. ¶ 65.)

The HPA provides that management at Tennessee Walking Horse shows or exhibitions "shall disqualify any horse from being shown or exhibited (1) which is sore or (2) if management has been notified by a person appointed in accordance with [the] regulations ... or by the Secretary that the horse is sore." 15 U.S.C. § 1823(a). The USDA may seek administrative review of a disqualification. (Am. Compl., Dkt. [5] ¶ 38.) This is for the purpose of seeking a penalty, either civil or criminal, beyond disqualification after a finding of soring. (Id.) See also 15 U.S.C. § 1825 (outlining civil and criminal penalties). There is, however, no administrative procedure in place for a horse owner to initiate a hearing to contest a disqualification after a horse is

disqualified for a violation of the Scar Rule. (Am. Compl., Dkt. [5] ¶ 39.)

Plaintiffs own several Tennessee Walking Horses, but Plaintiffs' Complaint and Motion for Preliminary Injunction focus primarily on Plaintiffs' prize horse, Honors. Honors is "one of the most famous Tennessee Walking Horses in the world," and has been called the "Secretariat of Tennessee Walking Horses." (Id. ¶ 33.) Plaintiffs state that they have never sored Honors and that all of Honors' success is a result of breeding and training. (Id. ¶¶ 34-35.) In recent years, however, Honors has been disqualified for violations of the Scar Rule on at least four occasions: at the 2013, 2014, and 2015 Tennessee Walking Horse National Celebration in Shelbyville, Tennessee, and at the 2014 Red Carpet Horse Show of the South in Pulaski, Tennessee. (Id. ¶ 36.)

Plaintiffs allege that Defendants apply an informal "once-scarred-always-scarred" rule. (Id. ¶ 71.) Under this "rule," Defendants use a prior disqualification of a horse pursuant to the Scar Rule as a basis to disqualify the horse in subsequent competitions. (Id.) Plaintiffs claim that Defendants have used this unwritten rule to disqualify Honors on multiple occasions. (Id.) Defendants deny that they apply this rule.

As a result of the informal "once-scarred-always-scarred" rule, Plaintiffs

allege that one Scar Rule disqualification can operate to effectively end a horse's career without any due process. (Id. ¶ 72.) Plaintiffs claim that this result can be much harsher than the penalties provided in the statute–but that unlike the penalties in 15 U.S.C. § 1825, which require notice and an opportunity for a hearing, disqualification pursuant to the Scar Rule is not subject to challenge or review. (Id. ¶¶ 74-75.) Plaintiffs assert that Defendants' practice accordingly violates the Fifth Amendment. Additionally, Plaintiffs contend that Defendants are applying criteria not included in the Scar Rule, and therefore improperly altering their interpretation and application of the Rule. (Id. ¶ 10.) Plaintiffs argue that Defendants are acting without legislative approval to disqualify horses with lawful scars. (Id.) This contention serves as the basis for Plaintiffs' Administrative Procedure Act claim.

The focus of this Order is Plaintiffs' claim under the Fifth Amendment. Plaintiffs challenge Defendants' application of the Scar Rule on constitutional grounds, because Defendants do not provide a method for Plaintiffs to challenge any disqualifications under the Scar Rule. In Count I of the Amended Complaint, Plaintiffs seek a declaration that Defendants'

enforcement of the HPA, and particularly the Scar Rule, violates Plaintiffs' Fifth Amendment right to due process. (Id. ¶ 143.)

Plaintiff alleges that Defendants' failure to provide a pre-deprivation hearing is "particularly troubling in light of the subjective nature of VMO inspections. . . . The risk of an erroneous disqualification is high, as are the risks of arbitrary and capricious findings by VMOs and DQPs." (Id. ¶ 149.) Moreover, neither the HPA nor Defendants' regulations provide a procedure for a horse owner to initiate a post-deprivation challenge to a horse's disqualification. (Id. ¶ 150.) Instead, judicial review only occurs when Defendants bring an administrative complaint, the administrative law judge enters judgment, and the horse's owner appeals the judgment to a court of law. (Id. ¶ 151.) Plaintiffs argue that Defendants' failure to provide any pre- or post-deprivation hearing is a constitutional deprivation.

