

**In re: DEORA SEWNANAN.**  
**P.Q. Docket No. 00-0018.**  
**Order Vacating Decision.**  
**Filed November 9, 2001.**

**P.Q. – Default – Service – Proof of service.**

The Judicial Officer (JO) vacated Administrative Law Judge Dorothea A. Baker's (ALJ) Default Decision and Order. The JO found the ALJ's Default Decision and Order was based on the ALJ's finding that Respondent failed to file an answer within 20 days after Respondent had been served with the Complaint, as required by 7 C.F.R. § 1.136(a). The JO found the record contained no proof that Respondent had been served with the Complaint.

Rick D. Herndon, for Complainant.  
Respondent, Pro se.  
Initial decision issued by Dorothea A. Baker, 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 September 14, 2000. Complainant instituted this proceeding under the Act of August 20, 1912, as amended (7 U.S.C. §§ 151-167) [hereinafter the Plant Quarantine Act]; the Federal Plant Pest Act, as amended (7 U.S.C. §§ 150aa-150jj) [hereinafter the Federal Plant Pest Act]; the Act of February 2, 1903, as amended (21 U.S.C. § 111) [hereinafter the Act of February 2, 1903]; regulations issued under the Plant Quarantine Act, the Federal Plant Pest Act, and the Act of February 2, 1903 (7 C.F.R. §§ 319.56-.56-8); 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] (Compl. at 1-2).

Complainant alleges that on or about November 5, 1999, Deora Sewnanan [hereinafter Respondent] violated 7 C.F.R. § 319.56(c) by importing four mangoes from Guyana into the United States, importation of which was prohibited (Compl. ¶ II).

The Hearing Clerk sent Respondent the Complaint, the Rules of Practice, and a service letter dated September 14, 2000, by certified mail. The United States Postal Service marked the envelope containing the Complaint, the Rules of Practice, and the September 14, 2000, service letter "unclaimed" and returned the mailing to the Hearing Clerk. On November 20, 2000, the Hearing Clerk remailed the Complaint and Rules of Practice to Respondent by certified mail.<sup>1</sup>

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<sup>1</sup> See memorandum dated November 20, 2000, from "TMFisher."

On August 1, 2001, 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 Default Decision and Order” [hereinafter Motion for Adoption of Proposed Decision and Order], and a “Proposed Default Decision and Order” [hereinafter Proposed Decision and Order]. On or before August 17, 2001, the Hearing Clerk served Respondent with Complainant’s Motion for Adoption of Proposed Decision and Order, Complainant’s Proposed Decision and Order, and a service letter dated August 1, 2001.<sup>2</sup> Respondent failed to file objections to Complainant’s Motion for Adoption of Proposed Decision and Order and Complainant’s Proposed Decision and Order within 20 days after service, as required by section 1.139 of the Rules of Practice (7 C.F.R. § 1.139).

On September 18, 2001, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Administrative Law Judge Dorothea A. Baker [hereinafter the ALJ] issued a “Default Decision and Order” [hereinafter Initial Decision and Order]: (1) finding that on or about November 5, 1999, Respondent imported four mangoes from Guyana into the United States in violation of 7 C.F.R. § 319.56; and (2) assessing Respondent a \$500 civil penalty (Initial Decision and Order at second unnumbered page).

On September 26, 2001, Respondent appealed to the Judicial Officer. On November 1, 2001, Complainant filed “Complainant’s Response to Respondent’s Appeal Letter.” On November 2, 2001, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

Based upon a careful consideration of the record, I disagree with the ALJ’s Initial Decision and Order and I vacate the Initial Decision and Order.

### CONCLUSIONS BY THE JUDICIAL OFFICER

Sections 1.136(a), 1.136(c), and 1.139 of the Rules of Practice state the time within which an answer must be filed and the consequences of failing to file a timely answer, as follows:

#### § 1.136 Answer.

(a) *Filing and service.* 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 . . . .

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<sup>2</sup>See Domestic Return Receipt for Article Number 7099 3400 0014 4579 0150. Domestic Return Receipt for Article Number 7099 3400 0014 4579 0150 does not indicate the date of delivery of Complainant’s Motion for Adoption of Proposed Decision and Order, Complainant’s Proposed Decision and Order, and the August 1, 2001, service letter. However, the latest date the mailing could have been served on Respondent is August 17, 2001, the date the Hearing Clerk received the returned Domestic Return Receipt for Article Number 7099 3400 0014 4579 0150.

....

(c) *Default.* Failure to file an answer within the time provided under § 1.136(a) 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 the proceeding, an admission of said allegation, unless the parties have agreed to a consent decision pursuant to § 1.138.

**§ 1.139 Procedure upon failure to file an answer or admission of facts.**

The failure to file an answer, or the admission by the answer of all the material allegations of fact contained in the complaint, shall constitute a waiver of hearing. . . .

