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UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	HPA Docket No. 17-0027
	)	HPA Docket No. 17-0028
Danny Burks, an individual;	)	HPA Docket No. 17-0029
Hayden Burks, an individual; and	)	
Sonny McCarter, an individual,	)	
	)	<b>Order Denying Petition For</b>
Respondents	)	<b>Reconsideration as to Hayden Burks</b>

**PROCEDURAL HISTORY**

On July 31, 2017, Hayden Burks filed a Petition for Reconsideration requesting that I reconsider *Burks* (Decision as to Hayden Burks), \_\_ Agric. Dec. \_\_ (U.S.D.A. July 18, 2017). On August 18, 2017, Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], filed Complainant's Reply to Petition for Reconsideration, and, on August 21, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], transmitted the record to the Office of the Judicial Officer for consideration of, and a ruling on, Mr. Burks' Petition for Reconsideration.

## DISCUSSION

The rules of practice applicable to this proceeding<sup>1</sup> provide that a party to a proceeding may file a petition for reconsideration of the decision of the Judicial Officer.<sup>2</sup> The purpose of a petition for reconsideration is to seek correction of manifest errors of law or fact. Petitions for reconsideration are not to be used as vehicles merely for registering disagreement with the Judicial Officer's decisions. A petition for reconsideration is only granted, absent highly unusual circumstances, if the Judicial Officer has committed error or if there is an intervening change in the controlling law.

Mr. Burks raises seven issues in his Petition for Reconsideration. First, Mr. Burks contends Chief Administrative Law Judge Bobbie J. McCartney's [Chief ALJ] Default Decision and Order as to Respondent Hayden Burks [Default Decision] should be vacated because it does not comply with the Horse Protection Act of 1970, as amended [Horse Protection Act]; the Administrative Procedure Act; or the historical practices of the United States Department of Agriculture (Pet. for Recons. ¶ 1 at 1).

Mr. Burks failed to explain or to offer any support for his contention that the Chief ALJ's Default Decision does not comply with the Horse Protection Act, the Administrative Procedure Act, and the historical practices of the United States Department of Agriculture. A review of the record establishes that the Chief ALJ's Default Decision complies with the Horse Protection Act, the Administrative Procedure Act, and United States Department of Agriculture precedent.

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<sup>1</sup> The rules of practice applicable to this proceeding are the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) [Rules of Practice].

<sup>2</sup> 7 C.F.R. § 1.146(a)(3).

Second, Mr. Burks contends the Chief ALJ's Default Decision should be vacated because of the judicial preference for adjudication on the merits (Pet. for Recons. ¶ 1 at 1).

I agree with Mr. Burks that there exists a judicial preference for a decision on the merits, as opposed to a default decision. While I too prefer a decision on the merits, as opposed to a default decision, that preference is not a basis for setting aside a properly issued default decision.<sup>3</sup> Therefore, I reject Mr. Burks' contention that the Chief ALJ's properly issued Default Decision should be vacated merely because of the judicial preference for a decision on the merits.

Third, Mr. Burks asserts, after he filed his Petition for Appeal, his attorney, L. Thomas Austin, tried on numerous occasions to contact Colleen A. Carroll, counsel for the Administrator, to discuss a resolution of this proceeding (Pet. for Recons. ¶ 1 at 1).

Mr. Burks' attempts to resolve this proceeding without protracted litigation are commendable and to be encouraged; however, Mr. Burks' counsel's unsuccessful attempts to contact counsel for the Administrator do not constitute a basis for setting aside the Chief ALJ's Default Decision.<sup>4</sup>

Fourth, Mr. Burks asserts he demanded, but was denied, an oral hearing (Pet. for Recons. ¶ 2 at 1).

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<sup>3</sup> See McCoy, 75 Agric. Dec. 193, 201-02 (U.S.D.A. 2016) (stating an administrative law judge's preference for a decision on the merits, as opposed to a default decision, is not a meritorious reason for denial of a complainant's motion for a default decision).

<sup>4</sup> See Knapp, 64 Agric. Dec. 253, 301-02 (U.S.D.A. 2005) (stating the respondent's unsuccessful attempts to contact counsel for the complainant and a United States Department of Agriculture inspector do not constitute a basis for setting aside the administrative law judge's default decision).

The Hearing Clerk served Mr. Burks with the Complaint on January 7, 2017.<sup>5</sup> Pursuant to the Rules of Practice, Mr. Burks had twenty days within which to file an answer to the Complaint,<sup>6</sup> viz., Mr. Burks was required to file an answer to the Complaint no later than January 27, 2017. However, on January 25, 2017, Mr. Burks requested an extension of time within which to file an answer, and, on January 27, 2017, the Chief ALJ granted Mr. Burks' request and extended the time for filing Mr. Burks' answer to the Complaint to March 9, 2017.<sup>7</sup>

Mr. Burks did not file a timely answer but, instead, filed his Answer to the Complaint on March 27, 2017, eighteen days after he was required to file his answer. Under the Rules of Practice, Mr. Burks is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint and waived the opportunity for hearing.<sup>8</sup> Therefore, there are no issues to be heard and denial of Mr. Burks' request for an oral hearing is not a basis for setting aside the Chief ALJ's Default Decision.

