

PLANT QUARANTINE ACT

In re: CYNTHIA TWUM BOAFO.
P.Q. Docket No. 00-0014.
Decision and Order filed February 21, 2001.

**Default – Failure to file timely answer – Beef – Avocados – Yams – Settlement – Ability to pay
– Civil penalty – Sanction policy.**

The Judicial Officer affirmed the Default Decision issued by Chief Administrative Law Judge James W. Hunt (Chief ALJ): (1) concluding that Respondent imported 8 pounds of beef from Ghana into the United States in violation of 9 C.F.R. § 94.1; (2) concluding that Respondent imported 20 pounds of yams from Ghana into the United States in violation of 7 C.F.R. § 319.56-2; (3) concluding that Respondent imported 5 pounds of avocados from Ghana into the United States in violation of 7 C.F.R. § 319.56-2; and (4) assessing Respondent a \$250 civil penalty. The Judicial Officer rejected Respondent's contention that she had settled the proceeding with the payment of \$50 and held that Respondent failed to prove, by producing documents, that she was not able to pay the \$250 civil penalty. The Judicial Officer rejected Respondent's assertion that her violations occurred on or about January 6, 2000. The Judicial Officer stated that, under the Rules of Practice (7 C.F.R. § 1.136(c)), Respondent's failure to file a timely answer is deemed an admission, for the purposes of the proceeding, that her violations occurred on or about February 29, 2000, as alleged in the complaint.

James D. Holt, for Complainant.
Respondent, Pro se.
Initial decision issued by James W. Hunt, Chief Administrative Law Judge.
Decision and Order issued by William G. Jenson, Judicial Officer.

Procedural History

The Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on July 7, 2000. Complainant instituted this proceeding under the Act of February 2, 1903, as amended [hereinafter the Act of February 2, 1903] (21 U.S.C. § 111); the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-154, 156-164a, 167) [hereinafter the Plant Quarantine Act]; the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) [hereinafter the Federal Plant Pest Act]; regulations issued under the Act of February 2, 1903, the Plant Quarantine Act, and the Federal Plant Pest Act (7 C.F.R. § 319.56-2 and 9 C.F.R. § 94.1); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-151) [hereinafter the Rules of Practice].¹

¹ Section 438(a) of the Plant Protection Act, enacted June 20, 2000, repealed the Plant Quarantine Act and the Federal Plant Pest Act. However, section 438(c) of the Plant Protection Act states

Complainant alleges that: (1) on or about February 29, 2000, at John F. Kennedy International Airport, Jamaica, New York, Cynthia Twum Bofo [hereinafter Respondent] imported approximately 8 pounds of beef from Ghana into the United States in violation of 9 C.F.R. § 94.1 because the importation of fresh, chilled, or frozen beef from Ghana, a country where rinderpest or foot-and-mouth disease exists, is prohibited; (2) on or about February 29, 2000, at John F. Kennedy International Airport, Jamaica, New York, Respondent imported approximately 20 pounds of yams from Ghana into the United States without a permit in violation of 7 C.F.R. § 319.56-2 because the importation of yams without a permit is prohibited; and (3) on or about February 29, 2000, at John F. Kennedy International Airport, Jamaica, New York, Respondent imported approximately 5 pounds of avocados from Ghana into the United States without a permit in violation of 7 C.F.R. § 319.56-2 because the importation of avocados without a permit is prohibited (Compl. ¶¶ II-IV).

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and a service letter on August 3, 2000.² Respondent failed to file an answer to the Complaint within 20 days after service of the Complaint, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). The Hearing Clerk sent Respondent a letter, dated October 27, 2000, stating that an answer to the Complaint had not been filed within the allotted time.

On December 12, 2000, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Motion for Adoption of Proposed Decision and Order and a proposed Decision and Order. The Hearing Clerk sent Respondent a copy of Complainant's Motion for Adoption of Proposed Decision and Order and a service letter, dated December 13, 2000. The Hearing Clerk's service letter states Respondent has 20 days from the date of the service letter to file objections to Complainant's Motion for Adoption of Proposed Decision and Order. Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Decision and Order within 20 days from the date of the Hearing Clerk's December 13, 2000, service letter. The Hearing Clerk sent Respondent a letter, dated January 10, 2001, stating that objections to Complainant's Motion for Adoption of Proposed Decision and Order had not been filed within the allotted time and that the record was being referred to an administrative law judge for consideration of a decision.

On January 11, 2001, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Chief Administrative Law Judge James W. Hunt [hereinafter

“[r]egulations issued under the authority of a provision of law repealed by subsection (a) shall remain in effect until such time as the Secretary [of Agriculture] issues a regulation under section 434 that supercedes the earlier regulation.”

