

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) A.Q. Docket No. 01-0010
)
Salvador Sanchez-Gomez,)
)
Respondent) **Decision and Order**

PROCEDURAL HISTORY

Bobby R. Acord, Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture [hereinafter Complainant], instituted this disciplinary administrative proceeding by filing a Complaint on August 6, 2001. Complainant instituted this proceeding under sections 4 and 5 of the Act of May 29, 1884, as amended (21 U.S.C. § 120) [hereinafter the Act of May 29, 1884]; regulations issued under the Act of May 29, 1884 (9 C.F.R. §§ 93.100-.107); 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).

Complainant alleges that: (1) on or about September 25, 2000, Salvador Sanchez-Gomez [hereinafter Respondent] brought a pet canary into the United States in violation of 9 C.F.R. § 93.101(a) in that the pet bird was not brought into the United

States in accordance with the regulations in 9 C.F.R. pt. 93, as required; (2) on or about September 25, 2000, Respondent imported a pet canary into the United States from Mexico in violation of 9 C.F.R. § 93.104(a) in that the pet bird was not accompanied by a certificate, as required; and (3) on or about September 25, 2000, Respondent imported a pet canary into the United States from Mexico in violation of 9 C.F.R. § 93.105(b) in that the pet bird was not offered for entry at one of the ports of entry designated in 9 C.F.R. § 93.102(a), as required (Compl. ¶¶ II-IV).¹

On August 21, 2001, the Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter dated August 6, 2001.² Respondent failed to answer 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 October 10, 2001, the

¹Sections 4 and 5 of the Act of May 29, 1884 (21 U.S.C. § 120), do not provide the Secretary of Agriculture with authority to regulate the importation of birds into the United States, and the authority citation for 9 C.F.R. pt. 93 does not include a reference to section 4 or 5 of the Act of May 29, 1884 (21 U.S.C. § 120). Therefore, I find Complainant's institution of this proceeding under sections 4 and 5 of the Act of May 29, 1884 (21 U.S.C. § 120), is error. However, Respondent does not contend he was misled by the reference in the Complaint to sections 4 and 5 of the Act of May 29, 1884 (21 U.S.C. § 120). Moreover, the Secretary of Agriculture has authority under other statutes to regulate the importation of birds into the United States. (*See, e.g.*, section 2 of the Act of February 2, 1903, as amended (21 U.S.C. § 111) [hereinafter the Act of February 2, 1903].) Therefore, I find Complainant's erroneous reference in the Complaint to sections 4 and 5 of the Act of May 29, 1884 (21 U.S.C. § 120), harmless error.

²*See* Memorandum to File dated August 22, 2001, from Regina A. Paris.

Hearing Clerk sent a letter to Respondent informing him that his answer to the Complaint had not been received within the time required in the Rules of Practice.³

On November 26, 2001, the Hearing Clerk again served Respondent with the Complaint, the Rules of Practice, and the Hearing Clerk's service letter dated August 6, 2001.⁴ Respondent failed to answer 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 January 15, 2002, the Hearing Clerk sent a letter to Respondent informing him that his answer to the Complaint had not been received within the time required in the Rules of Practice.⁵

On January 16, 2002, 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 and a Proposed Default Decision and Order. On February 4, 2002, the Hearing Clerk served Respondent with Complainant's Motion for Adoption of Proposed Default Decision and Order, Complainant's Proposed Default Decision and Order, and the Hearing Clerk's service letter dated January 17, 2002.⁶ Respondent failed

³See letter dated October 10, 2001, from Joyce A. Dawson, Hearing Clerk, to Salvador Sanchez-Gomez.

⁴See Domestic Return Receipt for Article Number 7099 3400 0014 4581 5419.

⁵See letter dated January 15, 2002, from Joyce A. Dawson, Hearing Clerk, to Salvador Sanchez-Gomez.

