UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	
Tony Lowe, an individual,	)	HPA Docket No. 17-0189
	)	
Respondent.	)	

DECISION AND ORDER WITHOUT HEARING BY REASON OF DEFAULT

Appearance:

John V. Rodriguez, Esq., with the Office of the General Counsel, United States Department of Agriculture, Washington, DC, for the Complainant, Animal and Plant Health Inspection Service ("APHIS").[1]

Preliminary Statement

This is a disciplinary proceeding under the Horse Protection Act, as amended (15 U.S.C. §§ 1821 *et seq.*) ("HPA" or "Act"); the regulations promulgated thereunder (9 C.F.R. §§ 11.1 through 11.4) ("Regulations"); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130 through 1.151) ("Rules of Practice"). The matter initiated with a complaint filed on February 1, 2017 by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture ("APHIS" or "Complainant"), against Tony Lowe ("Respondent") and others.[2]

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[1] Complainant was previously represented by Colleen A. Carroll, Esq., who filed the Motion for Default and Proposed Decision addressed herein; however, Ms. Carroll withdrew as attorney of record on September 3, 2019. Complainant is now represented by John V. Rodriguez, Esq. *See* Substitution of Attorney at 1.

[2] In addition to Mr. Lowe, the following respondents were named in the February 1, 2017 Complaint: Brandye Craig Mills, an individual (HPA Docket No. 17-0190); Beth Pippin, an individual (HPA Docket No. 17-0191); Gail Putman, and individual (HPA Docket No. 17-0192); Wayne Putman, an individual (HPA Docket No. 17-0193); and Timothy Lee Smith, an individual (HPA Docket No. 17-0194). Consent decisions were entered in all four dockets, which resolved the case as to those respondents.

The Complaint alleged, *inter alia*, that on or about August 27, 2016, Respondent allowed a horse he owned (A Major Tsunami) to be entered in a horse show while the horse was sore, in violation of the Act (15 U.S.C. § 1824(2)(D)).[3] The Complaint also requested that any "order or orders with respect to sanctions issued be as are authorized by the Act (15 U.S.C. § 1825) and warranted under the circumstances."[4] Respondent did not file an answer to the Complaint.

On May 16, 2019, Complainant filed an amended complaint re-alleging that Respondent[5] "violated the HPA with respect to a horse he owned"[6] and further stating Respondent "has the ability to pay the maximum civil penalty assessable under the HPA for the violation alleged in this amended complaint, and his ability to do business would not be affected by the assessment of civil penalties."[7] Complainant requested the same relief as in the original Complaint.[8]

Respondent was duly served with a copy of the Amended Complaint and did not file an answer within the twenty-day period prescribed by section 1.136 of the Rules of Practice (7 C.F.R. § 1.136).[9] On July 24, 2019, Complainant filed a proposed Decision and Order by Reason

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[3] *See* Complaint at 2 ¶ 7, 8 ¶ 37.

[4] *Id.* at 9-10.

[5] Mr. Lowe is the sole respondent named in the Amended Complaint.

[6] Amended Complaint at 1-2 ¶ 2.

[7] *Id.* at 2 ¶ 3.

[8] *See id.* at 3; *supra* note 4 and accompanying text.

[9] The Amended Complaint was sent via certified mail to both Respondent's business address and Respondent's last known residence. United States Postal Service records reflect that the certified mailing to Respondent's business was delivered on May 31, 2019, but the certified mailing to Respondent's last known residence was returned to the Hearing Clerk's Office as "unclaimed." In accordance with the Rules of Practice, the Hearing Clerk re-mailed (*see* 7 C.F.R. § 1.142) the Amended Complaint to Respondent's last known residence via ordinary mail on June 24, 2019. 7 C.F.R. § 1.147(c). Respondent had twenty 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(h). In this case, Respondent's answer was due on or

of Default ("Proposed Decision") and Motion for Adoption of Decision and Order by Reason of Default ("Motion for Default"). Respondent has not filed any objections thereto.[10]

Failure to file a timely answer or failure to deny or otherwise respond to allegations in the Amended Complaint shall be deemed, for purposes of this proceeding, an admission of the allegations in the Amended Complaint, unless the parties have agreed to a consent decision.[11] Other than a consent decision, the Rules of Practice do not provide for exceptions to the regulatory consequences of an unfiled answer where, as in the present case, no meritorious objections have been filed.[12]

As Respondent failed to answer the Amended Complaint, and upon Complainant's motion for the issuance of a decision without hearing by reason of default, this Decision and Order is issued without further procedure or hearing pursuant to section 1.139 of the Rules of

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before July 15, 2019. Respondent has not filed an answer in this matter.

