UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	HPA Docket No. 17-0093
	)	HPA Docket No. 17-0094
Amy Blackburn, an individual;	)	HPA Docket No. 17-0095
Keith Blackburn, an individual; and	)	
Al Morgan, an individual,	)	
	)	
Respondents	)	**Decision and Order as to Keith Blackburn**

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 January 10, 2017. 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 26, 2016, Keith Blackburn entered a horse known as Mastercard of Jazz, while Mastercard of Jazz was sore, for showing in class 58 in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).[1]

[1] Compl. ¶ 17 at the fourth unnumbered page.

On February 2, 2017, the Hearing Clerk, Office of Administrative Law Judges, United States Department of Agriculture [Hearing Clerk], by certified mail, served Mr. Blackburn with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter, dated January 26, 2017.[2] Mr. Blackburn failed to file an answer within 20 days after the Hearing Clerk served him with the Complaint, as required by 7 C.F.R. § 1.136(a).

On February 24, 2017, the Administrator filed a Motion for Adoption of Decision and Order by Reason of Default [Motion for Default Decision] and a Proposed Decision and Order by Reason of Default [Proposed Default Decision]. On March 1, 2017, Mr. Blackburn filed an Answer to Complaint, and on March 20, 2017, Mr. Blackburn filed a Motion to Accept Answer of Respondent.

Mr. Blackburn failed to file a response to the Administrator's Motion for Default Decision, and, on May 30, 2017, in accordance with 7 C.F.R. § 1.139, Chief Administrative Law Judge Bobbie J. McCartney [Chief ALJ] filed a Default Decision and Order Denying Motion to Accept Late Answer of Respondent Keith Blackburn [Default Decision] in which the Chief ALJ: (1) denied Mr. Blackburn's Motion to Accept Answer of Respondent; (2) concluded Mr. Blackburn violated the Horse Protection Act, as alleged in the Complaint; (3) assessed Mr. Blackburn a $2,200 civil penalty; and (4) disqualified Mr. Blackburn 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.[3]

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[2] United States Postal Service Domestic Return Receipt for article number [redacted] 0820.

[3] Chief ALJ's Default Decision at 6-7.

On June 30, 2017, Mr. Blackburn appealed the Chief ALJ's Default Decision to the Judicial Officer.[4] On July 11, 2017, the Administrator filed a response to Mr. Blackburn's Appeal Petition, and on July 14, 2017, the Hearing Clerk transmitted the 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. Blackburn failed to file an answer to the Complaint within the time prescribed in 7 C.F.R. § 1.136(a). The Rules of Practice (7 C.F.R. § 1.136(c)) provide that the failure to file an answer to the complaint within the time prescribed in 7 C.F.R. § 1.136(a) 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. Blackburn are adopted as findings of fact. I issue this Decision and Order as to Keith Blackburn pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Mr. Blackburn is an individual whose business mailing address is [redacted] At all times material to this proceeding, Mr. Blackburn was a "person" and an "exhibitor," as those terms are defined in the Regulations.

2. The nature and circumstances of the prohibited conduct are that Mr. Blackburn entered a horse (Mastercard of Jazz) 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. Blackburn's

[4] Appeal to Judicial Officer/and/or Motion to Reconsider to Vacate and Set Aside Judgment [Appeal Petition].

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]

3. Mr. Blackburn 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. The Animal and Plant Health Inspection Service, United States Department of Agriculture [APHIS], has issued multiple warning letters to Mr. Blackburn.

5. On November 15, 2012, APHIS issued an Official Warning (TN 130051) to Mr. Blackburn with respect to his having shown a horse (The Sportster) in a horse show on August 24, 2012, which horse APHIS found was sore.

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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 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).

6. On June 18, 2013, APHIS issued an Official Warning (KY 10064) to Mr. Blackburn with respect to his having shown a horse (Unreal) in a horse show on April 23, 2010, which horse APHIS found was sore.

7. On February 3, 2015, APHIS issued an Official Warning (TN 130448) to Mr. Blackburn with respect to his having shown a horse (Lady Antebellum) in a horse show on June 21, 2013, which horse APHIS found was bearing prohibited equipment (metal plates).

8. On July 14, 2016, APHIS issued an Official Warning (TN 160113) to Mr. Blackburn with respect to his having entered a horse (John Gruden) in a horse show on September 2, 2015, which horse APHIS found was sore.

Conclusions of Law

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

2. On or about August 26, 2016, Mr. Blackburn entered a horse (Mastercard of Jazz), while Mastercard of Jazz was sore, for showing in class 58 in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).

