

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) P.Q. Docket No. 04-0009
)
Alliance Airlines,)
)
Respondent) **Decision and Order**

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 May 11, 2004. Complainant instituted this proceeding under the Plant Protection Act (7 U.S.C. §§ 7701-7772); regulations issued under the Plant Protection Act (7 C.F.R. §§ 319.56-.56-8 (2001)); and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes (7 C.F.R. §§ 1.130-.151) and the Rules of Practice Governing Proceedings Under Certain Acts (7 C.F.R. pt. 380) [hereinafter the Rules of Practice].¹

¹Complainant also references the Rules of Practice Governing Proceedings Under Certain Acts (9 C.F.R. pt. 99) (Compl. at first unnumbered page); however, the Rules of Practice Governing Proceedings Under Certain Acts (9 C.F.R. pt. 99) have no relevance to proceedings under the Plant Protection Act. 9 C.F.R. § 99.1.

Complainant alleges that, on or about March 25, 2001, Alliance Airlines, Inc. [hereinafter Respondent], failed to assemble for inspection approximately 119 boxes of restricted callaloo and 18 boxes of restricted peppers from Jamaica, in violation of 7 C.F.R. § 319.56-6(b) (2001) (Compl. ¶ IV).

On March 8, 2005, Samuel Santiago, a senior investigator, personally served Respondent with the Complaint.² Respondent failed to file an answer to the Complaint within 20 days after service, as required by section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)).

On March 29, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed a Second Motion for Adoption of Proposed Default Decision and Order and a Second Proposed Default Decision and Order. The Hearing Clerk served Respondent with Complainant's Second Motion for Adoption of Default Decision and Order, Complainant's Second Proposed Default Decision and Order, and a

²See United States Department of Agriculture Certificate of Personal Service, which indicates on March 8, 2005, Samuel Santiago, senior investigator, served Respondent with "P.Q. Docket # 04-0009." (Based solely on the United States Department of Agriculture Certificate of Personal Service, I cannot determine the nature of the document served on Respondent. However, the record reveals Administrative Law Judge Peter M. Davenport [hereinafter the ALJ] ordered Complainant to cause the Complaint to be delivered to Respondent and Samuel Santiago delivered the Complaint in accordance with the ALJ's Order (Order filed January 19, 2005; Complainant's March 9, 2005, "Filing of Certificate of Service on Alliance Airlines"). Moreover, Respondent concedes Complainant caused Eduardo F. Sanchez, a regional manager with Alliance Airlines, Inc., to be served with the Complaint on March 8, 2005 (Respondent's Appeal Pet. ¶ 5)).

service letter on April 8, 2005.³ Respondent failed to file objections to Complainant's Second Motion for Adoption of Default Decision and Order and Complainant's Second Proposed Default 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 May 2, 2005, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the ALJ issued a Decision and Order [hereinafter Initial Decision and Order]: (1) finding, on or about March 25, 2001, Respondent imported approximately 119 boxes of restricted callaloo and 18 boxes of restricted peppers into the United States and failed to provide advance notice of their arrival to the Animal and Plant Health Inspection Service, in violation of 7 C.F.R. § 319.56-5(a) (2001); (2) finding, on or about March 25, 2001, Respondent failed to assemble for inspection approximately 119 boxes of restricted callaloo and 18 boxes of restricted peppers from Jamaica, in violation of 7 C.F.R. § 319.56-6(b) (2001); (3) concluding Respondent violated the Plant Protection Act and 7 C.F.R. § 319.56 *et seq.*; and (4) assessing Respondent a \$20,000 civil penalty (Initial Decision and Order at 2-3).

On June 3, 2005, Respondent appealed to the Judicial Officer. On June 27, 2005, Complainant filed Complainant's Response to Respondent's Appeal Petition, and on June 30, 2005, the Hearing Clerk transmitted the record to the Judicial Officer for consideration and decision.

³United States Postal Service Domestic Return Receipt for Article Number 7004 1160 0001 9221 3854.

Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision and Order, except that I disagree with the ALJ's finding that Respondent violated 7 C.F.R. § 319.56-5(a) (2001) and the ALJ's assessment of a \$20,000 civil penalty. Therefore, I adopt the Initial Decision and Order as the final Decision and Order, with exceptions. Additional conclusions by the Judicial Officer follow the ALJ's conclusion of law, as restated.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

7 U.S.C.:

TITLE 7—AGRICULTURE

.....

CHAPTER 104—PLANT PROTECTION

.....

SUBCHAPTER II—INSPECTION AND ENFORCEMENT

.....

§ 7734. Penalties for violation

.....

(b) Civil penalties

(1) In general

Any person that violates this chapter, or that forges, counterfeits, or, without authority from the Secretary, uses, alters, defaces, or destroys any certificate, permit, or other document provided for in this chapter may, after notice and opportunity for a

hearing on the record, be assessed a civil penalty by the Secretary that does not exceed the greater of—

(A) \$50,000 in the case of any individual (except that the civil penalty may not exceed \$1,000 in the case of an initial violation of this chapter by an individual moving regulated articles not for monetary gain), \$250,000 in the case of any other person for each violation, and \$500,000 for all violations adjudicated in a single proceeding; or

(B) twice the gross gain or gross loss for any violation, forgery, counterfeiting, unauthorized use, defacing, or destruction of a certificate, permit, or other document provided for in this chapter that results in the person deriving pecuniary gain or causing pecuniary loss to another.

(2) Factors in determining civil penalty

In determining the amount of a civil penalty, the Secretary shall take into account the nature, circumstance, extent, and gravity of the violation or violations and the Secretary may consider with respect to the violator—

(A) ability to pay;

(B) effect on ability to continue to do business;

(C) any history of prior violations;

(D) the degree of culpability; and

(E) any other factors the Secretary considers

appropriate.

....

(4) Finality of orders

The order of the Secretary assessing a civil penalty shall be treated as a final order reviewable under chapter 158 of title 28. The validity of the Secretary's order may not be reviewed in an action to collect the civil penalty. Any civil penalty not paid in full when due under an order assessing the civil penalty shall thereafter accrue interest until paid at the rate of interest applicable to civil judgments of the courts of the United States.

7 C.F.R.:

TITLE 7—AGRICULTURE

.....

SUBTITLE B—REGULATIONS OF THE DEPARTMENT OF AGRICULTURE

.....

**CHAPTER III—ANIMAL AND PLANT HEALTH INSPECTION SERVICE,
DEPARTMENT OF AGRICULTURE**

.....

PART 319—FOREIGN QUARANTINE NOTICES

.....

SUBPART—FRUITS AND VEGETABLES

.....

RULES AND REGULATIONS

.....

§ 319.56-5 Notice of arrival by permittee.

(a) Immediately upon the arrival of fruits or vegetables, from the countries specified in § 319.56, at the port of first arrival, the permittee or his agent shall submit a notice, in duplicate, to the Plant Protection and Quarantine Programs, through the United States Collector of Customs, or, in the case of Guam, through the Customs officer of the Government of Guam, on forms provided for that purpose, stating the number of the permit; the kinds of fruits or vegetables; the quantity or the number of crates or other containers included in the shipment; the country or locality where the fruits or vegetables were grown; the date of arrival; the name of the vessel, the name and the number, if any, of the dock where the fruits or vegetables are to be unloaded, and the name of the importer or broker at the port of first arrival, or, if shipped by rail, the name of the railroad, the car numbers, and the terminal where the fruits or vegetables are to be unloaded.

....

§ 319.56-6 Inspection and other requirements at the port of first arrival.

....

(b) *Assembly for inspection.* The owner or agent of the owner shall assemble imported fruits and vegetables for inspection at the port of first arrival, or at any other place designated by an inspector, at a place and time and in a manner designated by an inspector.

7 C.F.R. §§ 319.56-5(a), .56-6(b) (2001).

**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 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 is a business whose mailing address is 1950 NW 66th Avenue, Miami, Florida 33122.

