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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,	)	**Decision and Order as to Hayden Burks**

PROCEDURAL HISTORY

Kevin Shea, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [Administrator], instituted this disciplinary administrative proceeding by filing a Complaint on December 28, 2016. The Administrator instituted the proceeding under the Horse Protection Act of 1970, as amended (15 U.S.C. §§ 1821-1831) [Horse Protection Act]; the regulations issued pursuant to the Horse Protection Act (9 C.F.R. pt. 11) [Regulations]; and 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].

The Administrator alleges that, on or about August 27, 2016, Hayden Burks entered a horse known as Cuttin' in Line, while Cuttin' in Line was sore, for showing in class 77A in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).[1]

On January 7, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], by certified mail, served Mr. Burks with the

[1] Compl. ¶ 11 at the third unnumbered page.

Complaint, the Rules of Practice, and the Hearing Clerk's service letter, dated January 3, 2017.[2] On January 25, 2017, Mr. Burks filed a motion requesting an extension of time within which to file an answer to the Complaint, and on January 27, 2017, Chief Administrative Law Judge Bobbie J. McCartney [Chief ALJ] granted Mr. Burks' motion and extended to March 9, 2017, the time for filing Mr. Burks' answer to the Complaint.[3]

Mr. Burks failed to file an answer to the Complaint on or before March 9, 2017, and on March 13, 2017, the Administrator filed a Motion for Adoption of Decision and Order as to Respondent Hayden Burks by Reason of Default [Motion for Default Decision] and a Proposed Decision and Order as to Respondent Hayden Burks by Reason of Default [Proposed Default Decision]. On March 27, 2017, Mr. Burks filed an Answer.

On May 30, 2017, in accordance with 7 C.F.R. § 1.139, the Chief ALJ filed a Default Decision and Order as to Respondent Hayden Burks [Default Decision]: (1) concluding Mr. Burks violated the Horse Protection Act, as alleged in the Complaint; (2) assessing Mr. Burks a $2,200 civil penalty; and (3) disqualifying Mr. Burks for one year from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction and from judging or managing any horse show, horse exhibition, horse sale, or horse auction.[4]

On June 23, 2017, Mr. Burks filed a Petition for Appeal in which he appealed the Chief ALJ's Default Decision to the Judicial Officer. On July 11, 2017, the Administrator filed a response to Mr. Burks' Petition for Appeal. On July 12, 2017, the Hearing Clerk transmitted the

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[2] United States Postal Service Domestic Return Receipt for article number 7015 3010 0001 5187 5594.

[3] Order Granting Respondents Motion to Extend Time to Answer Complaint.

[4] Chief ALJ's Default Decision at 5.

record to the Office of the Judicial Officer for consideration and decision. Based upon a careful consideration of the record, I affirm the Chief ALJ's Default Decision.

DECISION

Statement of the Case

Mr. Burks failed to file a timely answer to the Complaint. The Rules of Practice provide that the failure to file a timely answer to the Complaint shall be deemed an admission of the allegations in the complaint. Further, pursuant to 7 C.F.R. § 1.139, the failure to file a timely answer constitutes a waiver of hearing. Accordingly, the material allegations of the Complaint as they relate to Mr. Hayden Burks are adopted as findings of fact. I issue this Decision and Order as to Hayden Burks pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Mr. Burks is an individual whose business mailing address is 109 Parker Circle, Shelbyville, Tennessee 37160. At all times material to this proceeding, Mr. Burks was a "person" and an "exhibitor," as those terms are defined in the Regulations.