Mr. Blackburn's Appeal Petition

Mr. Blackburn raises six issues in his Appeal Petition. First, Mr. Blackburn contends the Chief ALJ erroneously held in an order dated April 18, 2017, that she does not have jurisdiction to rule on a motion to vacate or set aside a default decision after the default decision is issued (Appeal Pet. ¶ II at 2).

The record does not contain an order by the Chief ALJ dated April 18, 2017. Therefore, Mr. Blackburn's contention that the Chief ALJ's order dated April 18, 2017, is error, has no merit.

Second, Mr. Blackburn contends that the United States Department of Agriculture's determination that Mastercard of Jazz was "sore," as that term is defined in the Horse Protection

Act, on August 26, 2016, is the product of the United States Department of Agriculture's "inherently flawed inspection process" (Appeal Pet. ¶ III at 3).

Mr. Blackburn failed to file a timely answer to the Complaint, and, in accordance with the Rules of Practice, Mr. Blackburn is deemed, for the purposes of this proceeding, to have admitted the allegations in the Complaint.[7] Therefore, Mr. Blackburn is deemed, for the purposes of this proceeding, to have admitted that, on or about August 26, 2016, Mastercard of Jazz was sore. Mr. Blackburn's challenge in his Appeal Petition to the determination that Mastercard of Jazz was sore comes far too late to be considered.

Third, Mr. Blackburn contends that the Hearing Clerk's use of the word "may" in the following sentence in the Hearing Clerk's January 26, 2017 service letter, which accompanied the Complaint, was not clear and was prejudicial to Mr. Blackburn: "Failure to file a timely answer or filing an answer which does not deny the allegations of the Complaint may constitute an admission of those allegations and waive your right to an oral hearing." (Appeal Pet. ¶ III at 3).

The record does not support Mr. Blackburn's contention that the Hearing Clerk's January 26, 2017 service letter was unclear or that the alleged lack of clarity in the Hearing Clerk's letter caused Mr. Blackburn to file a late-filed answer to the Complaint. The Rules of Practice, a copy of which accompanied the Hearing Clerk's January 26, 2017 service letter, state the time within which an answer must be filed and the consequences of failing to file a timely answer.[8] Moreover, the Complaint states that an answer must be filed with the Hearing Clerk in accordance

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[7] 7 C.F.R. § 1.136(c).

[8] 7 C.F.R. §§ 1.136(a), (c); .139.

with the Rules of Practice and that failure to file a timely answer shall constitute an admission of all the material allegations of the Complaint.[9]

Fourth, Mr. Blackburn asserts APHIS bombarded him with meaningless warning letters to desensitize him, to confuse him, and to cause him to ignore any future-filed complaint (Appeal Pet. ¶ III at 4).

APHIS issued four warning letters to Mr. Blackburn during the period November 15, 2012, through July 14, 2016. The record does not contain any support for Mr. Blackburn's contention that APHIS issued these warning letters to desensitize Mr. Blackburn, to confuse Mr. Blackburn, or to cause Mr. Blackburn to ignore the Complaint filed by the Administrator on January 10, 2017. A presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, I must presume that APHIS officials sent the warning letters to Mr. Blackburn for the purpose of warning Mr. Blackburn that APHIS believes that he had violated the Horse Protection Act and not for the purpose of desensitizing him, confusing him, or causing him to ignore the Complaint.[10]

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[9] Compl. at the fourth unnumbered page.

[10] See National Archives and Records Admin. v. Favish, 541 U.S. 157, 174 (2004) (holding absent clear evidence to the contrary, there is a presumption of legitimacy accorded to the government's official conduct); United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926) (stating a presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume public officers have properly discharged their official duties); Sunday Lake Iron Co. v. Wakefield TP, 247 U.S. 350, 353 (1918) (stating the good faith of taxing officers and the validity of their actions are presumed; when assailed, the burden of proof is on the complaining party); Lawson Milk Co. v. Freeman, 358 F.2d 647, 649 (6th Cir. 1966) (stating without a showing that the action of the Secretary of Agriculture was arbitrary, his action is presumed to be valid); Donaldson v. United States, 264 F.2d 804, 807 (6th Cir. 1959) (stating the presumption of regularity supports official acts of public officers and, in the absence of clear evidence to the contrary, courts presume public officers have properly discharged their duties); Greenville Packing Co., 59 Agric. Dec. 194, 220-22 (U.S.D.A. 2000) (stating, in the absence of evidence to the contrary, Food Safety and Inspection Service inspectors are presumed to have properly issued process deficiency records), *aff'd in part and transferred in part*, No. 00-CV-1054

Fifth, Mr. Blackburn contends the Chief ALJ's Default Decision should be set aside because the Federal Rules of Civil Procedure "would apply in this instance" and Mr. Blackburn's failure to file a timely answer was due to excusable neglect (Appeal Pet. ¶ III at 4-5).