2. On or about March 25, 2001, Respondent failed to assemble for inspection approximately 119 boxes of restricted callaloo and 18 boxes of restricted peppers from Jamaica, in violation of 7 C.F.R. § 319.56-6(b) (2001).

Conclusion of Law

By reason of the Findings of Fact, Respondent has violated the Plant Protection Act and regulations issued under the Plant Protection Act (7 C.F.R. § 319.56 *et seq.*).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Respondent's Appeal Petition

Respondent raises three issues in Respondent's Appeal Petition. First, Respondent requests an opportunity to respond to the Complaint (Respondent's Appeal Pet. ¶¶ 5-9.)

Respondent concedes it was served with the Complaint on March 8, 2005, and failed to file a timely response to the Complaint (Respondent's Appeal Pet. ¶¶ 5, 8). Respondent's request to file an answer comes far too late to be granted. Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) 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

....

(c) *Default.* Failure to file an answer within the time provided under paragraph (a) of this section 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. Upon such admission or failure to file, complainant shall file a proposed decision, along with a motion for the adoption thereof, both of which shall be served upon the respondent by the Hearing Clerk. Within 20 days after service of such motion and proposed decision, the respondent may file with the Hearing Clerk objections thereto. If the Judge finds that meritorious objections have been filed, complainant's Motion shall be denied with supporting reasons. If meritorious objections are not filed, the Judge shall issue a decision without further procedure or hearing.

§ 1.141 Procedure for hearing.

(a) *Request for hearing.* Any party may request a hearing on the facts by including such request in the complaint or answer, or by a separate request, in writing, filed with the Hearing Clerk within the time in which an answer may be filed Failure to request a hearing within the time allowed for the filing of the answer shall constitute a waiver of such hearing.

7 C.F.R. §§ 1.136(a), (c), .139, .141(a).

Moreover, the Complaint informs Respondent of the consequences of failing to file a timely answer, as follows:

[T]his complaint shall be served upon the respondents. The respondents must file an answer with the Hearing Clerk, United States Department of Agriculture, Room 1081, South Building, Washington, D.C. 20250-9200, in accordance with the Rules of Practice governing proceedings under the Acts (7 C.F.R. § 1.130 *et seq.*). Failure to file an answer within the prescribed time shall constitute an admission of all material allegations of this complaint and a waiver of hearing.

Compl. ¶ V.

Respondent's answer was due no later than March 28, 2005. Respondent's first filing in this proceeding was filed June 3, 2005, 2 months 6 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed an admission of the allegations of the Complaint (7 C.F.R. § 1.136(a), (c)) and constitutes a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)).

On March 29, 2005, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Complainant's Second Motion for Adoption of Default Decision and Order and Complainant's Second Proposed Default Decision and Order. The Hearing Clerk served Respondent with Complainant's Second Motion for Adoption of Default Decision and Order, Complainant's Second Proposed Default Decision and Order, and a service letter on April 8, 2005.⁴

The Hearing Clerk informed Respondent in the April 4, 2005, service letter that objections to Complainant's Second Motion for Adoption of Default Decision and Order must be filed within 20 days after service, as follows:

⁴See note 3.

CERTIFIED RECEIPT REQUESTED

April 4, 2005

Mr. Edurado [sic] F. Sanchez
Regional Manager
Alliance Airlines
1950 NW 66th Avenue
Suite 226
Miami, Florida 33126

Dear Mr. Sanchez:

Subject: In re: Alliance Airlines, Respondent-
P.Q. Docket No. -04-0009

Enclosed is a copy of Complainant's Second Motion for Adoption of Proposed Default Decision and Order together with Proposed Default Decision and Order, which have been filed with this office in the above-captioned proceeding.

In accordance with the applicable Rules of Practice, you will have 20 days from the receipt of this letter in which to file with this office an original and three copies of objections to the Motion for Decision.

