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UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	HPA Docket No. 17-0119
	)	HPA Docket No. 17-0120
Beth Beasley, an individual;	)	HPA Docket No. 17-0121
Jarrett Bradley, an individual;	)	HPA Docket No. 17-0122
Jeffrey Page Bronnenberg, an individual;	)	HPA Docket No. 17-0123
Dr. Michael Coleman, an individual;	)	HPA Docket No. 17-0124
Joe Fleming, an individual doing	)	HPA Docket No. 17-0125
business as Joe Fleming Stables;	)	HPA Docket No. 17-0126
Shawn Fulton, an individual;	)	HPA Docket No. 17-0127
Jimmy Grant, an individual;	)	HPA Docket No. 17-0128
Justin Harris, an individual;	)	HPA Docket No. 17-0129
Amelia Haselden, an individual;	)	HPA Docket No. 17-0130
Sam Perkins, an individual;	)	HPA Docket No. 17-0131
Amanda Wright, an individual;	)	
G. Russell Wright, an individual;	)	
and Charles Yoder, an individual,	)	
	)	**Decision and Order As To**
Respondents	)	**Sam Perkins**

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 11, 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: (1) on August 25, 2016, Sam Perkins entered a horse

known as "Kentucky Line," while Kentucky Line was sore, for showing in class 26 in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B); and (2) on August 27, 2016, Mr. Perkins entered a horse known as "Prince at the Ritz," while Prince at the Ritz was sore, for showing in class 84B in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).[1]

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

On February 21, 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 February 21, 2017, Mr. Perkins filed a late-filed Answer of Respondents, and on March 6, 2017, Mr. Perkins filed Respondents' Opposition to Petitioner's Motion for Adoption of Decision and Order by Reason of Default [Opposition to the Motion for Default Decision]. Mr. Perkins included in the Opposition to the Motion for Default Decision a request that the case be dismissed or abated based upon Mr. Perkins' contention that no United States Department of Agriculture administrative law judge can preside over this proceeding because none has been appointed an officer of the United States, as required

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[1] Compl. ¶¶ 84-85 at 14.

[2] United States Postal Service domestic return receipt for article number [redacted] 4931.

by the Appointments Clause of the Constitution of the United States.[3] On March 10, 2017, the Administrator requested that the administrative law judge assigned to the proceeding certify the following question to the Judicial Officer:[4]

> Should the U.S. Department of Agriculture's Administrative Law Judges continue to preside over administrative proceedings before the Secretary of Agriculture unless and until such time as there is a final determination by the federal courts that they lack authority to do so?

Complainant's Motion to Certify Question to the Judicial Officer at 1.

On April 5, 2017, Chief Administrative Law Judge Bobbie J. McCartney [Chief ALJ] issued an Order Denying Respondents' Motion to Dismiss or Abate Proceedings and Complainant's Motion to Certify Question to the Judicial Officer. On April 11, 2017, in accordance with 7 C.F.R. § 1.139, the Chief ALJ filed a Default Decision and Order [Default Decision] in which the Chief ALJ: (1) concluded Mr. Perkins violated the Horse Protection Act, as alleged in the Complaint; (2) assessed Mr. Perkins a $4,400 civil penalty; and (3) disqualified Mr. Perkins for two years 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.[5]

On May 10, 2017, Mr. Perkins appealed the Chief ALJ's Default Decision to the Judicial Officer.[6] On June 30, 2017, the Administrator filed a response to Mr. Perkins' Appeal Petition,[7]

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[3] Opposition to the Mot. for Default Decision ¶¶ 21, 27 at 5-6.

[4] The Rules of Practice authorize administrative law judges to certify questions to the Judicial Officer (7 C.F.R. § 1.143(e)).

[5] Chief ALJ's Default Decision at the sixth unnumbered page.

[6] Respondent Sam Perkins Appeal Petition and Supporting Brief [Appeal Petition].

[7] Complainant's Response to Petitions for Appeal Filed by Jarrett Bradley, Shawn Fulton, and Sam Perkins.

and, on August 11, 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.

MR. PERKINS' APPEAL PETITION

Mr. Perkins raises fourteen issues in his Appeal Petition. First, Mr. Perkins contends this case must be dismissed because the Chief ALJ has not been appointed an inferior officer, as required by the Appointments Clause of the Constitution of the United States, and, therefore, is not authorized to adjudicate this proceeding (Appeal Pet. at 8-37).

