UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	
Harbert Alexander, an individual,	)	HPA Docket No. 17-0159
	)	
Respondent	)	

DEFAULT DECISION AND ORDER

Appearances:

Colleen A. Carroll, Esq., with the Office of the General Counsel, United States Department of Agriculture, 1400 Independence Avenue, SW, Washington D.C. 20250, for the Complainant, Animal and Plant Health Inspection Service [APHIS]; and

Robin L. Webb, Esq., of Grayson, KY, for the Respondent, Harbert Alexander.

Preliminary Statement

This proceeding was instituted under the Horse Protection Act (15 U.S.C. § 1821 *et seq.*) [Act or HPA] by a complaint filed by the Administrator of the Animal and Plant Health Inspection Service [Complainant] on January 12, 2017, alleging that Harbert Alexander [Respondent] violated the Act with respect to a horse: Always in Style, believed to be a seven-year-old mare registered as 20900514.

On January 18, 2017, the Office of the Hearing Clerk [OHC] sent Respondent a copy of the Complaint by certified mail. The addressed used by OHC is the same address that appears on the entry form used to register Always in Style in the relevant horse show. According to United States Postal Service records, the certified mailing was delivered to Respondent on January 27, 2017.

Pursuant to section 1.136(a) of the Rules of Practice, Respondent was required to file an answer to the Complaint no later than twenty days after service. 7 C.F.R. § 1.136(c). The

Complaint itself states that the "[f]ailure to file a timely answer shall constitute an admission of all the material allegations of this complaint." The twentieth day after service of the Complaint was February 16, 2017. Respondent did not file an answer by that date.[1]

On March 8, 2017, Complainant filed with the Hearing Clerk a "Motion for Adoption of Decision and Order as to Harbert Alexander by Reason of Default" [Motion for Default] and proposed "Decision and Order as to Harbert Alexander by Reason of Default" [Proposed Decision]. Complainant moved for adoption of a Decision and Order: (1) finding that Respondent had admitted the violations of the Act alleged in the Complaint; and (2) ordering Respondent to be assessed a civil penalty of $2,200 and to be disqualified for not less than one year from showing or exhibiting any horse in any horse show, horse exhibition, or horse sale, or auction and from judging or managing any horse show, horse exhibition, horse sale, or auction.

On March 20, 2017, Respondent, by and through counsel, filed an answer and a "Motion to Set Aside Default Judgment and Accept Late Answer"[2] [Response]. On March 28, 2017, Complainant filed a Reply to the Response.

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[1] United States Postal Service records reflect that Respondent received a copy of the Complaint on January 27, 2017. Respondent had twenty (20) days from the date of service to file a response. 7 C.F.R. § 1.136(a). Weekends and federal holidays shall be included in the count; however, if the due date falls on a Saturday, Sunday, or federal holiday, the last day for timely filing shall be the following work day. 7 C.F.R. §§ 1.147(g), (h). In this case, Respondent's answer was due by February 16, 2017 but was not filed until March 20, 2017. Failure to file a timely answer or failure to deny or otherwise respond to allegations in the Complaint shall be deemed, for purposes of this proceeding, an admission of the allegations in the Complaint, unless the parties have agreed to a consent decision. 7 C.F.R. § 1136(c). Regrettably, other than a consent decision, the Rules of Practice do not provide for exceptions to the regulatory consequences of an untimely filed answer.

[2] Although the motion was captioned as a request to set aside default judgment, there had been no default judgment entered against Respondent at the time of filing. Accordingly, Respondent's filing shall be treated as a Response in Opposition to Complainant's Motion for Default [Response].

Discussion

Respondent has failed to show good cause why Complainant's Motion for Default should not be granted. His Response simply provides: "Counsel was notified by Respondent that he had received a Default from the USDA, and same prompts this request to remedy the error and allow the continuation of proceedings." (Resp. at 1).[3]

Further, Respondent's Answer lacks the specificity required under the Rules of Practice in that it does not respond to all of the allegations contained in the Complaint.[4] The Answer does not mention, and contains no specific responses to, the allegations in paragraphs 11 through 21 of the Complaint. (Answer at 2).[5] These include the alleged violations of the Act, which are set forth in paragraphs 20 and 21 of the Complaint. (Compl. at ¶¶ 20, 21). The "certificate of service" in the Answer does not refer to Respondent Harbert Alexander but appears to reference another respondent in another case. (Answer at 5).

