

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:) P.Q. Docket No. 05-0015
)
ESTER NOVAK,)
)
Respondent) **Decision and Order**
) **by Reason of Default**

[1] This proceeding was instituted under the Plant Protection Act (7 U.S.C. § 7701 et seq.) (hereinafter frequently “the Act”), by a complaint filed on January 12, 2005, by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (hereinafter frequently “APHIS”), alleging that respondent Ester Novak violated the Act and regulations promulgated under the Act.

[2] This is an administrative proceeding for the assessment of a civil penalty as authorized by 7 U.S.C. § 7734 for violations of the regulations governing the movement of plants, plant products including fruits, and plant pests from Hawaii into the continental United States (7 C.F.R. § 318.13 et seq., specifically 7 C.F.R. §§ 318.13(b) and 318.13-2(a)); and the interstate movement of plant pests (7 C.F.R. § 330.200) (hereinafter frequently “the regulations”).

[3] On January 13, 2005, the Hearing Clerk sent to respondent Ester Novak, by certified mail, return receipt requested, a copy of the complaint and a copy of the Rules of Practice, together with a cover letter (service letter). Respondent Ester Novak was informed in the service letter and in the complaint that an answer to the complaint should be filed in

accordance with the Rules of Practice within 20 days and that failure to answer any allegation in the complaint would constitute an admission of that allegation. 7 C.F.R. § 1.136.

[4] The envelope containing the complaint, copy of the Rules of Practice, and service letter was addressed to Ester Novak, 86-259 Leihua Street, Waianae, Hawaii 96792, and was returned to the Hearing Clerk's Office on March 21, 2005 marked "Returned to Sender - UNCLAIMED" by the U.S. Postal Service. The Hearing Clerk staff then, on March 22, 2005, sent the complaint with accompanying documents to respondent Ester Novak at that same address via ordinary mail. The complaint was thereby deemed to have been received by respondent Ester Novak on March 22, 2005. 7 C.F.R. § 1.137.

[5] Also on March 22, 2005, APHIS provided the Hearing Clerk's Office with another address that APHIS had for respondent Ester Novak, and the Hearing Clerk staff mailed the complaint, copy of the Rules of Practice, and service letter to that address as well. That address was Ester M. Novak, 89-210 **Huikala** Place, #89-210B, Waianae, Hawaii 96792-4145. On April 12, 2005, this second sent copy of the complaint was returned to the Hearing Clerk's Office marked "Returned to Sender - UNCLAIMED" by the U.S. Postal Service. The Hearing Clerk staff then, on April 13, 2005, sent the complaint with accompanying documents to respondent Ester Novak at that same address via ordinary mail. This second sent copy of the complaint was thereby deemed to have been received by respondent Ester Novak on April 13, 2005. 7 C.F.R. § 1.137.

[6] Consequently, respondent Ester Novak had until April 11, 2005, or until May 3, 2005, to file an answer to the complaint. 7 C.F.R. § 1.136(a). Respondent Ester Novak failed to file

an answer to the complaint by April 11, 2005, or even by May 3, 2005, as required. Now, more than six months later, she still has not filed an answer. The Rules of Practice provide 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. 7 C.F.R. §1.136(c). Further, the failure to file an answer constitutes a waiver of hearing. 7 C.F.R. § 1.139.

[7] Accordingly, the material allegations in the complaint, which are admitted by respondent Ester Novak's default, are adopted and set forth herein as Findings of Fact. This Decision and Order, therefore, is issued pursuant to section 1.139 of the Rules of Practice, 7 C.F.R. § 1.139. *See* 7 C.F.R. §1.130 *et seq.*; *see also* 7 C.F.R. §380.1 *et seq.*

[8] APHIS filed a Motion for Adoption of Proposed Default Decision and Order on June 2, 2005, identifying APHIS's request for "a civil penalty of five hundred dollars (\$500)". The Motion was sent to respondent Ester Novak by the Hearing Clerk on June 2, 2005, by certified mail, return receipt requested, together with a cover letter.

[9] APHIS's Motion states, among other things, that respondent Ester Novak's actions undermine the United States Department of Agriculture's efforts to prevent the introduction and/or spread of plant diseases and pests throughout the United States. The U.S. Department of Agriculture spends millions of dollars in efforts to control and eradicate these risks. Hawaii's unique ecosystem and environment contain plant pests and risks which are not present on the mainland and must be contained to avert serious plant pest and other plant health risks. In order to deter respondent and others similarly situated from committing violations of this nature in the future, Complainant (APHIS) believes that assessment of the requested civil penalty of five hundred dollars (\$500) against respondent, is warranted and appropriate.

Findings Of Fact

[10] Respondent Ester Novak is an individual whose last known mailing addresses were

Ester Novak, 86-259 **Leihua** Street, Waianae, Hawaii 96792; and Ester M. Novak, 89-210 **Huikala** Place, #89-210B, Waianae, Hawaii 96792-4145.

[11] On or about August 25, 2003, at Waianae, Hawaii, respondent Ester Novak offered to a common carrier, specifically the U.S. Postal Service, approximately 1.2 pounds of fresh marungai fruit, 2.2 pounds of ipomoea leaves, and 1.2 pounds of bittermelon leaves for shipment from Hawaii to the continental United States, in violation of 7 C.F.R. §§ 318.13(b) and 318.13-2(a).