2. The nature, circumstances, and extent of the prohibited conduct are that Mr. Burks entered a horse (Cuttin' in Line) in a horse show while the horse was "sore," as that term is defined in the Horse Protection Act and the Regulations. The extent and gravity of Mr. Burks' prohibited conduct are great. Congress enacted the Horse Protection Act 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]

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[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, reproducing exactly [the

3. Mr. Burks is culpable for the violation of the Horse Protection Act set forth in the Conclusions of Law. Exhibitors of horses are absolute guarantors that those horses will not be sore within the meaning of the Horse Protection Act when they are entered or shown.[6]

4. On November 16, 2012, the Animal and Plant Health Inspection Service, United States Department of Agriculture [APHIS], issued an Official Warning (TN 130059) to Mr. Burks with respect to his having shown a horse (A Shady Character) in a horse show on August 28, 2012, which horse APHIS found was sore.

Conclusions of Law

1. The Secretary of Agriculture has jurisdiction in this matter.

2. On or about August 27, 2016, Mr. 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 15 U.S.C. § 1824(2)(B).

Mr. Burks' Petition for Appeal

Mr. Burks raises seven issues in his Petition for Appeal. First, Mr. Burks asserts he was "never properly served" (Pet. for Appeal ¶ 1).

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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 a necessary 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), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997).

[6] Carl Edwards & Sons Stables, 56 Agric. Dec. 529, 588-89 (U.S.D.A. 1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998) (Table), *printed in* 57 Agric. Dec. 296 (1998); Edwards, 55 Agric. Dec. 892, 979 (U.S.D.A. 1996), *dismissed*, No. 96-9472 (11th Cir. Aug. 15, 1997).

The record reveals that the Hearing Clerk, by certified mail, served Mr. Burks with the Complaint.[7] The Rules of Practice provide that copies of documents required or authorized to be filed with the Hearing Clerk shall be served upon the parties by the Hearing Clerk, an employee of the United States Department of Agriculture, a United States Marshall, or a Deputy United States Marshall.[8] A complaint is a document required or authorized by the Rules of Practice to be filed with the Hearing Clerk,[9] and any complaint initially served on a person to make that person a party respondent shall be deemed to be received by that person on the date of delivery by certified mail.[10] Therefore, I reject Mr. Burks' contention that he was "never properly served." Moreover, I note that, on January 25, 2017, Mr. Burks requested an extension of time within which to file an answer to the Complaint, thereby confirming that Mr. Burks received the Complaint.

Second, Mr. Burks asserts he filed an answer to the Complaint before the Chief ALJ filed the Default Decision (Pet. for Appeal ¶ 2).

The record reveals that Mr. Burks filed an Answer in response to the Complaint on March 27, 2017, and that the Chief ALJ filed the Default Decision on May 30, 2017. Therefore, I agree with Mr. Burks' assertion that he filed the Answer to the Complaint prior to the date the Chief ALJ filed the Default Decision.

Third, Mr. Burks contends the Chief ALJ violated Mr. Burks' due process and equal protection rights by entering the Default Decision after Mr. Burks filed the Answer to the Complaint (Pet. for Appeal ¶ 3).

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[7] See note 2.

[8] 7 C.F.R. § 1.147(b).

[9] 7 C.F.R. § 1.133(b).

[10] 7 C.F.R. § 1.147(c)(1).

The Hearing Clerk served Mr. Burks with the Complaint on January 7, 2017.[11] Pursuant to the Rules of Practice, Mr. Burks had twenty days within which to file an answer to the Complaint;[12] 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.[13]

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.[14] Thus, the default provisions of the Rules of Practice apply, and a late-filed answer does not preclude an administrative law judge's subsequent issuance of a default decision. Application of the default provisions of the Rules of Practice does not deprive a respondent of due process.[15] Therefore, I reject Mr. Burks' contention that the Chief

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[11] See note 2.

[12] 7 C.F.R. § 1.136(a).

[13] See note 3.

[14] 7 C.F.R. §§ 1.136(c), .139.

[15] See United States v. Hulings, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States in a proceeding in which the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to deny the allegations). See also Father & Sons Lumber and Building Supplies, Inc. v. NLRB, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating due process generally does not entitle parties to an evidentiary hearing in a proceeding in which the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); Kirk v. INS, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

ALJ violated Mr. Burks' due process rights by entering the Default Decision after Mr. Burks filed the Answer to the Complaint.