The Federal Rules of Civil Procedure govern procedure in the United States district courts[11] and are not applicable to administrative proceedings conducted before the Secretary of Agriculture under the Horse Protection Act and the Rules of Practice.[12] Unlike the Federal Rules of Civil Procedure, the Rules of Practice do not provide that a default decision may be set aside for excusable neglect.

(N.D.N.Y. Sept. 4, 2001), *appeal withdrawn*, No. 01-6214 (2d Cir. Apr. 30, 2002); Shepherd, 57 Agric. Dec. 242, 280-82 (U.S.D.A. 1998) (stating, in the absence of clear evidence to the contrary, United States Department of Agriculture inspectors and investigators are presumed to have properly discharged their duty to document violations of the Animal Welfare Act); Auvil Fruit Co., 56 Agric. Dec. 1045, 1079 (U.S.D.A. 1997) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); Mil-Key Farm, Inc., 54 Agric. Dec. 26, 55 (U.S.D.A. 1995) (stating without a showing that the official acts of the Secretary of Agriculture are arbitrary, his actions are presumed to be valid); King Meat Co., 40 Agric. Dec. 1468, 1494 (U.S.D.A. 1981) (stating there is a presumption of regularity with respect to the issuance of instructions as to grading methods and procedures by the Chief of the Meat Grading Branch, Food Safety and Quality Service, United States Department of Agriculture), *aff'd*, No. CV 81-6485 (C.D. Cal. Oct. 20, 1982), *remanded*, No. CV 81-6485 (C.D. Cal. Mar. 25, 1983) (to consider newly discovered evidence), *order on remand*, 42 Agric. Dec. 726 (U.S.D.A. 1983), *aff'd*, No. CV 81-6485 (C.D. Cal. Aug. 11, 1983) (original order of Oct. 20, 1982, reinstated *nunc pro tunc*), *aff'd*, 742 F.2d 1462 (9th Cir. 1984) (unpublished) (not to be cited as precedent under 9th Circuit Rule 21); Gold Bell-I&S Jersey Farms, Inc., 37 Agric. Dec. 1336, 1361 (U.S.D.A. 1978) (rejecting the respondent's theory that United States Department of Agriculture shell egg graders switched cases of eggs to discredit respondent, in view of the presumption of regularity supporting acts of public officials), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980).

[11] Fed. R. Civ. P. 1.

[12] Heartland Kennels, Inc., 61 Agric. Dec. 492, 535 (U.S.D.A. 2002); Mitchell, 60 Agric. Dec. 91, 123 (U.S.D.A. 2001), *aff'd*, 42 F. App'x 991 (9th Cir. 2002); Noell, 58 Agric. Dec. 130, 147 (U.S.D.A. 1999), *appeal dismissed sub nom. The Chimp Farm, Inc. v. U.S. Dep't of Agric.*, No. 00-10608-A (11th Cir. July 20, 2000).

Sixth, Mr. Blackburn contends the Chief ALJ's Default Decision should be set aside because the Rules of Practice do not provide due process and have not been updated since 1977 (Appeal Pet. ¶¶ III-IV at 4-6).

The default provisions of the Rules of Practice have long been held to provide respondents due process.[13] Moreover, contrary to Mr. Blackburn's assertion, the Rules of Practice have been amended five times since 1977.[14]

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Blackburn is assessed a $2,200 civil penalty. Mr. Blackburn 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. Blackburn's civil penalty payment shall be forwarded to, and received by USDA, APHIS, MISCELLANEOUS, within 60 days after service of this Order on Mr. Blackburn.

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[13] 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).

[14] See 53 Fed. Reg. 7177 (Mar. 7, 1988); 55 Fed. Reg. 30673 (July 27, 1990); 60 Fed. Reg. 8455 (Feb. 14, 1995); 61 Fed. Reg. 11503 (Mar. 21, 1996); 68 Fed. Reg. 6340 (Feb. 7, 2003).

Mr. Blackburn shall indicate on the certified check or money order that the payment is in reference to HPA Docket No. 17-0094.

2. Mr. Blackburn 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. Blackburn shall become effective on the 60th day after service of this Order on Mr. Blackburn.

RIGHT TO SEEK JUDICIAL REVIEW

Mr. Blackburn has the right to seek judicial review of the Order in this Decision and Order as to Keith Blackburn in the court of appeals of the United States for the circuit in which Mr. Blackburn resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Mr. Blackburn 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.[15] The date of this Order is July 31, 2017.

Done at Washington, DC

July 31, 2017

[redacted]

William G. Jenson
Judicial Officer

[15] 15 U.S.C. § 1825(b)(2), (c).