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,	)	
	)	**Order Denying Petition to Reconsider**
Respondents	)	**As to Keith Blackburn**

PROCEDURAL HISTORY

On August 10, 2017, Keith Blackburn filed a Motion to Reconsider Ruling of Judicial Officer [Petition to Reconsider] requesting that I reconsider *Blackburn* (Decision as to Keith Blackburn), __ Agric. Dec. ___ (U.S.D.A. July 31, 2017). On September 7, 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 September 11, 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. Blackburn's Petition to Reconsider.

DISCUSSION

The rules of practice applicable to this proceeding[1] provide that a party to a proceeding may file a petition to reconsider the decision of the Judicial Officer.[2] The purpose of a petition to

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[1] 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].

[2] 7 C.F.R. § 1.146(a)(3).

reconsider is to seek correction of manifest errors of law or fact. A petition to reconsider is not to be used as a vehicle merely for registering disagreement with the Judicial Officer's decision. A petition to reconsider 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. Blackburn raises eight issues in his Petition to Reconsider. First, Mr. Blackburn asserts the Complaint does not "contain any attachments in relation to the entry form, inspection paperwork, or violation documentation" (Pet. to Reconsider at 1).

I agree with Mr. Blackburn's assertion that the Complaint does not contain any attachments. The Rules of Practice set forth the requirements for a complaint, as follows:

> **§ 1.135 Contents of complaint or petition for review.**
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> (a) *Complaint.* A complaint filed pursuant to § 1.133(b) shall state briefly and clearly the nature of the proceeding, the identification of the complainant and the respondent, the legal authority and jurisdiction under which the proceeding is instituted, the allegations of fact and provisions of law which constitute a basis for the proceeding, and the nature of the relief sought.

7 C.F.R. § 1.135(a). There is no requirement that a complaint filed in a proceeding conducted under the Rules of Practice contain attachments.

Second, Mr. Blackburn asserts the Chief ALJ lacked jurisdiction to issue the May 30, 2017 Default Decision and Order Denying Motion to Accept Late Answer of Respondent Keith Blackburn [Default Decision] and contends the Chief ALJ's Default Decision should be vacated and the case dismissed. Mr. Blackburn contends the functions the United States Department of Agriculture delegated to the Chief ALJ can only be performed by an inferior officer appointed by the Secretary of Agriculture, as required by the Appointments Clause of the Constitution of the United States, and no such appointment has been made. (Pet. to Reconsider at 2-4).

The federal courts have made no final determination that administrative law judges generally -- or United States Department of Agriculture administrative law judges specifically -- lack constitutional authority to preside over administrative disciplinary proceedings instituted by the Secretary of Agriculture in accordance with the Administrative Procedure Act. The United States Department of Agriculture's administrative law judges should continue to preside over administrative proceedings before the Secretary of Agriculture unless and until there is a final determination by the federal courts that they lack the authority to do so. The authority of United States Department of Agriculture administrative law judges to preside over administrative proceedings is a matter of great importance, as these proceedings are an essential part of the United States Department of Agriculture's mission. The Rules of Practice explicitly provide for appeals of the initial decisions of the administrative law judges[3] and the Horse Protection Act provides for judicial review of the decisions of the Secretary of Agriculture.[4] Based upon the provisions for judicial review in the Horse Protection Act, I find challenges to the constitutionality of the United States Department of Agriculture's administrative law judges and the administrative process, should be raised in an appropriate United States Court of Appeals.[5] Moreover, Mr. Blackburn

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[3] 7 C.F.R. § 1.145(a).

[4] 15 U.S.C. § 1825(b)-(c).

[5] See Bennett v. SEC, 844 F.3d 174, 188 (4th Cir. 2016) ("From the text and structure of the statute, it is fairly discernible that Congress intended to channel all objections to such orders-including challenges rooted in the Appointments Clause-through the administrative adjudication and judicial review process set forth in the statute."); Bebo v. SEC, 799 F.3d 765, 774 (7th Cir. 2015) ("After the pending enforcement action has run its course, [the plaintiff] can raise her objections in a circuit court of appeals established under Article III."), *cert. denied*, 136 S. Ct. 1500 (2016).

cannot avoid or enjoin this administrative proceeding by raising constitutional issues.[6] As the United States Court of Appeal for the Seventh Circuit stated:

> This point is fundamental to administrative law. Every person hoping to enjoin an ongoing administrative proceeding could make this argument, yet courts consistently require plaintiffs to use the administrative review schemes established by Congress. See *Thunder Basin Coal*, 510 U.S. at 216, 114 S. Ct. 771 ("Nothing in the language and structure of the Act or its legislative history suggests that Congress intended to allow mine operators to evade the statutory-review process by enjoining the Secretary from commencing enforcement proceedings, as petitioner sought to do here."); *Sturm Ruger & Co. v. Chao*, 300 F.3d 867, 876 (D.C. Cir. 2002) ("Our obligation to respect the review process established by Congress bars us from permitting Sturm Ruger to make this end run, and requires dismissal of its district court complaint."); *USAA Federal Savings Bank v. McLaughlin*, 849 F.2d 1505, 1510 (D.C. Cir. 1988) ("Where, as here, the 'injury' inflicted on the party seeking review is the burden of going through an agency proceeding, [*Standard Oil Co.*] teaches that the party must patiently await the denouement of proceeding within the Article II branch."); *Chau v. SEC*, 72 F. Supp.3d 417, 425 (S.D.N.Y. 2014), ("This Court's jurisdiction is not an escape hatch for litigants to delay or derail an administrative action when statutory channels of review are entirely adequate."). . . .
>
> We see no evidence from the statute's text, structure, and purpose that Congress intended for plaintiffs like Bebo who are already subject to ongoing administrative enforcement proceedings to be able to stop those proceedings by challenging the constitutionality of the enabling legislation or the structural authority of the SEC.

Bebo v. SEC, 799 F.3d 765, 774-75 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1500 (2016).

To disqualify administrative law judges and dismiss administrative proceedings in advance of a final determination by the federal judiciary as to the authority of those administrative law judges to preside over administrative proceedings would be premature. Therefore, I reject

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[6] See FTC v. Standard Oil Co. of California, 449 U.S. 232, 244-45 (1980) (refusing to enjoin an allegedly unlawful administrative proceeding where the court of appeals would be able to review alleged unlawfulness after the agency proceeding had concluded); Jarkesy v. SEC, 803 F.3d 9, 27 (D.C. Cir. 2015) (refusing to enjoin proceedings before an administrative law judge based on an Appointments Clause challenge because the plaintiff had "no inherent right to avoid an administrative proceeding at all" even if his arguments were correct).

Mr. Blackburn's contention that the Chief ALJ's Default Decision should be vacated and the case should be dismissed.

Third, Mr. Blackburn asserts the Order in the Chief ALJ's Default Decision contains "**no mention of a Default Judgment**" (Pet. to Reconsider at 2 (emphasis in original)).

I agree with Mr. Blackburn's assertion that the Order in the Chief ALJ's Default Decision does not mention a default judgment.[7] However, the Rules of Practice do not require that an order in an administrative law judge's decision issued by reason of default mention a default judgment.

Fourth, Mr. Blackburn contends I erroneously stated in *Blackburn* (Decision as to Keith Blackburn), __ Agric. Dec. ___ (U.S.D.A. July 31, 2017), that the Chief ALJ's Default Decision contains a "suspension period" (Pet. to Reconsider at 2).

I did not state in *Blackburn* that the Chief ALJ's Default Decision contains a "suspension period." However, I infer Mr. Blackburn's reference to a "suspension period" is a reference to a "disqualification period." A plain reading of the Chief ALJ's Default Decision reveals that the Order issued by the Chief ALJ contains a period of disqualification.[8] Therefore, I reject Mr. Blackburn's assertion that my reference to the Chief ALJ's imposition of a "disqualification period," is error.

Fifth, Mr. Blackburn contends the Judicial Officer does not have authority to enter a final order imposing a sanction for a violation of the Horse Protection Act because no statute authorizes the Judicial Officer's appointment and the function the Judicial Officer performs can only be

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

[8] Id.

performed by a principal officer appointed by the President and confirmed by the Senate (Pet. to Reconsider at 4).

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 employee of the United States Department of Agriculture.[9] Pursuant to the authority to delegate regulatory functions, the Secretary of Agriculture established the position of "Judicial Officer"[10] 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.[11] 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.[12] Therefore, I reject Mr. Blackburn's 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.

Moreover, the Judicial Officer is not a principal officer that must be appointed by the President and confirmed by the Senate, as Mr. Blackburn contends. The Judicial Officer serves at the pleasure of the Secretary of Agriculture, who can remove the Judicial Officer at any time.

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[9] 7 U.S.C. §§ 450c-450g.

[10] 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)).

[11] 7 C.F.R. § 2.35(a)(2).

[12] Attach. 1.