Mr. Burks failed to explain or offer any support for his contention that the Chief ALJ's entry of the Default Decision violated Mr. Burks' equal protection rights, and, without some minimal explanation of Mr. Burks' contention, I am unable to address Mr. Burks' contention that the Chief ALJ denied Mr. Burks equal protection of the law.

Fourth, Mr. Burks contests the Chief ALJ's findings of fact and conclusion of law (Pet. for Appeal ¶¶ 4-5).

Under the Rules of Practice, the failure to file a timely answer is deemed an admission of the allegations in the complaint. As discussed in this Decision and Order as to Hayden Burks, *supra*, Mr. Burks failed to file a timely answer to the Complaint and is deemed to have admitted the allegations in the Complaint. Mr. Burks' denial of the allegations in the Complaint, which he has been deemed to have admitted, comes far too late to be considered.

Fifth, Mr. Burks asserts that he and Mr. Danny Burks did not both enter Cuttin' in Line in a horse show as alleged in the Complaint (Pet. for Appeal ¶¶ 6-7). I infer Mr. Burks contends that only one person can enter a horse in a horse show and be liable for a Horse Protection Act violation should that horse be found to be sore.

The Administrator alleges that both Mr. Hayden Burks and Mr. 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 15 U.S.C. § 1824(2)(B).[16] "Entering," within the meaning of the Horse Protection Act, is a continuing process, not an event, and includes all

[16] Mr. Danny Burks (Compl. ¶ 10 at the third unnumbered page); Mr. Hayden Burks (Compl. ¶ 11 at the third unnumbered page).

activities required to be completed before a horse can be shown or exhibited.[17] Any person who participates in, or completes any part of, the entry process is liable for the Horse Protection Act violation should the horse be found to be sore.[18] Thus, multiple persons can enter a horse in a horse show and be liable for a Horse Protection Act violation should that horse be found to be sore. Therefore, I reject Mr. Burks' unsupported contention that only one person can enter a horse in a horse show and be liable for a Horse Protection Act violation should that horse be found to be sore.

Sixth, Mr. Burks asserts "this was a scar rule violation" and contends "the scar rule is not a sore horse" (Pet. for Appeal ¶ 8).

Mr. Burks provides no support for his assertion that this proceeding concerns "a scar rule violation." Moreover, a horse is sore if it meets the statutory definition of a "sore" horse,[19] and,

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[17] Stepp, 57 Agric. Dec. 297, 309 (U.S.D.A. 1998) (stating "entering," within the meaning of the Horse Protection Act, is a process that begins with the payment of the entry fee and which includes pre-show examination by the Designated Qualified Person or APHIS veterinarian), *aff'd*, 188 F.3d 508 (Table), 1999 WL 646138 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 820 (1999); Burks, 53 Agric. Dec. 322, 334 (U.S.D.A. 1994) (rejecting the respondent's argument that the mere act of submitting a horse for pre-show inspection does not constitute "entering" as that term is used in the Horse Protection Act); Callaway, 52 Agric. Dec. 272, 293 (U.S.D.A. 1993) (stating entering a horse in a horse show is a continuing process, not an event, and includes all activities required to be completed before a horse can be shown or exhibited); Watlington, 52 Agric. Dec. 1172, 1183 (U.S.D.A. 1993) (stating that entry is a process that gives a status of being entered to a horse and it includes filling out forms and presenting the horse for inspection); Crowe, 52 Agric. Dec. 1132, 1146-47 (U.S.D.A. 1993) (stating that "entering," within the meaning of the Horse Protection Act, is a process that begins with the payment of the entry fee); Elliott (Decision as to William Dwaine Elliott), 51 Agric. Dec. 334, 344 (U.S.D.A. 1992) (stating that "entering," within the meaning of the Horse Protection Act, is a process that begins with the payment of the entry fee and which includes pre-show examination by Designated Qualified Persons or United States Department of Agriculture veterinarians), *aff'd*, 990 F.2d 140 (4th Cir.), *cert. denied*, 510 U.S. 867 (1993).