Fifth, Mr. Burks contends the Judicial Officer has no authority under the Horse Protection Act and has not been properly appointed to act for the Secretary of Agriculture under the Horse Protection Act (Pet. for Recons. ¶ 3 at 1-2).

Congress authorized the Secretary of Agriculture to administer the Horse Protection Act and authorized the Secretary of Agriculture to delegate his regulatory functions to an officer or

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<sup>5</sup> United States Postal Service Domestic Return Receipt for article number 7015 3010 0001 5187 5594.

<sup>6</sup> 7 C.F.R. § 1.136(a).

<sup>7</sup> Order Granting Respondents Mot. to Extend Time to Answer Complaint.

<sup>8</sup> 7 C.F.R. §§ 1.136(c), .139.

employee of the United States Department of Agriculture.<sup>9</sup> Pursuant to the authority to delegate regulatory functions, the Secretary of Agriculture established the position of “Judicial Officer”<sup>10</sup> and delegated authority to the Judicial Officer to act as the final deciding officer, in lieu of the Secretary of Agriculture, in adjudicatory proceedings identified in 7 C.F.R. § 2.35. These adjudicatory proceedings include all proceedings subject to the Rules of Practice.<sup>11</sup> Secretary of Agriculture Daniel R. Glickman first appointed me as the Judicial Officer in January 1996 and, on June 6, 2017, Secretary of Agriculture Sonny Perdue reappointed me as the Judicial Officer.<sup>12</sup> Therefore, I reject Mr. Burks’ contentions that the Judicial Officer has no authority under the Horse Protection Act and that I have not been properly appointed to act as final deciding officer in adjudicatory proceedings under the Horse Protection Act.

Sixth, Mr. Burks asserts there was no proof submitted to the Judicial Officer as to the merits (Pet. for Recons. ¶ 4 at 2).

Mr. Burks failed to file a timely answer to the Complaint. Therefore, under the Rules of Practice, Mr. Burks is deemed, for purposes of this proceeding, to have admitted the allegations in the Complaint and waived the opportunity for hearing;<sup>13</sup> thus, no proof regarding the merits is necessary for the proper disposition of this proceeding.

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<sup>9</sup> 7 U.S.C. §§ 450c-450g.

<sup>10</sup> Originally the position was designated “Assistant to the Secretary.” In 1945, as a result of a United States Department of Agriculture reorganization, the position was redesignated “Judicial Officer” (10 Fed. Reg. 13769 (Nov. 9, 1945)).

<sup>11</sup> 7 C.F.R. § 2.35(a)(2).

<sup>12</sup> Attach. 1.

<sup>13</sup> 7 C.F.R. §§ 1.136(c), .139.

Seventh, Mr. Burks requests that I reconsider the nine issues set out in Mr. Burks' Petition for Appeal (Pet. for Recons. at 2).

I considered each of the issues raised by Mr. Burks in his Petition for Appeal. Those issues are addressed in *Burks* (Decision as to Hayden Burks), \_\_ Agric. Dec. \_\_ (U.S.D.A. July 18, 2017), and Mr. Burks fails to identify any errors of law or fact, any intervening change of controlling law, or any highly unusual circumstances necessitating my reconsideration of *Burks* (Decision as to Hayden Burks), \_\_ Agric. Dec. \_\_ (U.S.D.A. July 18, 2017).

Pursuant to the Rules of Practice, the decision of the Judicial Officer is automatically stayed pending the determination to grant or deny a timely-filed petition for reconsideration.<sup>14</sup> Mr. Burks' Petition for Reconsideration was timely filed and automatically stayed *Burks* (Decision as to Hayden Burks), \_\_ Agric. Dec. \_\_ (U.S.D.A. July 18, 2017). Therefore, since Mr. Burks' Petition for Reconsideration is denied, I lift the automatic stay, and the Order in *Burks* (Decision as to Hayden Burks), \_\_ Agric. Dec. \_\_ (U.S.D.A. July 18, 2017), is reinstated.

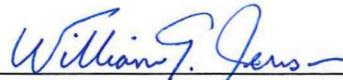
For the foregoing reasons, the following Order is issued.

### ORDER

Mr. Burks' Petition for Reconsideration, filed July 31, 2017, is denied.

Done at Washington, DC

August 22, 2017



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William G. Jenson  
Judicial Officer

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<sup>14</sup> 7 C.F.R. § 1.146(b).



DEPARTMENT OF AGRICULTURE  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C. 20250

Appointment of William G. Jenson as Judicial Officer

I, Sonny Perdue, as the Secretary of Agriculture and pursuant to the Act of April 4, 1940, as amended (7 U.S.C. § 450c – 450g) and Reorganization Plan No. 2 of 1953 (5 U.S.C. app), on this day do hereby reappoint William G. Jenson the Judicial Officer for the United States Department of Agriculture, and recognize and reaffirm the 1996, appointment made by then Secretary of Agriculture Daniel R. Glickman of William G. Jenson as the Judicial Officer.

Signed this 6<sup>th</sup> day of June 2017, in Washington, D.C.

A handwritten signature in cursive script that reads "Sonny Perdue".

SONNY PERDUE  
Secretary

Attachment 1