Plaintiffs move for preliminary injunctive relief in advance of nine upcoming Tennessee Walking Horse competitions, beginning with the Fun Show held from May 26 to 28, 2016, in Shelbyvill, Tennessee. (Am. Compl., Dkt. [5] ¶ 202; Pls.' Mot. for Prelim. Inj., Dkt. [9].)

Discussion

The Court agrees that the current enforcement scheme violates Plaintiffs' due process rights. The Court will first lay out the relevant legal standard for a motion for a preliminary injunction. Then, the Court will discuss the constitutionally protected rights in this case before turning to an analysis of how Defendants' procedures deprive Plaintiffs of those rights without due process. Finally, the Court considers a remedy.

I. Legal Standard – Preliminary Injunction

Before a court will grant preliminary injunctive relief, the moving party must establish that: (1) "it has substantial likelihood of success on the merits," (2) it will suffer irreparable injury if the relief is not granted, (3) the threatened injury outweighs the harm the relief may inflict on the non-moving party, and (4) entry of relief "would not be adverse to the public interest." KH Outdoor, LLC v. City of Trussville, 458 F.3d 1261, 1268 (11th Cir. 2006). "Of these four requisites, the first factor, establishing a substantial likelihood of success on the merits, is most important . . . ." ABC Charters, Inc. v. Bronson, 591 F. Supp. 2d 1272, 1294 (S.D. Fla. 2008). For a permanent injunction, the standard is essentially the same, except that the movant must establish actual success on the merits, as opposed to a likelihood of success. Amoco Prod. Co.

v. Vill. of Gambell, 480 U.S. 531, 546 n. 12 (1987).

II. Analysis

Here, the Court holds that Plaintiffs have demonstrated a substantial likelihood of success on the merits of their constitutional claim. The Court does not hold that Plaintiffs have similarly met this high burden with respect to their claim under the Administrative Procedure Act. Accordingly, this Order focuses only on Plaintiffs' claim under the Fifth Amendment.

The due process clause of the Fifth Amendment protects individuals against deprivations of liberty or property by the federal government without due process of law. U.S. Const. amend. V. In order to establish a due process violation, plaintiffs must show (1) they have a protected property interest; and (2) they were deprived of that interest by governmental action and without due process of law. Callaway v. Block, 763 F.2d 1283, 1290 (11th Cir. 1985).

A. Property Right

Plaintiffs characterize the constitutional right at issue as their property interest in Honors, including the "right to show Honors and reap the financial gains." (Pls.' Mot. for Prelim. Inj., Dkt. [9-1] at 12 n.4.) The Court agrees that Plaintiffs have a constitutionally protected right here.

To have a fifth amendment property interest in a benefit, "a person . . . must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). The Supreme Court has recognized the constitutional right to practice a chosen profession. See Greene v. McElroy, 360 U.S. 474, 492 (1959) ("the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment"). The Sixth Circuit Court of Appeals has applied that holding in a due process case challenging the Horse Protection Act. Fleming v. U.S. Dep't of Agric., 713 F.2d 179 (6th Cir. 1983). See also Barry v. Barchi, 443 U.S. 55, 59 (1979) (finding a constitutionally protected interest in a harness race horse trainer's license).

Additionally, an animal owner has rights in his or her animals. Siebert v. Severino, 256 F.3d 648, 660 (7th Cir. 2001). This is "especially the case with potential income-generating animals such as horses." Reams v. Irvin, 561 F.3d 1258, 1264 (11th Cir. 2009) (quoting Porter v. DiBlasio, 93 F.3d 301, 306-07 (7th Cir. 1996)). Here, aside from the general interests Plaintiffs have in their

animal and in their chosen profession, Plaintiffs have represented to the Court that Honors is an exemplary Tennessee Walking Horse. Honors has the potential to generate substantial income for the McSwains. It is for this purpose that the McSwains have chosen to breed and train Honors.