² See August 3, 2000, Memorandum to the File from Regina Paris, Hearing Clerk's Office.

the Chief ALJ] issued a Decision and Order [hereinafter Initial Decision and Order]: (1) finding that on February 29, 2000, at John F. Kennedy International Airport, Jamaica, New York, Respondent imported 8 pounds of beef from Ghana into the United States; (2) finding that on February 29, 2000, at John F. Kennedy International Airport, Jamaica, New York, Respondent imported 20 pounds of yams from Ghana into the United States without a permit; (3) finding that on February 29, 2000, at John F. Kennedy International Airport, Jamaica, New York, Respondent imported 5 pounds of avocados from Ghana into the United States without a permit; (4) concluding that Respondent violated the Act of February 2, 1903, the Plant Quarantine Act, the Federal Plant Pest Act, 7 C.F.R. § 319.56-2, and 9 C.F.R. § 94.1; and (5) assessing Respondent a \$250 civil penalty (Initial Decision and Order at 2-5).

On January 29, 2001, Respondent appealed to the Judicial Officer. On February 14, 2001, Complainant filed Complainant's Response to Respondent's Appeal. On February 15, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for a decision.

Based upon a careful consideration of the record, I agree with the Chief ALJ's Initial Decision and Order. Therefore, pursuant to section 1.145(i) of the Rules of Practice (7 C.F.R. § 1.145(i)), I adopt with minor modifications the Initial Decision and Order as the final Decision and Order. Additional conclusions by the Judicial Officer follow the Chief ALJ's discussion, as restated.

**CHIEF ADMINISTRATIVE LAW JUDGE'S
INITIAL DECISION AND ORDER
(AS RESTATED)**

Respondent failed to file an answer within the time prescribed in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)). Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that the failure to file an answer within the time provided under 7 C.F.R. § 1.136(a) shall be deemed an admission of the allegations in the complaint. Further, the failure to file an answer constitutes a waiver of hearing (7 C.F.R. § 1.139). Accordingly, the material allegations in the Complaint are adopted as Findings of Fact, and 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's mailing address is 14 I Blue Hill Commons, Orangeburg, New York 10962.
2. On or about February 29, 2000, at John F. Kennedy International Airport, Jamaica, New York, Respondent imported 8 pounds of beef from

Ghana into the United States.

3. On or about February 29, 2000, at John F. Kennedy International Airport, Jamaica, New York, Respondent imported 20 pounds of yams from Ghana into the United States without a permit.

4. On or about February 29, 2000, at John F. Kennedy International Airport, Jamaica, New York, Respondent imported 5 pounds of avocados from Ghana into the United States without a permit.

Conclusions of Law

By reason of the facts contained in the Findings of Fact, I conclude Respondent violated the Act of February 2, 1903, the Plant Quarantine Act, the Federal Plant Pest Act, 7 C.F.R. § 319.56-2, and 9 C.F.R. § 94.1.

Discussion

The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County, Inc.* (Decision as to James Joseph Hickey and Shannon Hansen), 50 Agric. Dec. 476, 497 (1991), *aff'd*, 991 F.2d 803, 1993 WL 128889 (9th Cir. 1993) (not to be cited as precedent under 9th Circuit Rule 36-3):

[T]he sanction in each case will be determined by examining the nature of the violations in relation to the remedial purposes of the regulatory statute involved, along with all relevant circumstances, always giving appropriate weight to the recommendations of the administrative officials charged with the responsibility for achieving the congressional purpose.

The success of the programs designed to protect United States agriculture by the prevention, control, and eradication of animal diseases and plant pests is dependent upon the compliance of individuals, such as Respondent, with laws and regulations designed to prevent the introduction of animal diseases and plant pests into the United States. A failure to comply with these laws and regulations greatly increases the risk of the introduction of animal diseases and plant pests into the United States and the spread of animal diseases and plant pests within the United States. The imposition of sanctions in cases, such as this case, is extremely important to the prevention of the introduction and spread of animal diseases and plant pests. Sanctions must be sufficiently substantial to deter the violator and other potential violators from future violations of the laws and regulations designed to prevent the introduction and spread of animal diseases and plant pests.

A single violation of the Act of February 2, 1903, the Plant Quarantine Act, or the Federal Plant Pest Act could cause losses of billions of dollars and

eradication expenses of tens of millions of dollars. These circumstances suggest the need for a severe sanction to serve as an effective deterrent to future violations. The maximum civil penalty that could be assessed against Respondent for her three violations of the Act of February 2, 1903, the Plant Quarantine Act, and the Federal Plant Pest Act is \$3,000. (See 7 U.S.C. §§ 150gg(b), 163; 21 U.S.C. § 122.)