⁶See Domestic Return Receipt for Article Number 7099 3400 0014 4581 5112.

to file objections to Complainant s Motion for Adoption of Proposed Default Decision and Order and Complainant s 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 March 19, 2002, the Hearing Clerk sent a letter to Respondent informing him that he failed to file timely objections to Complainant s Motion for Adoption of Proposed Default Decision and Order and Complainant s Proposed Default Decision and Order and that the file was being referred to an administrative law judge for consideration and decision.⁷

On March 22, 2002, 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 September 25, 2000, Respondent imported a pet canary into the United States from Mexico in violation of 9 C.F.R. §§ 93.101(a), .104(a), and .105(b) because the pet bird was not brought into the United States in accordance with 9 C.F.R. pt. 93, as required, the pet bird was not accompanied by the required certificate, and the pet bird was not offered for entry at a designated port of entry; (2) concluding that Respondent violated section 2 of the Act of February 2, 1903 (21 U.S.C. § 111), and the regulations

⁷See letter dated March 19, 2002, from Joyce A. Dawson, Hearing Clerk, to Salvador Sanchez-Gomez.

issued under the Act of February 2, 1903 (9 C.F.R. § 100 et seq.)⁸ and (3) assessing Respondent a \$1,000 civil penalty (Initial Decision and Order at 2).

On April 30, 2002, Respondent appealed to the Judicial Officer. On May 17, 2002, Complainant filed Response to Respondent's Appeal. On May 22, 2002, the Hearing Clerk transmitted the record to the Judicial Officer to consider Respondent's appeal petition and issue a decision.

Based upon a careful consideration of the record, I agree with the ALJ's Initial Decision and Order, except that I issue an Order that provides for Respondent's payment of the civil penalty in installments. 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 ALJ's conclusion of law, as restated.

⁸The ALJ's reference to 9 C.F.R. § 100 *et seq.* appears to be a typographical error. Based on the record before me, I infer the ALJ concluded that Respondent violated 9 C.F.R. § 93.100 *et seq.* The ALJ's incorrect citation of the Code of Federal Regulations is harmless error.

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

21 U.S.C.:

TITLE 21 FOOD AND DRUGS

....

CHAPTER 4 ANIMALS, MEATS, AND MEAT AND DAIRY PRODUCTS

....

**SUBCHAPTER III PREVENTION OF INTRODUCTION
AND SPREAD OF CONTAGION**

§ 111. Regulations to prevent contagious diseases

The Secretary of Agriculture shall have authority to make such regulations and take such measures as he may deem proper to prevent the introduction or dissemination of the contagion of any contagious, infectious, or communicable disease of animals and/or live poultry from a foreign country into the United States or from one State or Territory of the United States or the District of Columbia to another, and to seize, quarantine, and dispose of any hay, straw, forage, or similar material, or any meats, hides, or other animal products coming from an infected foreign country to the United States, or from one State or Territory or the District of Columbia in transit to another State or Territory or the District of Columbia whenever in his judgment such action is advisable in order to guard against the introduction or spread of such contagion.

§ 120. Regulation of exportation and transportation of infected livestock and live poultry

In order to enable the Secretary of Agriculture to effectually suppress and extirpate contagious pleuropneumonia, foot-and-mouth disease, and other dangerous contagious, infectious, and communicable diseases in cattle and other livestock and/or live poultry, and to prevent the spread of such diseases, he is authorized and directed from time to time to establish such rules and regulations concerning the exportation and transportation of livestock and/or live poultry from any place within the United States where he may have reason to believe such diseases may exist into and through any

State or Territory, and into and through the District of Columbia and to foreign countries as he may deem necessary, and all such rules and regulations shall have the force of law.

§ 122. Offenses; penalty

Any person, company, or corporation knowingly violating the provisions of this Act or the orders or regulations made in pursuance thereof shall be guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than one hundred dollars nor more than five thousand dollars, or by imprisonment not more than one year, or by both such fine and imprisonment. Any person, company, or corporation violating such provisions, orders, or regulations may be assessed a civil penalty by the Secretary of Agriculture of not more than one thousand dollars. The Secretary may issue an order assessing such civil penalty only after notice and an opportunity for an agency hearing on the record. Such order shall be treated as a final order reviewable under chapter 158 of title 28. The validity of such order may not be reviewed in an action to collect such civil penalty.

