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UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	
DANNY BURKS, an individual;	)	**HPA Docket No. 17-0027**
HAYDEN BURKS, an individual; and	)	HPA Docket No. 17-0028
SONNY MCCARTER, an individual,	)	HPA Docket No. 17-0029
	)	
Respondents	)	

DEFAULT DECISION AND ORDER AS TO RESPONDENT DANNY BURKS

Appearances:

Colleen A. Carroll, Esq., and Lauren C. Axley, Esq., with the Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue, SW, Washington D.C. 20250, for the Complainant, Animal and Plant Health Inspection Service [APHIS];

L. Thomas Austin, Esq., of Dunlap, TN, for Respondents Danny Burks and Hayden Burks; and

R. Craig Evans, Esq., of Mechanicsville, VA, for Respondent Sonny McCarter.

Preliminary Statement

This proceeding was instituted under the Horse Protection Act (15 U.S.C. § 1821 *et seq.*) [Act or HPA] by a complaint filed on December 28, 2016, by the Administrator of the Animal and Plant Health Inspection Service [APHIS or Complainant], alleging, *inter alia*, that respondent Danny Burks [Mr. Burks] violated the Act by entering a horse, Cuttin' in Line,[1] in class 77A in a horse show in Shelbyville, Tennessee, while the horse was sore.

On January 3, 2017, the Office of the Hearing Clerk sent Mr. Burks a copy of the Complaint by certified mail. On January 25, 2017, by email, Mr. Burks filed a Request for Additional Time

[1] Cuttin' in Line is a two-year-old filly registered as 21400785.

to Answer to the Complaint. On January 27, 2017, I entered an order granting the requested extension of time and allowing Mr. Burks until March 9, 2017, to file an answer.

Mr. Burks did not file an answer on or before March 9, 2017; rather, by and through counsel, Mr. Burks filed an answer on March 27, 2017.[2]

On March 13, 2017, Complainant filed a "Motion for Adoption of Decision and Order as to Respondent Danny Burks by Reason of Default" [Motion for Default] and "Proposed Decision and Order as to Respondent Danny Burks by Reason of Default" [Proposed Decision]. Complainant requests that Mr. Burks: (1) be assessed a civil penalty of $2,200; and (2) be disqualified for not less than five years, pursuant to 15 U.S.C. § 1825(c), from showing or exhibiting any horse in any horse show, horse exhibition, or horse sale or auction and from judging or managing any horse show, horse exhibition, or horse sale or auction. As of this date, Mr. Burks has not filed any objections to Complainant's Motion for Default.[3]

Failure to file a timely answer or failure to deny or otherwise respond to allegations in the

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[2] United States Postal Service records reflect that Mr. Burks received a copy of the Complaint on January 7, 2017. Pursuant to the Rules of Practice, a respondent has twenty (20) days from the date of service to file a response. 7 C.F.R. § 1.136(a). In this case, Mr. Burks's answer was due by January 27, 2017; however, I entered an order extending the filing deadline to March 9, 2017. Nevertheless, Mr. Burks did not file an answer until March 27, 2017. Failure to file a timely answer or failure to deny or otherwise respond to allegations in the Complaint shall be deemed, for purposes of this proceeding, an admission of the allegations in the Complaint, unless the parties have agreed to a consent decision. 7 C.F.R. § 1136(c). Other than a consent decision, the Rules of Practice do not provide for exceptions to the regulatory consequences of an untimely filed answer.

[3] The Hearing Clerk's records reflect that the Motion for Default and Proposed Decision were sent to Mr. Burks on March 16, 2017. Mr. Burks had twenty (20) days from the date of service to file objections thereto. 7 C.F.R. § 1.139. Weekends and federal holidays shall not be included in the count; however, if the due date falls on a Saturday, Sunday, or federal holiday, the last day for timely filing shall be the following work day. 7 C.F.R. §§ 1.147(g), (h). In this case, Mr. Burks's objections were due by April 5, 2017. Respondent did not file any objections by that date.

Complaint shall be deemed, for purposes of this proceeding, an admission of the allegations in the Complaint, unless the parties have agreed to a consent decision. 7 C.F.R. § 1.136(c). "Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant does not object to setting aside the default decision, generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer."[4]

> The requirement in the Department's rules of practice that respondent deny or explain any allegation of the complaint and set forth any defense in a timely answer is necessary to enable this Department to handle its large workload in an expeditious and economical manner. During the last fiscal year, the Department's five ALJ's (who do not have law clerks) disposed of 496 cases. The Department's Judicial Officer disposed of 42 cases. In a recent month, 66 new cases were filed with the Hearing Clerk. Over 150 new Plant Quarantine Act cases are awaiting processing in the Office of the General Counsel.
>
> The courts have recognized that administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." If a respondent in one case is permitted to contest some of the allegations of fact, or raise new issues, even though a timely answer was not filed, all other respondents in all other cases would have to be afforded the same privilege. Permitting such practice would greatly delay the administrative process and would require additional personnel.