Sincerely,

/s/

Joyce A. Dawson
Hearing Clerk

Respondent failed to file objections to Complainant's Second Motion for Adoption of Proposed Default Decision and Order and Complainant's Second Proposed Default 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 May 2, 2005, the ALJ issued an Initial Decision and Order in which the ALJ found Respondent admitted the allegations in the Complaint by reason of default.

Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant states the complainant does not object to setting aside the default decision,⁵ generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.⁶

⁵See *In re Dale Goodale*, 60 Agric. Dec. 670 (2001) (Remand Order) (setting aside the default decision because the administrative law judge adopted apparently inconsistent findings of a dispositive fact in the default decision and the order in the default decision was not clear); *In re Deora Sewnanan*, 60 Agric. Dec. 688 (2001) (setting aside the default decision because the respondent was not served with the complaint); *In re H. Schnell & Co.*, 57 Agric. Dec. 1722 (1998) (Remand Order) (setting aside the default decision, which was based upon the respondent's statements during two telephone conference calls with the administrative law judge and the complainant's counsel, because the respondent's statements did not constitute a clear admission of the material allegations in the complaint and concluding the default decision deprived the respondent of its right to due process under the Fifth Amendment to the Constitution of the United States); *In re Arizona Livestock Auction, Inc.*, 55 Agric. Dec. 1121 (1996) (setting aside the default decision because facts alleged in the complaint and deemed admitted by failure to answer were not sufficient to find a violation of the Packers and Stockyards Act or jurisdiction over the matter by the Secretary of Agriculture); *In re Veg-Pro Distributors*, 42 Agric. Dec. 273 (1983) (Remand Order) (setting aside the default decision because service of the complaint by registered and regular mail was returned as undeliverable, and the respondent's license under the Perishable Agricultural Commodities Act had lapsed before service was attempted), *final decision*, 42 Agric. Dec. 1173 (1983); *In re Vaughn Gallop*, 40 Agric. Dec. 217 (1981) (Order Vacating Default Decision and Remanding Proceeding) (vacating the default decision and remanding the case to the administrative law judge to determine whether just cause exists for permitting late answer), *final decision*, 40 Agric. Dec. 1254 (1981); *In re J. Fleishman & Co.*, 38 Agric. Dec. 789 (1978) (Remand Order) (remanding the proceeding to the administrative law judge for the purpose of receiving evidence because the complainant had no objection to the respondent's motion for remand), *final decision*, 37 Agric. Dec. 1175 (1978); *In re Richard Cain*, 17 Agric. Dec. 985 (1958) (Order Reopening After Default) (setting aside a default decision and accepting a late-filed answer because the complainant did not object to the respondent's motion to reopen after default).

⁶See generally *In re St. Johns Shipping Co.* (Decision as to Bobby L. Shields),
(continued...)

Respondent's first filing in this proceeding was filed with the Hearing Clerk 2 months 6 days after Respondent's answer was due. Respondent's failure to file a timely answer is deemed, for purposes of this proceeding, an admission of the allegations of the Complaint (7 C.F.R. § 1.136(c)) and constitutes a waiver of hearing (7 C.F.R. §§ 1.139, .141(a)). Therefore, there are no issues of fact on which a meaningful hearing could be held in this proceeding, and the ALJ properly issued the Initial Decision and Order, except for the ALJ's finding that Respondent violated 7 C.F.R. § 319.56-5(a) (2001).

⁶(...continued)