21 U.S.C. §§ 111, 120, 122.

28 U.S.C.:

TITLE 28 JUDICIARY AND JUDICIAL PROCEDURE

....

PART VI PARTICULAR PROCEEDINGS

....

CHAPTER 163 FINES, PENALTIES AND FORFEITURES

§ 2461. Mode of recovery

....

FEDERAL CIVIL PENALTIES INFLATION ADJUSTMENT

SHORT TITLE

SECTION 1. This Act may be cited as the Federal Civil Penalties Inflation Adjustment Act of 1990

FINDINGS AND PURPOSE

SEC. 2. (a) FINDINGS. The Congress finds that

(1) the power of Federal agencies to impose civil monetary penalties for violations of Federal law and regulations plays an important role in deterring violations and furthering the policy goals embodied in such laws and regulations;

(2) the impact of many civil monetary penalties has been and is diminished due to the effect of inflation;

(3) by reducing the impact of civil monetary penalties, inflation has weakened the deterrent effect of such penalties; and

(4) the Federal Government does not maintain comprehensive, detailed accounting of the efforts of Federal agencies to assess and collect civil monetary penalties.

(b) PURPOSE The purpose of this Act is to establish a mechanism that shall

- (1) allow for regular adjustment for inflation of civil monetary penalties;
- (2) maintain the deterrent effect of civil monetary penalties and promote compliance with the law; and
- (3) improve the collection by the Federal Government of civil monetary penalties.

DEFINITIONS

SEC. 3. For purposes of this Act, the term

- (1) **agency** means an Executive agency as defined under section 105 of title 5, United States Code, and includes the United States Postal Service;
- (2) **civil monetary penalty** means any penalty, fine, or other sanction that
 - (A)(i) is for a specific monetary amount as provided by Federal law; or
 - (ii) has a maximum amount provided for by Federal law; and
 - (B) is assessed or enforced by an agency pursuant to Federal law; and
 - (C) is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal courts; and
- (3) **Consumer Price Index** means the Consumer Price Index for all-urban consumers published by the Department of Labor.

CIVIL MONETARY PENALTY INFLATION ADJUSTMENT REPORTS

SEC. 4. The head of each agency shall, not later than 180 days after the date of enactment of the Debt Collection Improvement Act of 1996 [Apr. 26, 1996], and at least once every 4 years thereafter

- (1) by regulation adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency, except for any penalty (including any addition to tax and additional amount) under the Internal Revenue Code of 1986 [26 U.S.C. 1 et seq.], the Tariff Act of 1930 [19 U.S.C. 1202 et seq.], the Occupational Safety and Health Act of 1970 [20 U.S.C. 651 et seq.], or the Social Security

Act [42 U.S.C. 301 et seq.], by the inflation adjustment described under section 5 of this Act [bracketed material in original]; and

(2) publish each such regulation in the Federal Register.

COST-OF-LIVING ADJUSTMENTS OF CIVIL
MONETARY PENALTIES

SEC. 5. (a) ADJUSTMENT. The inflation adjustment under section 4 shall be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest

(1) multiple of \$10 in the case of penalties less than or equal to \$100;

(2) multiple of \$100 in the case of penalties greater than \$100 but less than or equal to \$1,000;

(3) multiple of \$1,000 in the case of penalties greater than \$1,000 but less than or equal to \$10,000;

(4) multiple of \$5,000 in the case of penalties greater than \$10,000 but less than or equal to \$100,000;

(5) multiple of \$10,000 in the case of penalties greater than \$100,000 but less than or equal to \$200,000; and

(6) multiple of \$25,000 in the case of penalties greater than \$200,000.

(b) DEFINITION. For purposes of subsection (a), the term cost-of-living adjustment means the percentage (if any) for each civil monetary penalty by which

(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds

(2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law.

ANNUAL REPORT

SEC. 6. Any increase under this Act in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect.