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 provide for appeals of the initial decisions of administrative law judges[8] and the Horse Protection Act provides for judicial review of the decisions of the Secretary of Agriculture.[9] Based upon the provisions for judicial review in

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[8] 7 C.F.R. § 1.145(a).

[9] 15 U.S.C. § 1825(b)-(c).

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.[10] Moreover, Mr. Perkins cannot avoid or enjoin this administrative proceeding by raising constitutional issues.[11] As the United States Court of Appeals 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."). . . .

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[10] 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).

[11] 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).

> 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 Mr. Perkins' contention that this case must be dismissed because the Chief ALJ has not been appointed an inferior officer, as required by the Appointments Clause of the Constitution of the United States.

Second, Mr. Perkins contends the Judicial Officer is not lawfully appointed, as required by the Appointments Clause of the Constitution of the United States (Appeal Pet. at 37-66).

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.[12] Pursuant to the authority to delegate regulatory functions, the Secretary of Agriculture established the position of "Judicial Officer"[13] 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, including

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[12] 7 U.S.C. §§ 450c-450g.

[13] 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)).

proceedings instituted under the Horse Protection Act.[14] 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.[15] Therefore, I reject Mr. Perkins' contention that I have not been lawfully appointed an inferior officer to act as the deciding officer in adjudicatory proceedings under the Horse Protection Act.

Mr. Perkins further contends the Judicial Officer is a principal officer that must be appointed by the President and confirmed by the Senate because no principal officer in the United States Department of Agriculture supervises the Judicial Officer's exercise of decision making authority (Appeal Pet. at 47-54).

The Judicial Officer serves at the pleasure of the Secretary of Agriculture, who can remove the Judicial Officer at any time. 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 became subject to a performance plan. During the period August 2015 through May 2017, the Judicial Officer was subject to appraisal by the United States Department of Agriculture's Assistant Secretary for Administration and, since May 2017, by the Deputy Secretary of Agriculture. Therefore, I reject Mr. Perkins' contention that the Judicial Officer is a principal officer that must be appointed by the President and confirmed by the Senate because no principal officer in the United States Department of Agriculture supervises the Judicial Officer's exercise of decision making authority.

Third, Mr. Perkins asserts he was not provided with notice of this proceeding and an

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[14] 7 C.F.R. § 2.35(a)(2).

[15] Attach. 1.

opportunity for a hearing before the Secretary of Agriculture (Appeal Pet. at 66).

The record establishes that the Hearing Clerk served Mr. Perkins with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter on January 26, 2017.[16] The Complaint states 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. The Complaint and the Hearing Clerk's January 12, 2017 service letter also state that the Rules of Practice govern the proceeding and that Mr. Perkins has an opportunity for a hearing.[17] Moreover, the Rules of Practice, the Hearing Clerk's January 12, 2017 service letter, and the Complaint state that failure to file a timely answer to the Complaint shall be deemed an admission of the allegations in the Complaint and a waiver of hearing.[18] Therefore, I reject Mr. Perkins' assertion that he was not provided with notice of this proceeding and an opportunity for a hearing.

Fourth, Mr. Perkins contends the Chief ALJ's issuance of the Default Decision, based upon Mr. Perkins' failure to file a timely response to the Complaint, is an abuse of discretion, violates the Administrative Procedure Act, and is not in accord with the Horse Protection Act and United States Department of Agriculture practice (Appeal Pet. at 67).

The Hearing Clerk served Mr. Perkins with the Complaint on January 26, 2017.[19] The Rules of Practice provide that within twenty days after service of a complaint the respondent shall

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[16] See note 2.

[17] Compl. at 15; Hearing Clerk's January 12, 2017 service letter at 1.

[18] 7 C.F.R. §§ 1.136(c), .139; Compl. at 15; Hearing Clerk's January 12, 2017 service letter at 1.