The Court finds that Plaintiffs have a constitutionally protected interest in showing Honors without unreasonable government interference. Defendants argue that Plaintiffs do not have a constitutionally protected interest in showing a sored horse. But that argument misses the thrust of this case. Plaintiffs' position is that Honors is not and has never been sored. The problem here is that Plaintifs do not have a way to challenge the USDA's finding that Honors has been sored. The Court does not find an unchecked constitutional right to show horses. Rather, the Court holds that these Plaintiffs have a right to show an unsored horse without unreasonable government interference. "Indeed, the hallmark of a protected property interest is 'an individual entitlement grounded in . . . law, which cannot be removed except 'for cause.'" Callaway v. Block, 763 F.2d 1283, 1290 (11th Cir. 1985) (quoting Logan v. Zimmerman Brush Co., 455 U.S. 422, 430 (1982)). If Plaintiffs–or any other Tennessee Walking Horse owners and trainers–have in fact sored their horses, then their

entitlement to show those horses may be removed "for cause." But the "for cause" question is another, later step of the analysis. The Court and Defendants must start from the premise that Plaintiffs and other horse owners have a constitutionally protected right in showing their horses. Next, the Court considers whether Plaintiffs were deprived of that interest by governmental action and without due process of law.

B. Due Process

Because Plaintiffs were denied their property interest in showing Honors at the 2013, 2014, and 2015 Tennessee Walking Horse National Celebrations and at the 2014 Red Carpet Horse Show of the South, the Court must now consider the constitutionally required process corresponding to those deprivations. A government deprivation of property must normally be preceded by adequate process. Zinermon v. Burch, 494 U.S. 113, 132 (1990). However, post-deprivation process may be sufficient where there exists a "necessity of quick action by the State or the impracticability of providing any predeprivation process." Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982).

As Defendants currently enforce the HPA, the Court holds that Plaintiffs

have not been provided with adequate process either pre- or post-deprivation. Here, the deprivation is Honors' disqualification. Pre-disqualification, the process afforded to Plaintiffs is an inspection by a VMO, a DPQ, or both. Plaintiffs contend, and Defendants concede, that this inspection is the only pre-disqualification process afforded to Plaintiffs under the current scheme. Defendants point to 9 C.F.R. § 11.4(h), which provides for reexamination by a VMO within 24-hours of finding an HPA violation. But here, Plaintiffs complain specifically about instances in which Honors was first inspected and passed by DPQs before being re-inspected and disqualified by VMOs. (See Pl.'s Mot. for Prelim. Inj. Br., Dkt. [9-1] at 17.) Accordingly, based on the record before the Court, this regulation does not adequately protect Plaintiffs' property interests. Importantly, Plaintiff do not have the opportunity to appeal or otherwise be heard prior to their horse's disqualification.

In addition, any post-deprivation action must be initiated by the USDA. It is *only* if the USDA seeks to impose a criminal or civil penalty that the owner or trainer is guaranteed notice and an opportunity to be heard. 15. U.S.C. § 1825. This provision is not mandatory–it authorizes rather than requires the USDA to pursue civil or criminal sanctions. As such, there is no guarantee of

post-deprivation process. In this case, Honors has been disqualified on four occasions and the USDA has never sought any additional penalties. Accordingly, Plaintiffs have not had the opportunity for post-deprivation process.

In conclusion, Plaintiffs have demonstrated a substantial likelihood of success on their Fifth Amendment claim. The disqualification of Honors marks the point of deprivation and Plaintiffs have no guarantee of either pre- or post-deprivation process. Additionally, the record shows that disqualification is an irreparable injury. The Tennessee Walking Horse shows are unique and finite opportunities for Honors to compete and as such Plaintiffs suffer an irreparable harm if Honors is erroneously disqualified. Moreover, the potential injury to Plaintiffs is significant and the relief requested–the opportunity to prove that Honors is not sore–inflicts little harm on Defendants. Finally, while the Court recognizes the important public interest and Congressional intent of preventing the soring of horses, any entry of relief here will be limited to the parties to this case and therefore will not be adverse to the public interest. Plaintiffs are therefore entitled to preliminary injunctive relief.

III. Relief

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " Reams v. Irvin, 561 F.3d 1258, 1263 (11th Cir. 2009) (quoting Mathews v. Eldridge, 424 U.S. 319, 333 (1976)). This requirement, however, does not necessarily dictate that the government provide a hearing prior to the initial deprivation of property. Id. (citing Parratt v. Taylor, 451 U.S. 527, 540-41 (1981)) (noting that the court's rejection of such a rule "is based in part on the impracticability in some cases of providing any pre-seizure hearing under a state-authorized procedure, and the assumption that at some time a full and meaningful hearing will be available"), overruled on other grounds by Daniels v. Williams, 474 U.S. 327 (1986)).