LIMITATION ON INITIAL ADJUSTMENT. The first adjustment of a civil monetary penalty . . . may not exceed 10 percent of such penalty.

7 C.F.R.:

TITLE 7 AGRICULTURE

SUBTITLE A OFFICE OF THE SECRETARY OF AGRICULTURE

....

PART 3 DEBT MANAGEMENT

....

Subpart E Adjusted Civil Monetary Penalties

§ 3.91 Adjusted civil monetary penalties.

(a) *In general.* The Secretary will adjust the civil monetary penalties, listed in paragraph (b), to take account of inflation at least once every 4 years as required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. No. 101-410), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134).

(b) *Penalties*

....

(2) *Animal and Plant Health Inspection Service.* . . .

....

(xi) Civil penalty for a violation of the Act of February 2, 1903 (commonly known as the Cattle Contagious Disease Act), codified at 21 U.S.C. 122, has a maximum of \$1,100.

7 C.F.R. § 3.91(a), (b)(2)(xi).

9 C.F.R.:

TITLE 9 ANIMALS AND ANIMAL PRODUCTS

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

....

**SUBCHAPTER D EXPORTATION AND IMPORTATION OF ANIMALS
(INCLUDING POULTRY) AND ANIMAL PRODUCTS**

....

**PART 93 IMPORTATION OF CERTAIN ANIMALS, BIRDS, AND POULTRY,
AND CERTAIN ANIMAL, BIRD, AND POULTRY PRODUCTS;
REQUIREMENTS FOR MEANS OF CONVEYANCE
AND SHIPPING CONTAINERS**

SUBPART A BIRDS

§ 93.100 Definitions.

Whenever in this subpart the following terms are used, unless the context otherwise requires, they shall be construed, respectively, to mean:

....

Birds. All members of the class aves (including eggs for hatching), other than poultry.

....

Pet birds. Birds, except ratites, which are imported for the personal pleasure of their individual owners and are not intended for resale.

§ 93.101 General prohibitions; exceptions.

(a) No product or bird subject to the provisions of this part shall be brought into the United States except in accordance with the regulations in

this part and part 94 of this subchapter; nor shall any such product or bird be handled or moved after physical entry into the United States before final release from quarantine or any [sic] other form of governmental detention except in compliance with such regulations; *Provided*, That the Administrator may upon request in specific cases permit products or birds to be brought into or through the United States under such conditions as he or she may prescribe, when he or she determines in the specific case that such action will not endanger the livestock or poultry of the United States.

§ 93.104 Certificate for pet birds, commercial birds, zoological birds, and research birds.

(a) *General*. All pet birds, except as provided in § 93.101(b) and (c) of this part; all research birds; and all commercial birds and zoological birds, including ratites and hatching eggs of ratites, offered for importation from any part of the world, shall be accompanied by a certificate issued by a full-time salaried veterinary officer of the national government of the exporting region, or issued by a veterinarian authorized or accredited by the national government of the exporting region and endorsed by a full-time salaried veterinary officer of the national government of that region.

§ 93.105 Inspection at the port of entry.

....

(b) All pet birds imported from any part of the world, except pet birds from Canada and pet birds meeting the provisions of § 93.101(c)(2), shall be subjected to inspection at the Customs port of entry by a veterinary inspector of APHIS and such birds shall be permitted entry only at the ports listed in § 93.102(a). Pet birds of Canadian origin and those birds meeting the provisions of § 93.101(c)(2) shall be subject to veterinary inspection at any of the ports of entry listed in § 93.102 and 93.203.

9 C.F.R. §§ 93.100, .101(a), .104(a), .105(b) (footnote omitted).

**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 in section 1.136(a) of the Rules of Practice (7 C.F.R. § 1.136(a)) shall be deemed an admission of the allegations in the complaint. Further, pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), the failure to file an answer constitutes a waiver of hearing. Accordingly, the material allegations in the Complaint are adopted and set forth in this Decision and Order 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 an individual whose mailing address is 334 State Avenue, Somerton, Arizona 85350.
2. On or about September 25, 2000, Respondent brought a pet canary into the United States in violation of 9 C.F.R. § 93.101(a) in that the pet bird was not brought into the United States in accordance with the regulations in 9 C.F.R. pt. 93, as required.
3. On or about September 25, 2000, Respondent imported a pet canary into the United States from Mexico in violation of 9 C.F.R. § 93.104(a) in that the pet bird was not accompanied by a certificate, as required.