[10] United States Postal Service records reflect that the Motion for Default and Proposed Decision were sent to Respondent's last known residence via certified mail but returned to the Hearing Clerk's Office "unclaimed." In accordance with the Rules of Practice, the Hearing Clerk re-mailed (*see* 7 C.F.R. § 1.142) the Motion for Default and Proposed Decision to the same address via ordinary mail on September 19, 2019. 7 C.F.R. § 1.147(c). Respondent had twenty days from the date of service to file objections thereto. 7 C.F.R. § 1.139. Weekends and federal holidays shall not 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(h). In this case, Respondent's objections were due by October 9, 2019. Respondent has not filed any objections.

[11] 7 C.F.R. § 1.136(c). In the Motion for Default, Complainant's former counsel states that Respondent telephoned her on June 27, 2019 to discuss resolution of the case and that "[t]he parties agreed to settlement terms." Motion at 2. "Following that call, complainant's counsel sent an email to the respondent confirming their settlement terms and enclosing a consent decision and order." *Id.* However, Respondent did not reply to that email, and Complainant's counsel never heard back from Respondent despite additional attempts to contact him via email and telephone. *Id.* "To date, respondent has not filed an answer to the amended complaint, returned the consent decision, or communicated with Complainant's counsel." *Id.*

[12] 7 C.F.R. § 1.139; *see supra* note 10.

Practice (7 C.F.R. § 1.139).

Findings of Fact

1. Respondent Tony Lowe, also known as Tony Allen Lowe, is an individual residing in (b) (6) and whose principal place of business is Top Notch Lawns, 895 Excelsior Drive, Montgomery, Alabama 36117-4542. At all times mentioned herein, Respondent 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.*).
2. The nature and circumstances of the prohibited conduct alleged in the Amended Complaint are that Respondent Tony Lowe allowed 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 are great. The Amended Complaint alleges that Respondent Tony Lowe violated the HPA with respect to a horse he owned. 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 performance at horse shows.[13] Respondent Tony Lowe is culpable for the violation alleged in the Amended Complaint. Owners of horses are

[13] "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 two-fold. 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." *Elliott v. U.S. Dep't of Agric.*, 990 F.2d 140, 144-45 (4th Cir. 1993) (citation omitted), *cert. denied*, 510 U.S. 867 (1993) (citing *Thornton v. U.S. Dep't of Agric.*, 715 F.2d 1508, 1511 (11th Cir. 1983)).

absolute guarantors that those horses will not be sore within the meaning of the HPA wen they are entered or shown.[14]

3. Respondent Tony Lowe has the ability to pay the maximum civil penalty assessable under the HPA for one violation, and his ability to continue to do business would not be affected by the assessment of civil penalties.

Conclusions

1. The Secretary of Agriculture has jurisdiction in this matter.
2. On or about August 27, 2016, Respondent Tony Lowe allowed the entry of a horse he owned (A Major Tsunami), while the horse was sore, for showing in class 82 in a horse show in Shelbyville, Tennessee, in violation of the Act (15 U.S.C. § 1824(2)(D)).

ORDER

1. Complainant's Motion for Decision Without Hearing by Reason of Default is GRANTED.
2. Respondent Tony Lowe is assessed a civil penalty of $2,200.00 (two-thousand and two-hundred dollars), which shall be paid by certified check or money order, made payable to the "Treasurer of the United States," indicating that payment is in reference to HPA Docket No. 17-0189, and sent to:

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

3. Respondent Tony Lowe 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

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[14] *Edwards*, 55 Agric. Dec. 892, 979 (U.S.D.A. 1996); *see also Carl Edwards & Sons Stables*, 56 Agric. Dec. 529, 589-90 (U.S.D.A. 1997), *aff'd per curiam*, 138 F.3d 958 (11th Cir. 1998); *Stamper*, 42 Agric. Dec. 20, 28 (U.S.D.A. 1983), *aff'd*, 722 F.2d 1483 (9th Cir. 1985); *Thornton*, 41 Agric. Dec. 870, 888 (U.S.D.A. 1982), *aff'd*, 715 F.2d 1508 (11th Cir. 1983).

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 provisions of this Order shall be effective on the first day after this Decision becomes final. This Decision shall be final 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, as provided in sections 1.139 and 1.145 of the Rules of Practice (7 C.F.R. §§ 1.139 and 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 17th day of October 2019

[redacted]

Channing D. Strother
Chief Administrative Law Judge

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