Kaplinsky, 47 Agric. Dec. 613, 618–19 (U.S.D.A. 1988) (quoting *Cella v. United States*, 208 F.2d 783, 789 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954) (internal quotations omitted)); *accord Swift & Co. v. United States*, 308 F.2d 849, 851-52 (7th Cir. 1962).

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[4] Knapp, 64 Agric. Dec. 253, 295 (U.S.D.A. 2005); *see also* Drogosch, 63 Agric. Dec. 623, 643-44 (U.S.D.A. 2004) (default proper where respondent failed to file timely answer); Lutz, 60 Agric. Dec. 53, 65-67 (U.S.D.A. 2001) (default decision properly issued where respondent filed answer twenty-three days after service of complaint and three days after answer was due); Kutz, 58 Agric. Dec. 744, 758-61 (U.S.D.A. 1999) (Decision as to Nancy M. Kutz) (default proper where respondent's first filing was twenty-eight days after service of complaint on respondent).

Here, Mr. Burks had more than two months in which to file an answer to the Complaint and failed to do so. Accordingly, the material facts alleged in the Complaint are all admitted by Mr. Burks's failure to file a timely answer, and those material facts are adopted and set forth herein as Findings of Fact and Conclusions of Law. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Danny Burks is an individual whose business mailing address is 109 Parker Circle, Shelbyville, Tennessee 37160. At all times mentioned herein, Mr. Burks was a "person" and an "exhibitor," as those terms are defined in the regulations issued pursuant to the Act (9 C.F.R. § 11.1 *et seq.*) [Regulations].

2. The nature and circumstances of the prohibited conduct are that Mr. Burks entered a horse in a horse show while the horse was "sore," as that term is defined in the Act and the Regulations. The extent and gravity of the prohibited conduct is great. Congress enacted the HPA to end the practice of making gaited horses, including Tennessee Walking Horses, "sore" for the purpose of altering their natural gait to achieve a higher-stepping gait and gaining an unfair competitive advantage during performances at horse shows.[5] Mr. Burks is culpable for the

[5] "When the front limbs of a horse have been deliberately made 'sore,' usually by using chains or chemicals, 'the intense pain which the animal suffered when placing his forefeet on the ground would cause him to lift them up quickly and thrust them forward, producing exactly [the distinctive high-stepping gait of a champion Walker].' H.R. Rep. No. 91-1597, 91st Cong., 2d Sess. 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4870, 4871. Congress' reasons for prohibiting this practice were twofold. First, it inflicted unnecessary pain on the animals; and second, those who made their animal 'sore' gained an unfair competitive advantage over those who relied on skill and patience. In 1976, Congress significantly strengthened the Act by amending it to make clear that intent to make a horse 'sore' is not necessary an element of a violation. *See Thornton v. U.S.D.A.*, 715 F.2d 1508, 1511-12 (11th Cir. 1983)." Edwards, 55 Agric. Dec. 892, 950 (U.S.D.A. 1996).

violation. Exhibitors are the absolute guarantors that horses will not be sore within the meaning of the HPA when they are entered or shown.[6]

3. Mr. Burks has previously been found to have violated the Act. *Burks*, 53 Agric. Dec. 322, 340, 346-49 (U.S.D.A. 1994) (finding that Mr. Burks violated section 5(2)(B) of the Act by entering a sore horse (Mountain on Fire) in a horse show, ordering Mr. Burks to be disqualified for one year, and assessing a $200 civil penalty).

Conclusions of Law

On or about August 27, 2016, Danny Burks entered a horse (Cuttin' in Line) while Cuttin' in Line was sore, for showing in class 77A in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(B)).

ORDER

1. Respondent Danny Burks is assessed a civil penalty of $2,200, to be paid by check made payable to USDA, APHIS, indicating that payment is in reference to HPA Docket 17-0027, and sent to:

USDA, APHIS, MISCELLANEOUS
P.O. Box 979043
St. Louis, Missouri 63197-9000

2. Respondent Danny Burks is disqualified for five (5) years from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction, directly or

[6] Carl Edwards & Sons Stables, 56 Agric. Dec. 529, 588-89 (U.S.D.A. 1997); Edwards, 55 Agric. Dec. 892, 979 (U.S.D.A. 1996).

indirectly through any agent, employee, corporation, partnership, or other device, and from judging or managing any horse show, horse exhibition, horse sale, or horse auction.

This Decision and Order shall be final and effective without further proceedings thirty-five (35) days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties, with courtesy copies provided via email where available.

Done at Washington, D.C.,
this 30 day of May, 2017

[redacted]

Bobbie J. McCartney
Chief Administrative Law Judge

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