7 C.F.R. §§ 1.136(a), (c), .139.

The ALJ found Respondent failed to file an answer within 20 days after the Hearing Clerk served Respondent with the Complaint. Pursuant to sections 1.136(c) and 1.139 of the Rules of Practice (7 C.F.R. §§ 1.136(c), .139), the ALJ found Respondent's failure to file a timely answer an admission of the allegations in the Complaint and a waiver of hearing. Accordingly, the ALJ issued the Initial Decision and Order in which she adopted the material allegations in the Complaint and assessed Respondent a civil penalty. (Initial Decision and Order at first and second unnumbered pages.)

I vacate the ALJ's Initial Decision and Order because the record does not contain proof of service of the Complaint on Respondent, and I conclude the 20-day period for filing Respondent's answer has not yet begun to run.

The record reveals the Hearing Clerk sent Respondent the Complaint, the Rules of Practice, and a service letter dated September 14, 2000, by certified mail. The United States Postal Service marked the envelope containing the Complaint, the Rules of Practice, and the September 14, 2000, service letter "unclaimed" and returned the mailing to the Hearing Clerk. Section 1.147(c)(1) of the Rules of Practice provides for service of a complaint by ordinary mail after certified mail is returned marked "unclaimed" or "refused" by the United States Postal Service, as follows:

**§ 1.147 Filing; service; extensions of time; and computation of time.**

....

(c) *Service on party other than the Secretary.* (1) Any complaint or

other document initially served on a person to make that person a party respondent in a proceeding . . . shall be deemed to be received by any party to a proceeding, other than the Secretary or agent thereof, on the date of delivery by certified or registered mail to the last known principal place of business of such party, last known principal place of business of the attorney or representative of record of such party, or last known residence of such party if an individual, *Provided that*, if any such document or paper is sent by certified or registered mail but is returned marked by the postal service as unclaimed or refused, it shall be deemed to be received by such party on the date of remailing by ordinary mail to the same address.

7 C.F.R. § 1.147(c)(1).

However, instead of remailing the Complaint, the Rules of Practice, and the September 14, 2000, service letter to Respondent by ordinary mail as provided in section 1.147(c)(1) of the Rules of Practice (7 C.F.R. § 1.147(c)(1)), the Hearing Clerk remailed the Complaint and Rules of Practice to Respondent by certified mail on November 20, 2000. The Office of the Hearing Clerk placed a memorandum in the record which memorializes the November 20, 2000, certified mailing, as follows:

Complaint and Rules of practice was [sic] remailed by *certified* mail as follow [sic]:

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Ms. Deora Sewananan [sic]  
32 17 54th Street  
Woodside, New York 11377

TMFisher: 11/20/00

Memorandum of November 20, 2000, from “TMFisher” (emphasis added).

Section 1.147(e) of the Rules of Practice provides various means by which service may be proved, as follows:

**§ 1.147 Filing; service; extensions of time; and computation of time.**

. . . .

(e) *Proof of service.* Any of the following, in the possession of the Department, showing such service, shall be deemed to be accurate:

- (1) A certified or registered mail receipt returned by the postal service with a signature;
- (2) An official record of the postal service;
- (3) An entry on a docket record or a copy placed in a docket file by the Hearing Clerk of the Department or by an employee of the Hearing Clerk in the ordinary course of business;
- (4) A certificate of service, which need not be separate from and may be incorporated in the document or paper of which it certifies service, showing the method, place and date of service in writing and signed by an individual with personal knowledge thereof, *Provided* that such certificate must be verified by oath or declaration under penalty of perjury if the individual certifying service is not a party to the proceeding in which such document or paper is served, an attorney or representative of record for such a party, or an official or employee of the United States or of a State or political subdivision thereof.

7 C.F.R. § 1.147(e).

While the record establishes that the Hearing Clerk mailed the Complaint by certified mail on November 20, 2000, the record contains no certified mail receipt returned by the United States Postal Service or other proof establishing that the Hearing Clerk served Respondent with the November 20, 2000, certified mailing.

Complainant asserts the Hearing Clerk served the Complaint by regular mail on November 20, 2000, and Respondent's answer was due December 10, 2000, 20 days after service (Complainant's Mot. for Default Decision at first unnumbered page). However, Complainant does not cite any document in the record to support Complainant's assertion that the Hearing Clerk mailed the Complaint by regular mail, and I can find nothing in the record that supports Complainant's assertion. Moreover, the November 20, 2000, memorandum of "TMFisher" belies Complainant's assertion.

I conclude Respondent was not served with the Complaint and the time for filing Respondent's answer has not yet begun to run. Therefore, I vacate the ALJ's Initial Decision and Order which is based upon the ALJ's finding that Respondent failed to file an answer within 20 days after Respondent had been served with the Complaint.

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

#### **ORDER**

The Initial Decision and Order issued September 18, 2001, is vacated.

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