Complainant believes the assessment of a \$250 civil penalty against Respondent will deter Respondent and other potential violators from future violations of the Act of February 2, 1903, the Plant Quarantine Act, the Federal Plant Pest Act, 7 C.F.R. § 319.56-2, and 9 C.F.R. § 94.1 (Complainant's Motion for Adoption of Proposed Decision and Order at 3). Complainant's recommendation as to the appropriate sanction is entitled to great weight in view of the experience gained by Complainant during Complainant's day-to-day supervision of the regulated industry. Civil penalties imposed by the Secretary of Agriculture for violations of laws designed to prevent the introduction and spread of animal diseases and plant pests must be sufficiently large to serve as an effective deterrent not only to the violator, but also to other potential violators.³ Furthermore, if the violator cannot pay the assessed civil penalty, arrangements can be made to allow the violator to pay the civil penalty over a period of time.⁴

In order to achieve the congressional purpose of the Act of February 2, 1903, the Plant Quarantine Act, and the Federal Plant Pest Act and to prevent the introduction and spread of animal diseases and plant pests, violators are held responsible for any violation irrespective of their lack of evil motive or intent to violate the Act of February 2, 1903, the Plant Quarantine Act, and the Federal Plant Pest Act.⁵

I find the assessment of a \$250 civil penalty against Respondent for her violations of the Act of February 2, 1903, the Plant Quarantine Act, the Federal Plant Pest Act, 7 C.F.R. § 319.56-2, and 9 C.F.R. § 94.1 warranted in law, justified by the facts, and consistent with the United States Department of Agriculture's sanction policy.

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

³ *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613, 629 (1988).

⁴ *In re Shulamis Kaplinsky*, 47 Agric. Dec. 613, 633 (1988).

⁵ *In re Mercedes Capistrano*, 45 Agric. Dec. 2196, 2198 (1986); *In re Rene Vallalta*, 45 Agric. Dec. 1421, 1423 (1986).

Respondent raises three issues in Respondent's note to the Hearing Clerk [hereinafter Appeal Petition]. First, Respondent contends she already paid a \$50 fine for her violations. As proof of payment, Respondent includes, as part of her Appeal Petition, a copy of a United States Postal Service Customer's Receipt for a \$50 money order issued on November 16, 2000, payable to the United States Department of Agriculture. The United States Postal Service Customer's Receipt indicates that the money order is from Respondent and used for P.Q. Docket No. 00-0014. (Appeal Pet.)

Complainant asserts that, prior to filing the Complaint, Complainant made three offers to Respondent to settle the alleged violations, which are the subject of this proceeding, for \$50. Complainant admits that Complainant is now in possession of a \$50 United States Postal Service money order sent by Respondent in connection with this proceeding.⁶ However, Complainant asserts that, in Complainant's third and last offer to settle the alleged violations prior to Complainant's filing the Complaint, Complainant notified Respondent that if Respondent failed to pay \$50 by April 28, 2000, Complainant would seek higher civil or criminal penalties. (Complainant's Response to Respondent's Appeal at 1-3.)

I find that Complainant's settlement offer terminated on April 29, 2000, by the lapse of time specified in Complainant's settlement offer. The United States Postal Service Customer's Receipt for the \$50 money order indicates that the United States Postal Service issued the money order on November 16, 2000, more than 6 months after Complainant's offer to settle the proceeding for \$50 had terminated. An attempted acceptance of a settlement offer after the offer terminates has no effect. Therefore, I find that, while Respondent did send Complainant a \$50 United States Postal Service money order in an effort to accept Complainant's settlement offer and Complainant received the money order, Complainant's receipt of the money order after April 28, 2000, did not operate as Respondent's acceptance of Complainant's offer to settle the alleged violations, which are the subject of this proceeding. Thus, Respondent's payment of \$50 to Complainant has no effect on this proceeding.

Complainant also asserts that, in a letter to Respondent, dated July 18, 2000, after Complainant filed the Complaint, Complainant offered to dispose of this proceeding by the entry of a consent decision in accordance with section 1.138 of the Rules of Practice (7 C.F.R. § 1.138). Complainant asserts that

⁶ Complainant does not state when Complainant acquired possession of the \$50 money order. Complainant asserts the Hearing Clerk received the \$50 money order on November 27, 2000 (Complainant's Response to Respondent's Appeal at 1). Complainant also asserts Respondent mailed the \$50 money order on January 23, 2001 (Complainant's Response to Respondent's Appeal at 3). Complainant fails to explain how the Hearing Clerk received the money order before Respondent mailed the money order.

