UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	
AMY BLACKBURN, an individual;	)	HPA Docket No. 17-0093
KEITH BLACKBURN, an individual; and	)	**HPA Docket No. 17-0094**
AL MORGAN, an individual,	)	HPA Docket No. 17-0095
	)	
Respondents	)	

DEFAULT DECISION AND ORDER DENYING MOTION TO ACCEPT LATE ANSWER OF RESPONDENT KEITH BLACKBURN

Appearances:

Colleen A. Carroll, Esq., and Tracy M. McGowan, 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 Respondents, Amy Blackburn, Keith Blackburn, and Al Morgan.

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 on January 10, 2017, by the Administrator of the Animal and Plant Health Inspection Service [APHIS or Complainant], alleging that Keith Blackburn [Respondent] violated the Act with respect to a horse: Mastercard of Jazz, believed to be a seven-year-old gelding registered as 20900005.

On January 26, 2017, the Office of the Hearing Clerk [OHC] sent Respondent a copy of the Complaint by certified mail.[1] According to U.S. Postal Service records, the certified mailing was delivered on February 2, 2017.

Respondent was required to file an answer to the Complaint no later than twenty days after service.[2] The twentieth day after service of the Complaint on Respondent was February 22, 2017. Respondent did not file an answer to the Complaint on or before that date; rather, he filed his Answer on March 1, 2017.[3]

On February 24, 2017, Complainant filed a "Motion for Decision and Order by Reason of Default" [Motion for Default] and "Proposed Decision and Order by Reason of Default" [Proposed Decision]. Respondent did not file any objections thereto.[4]

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[1] Respondent's address appeared on the entry form used to enter Mastercard of Jazz in class 58 at the horse show.

[2] "7 C.F.R. §§ 1.136(c) and 1.139 clearly describe the consequences of failing to answer a complaint in a timely fashion. These sections provide for default judgments to be entered. They specifically provide for admissions absent an answer. *See* 7 C.F.R. § 1.136(c) ('Failure to file an answer within the time provided ... shall be deemed ... an admission of the allegations in the complaint....'). Furthermore, the failure to answer constitutes a waiver of the right to a hearing. 7 C.F.R. § 1.139." Morrow v. Dep't of Agric., 65 F.3d 168 (6th Cir. 1995).

[3] U.S. Postal Service records reflect that the Complaint was sent via certified mail and delivered to Respondent on February 2, 2017. Respondent had twenty (20) days from the date of service to file a response. 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 22, 2017 but was not filed until March 1, 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. § 1.136(c). Regrettably, other than a consent decision, the Rules of Practice and Procedure do not provide for exceptions to the regulatory consequences of an untimely filed answer.

[4] The Hearing Clerk's records reflect that the Motion for Default and Proposed Decision were sent to Respondent's Counsel via email on March 2, 2017. Respondent had twenty (20) days from the date of service to file objections to Complainant's Motion. 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

On March 20, 2017, Respondent, by and through counsel, filed a "Motion to Accept Late Answer of Respondent" [Motion to Accept Late Answer]. The Motion provided that Respondent's Counsel had "electronically sent" Respondent's Answer on February 12, 2017, but that "Counsel was not aware that the answer in 17-0094 was returned to the computer as undeliverable until the email confirming receipt from the USDA on the 24th day of February, 2017." (Mot. to Accept Late Answer at 1).

Respondent's Motion must be denied, as the time period for filing an answer expired seven days prior.[5] As previously discussed herein, 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 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. § 1.136(c).

In this case, Respondent filed his Answer late despite having been made aware of the consequences of failure to file a timely answer by the Rules of Practice, Hearing Clerk's letter,[6]

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last day for timely filing shall be the following work day. 7 C.F.R. §§ 1.147(g), (h). In this case, Respondent's objections were due by March 22, 2017. Respondent did not file any objections by that date.

[5] *See supra* note 3. The Motion to Accept Late Answer was filed on March 20, 2017. Respondents' Answer was due on February 22, 2017.

[6] The Hearing Clerk's letter, which was sent to Respondents 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).

and the Complaint itself.[7] The Rules of Practice do not provide that a default decision may be set aside for excusable neglect.[8] It is immaterial that Respondent's Counsel was "not aware" that the Answer was returned undeliverable. (Mot. to Accept Late Answer at 1). Regrettably, other than a consent decision, the Rules of Practice do not provide for exceptions to the regulatory consequences of an untimely filed answer. "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 no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer."[9]

Accordingly, the material facts alleged in the Complaint are all 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. Respondent Keith Blackburn is an individual whose business mailing address is 477 Oakland Road, Rutledge, Tennessee 37861. At all times mentioned herein, Respondent

[7] The Complaint states: "Failure to file a timely answer shall constitute an admission of all the material allegations of this Complaint." (Compl. at 4).

[8] Anna Mae Noel & The Chimp Farm, Inc., 58 Agric. Dec. 130, 148 (U.S.D.A. 1999); *see also* Mitchell, 60 Agric. Dec. 91, 122-24 (U.S.D.A. 2001) ("Respondents state that 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. Respondents' reliance on the Federal Rules of Civil Procedure is misplaced. . . . the Rules of Practice do not provide that a default decision may be set aside for excusable neglect.").

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

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 are that Respondent entered a horse 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.[10] Respondent is culpable for the violation herein. Exhibitors of horses are absolute guarantors that those horses will not be sore within the meaning of the HPA when they are entered or shown.[11]

3. APHIS has issued multiple warning letters to Respondent. On November 15, 2012, APHIS issued an Official Warning (TN 130051) with respect to the showing of a horse (The Sportster) in a horse show on August 24, 2012, which horse APHIS found was sore. On June 18, 2013, APHIS issued an Official Warning (KY 10064) with respect to the showing

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[10] "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, 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 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).

[11] 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).

of a horse (Unreal) in a horse show on April 23, 2010, which horse APHIS found was sore. On February 3, 2015, APHIS issued an Official Warning (TN 130448) with respect to the showing of a horse (Lady Antebellum) in a horse show on June 21, 2013, which horse APHIS found was bearing prohibited equipment (metal plates). On July 14, 2016, APHIS issued an Official Warning (TN 160113) with respect to the entry of a horse (John Gruden) in a horse show on September 2, 2015, which horse APHIS found was sore.

Conclusions of Law

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

ORDER

1. The Motion to Accept Late Answer of Respondent is hereby **DENIED**.

2. Respondent is assessed a $2,200 civil penalty to be paid by check or money order, made payable to USDA/APHIS, indicating that the payment is in reference to HPA Docket No. 17-0094, and sent to:

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

3. Respondent 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 30th day of May, 2017

[redacted]

Bobbie J. McCartney
Chief Administrative Law Judge

Hearing Clerk's Office
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