4. On or about September 25, 2000, Respondent imported a pet canary into the United States from Mexico in violation of 9 C.F.R. § 93.105(b) in that the pet bird was not offered for entry at one of the ports of entry designated in 9 C.F.R. § 93.102(a), as required.

Conclusion of Law

By reason of the Findings of Fact in this Decision and Order, Respondent violated 21 U.S.C. § 111 and 9 C.F.R. §§ 93.101(a), .104(a), and .105(b).

ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

On April 30, 2002, Respondent filed a letter dated April 18, 2002, addressed to the United States Department of Agriculture. Respondent's letter states that it is an appeal of your decision dated August 10, 2001[,] which states I did imported [sic] a canary without legal procedures[.] The record does not contain a decision dated August 10, 2001. Based on the record before me, I infer Respondent's letter dated April 18, 2002, addressed to the United States Department of Agriculture [hereinafter Appeal Petition], is an appeal of the ALJ's Initial Decision and Order.

Respondent raises three issues in his Appeal Petition. First, Respondent contends the ALJ erroneously found that Respondent imported a pet canary into the United States. Respondent asserts that the pet bird he imported into the United States was a cheap parakeet. (Respondent's Appeal Pet.)

I disagree with Respondent's contention that the ALJ erroneously found that Respondent imported a pet canary into the United States in violation of 9 C.F.R. §§ 93.101(a), .104(a), and .105(b). The Complaint alleges Respondent imported a pet canary into the United States in violation of 9 C.F.R. §§ 93.101(a), .104(a), and .105(b). Respondent failed to file a timely answer to the Complaint. In accordance with section 1.136(c) of the Rules of Practice (7 C.F.R. § 1.136(c)), Respondent is deemed, for the purposes of this proceeding, to have admitted the allegations in the Complaint, including the allegation that he imported a pet canary into the United States. Moreover, Complainant proposed a finding that Respondent imported a pet canary into the United States in violation of 9 C.F.R. §§ 93.101(a), .104(a), and .105(b) in Complainant's Proposed Default Decision and Order. Respondent failed to file objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). Respondent's denial in his Appeal Petition that he imported a pet canary into the United States comes too late to be considered.

Moreover, even if I were to find Respondent imported a cheap pet parakeet into the United States, as Respondent asserts, that finding would not alter the disposition of this proceeding. The regulations Respondent is alleged to have violated (9 C.F.R. §§

93.101(a), .104(a), .105(b)) apply equally to cheap pet parakeets and pet canaries imported into the United States from Mexico.⁹

Second, Respondent appears to offer a reason for his failure to file a timely answer and timely objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order, as follows:

Second.- At the time I was detained the officer asked me to return the pet to Mexico without any fine and before I did another officer kept the pet with him and one of them asked to return the pet and the other did not wanted [sic]. I was very confused about it. [T]hat was the reason I did not answer your previous letter on time.

Respondent's Appeal Pet.

Respondent's confusion regarding purported instructions by unidentified officers concerning the return of his pet bird to Mexico is not a meritorious basis for Respondent's failure to file a timely answer to the Complaint or for Respondent's failure to file timely objections to Complainant's Motion for Adoption of Proposed Default Decision and Order and Complainant's Proposed Default Decision and Order. Moreover, I cannot find anything in the record before me that would cause Respondent to believe that he would not be deemed, for purposes of this proceeding, to have admitted the allegations in the

⁹Section 93.101(a) of the regulations (9 C.F.R. § 93.101(a)) applies to *birds*. Sections 93.104(a) and 93.105(b) of the regulations (9 C.F.R. §§ 93.104(a), .105(b)) apply to *pet birds*. The terms *birds* and *pet birds* are defined in 9 C.F.R. § 93.100, and the pet parakeet Respondent asserts he imported from Mexico into the United States falls within the definition of the terms *birds* and *pet birds* in 9 C.F.R. § 93.100.