"[D]ue process is a flexible concept that varies with the particular circumstances of each case," and as such this Court must apply the balancing test articulated in Mathews v. Eldridge, 424 U.S. 319 (1976), to determine whether pre-deprivation process is required in this case. Grayden v. Rhodes, 345 F.3d 1225, 1232-33 (11th Cir. 2003). This Court must consider four factors:

(1) the private interest that will be affected by the official

> action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest, "including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Reams, 561 F.3d at 1263-64 (quoting Mathews, 424 U.S. at 335).

Here, the Court finds that the factors weigh in favor of requiring pre-deprivation process. The nature of the interest–Plaintiffs' ability to show Honors–is such that post-deprivation process cannot serve to fully make Plaintiffs whole. As the HPA is currently enforced, the disqualification is essentially final, complete, and irreversible. On the record before the Court, Plaintiffs have established a substantial likelihood that a pre-show disqualification that prevents Honors from competing is a "uniquely final deprivation." Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 20 (1978). Additionally, Plaintiffs proffered evidence that the subjective inspection methods currently employed by Defendants are subject to a high rate of error. Plaintiffs proffered evidence that additional methods, such as biopsies of the suspected scar tissue, have a much higher accuracy rate. Accordingly, the probable value of additional safeguards is quite high. The first two

Mathews factors weigh heavily in favor of pre-deprivation process.

The Court recognizes, however, the practical difficulties Defendants would face in providing the owner of each disqualified horse a hearing prior to a show. But Plaintiffs and Defendants have agreed that any relief imposed by the Court should apply only to the parties to this case. As such, the final Mathews factor is not sufficiently strong to outweigh the factors that tip the scale in favor of pre-deprivation relief. Additionally, while Defendants (and the public) certainly have an interest in preventing sore horses from competing, this interest must be protected without depriving Plaintiffs the process that they are due under the Constitution of the United States.

While Plaintiffs allege that they are being targeted by Defendants, the Court notes that it is not certain that Honors will be inspected and disqualified by Defendants at each of the Tennessee Walking Horse competitions identified in the Complaint. But the Court holds that if Defendants inspect Honors pre-show and find that he should be disqualified, Defendants must provide Plaintiffs notice and opportunity to be heard prior to any disqualification. The Court is sensitive to the burden this places on Defendants at the time of the event. Of course, since the HPA and enacting regulations allow for post-show

as well as pre-show inspections, Defendants may elect to inspect Honors post-show. This would alleviate some of the logistical burden on Defendants to provide Plaintiffs the opportunity to prove that the horse is not scarred prior to the permanent deprivation that is a disqualification. Regardless of the timing of any inspection, the constitutional burden is on the government to provide Plaintiffs with the process that they are due. The Court does not wish to tread further into the USDA's affairs than necessary, and so will leave the form of any hearing to Defendants' discretion.

The Court notes Defendants' objection, raised at the May 10 hearing, that the HPA requires show management to disqualify a horse that is found to be in violation of the Scar Rule and that Plaintiffs therefore cannot seek relief because the management of the individual shows are not parties to this action. But it is not the conduct of the DPQs, who are employed by show management, that is the basis of Plaintiffs' Complaint. Rather, Plaintiffs allege that the VMOs, who are representatives of the USDA, are unfairly targeting and inaccurately disqualifying Honors. It is the conduct of the VMOs that the Court enjoins here. As stated above, the relief here is limited to the parties to this action.

Conclusion

In accordance with the foregoing, the Court **DECLARES** that Plaintiffs have met their burden to show a substantial likelihood of success on the merits of their claim that Defendants' enforcement of the HPA violates the Due Process clause of the Fifth Amendment. The Court **GRANTS** Plaintiffs' Motion for Preliminary Injunction [9]. Defendants are hereby **ENJOINED** from disqualifying Plaintiffs' horse, Honors, under the Scar Rule without providing Plaintiffs with adequate pre-deprivation process, including notice and the opportunity to be heard.

SO ORDERED, this 25th day of May, 2016.

RICHARD W. STORY
United States District Judge