64 Agric. Dec. ____ (Mar. 1, 2005) (affirming the default decision where the respondent failed to respond to the complaint and stating the respondent is deemed, by his failure to file an answer, to have admitted the violations of the Plant Protection Act and the regulations issued under the Plant Protection Act alleged in the complaint); *In re Miguel A. Hidalgo*, 64 Agric. Dec. ____ (Jan. 24, 2005) (holding the default decision was properly issued where the respondent's response to the complaint was filed 1 year 5 months 2 days after the respondent's answer was due and the respondent is deemed, by his failure to file a timely answer, to have admitted the violations of the Plant Protection Act and 7 C.F.R. §§ 319.56(c), .56-2(e), .56-2i alleged in the complaint); *In re Bibi Uddin*, 55 Agric. Dec. 1010 (1996) (holding the default decision was properly issued where the respondent's response to the complaint was filed more than 9 months after service of the complaint on the respondent and the respondent is deemed, by her failure to file a timely answer, to have admitted the violation of 7 C.F.R. § 319.56 alleged in the complaint); *In re Sandra L. Reid*, 55 Agric. Dec. 996 (1996) (holding the default decision was properly issued where the respondent's response to the complaint was filed 43 days after service of the complaint on the respondent and the respondent is deemed, by her failure to file a timely answer, to have admitted the violation of 7 C.F.R. § 319.56(c) alleged in the complaint).

Moreover, application of the default provisions of the Rules of Practice does not deprive Respondent of its rights under the due process clause of the Fifth Amendment to the Constitution of the United States.⁷

Second, Respondent asserts the ALJ erroneously found Respondent imported approximately 119 boxes of restricted callaloo and 18 boxes of restricted peppers into the United States and failed to provide advance notice of their arrival to the Animal and Plant Health Inspection Service, in violation of 7 C.F.R. § 319.56-5(a) (2001) (Respondent's Appeal Pet. ¶¶ 11-12).

I agree with Respondent's assertion that the ALJ erroneously found Respondent violated 7 C.F.R. § 319.56-5(a) (2001). Respondent is deemed, by its failure to file a timely answer, to have admitted the allegations of the Complaint. The Complaint contains no allegation that Respondent imported approximately 119 boxes of restricted callaloo and 18 boxes of restricted peppers into the United States and failed to provide advance notice of their arrival to the Animal and Plant Health Inspection Service, in

⁷See *United States v. Hulings*, 484 F. Supp. 562, 567-68 (D. Kan. 1980) (concluding a hearing was not required under the Fifth Amendment to the Constitution of the United States where the respondent was notified that failure to deny the allegations of the complaint would constitute an admission of those allegations under the Rules of Practice and the respondent failed to specifically deny the allegations). See also *Father & Sons Lumber and Building Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1096 (6th Cir. 1991) (stating due process generally does not entitle parties to an evidentiary hearing where the National Labor Relations Board has properly determined that a default summary judgment is appropriate due to a party's failure to file a timely response); *Kirk v. INS*, 927 F.2d 1106, 1108 (9th Cir. 1991) (rejecting the contention that the administrative law judge erred by issuing a default judgment based on a party's failure to file a timely answer).

violation of 7 C.F.R. § 319.56-5(a) (2001). Therefore, I do not adopt the ALJ's finding that Respondent violated 7 C.F.R. § 319.56-5(a) (2001).

Third, Respondent asserts the ALJ erroneously found Respondent failed to assemble for inspection approximately 119 boxes of restricted callaloo and 18 boxes of restricted peppers from Jamaica, in violation of 7 C.F.R. § 319.56-6(b). Respondent contends, in order to be found in violation of 7 C.F.R. § 319.56-6(b), Respondent must have been the person who moved the produce in question into the United States. As the Complaint contains no allegation that Respondent imported the produce in question, Respondent contends it could not have violated 7 C.F.R. § 319.56-6(b). (Respondent's Appeal Pet. ¶¶ 13-15.)

I disagree with Respondent's assertion that the ALJ erroneously found Respondent violated 7 C.F.R. § 319.56-6(b). The provision of 7 C.F.R. § 319.56-6(b) on which Respondent relies for its contention that only importers may be found to have violated 7 C.F.R. § 319.56-6(b) was added to the regulations after Respondent's March 25, 2001, violation of 7 C.F.R. § 319.56-6(b).⁸ Moreover, the operative regulation, 7 C.F.R. § 319.56-6(b) (2001), requires the owner or the agent of the owner of imported fruits or vegetables to assemble the fruits or vegetables for inspection irrespective of whether the owner or the agent was the person who imported the fruits or vegetables.