Complaint if he failed to answer the Complaint within 20 days after the Hearing Clerk served him with the Complaint.

The Hearing Clerk served Respondent with the Complaint, the Rules of Practice, and the Hearing Clerk's August 6, 2001, service letter on August 21, 2001, and on November 26, 2001.¹⁰ Sections 1.136(a), 1.136(c), 1.139, and 1.141(a) of the Rules of Practice clearly 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 § 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. 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

¹⁰See notes 2 and 4.

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

The respondent shall have twenty (20) days after service of this complaint in which to file an answer with the Hearing Clerk, United States Department of Agriculture, Washington, D.C. 20250-9200, in accordance with the applicable rules of practice (7 C.F.R. § 1.136). Failure to deny or otherwise respond to any allegation in this complaint shall constitute an admission of the allegation. Failure to file an answer within the prescribed time shall constitute an admission of the allegation in this complaint and a waiver of hearing.

Compl. at 2.

Similarly, the Hearing Clerk informed Respondent in the August 6, 2001, service letter that a timely answer must be filed pursuant to the Rules of Practice and that failure to file a timely answer to any allegation in the Complaint would constitute an admission of that allegation, as follows:

August 6, 2001

Mr. Salvador Sanchez-Gomez
334 State Avenue
Somerton, Arizona 85350

Dear Mr. Gomez:

Subject: In re: Salvador Sanchez-Gomez, Respondent -
A.Q. Docket No. 01-0010

Enclosed is a copy of a Complaint, which has been filed with this office under the [sic] Section 2 of the Act of February 2, 1903, as amended.

Also enclosed is a copy of the Rules of Practice which govern the conduct of these proceedings. You should familiarize yourself with the rules in that the comments which follow are not a substitute for their exact requirements.

The rules specify that you may represent yourself personally or by an attorney of record. Unless an attorney files an appearance in your behalf, it shall be presumed that you have elected to represent yourself personally. Most importantly, you have 20 days from the receipt of this letter to file with the Hearing Clerk an original and three copies of your written and signed [sic] answer to the complaint. It is necessary that your answer set forth any defense you wish to assert, and to specifically admit, deny or explain each allegation of the complaint. Your answer may include a request for an oral hearing. Failure to file an answer or filing an answer which does not deny the material allegations of the complaint, shall constitute an admission of those allegations and a waiver of your right to an oral hearing.

In the event this proceeding does go to hearing, the hearing shall be formal in nature and will be held and the case decided by an Administrative Law Judge on the basis of exhibits received in evidence and sworn testimony subject to cross-examination.

You must notify us of any future address changes. Failure to do so may result in a judgment being entered against you without your knowledge. We also need your present and future telephone number.

Your answer, as well as any motions or requests that you may hereafter wish to file in this proceeding should be submitted in quadruplicate to the Hearing Clerk, OALJ, Room 1081-South Building, United States Department of Agriculture, Washington, D.C. 20250-9200.

Questions you may have respecting the possible settlement of this case should be directed to the attorney whose name and telephone number appears [sic] on the last page of the complaint.

Sincerely,

/s/

Joyce A. Dawson
Hearing Clerk

On October 10, 2001, and January 15, 2002, the Hearing Clerk sent letters to Respondent informing him that an answer to the Complaint had not been filed within the time required in the Rules of Practice.¹¹ Respondent did not respond to the Hearing Clerk's October 10, 2001, letter or to the Hearing Clerk's January 15, 2002, letter.

On January 16, 2002, in accordance with section 1.139 of the Rules of Practice (7 C.F.R. § 1.139), Complainant filed Motion for Adoption of Proposed Default Decision and Order and a Proposed Default Decision and Order. On February 4, 2002, the Hearing Clerk served Respondent with Complainant's Motion for Adoption of Proposed Default Decision and Order, Complainant's Proposed Default Decision and Order, and the Hearing Clerk's service letter dated January 17, 2002.¹² The Hearing Clerk informed Respondent in the January 17, 2002, service letter that he had 20 days within which to file

¹¹See notes 3 and 5.