[18] Black, 66 Agric. Dec. 1217, 1239 (U.S.D.A. 2007), *aff'd sub nom. Derickson v. U.S. Dep't of Agric.*, 546 F.3d 335 (6th Cir. 2008); Stewart, 60 Agric. Dec. 570, 605 (U.S.D.A. 2001), *aff'd*, 64 F. App'x 941 (6th Cir. 2003).

[19] 15 U.S.C. § 1821(3).

contrary to Mr. Burks' contention, a horse is considered to be "sore" if the horse fails to meet the criteria in the scar rule:

> **§ 11.3 Scar rule.**
>
> The scar rule applies to all horses born on or after October 1, 1975. Horses subject to this rule that do not meet the following scar rule criteria shall be considered to be "sore" and are subject to all prohibitions of section 5 of the [Horse Protection] Act. The scar rule criteria are as follows:
>
> (a) The anterior and anterior-lateral surfaces of the fore pasterns (extensor surface) must be free of bilateral granulomas, other bilateral pathological evidence of inflammation, and, other bilateral evidence of abuse indicative of soring including, but not limited to, excessive loss of hair.
>
> (b) The posterior surfaces of the pasterns (flexor surface), including the sulcus or "pocket" may show bilateral areas of uniformly thickened epithelial tissue if such areas are free of proliferating granuloma tissue, irritation, moisture, edema, or other evidence of inflammation.

9 C.F.R. § 11.3 (footnote omitted).

Seventh, Mr. Burks "challenge[s] the authority of the Administrative Judge and the procedure of the administrative office" (Pet. for Appeal ¶ 9). I infer Mr. Burks contends the Chief ALJ is not authorized to issue initial decisions in proceedings instituted under the Horse Protection Act.

Congress authorized the Secretary of Agriculture to administer the Horse Protection Act. The Secretary of Agriculture has designated administrative law judges within the Office of Administrative Law Judges, United States Department of Agriculture, to hold hearings, to perform related functions, and to issue initial decisions in proceedings subject to 5 U.S.C. §§ 556 and 557.[20] Administrative disciplinary proceedings instituted under the Horse Protection Act are proceedings subject to 5 U.S.C. §§ 556 and 557. Therefore, I reject Mr. Burks' contention that the Chief ALJ is not authorized to issue initial decisions in proceedings instituted under the Horse Protection Act.

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[20] 7 C.F.R. § 2.27(a)(1).

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Burks is assessed a $2,200 civil penalty. Mr. Burks shall pay the civil penalty by certified check or money order, made payable to the "Treasurer of the United States" and send the certified check or money order to:

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

Mr. Burks' civil penalty payment shall be forwarded to, and received by USDA, APHIS, MISCELLANEOUS, within 60 days after service of this Order on Mr. Burks. Mr. Burks shall indicate on the certified check or money order that the payment is in reference to HPA Docket No. 17-0028.

2. Mr. Burks is disqualified for one year from showing or exhibiting any horse in any horse show, horse exhibition, horse sale, or horse auction, directly or 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. The disqualification of Mr. Burks shall become effective on the 60th day after service of this Order on Mr. Burks.

RIGHT TO SEEK JUDICIAL REVIEW

Mr. Burks has the right to seek judicial review of the Order in this Decision and Order as to Hayden Burks in the court of appeals of the United States for the circuit in which Mr. Burks resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Mr. Burks must file a notice of appeal in such court within 30 days from the

date of this Order and must simultaneously send a copy of any notice of appeal by certified mail to the Secretary of Agriculture.[21] The date of this Order is July 18, 2017.

Done at Washington, DC

July 18, 2017

[redacted]

William G. Jenson
Judicial Officer

[21] 15 U.S.C. § 1825(b)(2), (c).