⁸See 68 Fed. Reg. 37,904, 37,922-23 (June 25, 2003).

Sanction

In determining the amount of the civil monetary penalty, the Secretary of Agriculture is required to take into account the nature, circumstance, extent, and gravity of the violation.⁹

Respondent is deemed to have admitted he failed to assemble for inspection 119 boxes of restricted callaloo and 18 boxes of restricted peppers from Jamaica, in violation of 7 C.F.R. § 319.56-6(b) (2001). The nature of Respondent's violation thwarts the ability of the Secretary of Agriculture to inspect fresh vegetables to prevent the introduction of plant pests into the United States. As for the extent of Respondent's violation, a large number of boxes of vegetables are involved; however, the violation occurred on a single day. Therefore, I find no ongoing pattern of violations. Further still, the limited record before me reveals no extenuating or aggravating circumstances.

The United States Department of Agriculture's current 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.

⁹7 U.S.C. § 7734(b)(2).

The recommendations of administrative officials charged with the responsibility for achieving the congressional purpose of the regulatory statute are highly relevant to any sanction to be imposed and are entitled to great weight in view of the experience gained by administrative officials during their day-to-day supervision of the regulated industry. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497. However, the recommendation of administrative officials as to the sanction is not controlling, and, in appropriate circumstances, the sanction imposed may be considerably less, or different, than that recommended by administrative officials.¹⁰

¹⁰*In re Mary Jean Williams* (Decision as to Deborah Ann Milette), 64 Agric. Dec. ____, slip op. at 28 (June 29, 2005); *In re Dennis Hill*, 63 Agric. Dec. ____, slip op. at 74 (Oct. 8, 2004), *appeal docketed*, No. 05-1154 (7th Cir. Jan. 24, 2005); *In re Geo. A. Heimos Produce Co.*, 62 Agric. Dec. 763, 787 (2003), *appeal dismissed*, No. 03-4008 (8th Cir. Aug. 31, 2004); *In re Excel Corp.*, 62 Agric. Dec. 196, 234 (2003), *enforced as modified*, 397 F.3d 1285 (10th Cir. 2005); *In re Steven Bourk* (Decision as to Steven Bourk and Carmella Bourk), 61 Agric. Dec. 25, 49 (2002); *In re H.C. MacClaren, Inc.*, 60 Agric. Dec. 733, 762-63 (2001), *aff'd*, 342 F.3d 584 (6th Cir. 2003); *In re Karl Mitchell*, 60 Agric. Dec. 91, 130 (2001), *aff'd*, 42 Fed. Appx. 991, 2002 WL 1941189 (9th Cir. 2002); *In re American Raisin Packers, Inc.*, 60 Agric. Dec. 165, 190 n.8 (2001), *aff'd*, 221 F. Supp.2d 1209 (E.D. Cal. 2002), *aff'd*, 66 Fed. Appx. 706, 2003 WL 21259771 (9th Cir. 2003); *In re Fred Hodgins*, 60 Agric. Dec. 73, 88 (2001) (Decision and Order on Remand), *aff'd*, 33 Fed. Appx. 784, 2002 WL 649102 (6th Cir. 2002) (unpublished); *In re Reginald Dwight Parr*, 59 Agric. Dec. 601, 626 (2000), *aff'd per curiam*, 273 F.3d 1095 (5th Cir. 2001) (Table); *In re Greenville Packing Co.*, 59 Agric. Dec. 194, 226-27 (2000), *aff'd in part and transferred in part*, No. 00-CV-1054 (N.D.N.Y. Sept. 4, 2001), *appeal withdrawn*, No. 01-6214 (2d Cir. Apr. 30, 2002); *In re James E. Stephens*, 58 Agric. Dec. 149, 182 (1999); *In re Western Sierra Packers, Inc.*, 57 Agric. Dec. 1578, 1604 (1998); *In re Colonial Produce Enterprises, Inc.*, 57 Agric. Dec. 1498, 1514 (1998); *In re Judie Hansen*, 57 Agric. Dec. 1072, 1141 (1998), *appeal dismissed*, 221 F.3d 1342 (Table), 2000 WL 1010575 (8th Cir. 2000) (per curiam); *In re Richard Lawson*, 57 Agric. Dec. 980, 1031-32 (1998), *appeal dismissed*, No. 99-1476 (4th Cir. June 18, 1999); *In re Scamcorp, Inc.*, 57 Agric. Dec. 527, 574 (1998); *In re* (continued...)