[19] See note 2.

file an answer with the Hearing Clerk[20] and the failure to file a timely answer shall be deemed, for the purposes of the proceeding, an admission of the allegations in the complaint and a waiver of hearing.[21] Twenty days after the Hearing Clerk served Mr. Perkins with the Complaint was February 15, 2017. Mr. Perkins did not file the Answer of Respondents until February 21, 2017, six days after Mr. Perkins' answer was required to be filed with Hearing Clerk. Therefore, the Chief ALJ's issuance of the Default Decision comports with the Rules of Practice. Mr. Perkins does not cite, and I cannot locate, any provision of the Administrative Procedure Act or the Horse Protection Act or any United States Department of Agriculture practice that supports Mr. Perkins' contentions that the Chief ALJ's issuance of the Default Decision violates the Administrative Procedure Act and that the Chief ALJ's issuance of the Default Decision is not in accord with the Horse Protection Act and United States Department of Agriculture practice.

Fifth, citing the four-month period between Mr. Perkins' alleged violations of the Horse Protection Act and the date the Administrator issued the Complaint and the number of complaints filed by the Administrator in 2016 and 2017, Mr. Perkins questions the adequacy of the investigation that resulted in the Administrator's issuance of the Complaint and the Administrator's motivation for filing the Complaint (Appeal Pet. at 67-75).

A presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, I must presume the Administrator filed the Complaint in this proceeding based upon his belief that the investigation of Mr. Perkins' violations of the Horse Protection Act was properly conducted and the evidence supports the allegations in the

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[20] 7 C.F.R. § 1.136(a).

[21] 7 C.F.R. §§ 1.136(c), .139.

Complaint.[22]

Sixth, Mr. Perkins contends the Hearing Clerk failed to serve him with the Complaint because the Hearing Clerk sent the Complaint to Mr. Perkins' place of business rather than his residence (Appeal Pet. at 76-82).

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[22] 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).

Mr. Perkins raises the argument that the Hearing Clerk was required to serve him with the Complaint at his residence rather than his place of business for the first time on appeal to the Judicial Officer. This argument should have been raised before the Chief ALJ. New arguments cannot be raised for the first time on appeal to the Judicial Officer.[23] Therefore, I conclude Mr. Perkins has waived his argument regarding the Hearing Clerk's failure to serve him with the Complaint at his residence.

Even if I were to find that Mr. Perkins has not waived his argument that the Hearing Clerk was required to serve him with the Complaint at his residence, I would reject his argument. The Rules of Practice provide that a complaint shall be deemed to be received by a party to the proceeding on the date of delivery by certified mail to (1) the last known principal place of business of the party, (2) the last known principal place of business of the attorney or representative of record of the party, or (3) the last known residence of the party, if that party is an individual.[24] The Hearing Clerk served Mr. Perkins with the Complaint by certified mail at Mr. Perkins' last known principal place of business.[25] Mr. Perkins admits that Joe Fleming received the Complaint for him, but states Mr. Fleming "mistakenly" signed the United States Postal Service domestic return receipt attached to the envelope containing the Complaint.[26] Mr. Perkins' contention that Mr. Fleming mistakenly signed the United States Postal Service domestic return receipt is

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[23] Essary, 75 Agric. Dec. 204, 207 (U.S.D.A. 2016); ZooCats, Inc. (Order Den. Respondents' Pet. to Reconsider and Administrator's Pet. to Reconsider), 68 Agric. Dec. 1072, 1074 n.1 (U.S.D.A. 2009); Schmidt (Order Den. Pet. to Reconsider), 66 Agric. Dec. 596, 599 (U.S.D.A. 2007); Reinhart (Order Den. William J. Reinhart's Pet. for Recons.), 60 Agric. Dec. 241, 257 (U.S.D.A. 2001).

[24] 7 C.F.R. § 1.147(c)(1).

[25] See note 2.

[26] Opposition to the Mot. for Default Decision ¶ 7 at 2.

irrelevant because service is effective when a complaint is delivered to a party's last known principal place of business and someone signs for the complaint.[27]

Seventh, Mr. Perkins contends the Chief ALJ erroneously found that Mr. Perkins' "address appeared on entry forms that he signed for the three horses at issue in this case" (Appeal Pet. at 76).