¹²See note 6.

objections to Complainant s Motion for Adoption of Proposed Default Decision and Order, as follows:

January 17, 2002

Mr. Salvador Sanchez-Gomez
P.O. Box 277
344 [sic] State Avenue
Somerton, Arizona 85350

Dear Mr. Gomez:

Subject: In re: Salvador Sanchez-Gomez, Respondent
A.Q. Docket No. 01-0010

Enclosed is a copy of Complainant s Motion for Adoption of Proposed Default Decision and Order together with a copy of the 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 objection to the Motion for Decision.

Sincerely,

/s/

Joyce A. Dawson
Hearing Clerk

Respondent failed to file objections to Complainant s Motion for Adoption of Proposed Default Decision and Order and Complainant s 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).

Although, on rare occasions, default decisions have been set aside for good cause shown or where the complainant states that the complainant does not object to setting aside the default decision,¹³ generally there is no basis for setting aside a default decision that is based upon a respondent's failure to file a timely answer.¹⁴

¹³See *In re Dale Goodale*, 60 Agric. Dec. ____ (Dec. 11, 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. ____ (Nov. 9, 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 that 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 PACA 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).

¹⁴See, e.g., *In re Daniel E. Murray*, 58 Agric. Dec. 64 (1999) (holding the
(continued...)

The Rules of Practice provide that an answer must be filed within 20 days after service of the complaint (7 C.F.R. § 1.136(a)). Respondent did not file a timely answer. Respondent's first and only filing in this proceeding was April 30, 2002, 8 months 9 days after the Hearing Clerk served Respondent with the Complaint on August 21, 2001, and 5 months 4 days after the Hearing Clerk served Respondent with the Complaint on November 26, 2001. Respondent's failure to file a timely answer is deemed, for purposes of this proceeding, an admission of the allegations in the Complaint and constitutes a waiver of hearing (7 C.F.R. §§ 1.136(c), .139, .141(a)).

¹⁴(...continued)

administrative law judge properly issued a default decision where the respondent filed his answer 9 months 3 days after the Hearing Clerk served him with the complaint and holding the respondent is deemed, by his failure to file a timely answer, to have admitted violating 9 C.F.R. § 78.8(a)(2)(ii), a regulation issued under the Act of February 2, 1903, as alleged in the complaint); *In Conrad Payne*, 57 Agric. Dec. 921 (1998) (holding the administrative law judge properly issued the default decision where the respondent failed to file a timely answer to the complaint and holding the respondent is deemed, by his failure to file a timely answer, to have admitted violating the Act of February 2, 1903, and 9 C.F.R. § 94.0 *et seq.*, as alleged in the complaint); *In re Eddie Benton*, 50 Agric. Dec. 428 (1991) (adopting the administrative law judge's default decision where the respondent failed to file an answer after the Hearing Clerk served the complaint on the respondent and holding the respondent is deemed, by the failure to file an answer, to have admitted violating 9 C.F.R. § 78.9(c)(2)(ii)(B), a regulation issued under the Act of February 2, 1903, as alleged in the complaint); *In re Daniel Cano*, 50 Agric. Dec. 383 (1991) (adopting the administrative law judge's default decision where the respondent failed to file a timely answer after the Hearing Clerk served the complaint on the respondent and holding the respondent is deemed, by the failure to file a timely answer, to have admitted violating the Act of February 2, 1903, and the regulations promulgated under the Act of February 2, 1903).

Accordingly, 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. Application of the default provisions of the Rules of Practice does not deprive Respondent of his rights under the due process clause of the Fifth Amendment to the Constitution of the United States.¹⁵

Third, Respondent offers to pay a reasonable fine according with the pet price (Respondent's Appeal Pet.). Respondent does not indicate the amount he believes is a reasonable civil penalty or the amount of the pet price. However, based on Respondent's description of the pet bird that he imported into the United States, I infer Respondent asserts that a reasonable civil penalty would be significantly less than the \$1,000 civil penalty assessed by the ALJ.