Respondent requests that "the Answer be accepted as error remedied." (Resp. at 1). This request must be denied as the Answer was filed fifty-two days late.[6]

The Rules of Practice are clear with regard to late-filed answers: "Within 20 days after the service of the complaint . . . the respondent shall file with the Hearing Clerk an answer signed by the respondent or the attorney of record in the proceeding." 7 C.F.R. § 1.136(a). Failure to answer

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[3] This portion of the Response appears to be based upon incorrect information; there had been no default decision entered against Respondent at the time of filing. *See supra* note 3.

[4] Pursuant to section 1.136 of the Rules of Practice, an answer shall "[c]learly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent."). 7 C.F.R. § 1.136(b).

[5] Specific answers end at paragraph 10.

[6] *See supra* note 1.

within twenty days of service of the complaint "shall be deemed, for purposes of the proceeding, an admission of the allegations in the Complaint, and failure to deny or otherwise respond to an allegation of the Complaint shall be deemed, for purposes of this proceeding, an admission of said allegation, unless the parties have agreed to a consent decision." 7 C.F.R. § 1.136(c). In this case, Respondent waited until March 20, 2017 to respond to a complaint that he received on January 27, 2017,[7] despite having been made aware of the ramifications of failing to file a timely answer by the Rules of Practice, Hearing Clerk's letter, [8] and the Complaint itself.[9]

In addition, the Response provides that Counsel "inadvertently and mistakenly" failed to include Respondent in an answer that had been filed in HPA Docket No. 17-0160.[10] It also asserts that Respondent "was intended to be included" in the aforementioned answer.[11] (Resp. at 1). However, that answer (HPA Docket No. 17-0160) [McCormick Answer] contains no indication whatsoever that it was also intended to be Respondent's answer. It refers to "respondent" in only the singular form—never in the plural. (McCormick Answer at 1-4). It cites *only* the docket number associated with Mr. Mickey McCormick, the respondent in that proceeding. (*Id.* at 1). The

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[7] *See supra* note 1.

[8] The Hearing Clerk's letter, which was sent to Respondent with the Complaint, reads: **"The rules specify that you have 20 days from the receipt of this letter to file with the Hearing Clerk your written Answer to the Complaint signed by you or your attorney of record**. . . . Failure to file a timely answer . . . may constitute an admission of those allegations and waive your right to an oral hearing." (Hearing Clerk's Letter at 1).

[9] The Complaint states: "Failure to file a timely answer shall constitute an admission of all the material allegations of this complaint." (Compl. at 5).

[10] "Counsel filed the co-respondent, companion case of 17-160[10], and the 17-159[10] number and Respondent's name inadvertently and mistakenly, left off the caption." (Resp. at 1).

[11] As "evidence" of intent, Counsel suggests that the aforementioned answer cites a "Letter of Warning referencing the Respondent, Alexander." (Resp. at 1). Although the answer (HPA Docket No. 17- 0160) does discuss the Letter of Warning, the answer does not mention Respondent by name or include a copy of the Letter of Warning for reference.

"certificate of service" of the McCormick Answer refers exclusively to Mr. McCormick.[12] (*Id.* at 5).

Further, that Respondent's Counsel might have intended to include Respondent in the McCormick Answer is immaterial. The Rules of Practice do not provide that a default decision may be set aside for excusable neglect.[13] Regrettably, other than a consent decision, the Rules of Practice do not provide for exceptions to the regulatory consequences of an untimely filed answer.

> . . . . Respondents state their failure to file a timely answer was not Respondents' fault and was due to mistake, inadvertence, or excusable neglect and was not deliberate or willful. Respondents, relying on the Federal Rules of Civil Procedure and a number of cases, contend the ALJ should have granted Respondents' Motion for Leave to File Late Answer to Complaint.
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> Respondent's reliance on the Federal Rules of Procedure is misplaced. . . . Moreover, unlike Rule 60(b) of the Federal Rules of Civil Procedure, the Rules of Practice do not provide that a default decision may be set aside for excusable neglect.