The Chief ALJ states Mr. Perkins' "address appeared on the entry forms that he signed for the three horses at issue in this case."[28] With respect to Mr. Perkins, only two horses (Kentucky Line and Prince at the Ritz) are at issue in this proceeding.[29] Moreover, the Administrator states that Mr. Perkins' address appeared on a single entry form Mr. Perkins used to enter a horse in a horse show on September 1, 2016,[30] and I find no basis for the Chief ALJ's statement that Mr. Perkins' address appeared on entry "forms" that he signed for "three horses." Therefore, I find the Chief ALJ's statement that Mr. Perkins' address appeared on the entry forms that he signed for the three horses at issue in this case, is error. Despite this factual error, the Chief ALJ correctly concluded that Mr. Perkins entered only two horses (Kentucky Line and Prince at the Ritz), while Kentucky Line and Prince at the Ritz were sore, for showing in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).[31] Therefore, I conclude the Chief ALJ's statement is harmless error.

Eighth, Mr. Perkins contends the Chief ALJ erroneously failed to rule on Mr. Perkins'

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[27] McCulloch (Decision as to Phillip Trimble), 62 Agric. Dec. 83, 95 (U.S.D.A. 2003), *aff'd sub nom.* Trimble v. U.S. Dep't of Agric., 87 Fed. App'x 456 (6th Cir. 2003); Carter, 46 Agric. Dec. 207, 211 (U.S.D.A. 1987); Cuttone, 44 Agric. Dec. 1573, 1576 (U.S.D.A. 1985), *aff'd per curiam*, 804 F.2d 153 (D.C. Cir. 1986) (unpublished); Buzun, 43 Agric. Dec. 751, 754-56 (U.S.D.A. 1984).

[28] Chief ALJ's Default Decision at the second unnumbered page n.4.

[29] Compl. ¶¶ 84-85 at 14.

[30] Mot. for Default Decision at 1 n.3.

[31] Chief ALJ's Default Decision at the sixth unnumbered page (Conclusions of Law ¶¶ 2-3).

request for an extension of time to file an answer to the Complaint (Appeal Pet. at 82-84).

On February 21, 2017, Mr. Perkins filed a late-filed Answer of Respondents, which included a request for "additional time to answer the Complaint."[32] I find nothing in the record indicating that the Chief ALJ ruled on Mr. Perkins' motion to enlarge the time to respond to the Complaint. Nonetheless, I decline to remand this proceeding to the Chief ALJ for a ruling on Mr. Perkins' motion. Instead, I find the Chief ALJ's issuance of the April 11, 2017 Default Decision and failure to rule on Mr. Perkins' request for additional time to file an answer operate as an implicit denial of Mr. Perkins' motion to extend the time to respond to the Complaint.[33] Parenthetically, I note Mr. Perkins' motion for an extension of time to file a response to the Complaint was moot when he filed the motion because Mr. Perkins simultaneously filed the Answer of Respondents.

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[32] Answer of Respondents ¶ 11 at 3.

[33] See Esso Standard Oil Co. v. Lopez-Freytes, 522 F.3d 136, 144 (1st Cir. 2008) (stating general principles of administrative law provide that an agency's failure to act on a pending matter is treated as a denial of the relief sought); Hernandez v. Reno, 238 F.3d 50, 55 (1st Cir. 2001) (treating the Board of Immigration Appeal's failure to act on the petitioner's motion to reopen for more than three years as a denial of that motion); United States v. Stefan, 784 F.2d 1093, 1100 (11th Cir. 1986) (concluding the United States District Court for the Southern District of Florida's failure to rule on appellant's motion for mistrial constitutes an implicit denial of the motion), *cert. denied*, 479 U.S. 1009 (1986); Dabone v. Karn, 763 F.2d 593, 597 n.2 (3d Cir. 1985) (stating the Board of Immigration Appeal's failure to act within a reasonable time period on a motion to reopen constitutes effective denial of that motion); Toronto-Dominion Bank v. Central Nat'l Bank & Trust Co., 753 F.2d 66, 68 (8th Cir. 1985) (stating the failure to rule on a motion to intervene can be interpreted as an implicit denial of that motion); Agri-Sales, Inc., 73 Agric. Dec. 612, 621 (U.S.D.A. 2014) (stating the administrative law judge's issuance of a decision and order and failure to rule on the respondent's motion for an extension of time operate as an implicit denial of the respondent's motion for an extension of time), *appeal dismissed*, No. 14-3180 (7th Cir. Oct. 14, 2014); Greenly, 72 Agric. Dec. 586, 595-96 (U.S.D.A. 2013) (stating the administrative law judge's issuance of a decision and order and failure to rule on the complainant's motion for summary judgment operate as an implicit denial of the complainant's motion for summary judgment), *aff'd per curiam*, 576 Fed. App'x 649 (8th Cir. 2014).