Section 3 of the Act of February 2, 1903 (21 U.S.C. § 122), provides that the Secretary of Agriculture may assess a civil penalty of not more than \$1,000 for each

¹⁵*See 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 United States Constitution 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 the Act of February 2, 1903, and the regulations issued under the Act of February 2, 1903. The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (28 U.S.C. § 2461 note), provides that the head of each agency shall, by regulation, adjust each civil monetary penalty provided by law within the jurisdiction of the Federal agency by increasing the maximum civil penalty for each civil monetary penalty by a cost-of-living adjustment. Effective September 2, 1997, the Secretary of Agriculture, by regulation, adjusted the civil monetary penalty that may be assessed under section 3 of the Act of February 2, 1903 (21 U.S.C. § 122), for each violation of the Act of February 2, 1903, and the regulations issued under Act of February 2, 1903, by increasing the maximum civil penalty from \$1,000 to \$1,100.¹⁶ Respondent committed two violations of the regulations under Act of February 2, 1903.¹⁷ Therefore, the ALJ could have assessed Respondent a maximum civil penalty of \$2,200, and the ALJ's assessment of \$1,000 civil penalty against Respondent is warranted in law.

Moreover, the assessment of a \$1,000 civil penalty against Respondent is in accord with the United States Department of Agriculture's sanction policy. The United States Department of Agriculture's sanction policy is set forth in *In re S.S. Farms Linn County*,

¹⁶7 C.F.R. § 3.91(b)(2)(xi).

¹⁷I conclude Respondent violated three regulations, 9 C.F.R. §§ 93.101(a), .104(a), and .105(b). However, based on the record before me, Respondent's violation of 9 C.F.R. § 93.101(a) appears to be no more than Respondent's failure to comply with 9 C.F.R. §§ 93.104(a) and .105(b). Therefore, I conclude Respondent committed two violations of the regulations under the Act of February 2, 1903.

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 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 administration of the regulatory statute. *In re S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497.

Complainant, one of the officials charged with administering the Act of February 2, 1903, recommends the assessment of a \$1,000 civil penalty against Respondent, as follows:

Respondent's action undermines the United States Department of Agriculture's efforts to prevent the spread of animal diseases throughout the United States. In order to deter [R]espondent and others similarly situated from committing violations of this nature in the future, [C]omplainant believes that assessment of the requested civil penalty of one thousand dollars (\$1,000.00), is warranted and appropriate.

Complainant's Motion for Adoption of Proposed Default Decision and Order at 2nd unnumbered page.

Thus, I find assessment of a \$1,000 civil penalty against Respondent is justified in fact. I find no basis in this proceeding for assessing a civil penalty against Respondent other than that recommended by Complainant. I reject Respondent's request that I assess a civil penalty against Respondent that is equal to the price of the pet bird Respondent brought into the United States in violation of 9 C.F.R. §§ 93.101(a), .104(a), and .105(b).

Complainant states he has no objection to Respondent's payment of the civil penalty in installments of \$50 per month (Response to Respondent's Appeal at 5). Based on Complainant's lack of objection to Respondent's paying the civil penalty in installments of \$50 per month and my finding that Respondent's payment of the \$1,000 civil penalty in installments of \$50 per month will achieve the remedial purposes of the Act of February 2, 1903, I issue an Order which allows Respondent to pay the \$1,000 civil penalty in installments of \$50 per month.

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

ORDER

Respondent is assessed a \$1,000 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, MN 55403

Respondent shall pay the \$1,000 civil penalty in installments of \$50 each month for 20 consecutive months. Respondent's first payment shall be sent to, and received by, the United States Department of Agriculture, APHIS Field Servicing Office, Accounting Section, within 30 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 the certified checks or money orders that payment is in reference to A.Q. Docket No. 01-0010.

Done at Washington, DC

May 28, 2002

William G. Jenson
Judicial Officer