Moreover, the Secretary of Agriculture can, at any time prior to issuance of a decision by the Judicial Officer, instruct the Judicial Officer regarding the disposition of the proceeding. Further still, beginning in August 2015, the Judicial Officer has been subject to a performance plan and appraisal by officers of the United States Department of Agriculture.

Sixth, Mr. Blackburn contends 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, is not accurate: "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." (Pet. to Reconsider at 9-10).

The record does not support Mr. Blackburn's contention that the Hearing Clerk's January 26, 2017 service letter is inaccurate. 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.[13] Moreover, the Complaint states that an answer must be filed with the Hearing Clerk in accordance 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.[14]

Seventh, Mr. Blackburn contends the Rules of Practice deny due process because they do not provide procedures which allow for consideration of late-filed answers and for setting aside default decisions (Pet. to Reconsider at 10-11).

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[13] 7 C.F.R. §§ 1.136(a), (c); .139.

[14] Compl. at the fourth unnumbered page.

The default provisions of the Rules of Practice have long been held to provide respondents due process.[15] Moreover, the United States Court of Appeals for Sixth Circuit has opined that "the sufficiency of the rules of practice or procedural safeguards which govern proceedings before the USDA under the Horse Protection Act's regulations" would not succeed.[16]

Eighth, Mr. Blackburn contends my reference in *Blackburn* (Decision as to Keith Blackburn), __ Agric. Dec. ___ (U.S.D.A. July 31, 2017), to warning letters issued to Mr. Blackburn by the Animal and Plant Health Inspection Service, United States Department of Agriculture [APHIS], regarding violations of the Horse Protection Act that APHIS officials believe Mr. Blackburn committed, is irrelevant. Mr. Blackburn contends the warning letters are "meaningless correspondence that is meant to confuse, intimidate and desensitize citizens, and prejudice" Mr. Blackburn. (Pet. to Reconsider at 13-14).

APHIS issued four warning letters to Mr. Blackburn during the period November 15, 2012, through July 14, 2016, regarding violations of the Horse Protection Act. The record does not contain any support for Mr. Blackburn's contention that APHIS issued these warning letters to confuse, intimidate, and desensitize citizens and to prejudice Mr. Blackburn. A presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the

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[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).

[16] Fleming v. U.S. Dep't of Agric., 713 F.2d 179, 183 n.8 (6th Cir. 1983).

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 confusing, intimidating, and desensitizing citizens or prejudicing Mr. Blackburn.[17]

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[17] 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 (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).

Moreover, I reject Mr. Blackburn's contention that the warning letters APHIS issued to him are irrelevant. I have long held that prior warnings are relevant to the sanction to be imposed.[18]

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 to reconsider.[19] Mr. Blackburn's Petition to Reconsider was timely filed and automatically stayed *Blackburn* (Decision as to Keith Blackburn), __ Agric. Dec. ___ (U.S.D.A. July 31, 2017). Therefore, since Mr. Blackburn's Petition to Reconsider is denied, I lift the automatic stay, and the Order in *Blackburn* (Decision as to Keith Blackburn), __ Agric. Dec. ___ (U.S.D.A. July 31, 2017), is reinstated.

For the foregoing reasons, the following Order is issued.

ORDER

Mr. Blackburn's Petition to Reconsider, filed August 10, 2017, is denied.

Done at Washington, DC

September 15, 2017

[redacted]

William G. Jenson
Judicial Officer

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[18] American Raisin Packers, Inc., 60 Agric. Dec. 165, 185 (U.S.D.A. 2001), *aff'd*, 221 F. Supp.2d 1209 (E.D. Cal. 2002), *aff'd*, 66 F. App'x 706 (9th Cir. 2003); Lawson, 57 Agric. Dec. 980, 1013 (U.S.D.A. 1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); Volpe Vito, Inc., 56 Agric. Dec. 166, 174 (U.S.D.A. 1997), *aff'd*, 172 F.3d 51 (Table), 1999 WL 16562 (6th Cir. 1999) (not to be cited as precedent under 6th Circuit Rule 206), *printed in* 58 Agric. Dec. 85 (1999); Hutto Stockyard, Inc., 48 Agric. Dec. 436, 488 (U.S.D.A. 1989), *aff'd in part, rev'd in part, vacated in part, and remanded*, 903 F.2d 299 (4th Cir. 1990), *reprinted in* 50 Agric. Dec. 1724 (1991), *final decision on remand*, 49 Agric. Dec. 1027 (U.S.D.A. 1990).

[19] 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 6th day of June 2017, in Washington, D.C.

[redacted]

SONNY PERDUE
Secretary

Attachment 1