Ninth, Mr. Perkins contends the Chief ALJ's Default Decision must be vacated because the Administrator failed to file a response to Mr. Perkins' Opposition to the Motion for Default Decision and the Chief ALJ failed to address the merits of Mr. Perkins' Opposition to the Motion for Default Decision (Appeal Pet. at 85-98).

The Rules of Practice do not require a complainant to file a response to a respondent's objections to a proposed default decision and motion for adoption of that proposed default decision.[34] Therefore, I reject Mr. Perkins' contention that the Chief ALJ's Default Decision must be vacated because the Administrator failed to file a response to Mr. Perkins' Opposition to the Motion for Default Decision.

Similarly, the Rules of Practice do not require the Chief ALJ to address the merits of Mr. Perkins' objections to the Administrator's Proposed Default Decision and Motion for Default Decision. The Rules of Practice provide, if the administrative law judge finds the respondent has filed meritorious objections to the complainant's motion for a default decision and proposed default decision, the administrative law judge shall deny the complainant's motion for a default decision with supporting reasons; however, if the administrative law judge finds the respondent has not filed meritorious objections to the complainant's motion for a default decision and proposed default decision, the administrative law judge is merely required to issue a decision without further procedure or hearing.[35] The Chief ALJ found Mr. Perkins' objections to the Administrator's Motion for Default Decision and Proposed Default Decision were not meritorious and, therefore, issued the April 11, 2017 Default Decision without further procedure or hearing, as required by the Rules of Practice.

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[34] See 7 C.F.R. § 1.139.

[35] Id.

Tenth, Mr. Perkins contends, even if he is deemed to have admitted the allegations of the Complaint, those allegations do not justify the sanctions imposed by the Chief ALJ (Appeal Pet. at 98-102).

The Administrator alleges that Mr. Perkins violated the Horse Protection Act and Mr. Perkins is deemed to have admitted that he violated the Horse Protection Act, as follows:

> 84. On August 25, 2016, Mr. Perkins entered a horse (Kentucky Line), while the horse was sore, for showing in class 26 in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(B)).
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> 85. On August 27, 2016, Mr. Perkins entered a horse (Prince at the Ritz), while the horse was sore, for showing in class 84B in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(B)).

Complaint ¶¶ 84-85 at 14. Therefore, Mr. Perkins is subject to the statutory penalties set forth in the Horse Protection Act and imposed by the Chief ALJ, namely, assessment of a civil penalty of up to $2,200 for each violation of the Horse Protection Act and disqualification 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 for not less than one year for each violation of the Horse Protection Act.[36]

Eleventh, Mr. Perkins contends the use of warning letters denies him due process (Appeal Pet. at 99-100).

The Administrator alleged and Mr. Perkins is deemed to have admitted that the Animal and Plant Health Inspection Service, United States Department of Agriculture [APHIS], issued fourteen warning letters to Mr. Perkins.[37] The Horse Protection Act specifically requires the Secretary of Agriculture, in assessing a civil penalty for a violation, to take into consideration all

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[36] 15 U.S.C. § 1825(b)-(c).

[37] Compl. ¶¶ 56-69 at 10-12.

factors relevant to such determination.[38] A respondent's receipt of a warning letter from APHIS is a factor that the Secretary of Agriculture may consider in determining the amount of a civil penalty. Warning letters are both relevant and admissible in Horse Protection Act cases (as well as in other administrative enforcement proceedings).[39] Warning letters show that APHIS notified a respondent of noncompliance with the Horse Protection Act. Warning letters are intended to insure future compliance.

Twelfth, Mr. Perkins contends the allegations in the Complaint are merely legal conclusions in the guise of allegations of fact that cannot be deemed to have been admitted by his failure to file a timely answer to the Complaint (Appeal Pet. at 101).

The formalities and technicalities of court pleading are not applicable in administrative proceedings.[40] A complaint in an administrative proceeding must reasonably apprise the litigant of the issues in controversy; a complaint is adequate and satisfies due process in the absence of a showing that some party was misled.[41] Therefore, in order to comply with the Administrative Procedure Act and the Rules of Practice, the complaint must include allegations of fact and provisions of law that constitute a basis for the proceeding, and, in order to comply with the Due

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[38] 15 U.S.C. § 1825(b)(1).