Mitchell, 60 Agric. Dec. 91, 122-24 (U.S.D.A. 2001) (citations omitted). Respondent's excusable-neglect argument is unavailing.

If Respondent disagrees with a Judge's decision or order to which he is a party, he may appeal to the Judicial Officer within the time period prescribed in the Rules of Practice.[14] Respondent should note, however, that the Judicial Officer has previously ruled on the present issue: "Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant does not object to setting aside the default decision, generally there is

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[12] "I, undersigned counsel for Mickey McCormick dba Mickey McCormick Stables, do hereby certify that a copy of the foregoing ANSWER was served to . . . ." (McCormick Answer at 5).

[13] Anna Mae Noel & The Chimp Farm, Inc., 58 Agric. Dec. 130, 148 (U.S.D.A. 1999).

[14] 7 C.F.R. § 1.145(a) ("Within 30 days after receiving service of the Judge's decision . . . a party who disagrees with the decision, any part of the decision, or any ruling by the Judge . . . may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk.").

no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer."[15]

Accordingly, the material facts alleged in the Complaint are deemed admitted by Respondent's failure to file a timely answer, and those material facts are adopted and set forth herein as Findings of Fact and Conclusions of Law. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Harbert Alexander is an individual with a mailing address in [redacted] At all times mentioned herein, Mr. Alexander was a "person" and an "exhibitor," as those terms are defined in the regulations issued pursuant to the Act (9 C.F.R. § 11.1 *et seq.*) [Regulations].
2. The nature and circumstances of the prohibited conduct alleged in the Complaint are that Mr. Alexander allowed the entry of a horse he owned in a horse show while the horse was "sore," as that term is defined in the Act and the Regulations. The extent and gravity of the prohibited conduct is great. Congress enacted the HPA 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.[16]

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[15] Knapp, 64 Agric. Dec. 253, 295 (U.S.D.A. 2005).

[16]

> 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, producing 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. 4870,4 871. 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

3. Respondent is culpable for the violations alleged in the Complaint. Owners of horses are absolute guarantors that those horses will not be sore within the meaning of the HPA when they are entered or shown.[17]

4. On December 22, 2015, APHIS issued an Official Warning (TN 150123) to Respondent with respect to his having allowed the entry of a horse (Generated by Folsom) in a horse show on August 25, 2014, which horse APHIS found was sore.

Conclusions of Law

1. The Secretary, USDA, has jurisdiction in this matter.

2. On or about August 26, 2016, Respondent Harbert Alexander allowed the entry of a horse he owned (Always in Style), while the horse was sore, for a showing in class 58 in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(D)).

ORDER

1. Respondent Harbert Alexander is assessed a $2,200 civil penalty, which shall be paid by certified check or money order, made payable to the "Treasurer of the United States," indicating that the payment is in reference to HPA Docket No. 17-0159, and sent to:

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

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necessary an 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).

[17] Carl Edwards & Sons Stables, 56 Agric. Dec. 529, 588-89 (U.S.D.A. 1997); Edwards, 55 Agric. Dec. 892, 979 (U.S.D.A. 1996).

2. Respondent Harbert Alexander is disqualified for one (1) 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.

This Decision and Order shall be final and effective without further proceedings thirty-five (35) days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties, with courtesy copies provided via email where available.

Done at Washington, D.C.,
this 4th day of May, 2017

[redacted]

Bobbie J. McCartney
Chief Administrative Law Judge

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CERTIFICATE OF SERVICE

Harbert Alexander, Respondent(s)
Docket: 17-0159

Having personal knowledge of the foregoing, I declare under penalty of perjury that the information herein is true and correct and this is to certify that a copy of the Default Decision and Order has been furnished and was served upon the following parties on May 4, 2017 by the following:

USDA (OGC) - Electronic Mail
Colleen Carroll
Ada Quick

USDA (HPA) - Electronic Mail
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Respondent: Electronic Mail
ROBIN L. WEBB, ESQUIRE
[redacted]

Respectfully Submitted,

[redacted]

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