Complainant recommends I assess Respondent a \$20,000 civil penalty.

Complainant contends the recommended \$20,000 civil penalty was very carefully determined by the Animal and Plant Health Inspection Service based solely on the allegation that Respondent violated 7 C.F.R. § 319.56-6(b) (2001). (Complainant's Response to Respondent's Appeal Pet. at 8). However, in Complainant's Second Motion for Adoption of Default Decision and Order, Complainant appears to base his recommendation on Complainant's contention that Respondent violated 7 C.F.R. § 319.56-5(a) (2001), as well as 7 C.F.R. § 319.56-6(b) (2001), as follows:

Therefore, Respondent is deemed to have admitted that on or about March 25, 2001, Respondent failed to provide advance notice of and failed to assemble for inspection, approximately one hundred and nineteen boxes of callaloo and approximately eighteen boxes of restricted peppers, in violation of 7 C.F.R. §§ 319.56-5(a) and 319.56-6(b) because advance notice of and assembly for inspection of such items is required.

. . . In order to deter Respondent and others similarly situated from committing *violations* of this nature in the future, Complainant believes that assessment of a civil penalty of twenty thousand dollars (\$20,000), is warranted and appropriate.

Complainant's Second Motion for Adoption of Proposed Default Decision and Order at 2-3 (emphasis added). Based upon Complainant's apparent inconsistent positions

¹⁰(...continued)

Marilyn Shepherd, 57 Agric. Dec. 242, 283 (1998); *In re Allred's Produce*, 56 Agric. Dec. 1884, 1918-19 (1997), *aff'd*, 178 F.3d 743 (5th Cir.), *cert. denied*, 528 U.S. 1021 (1999); *In re Kanowitz Fruit & Produce, Co.*, 56 Agric. Dec. 942, 953 (1997) (Order Denying Pet. for Recons.); *In re William E. Hatcher*, 41 Agric. Dec. 662, 669 (1982); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1735 (1978); *In re Braxton McLinden Worsley*, 33 Agric. Dec. 1547, 1568 (1974).

regarding the basis for his recommendation that I assess Respondent a \$20,000 civil penalty, I give Complainant's sanction recommendation very little weight.

After examining all the relevant circumstances and taking into account the requirements of section 424(b)(2) of the Plant Protection Act (7 U.S.C. § 7734(b)(2)) and the remedial purposes of the Plant Protection Act, I conclude assessment of a \$9,000 civil penalty against Respondent is appropriate and necessary to ensure Respondent's compliance with the Plant Protection Act and 7 C.F.R. § 319.56-6(b) in the future, to deter others from violating the Plant Protection Act and 7 C.F.R. § 319.56-6(b), and to fulfill the remedial purposes of the Plant Protection Act.

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

ORDER

Respondent is assessed a \$9,000 civil penalty. The civil penalty shall be paid by certified check or money order, 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

Payment of the civil penalty 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. Respondent shall state on the certified check or money order that payment is in reference to P.Q. Docket No. 04-0009.

RIGHT TO JUDICIAL REVIEW

The Order assessing Respondent a civil penalty is a final order reviewable under 28 U.S.C. §§ 2341-2351.¹¹ Respondent must seek judicial review within 60 days after entry of the Order.¹² The date of entry of the Order is July 5, 2005.

Done at Washington, DC

July 5, 2005

William G. Jenson
Judicial Officer

¹¹7 U.S.C. § 7734(b)(4).

¹²28 U.S.C. § 2344.