[39] See, e.g., 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 Fed. 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, 264 (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); Watlington, 52 Agric. Dec. 1172, 1185 (U.S.D.A. 1993).

[40] Wallace Corp. v. NLRB, 323 U.S. 248, 253 (1944); FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 142-44 (1940).

[41] NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 350-51 (1938); Hickey, Jr., 53 Agric. Dec. 1087, 1097 (U.S.D.A. 1994), *aff'd*, 878 F.2d 385 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); Petty, 43 Agric. Dec. 1406, 1434-35 (U.S.D.A. 1984), *aff'd*, No. 3-84-2200-R (N.D. Tex. June 5, 1986).

Process Clause of the Fifth Amendment to the Constitution of the United States, the complaint must apprise the respondent of the issues in controversy. The Complaint apprises Mr. Perkins of the issues in controversy and sets forth allegations of fact and provisions of law that constitute a basis for the proceeding.

Thirteenth, Mr. Perkins contends the Complaint does not provide him with sufficient notice to apprise him of the sanctions sought by the Administrator (Appeal Pet. at 101).

The Rules of Practice require that the complaint state briefly and clearly "the nature of the relief sought."[42] The Complaint does just that, namely, the Administrator requests issuance of "such order or orders with respect to sanctions…as are authorized by the Act (15 U.S.C. § 1825) and warranted under the circumstances."[43] The specific sanctions authorized by the Horse Protection Act are set forth in 15 U.S.C. § 1825. Therefore, I reject Mr. Perkins' contention that the Complaint does not provide him with sufficient notice to apprise him of the sanctions sought by the Administrator.

Fourteenth, Mr. Perkins contends the Chief ALJ lacked jurisdiction to assess a penalty of disqualification pursuant to the Horse Protection Act because there was no pleading or proof that Mr. Perkins had paid a fine assessed under 15 U.S.C. § 1825(b) or was subject to a final order issued by the Secretary of Agriculture assessing a penalty under 15 U.S.C. § 1825(b) (Appeal Pet. at 103-17).

The Horse Protection Act authorizes the Secretary of Agriculture to disqualify persons from "showing or exhibiting any horse, judging or managing any horse show, horse exhibition, or horse sale or auction for a period of not less than one year for the first violation and not less than

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[42] 7 C.F.R. § 1.135(a).

[43] Compl. at 15-16.

five years for any subsequent violation."[44] The Secretary of Agriculture is authorized to disqualify persons, as provided in the Horse Protection Act, whether or not the complaint "pleads" a prior violation of the Horse Protection Act.

DECISION

Statement of the Case

Mr. Perkins 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 a 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. Perkins are adopted as findings of fact. I issue this Decision and Order as to Sam Perkins pursuant to 7 C.F.R. § 1.139.

Findings of Fact

1. Mr. Perkins is an individual whose business mailing address is [redacted].

2. At all times material to this proceeding, Mr. Perkins was a "person" and an "exhibitor," as those terms are defined in the Regulations.

3. The nature and circumstances of Mr. Perkins' prohibited conduct are that Mr. Perkins entered two horses in a horse show, while the horses were "sore," as that term is defined in the Horse Protection Act and the Regulations. The extent and gravity of Mr. Perkins' prohibited conduct are great. Congress enacted the Horse Protection Act to end the practice of

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[44] 15 U.S.C. § 1825(c).

making gaited horses, including Tennessee Walking Horses, "sore" for the purpose of altering their natural gait to achieve a higher-stepping gait and to gain an unfair competitive advantage during performances at horse shows.[45]

4. Mr. Perkins is culpable for the violations 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.[46]

5. APHIS has issued fourteen warning letters to Mr. Perkins.

6. On October 2, 2014, APHIS issued an Official Warning (MS 140013) to Mr. Perkins with respect to his having entered a horse (Spooky Dollar) in a horse show on March 30, 2013, which horse APHIS found was sore.

7. On October 9, 2014, APHIS issued an Official Warning (TN 140104) to Mr. Perkins with respect to his having entered a horse (Inception) in a horse show on June 27, 2014, which horse APHIS found was sore.