Respondent never accepted the offer to agree to the entry of a consent decision. (Complainant's Response to Respondent's Appeal at 2 n.2.) The record establishes that no consent decision has been entered.

Second, Respondent states the dates of the violations alleged in the Complaint are not correct. Respondent indicates that her violations could not have occurred on February 29, 2000, as alleged in the Complaint, because she "traveled on January 5th." (Appeal Pet.) Complainant agrees with Respondent. Complainant asserts that Respondent incorrectly alleged and the Chief ALJ incorrectly found that Respondent's violations occurred on February 29, 2000. Instead, Complainant asserts that a review of the investigative file reveals that Respondent's violations occurred on January 6, 2000. (Complainant's Response to Respondent's Appeal at 2.)

Section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)) provides that failure to file a timely answer shall be deemed, for purposes of the proceeding, an admission of the allegations in the complaint. Therefore, Respondent is deemed, for the purposes of this proceeding, to have admitted that Respondent's violations occurred on or about February 29, 2000. Even if I found that Respondent's violations occurred on or about January 6, 2000, that finding would not change the disposition of this proceeding or the amount of the civil penalty which I assess against Respondent.

Third, Respondent contends that she is not able to pay a \$250 civil penalty (Appeal Pet.).

A violator's inability to pay a civil penalty is a mitigating circumstance to be considered for the purpose of determining the amount of the civil penalty to be assessed in animal quarantine cases and plant quarantine cases.⁷ However, the burden is on the respondents in animal quarantine cases and plant quarantine cases

to prove, by producing documentation, the lack of ability to pay the civil penalty.⁸ Respondent has failed to produce any documentation supporting her assertion that she lacks the ability to pay a \$250 civil penalty. Respondent's undocumented assertion that she lacks the ability to pay a \$250 civil penalty falls far short of the proof necessary to establish an inability to pay the civil

⁷ *In re Jerry Lynn Stokes*, 57 Agric. Dec. 914, 919 (1998); *In re Garland E. Samuel*, 57 Agric. Dec. 905, 912-13 (1998); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1324-25 (1993); *In re Robert L. Heywood*, 52 Agric. Dec. 1315, 1321-22 (1993) (Decision and Order and Remand Order).

⁸ *In re Jerry Lynn Stokes*, 57 Agric. Dec. 914, 919 (1998); *In re Garland E. Samuel*, 57 Agric. Dec. 905, 913 (1998); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1324-25 (1993); *In re Robert L. Heywood*, 52 Agric. Dec. 1315, 1321-22 (1993) (Decision and Order and Remand Order).

penalty.⁹ Nonetheless, in view of Respondent's assertion regarding her inability to pay a \$250 civil penalty, I am providing for payment of the civil penalty over a period of time.

For the foregoing reasons, the following Order should be issued.

ORDER

Respondent is assessed a \$250 civil penalty. The civil penalty shall be paid by certified checks or money orders, made payable to the Treasurer of the United States, and sent to:

United States Department of Agriculture
APHIS Field Servicing Office
Accounting Section
P.O. Box 3334
Minneapolis, Minnesota 55403

Respondent shall make payments of \$50 each month for 5 consecutive months. Respondent's initial payment of \$50 shall be sent to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 60 days after service of this Order on Respondent. If Respondent is late in making any payment or misses any payment, then all remaining payments

become immediately due and payable in full. Respondent shall state on each certified check or money order that payment is in reference to P.Q. Docket No. 00-0014.

⁹ See *In re Jerry Lynn Stokes*, 57 Agric. Dec. 914, 919-20 (1998) (holding that undocumented assertions by the respondent that he was unable to pay the civil penalty falls far short of the proof necessary to establish inability to pay); *In re Garland E. Samuel*, 57 Agric. Dec. 905, 913 (1998) (holding that undocumented assertions by the respondent that he was unable to pay the civil penalty falls far short of the proof necessary to establish inability to pay); *In re Barry Glick*, 55 Agric. Dec. 275, 283 (1996) (holding that undocumented assertions by the respondent that he lacked the assets to pay the civil penalty are not sufficient to prove inability to pay the civil penalty); *In re Don Tollefson*, 54 Agric. Dec. 437, 439 (1995) (assessing the full civil penalty despite the respondent's submission of some documentation of financial problems) (Order Denying Pet. for Recons.); *In re Robert L. Heywood*, 52 Agric. Dec. 1323, 1325 (1993) (assessing the full civil penalty because the respondent did not produce documentation establishing his inability to pay the civil penalty).