[12] On or about August 25, 2003, respondent Ester Novak knowingly attempted to move interstate from Hawaii to California via the U.S. Postal Service approximately 2.2 pounds of ipomoea leaves infested with Thysanoptera, a plant pest, and 1.2 pounds of bittermelon leaves infested with sp. of Aphidae, a plant pest, in violation of 7 C.F.R. § 330.200.

Conclusions

[13] The Secretary of Agriculture has jurisdiction in this matter.

[14] On or about August 25, 2003, respondent Ester Novak violated the Plant Protection Act (7 U.S.C. § 7701 et seq.), and regulations issued under the Act (7 C.F.R. § 318.13 et seq., specifically 7 C.F.R. §§ 318.13(b) and 318.13-2(a); and 7 C.F.R. § 330.200).

[15] A civil penalty in the amount of five hundred dollars (\$500) is appropriate, and the following Order is issued.

Order

[16] Respondent Ester Novak is hereby assessed a civil penalty of five hundred dollars (\$500), as authorized by 7 U.S.C. § 7734. Respondent shall pay the \$500 by cashier's check or money order or certified check, made payable to the order of the "**Treasurer of the United**

States" and forwarded within thirty (30) days from the effective date of this Order to:

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

Respondent shall indicate that payment is in reference to **P.Q. Docket No. 05-0015**.

[17] This Order shall be effective on the first day after this Decision and Order becomes final. This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final without further proceedings 35 days after service unless an appeal to the Judicial Officer is filed within 30 days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145, see attached Appendix A).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties. Respondent Ester Novak's copies should be sent to **both** of her last known addresses.

Done at Washington, D.C.
this 1st day of November 2005

Jill S. Clifton
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
South Building Room 1031
1400 Independence Ave SW
Washington, D.C. 20250-9203
202-720-4443
Fax: 202-720-9776

APPENDIX A

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—ADMINISTRATIVE REGULATIONS

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SUBPART H—RULES OF PRACTICE GOVERNING FORMAL

ADJUDICATORY PROCEEDINGS INSTITUTED BY THE SECRETARY UNDER

VARIOUS STATUTES

...

§ 1.145 Appeal to Judicial Officer.

(a) *Filing of petition.* Within 30 days after receiving service of the Judge's decision, if the decision is a written decision, or within 30 days after issuance of the Judge's decision, if the decision is an oral decision, a party who disagrees with the decision, any part of the decision, or any ruling by the Judge or who alleges any deprivation of rights, may appeal the decision to the Judicial Officer by filing an appeal petition with the Hearing Clerk. As provided in

§ 1.141(h)(2), objections regarding evidence or a limitation regarding examination or cross-examination or other ruling made before the Judge may be relied upon in an appeal. Each issue set forth in the appeal petition and the arguments regarding each issue shall be separately numbered; shall be plainly and concisely stated; and shall contain detailed citations to the record, statutes, regulations, or authorities being relied upon in support of each argument. A brief may be filed in support of the appeal simultaneously with the appeal petition.

(b) *Response to appeal petition.* Within 20 days after the service of a copy of an appeal petition and any brief in support thereof, filed by a party to the proceeding, any other party may file with the Hearing Clerk a response in support of or in opposition to the appeal and in such response any relevant issue, not presented in the appeal petition, may be raised.

(c) *Transmittal of record.* Whenever an appeal of a Judge's decision is filed and a response thereto has been filed or time for filing a response has expired, the Hearing Clerk shall transmit to the Judicial Officer the record of the proceeding. Such record shall include: the pleadings; motions and requests filed and rulings thereon; the transcript or recording of the testimony taken at the hearing, together with the exhibits filed in connection therewith; any documents or papers filed in connection with a pre-hearing conference; such proposed findings of fact, conclusions, and orders, and briefs in support thereof, as may have been filed in connection with the proceeding; the Judge's decision; such exceptions, statements of objections and briefs in support thereof as may have been filed in the proceeding; and the appeal petition, and such briefs in support thereof and responses thereto as may have been

filed in the proceeding.

(d) *Oral argument.* A party bringing an appeal may request, within the prescribed time for filing such appeal, an opportunity for oral argument before the Judicial Officer. Within the time allowed for filing a response, appellee may file a request in writing for opportunity for such an oral argument. Failure to make such request in writing, within the prescribed time period, shall be deemed a waiver of oral argument. The Judicial Officer may grant, refuse, or limit any request for oral argument. Oral argument shall not be transcribed unless so ordered in advance by the Judicial Officer for good cause shown upon request of a party or upon the Judicial Officer's own motion.

(e) *Scope of argument.* Argument to be heard on appeal, whether oral or on brief, shall be limited to the issues raised in the appeal or in the response to the appeal, except that if the Judicial Officer determines that additional issues should be argued, the parties shall be given reasonable notice of such determination, so as to permit preparation of adequate arguments on all issues to be argued.

(f) *Notice of argument; postponement.* The Hearing Clerk shall advise all parties of the time and place at which oral argument will be heard. A request for postponement of the argument must be made by motion filed a reasonable amount of time in advance of the date fixed for argument.

(g) *Order of argument.* The appellant is entitled to open and conclude the argument.

(h) *Submission on briefs.* By agreement of the parties, an appeal may be submitted for decision on the briefs, but the Judicial Officer may direct that the appeal be argued orally.

(i) *Decision of the [J]udicial [O]fficer on appeal.* As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.

[42 FR 743, Jan. 4, 1977, as amended at 60 FR 8456, Feb. 14, 1995; 68 FR 6341, Feb. 7, 2003]

7 C.F.R. § 1.145