8. On October 10, 2014, APHIS issued an Official Warning (FL 140188) to Mr. Perkins with respect to his having entered a horse (Threat on Parole) in a horse show on

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[45] "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).

[46] 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).

April 25, 2013, which horse APHIS found was sore.

9. On April 13, 2015, APHIS issued an Official Warning (TN 140111) to Mr. Perkins with respect to his having entered a horse (Cadillac's Bum) in a horse show on June 15, 2013, which horse APHIS found was sore.

10. On December 14, 2015, APHIS issued an Official Warning (TN 150022) to Mr. Perkins with respect to his having shown a horse (Escape from Alcatraz) in a horse show on August 24, 2014, which horse APHIS found was sore.

11. On December 14, 2015, APHIS issued an Official Warning (TN 150023) to Mr. Perkins with respect to his having entered a horse (A Super Bowl MVP) in a horse show on August 26, 2014, which horse APHIS found was sore.

12. On December 18, 2015, APHIS issued an Official Warning (TN 150172) to Mr. Perkins with respect to his having entered a horse (Cadillac's Bum) in a horse show on July 3, 2014, which horse APHIS found was sore and bearing a prohibited substance.

13. On December 18, 2015, APHIS issued an Official Warning (TN 150160) to Mr. Perkins with respect to his having shown a horse (The Sportster) in a horse show on August 23, 2014, which horse APHIS found was sore.

14. On December 18, 2015, APHIS issued an Official Warning (TN 150121) to Mr. Perkins with respect to his having entered a horse (Threat on Parole) in a horse show on August 22, 2014, which horse APHIS found was sore.

15. On December 18, 2015, APHIS issued an Official Warning (TN 150173) to Mr. Perkins with respect to his having entered a horse (Threat on Parole) in a horse show on July 4, 2014, which horse APHIS found was sore.

16. On April 11, 2016, APHIS issued an Official Warning (TN 160008) to Mr. Perkins

with respect to his having shown a horse (The American Patriot) in a horse show on August 30, 2015, which horse APHIS found was sore.

17. On April 11, 2016, APHIS issued an Official Warning (TN 160009) to Mr. Perkins with respect to his having shown a horse (Miss Empty Pockets) in a horse show on September 1, 2015, which horse APHIS found was sore.

18. On April 11, 2016, APHIS issued an Official Warning (TN 160010) to Mr. Perkins with respect to his having shown a horse (Sophisticated) in a horse show on September 1, 2015, which horse APHIS found was sore.

19. On April 12, 2016, APHIS issued an Official Warning (TN 160011) to Mr. Perkins with respect to his having shown a horse (I'm a Mastermind) 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 August 25, 2016, Mr. Perkins entered a horse known as "Kentucky Line," while Kentucky Line was sore, for showing in class 26 in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).

3. On August 27, 2016, Mr. Perkins entered a horse known as "Prince at the Ritz," while Prince at the Ritz was sore, for showing in class 84B in a horse show in Shelbyville, Tennessee, in violation of 15 U.S.C. § 1824(2)(B).

For the foregoing reasons, the following Order is issued.

ORDER

1. Mr. Perkins is assessed a $4,400 civil penalty. Mr. Perkins 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

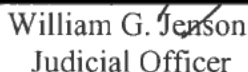
Mr. Perkins' civil penalty payment shall be forwarded to, and received by USDA, APHIS, MISCELLANEOUS, within sixty days after service of this Order on Mr. Perkins. Mr. Perkins shall indicate on the certified check or money order that the payment is in reference to HPA Docket No. 17-0128.

2. Mr. Perkins is disqualified for two years 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. Perkins shall become effective on the 60th day after service of this Order on Mr. Perkins.

RIGHT TO SEEK JUDICIAL REVIEW

Mr. Perkins has the right to seek judicial review of the Order in this Decision and Order as to Sam Perkins in the court of appeals of the United States for the circuit in which Mr. Perkins resides or has his place of business or in the United States Court of Appeals for the District of Columbia Circuit. Mr. Perkins must file a notice of appeal in such court within thirty 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.[47] The date of this Order is October 31, 2017.

Done at Washington, DC
October 31, 2017



William G. Jenson
Judicial Officer

[47] 15 U.S.C. § 1825(b)(2), (c).

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.

SONNY PERDUE
Secretary

Attachment 1