

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	
)	A.Q. Docket No. 07-0125
Washington Davila d/b/a DavilaTravel)	P.Q. Docket No. 07-0125
)	
Respondent)	Default Decision and Order

1. The Complaint, filed on June 12, 2007, alleged violations by the Respondent of the Plant Protection Act, as amended (7 U.S.C. § 7701 *et seq.*), and the Animal Health Protection Act (7 U.S.C. § 8301 *et seq.*), and regulations promulgated under those Acts (7 C.F.R. § 319.56-3; 9 C.F.R. § 94.4(a); 9 C.F.R. § 94.9(b); and 9 C.F.R. § 94.12(b)).

Parties and Counsel

2. The Acting Administrator, Animal and Plant Health Inspection Service, United States Department of Agriculture, is the Complainant (frequently herein “Complainant” or “APHIS”). APHIS is represented by Mr. Krishna Ramaraju, Esq. and was previously represented by Mr. Cory S. Spiller, Esq., both with the Office of the General Counsel (Regulatory Division), United States Department of Agriculture, 1400 Independence Avenue, S.W., Washington D.C. 20250-1400.

3. Washington Davila, an individual, doing business as DavilaTravel, is the Respondent (frequently herein “Respondent Davila” or “Respondent”), with an address of 112 Tonnele Ave. Apt #5, Jersey City, New Jersey 07306.

Procedural History

4. APHIS's Motion for Adoption of Proposed Default Decision and Order, filed January 14, 2008, is before me. Respondent Davila was served on March 3, 2008 with a copy of that Motion and a copy of the proposed Default Decision and Order, and Respondent Davila failed to respond. The time to file a response expired on March 24, 2008.

5. Respondent Davila was served with a copy of the Complaint on June 27, 2007. The Complaint was accompanied by a copy of the Hearing Clerk's Notice Letter and a copy of the Rules of Practice. Respondent Davila's answer was due to be filed no later than July 17, 2007, 20 days after service of the Complaint (7 C.F.R. § 136(a)). Respondent Davila never filed an answer.

6. Respondent Davila was informed in the Complaint, and in the Hearing Clerk's letter accompanying the Complaint, that an answer should be filed with the Hearing Clerk within 20 days after service of the complaint, and that failure to file an answer within 20 days after service of the complaint constitutes an admission of the allegations in the complaint and waiver of a hearing. 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 are adopted and set forth in this Default Decision as the Findings of Fact, and this Decision is issued pursuant to the Rules of Practice. 7 C.F.R. § 1.139. *See* 7 C.F.R. §1.130 *et seq.*

Findings of Fact and Conclusions

8. The Secretary of Agriculture has jurisdiction over Respondent Washington Davila d/b/a DavilaTravel and the subject matter involved herein.
9. Respondent Washington Davila d/b/a DavilaTravel is an individual doing business with an address of 112 Tonnele Ave. Apt #5, Jersey City, New Jersey 07306.
10. On or about March 16, 2003, Respondent Washington Davila d/b/a DavilaTravel imported from Ecuador into the United States, one bunch of lemongrass, two apples, a box of peaches, and a box of tree tomatoes, in violation of 7 C.F.R. § 319.56-3.
11. On or about March 16, 2003, Respondent Washington Davila d/b/a DavilaTravel imported from Ecuador into the United States, pork in a food mixture, in violation of 9 C.F.R. § 94.4(a), 9 C.F.R. § 94.9(b), and 9 C.F.R. § 94.12(b).
12. On or about April 1, 2003, Respondent Washington Davila d/b/a DavilaTravel imported from Ecuador into the United States, 3 pounds of pork, in violation of 9 C.F.R. § 94.4(a), 9 C.F.R. § 94.9(b), and 9 C.F.R. § 94.12(b).
13. Respondent Washington Davila d/b/a DavilaTravel has violated the Plant Protection Act, as amended (7 U.S.C. § 7701 *et seq.*), and the Animal Health Protection Act (7 U.S.C. § 8301 *et seq.*), and certain regulations, specifically 7 C.F.R. § 319.56-3; 9 C.F.R. § 94.4(a); 9 C.F.R. § 94.9(b); and 9 C.F.R. § 94.12(b).
14. The civil penalty is limited to \$1,000, in the case of an initial violation by an individual moving regulated articles not for monetary gain, under both Section 424(b) of the

Plant Protection Act, 7 U.S.C. § 7734(b), and Section 10414 of the Animal Health Protection Act, 7 U.S.C. § 8313(b).

15. APHIS requests that a \$5,000 civil penalty be imposed as appropriate and necessary to achieve the remedial purposes of the Acts.

16. There is scant evidence before me on the factors to be used in determining civil penalties, enumerated in 7 U.S.C. § 7734(b)(2) and in 7 U.S.C. § 8313(b)(2).

17. I conclude that a \$500 civil penalty for the violation described in paragraph 10; a \$500 civil penalty for the violation described in paragraph 11; and a \$1,000 penalty for the violation described in paragraph 12; is in accordance with 7 U.S.C. § 7734(b) and 7 U.S.C. § 8313(b) and is appropriate and proportionate and will achieve the remedial purposes of the Acts. I conclude further that the \$2,000 total civil penalty (\$500 + \$500 + \$1,000) is adequate to deter Respondent Davila and others from committing like violations.

Order

18. Respondent Washington Davila d/b/a DavilaTravel is hereby assessed a civil penalty of **\$2,000.00**. Respondent shall pay the \$2,000.00 by cashier's check or certified check or money order, made payable to the order of the "**Treasurer of the United States**" and forwarded within sixty (60) 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 Washington Davila d/b/a DavilaTravel shall indicate that payment is in reference to **P.Q. Docket No. 07-0125** and **A.Q. Docket No. 07-0125**.

Finality

19. This Decision and Order shall be final and effective thirty five (35) days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (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.

Done at Washington, D.C.
this 27th day of March 2008

Jill S. Clifton
Administrative Law Judge

Hearing Clerk's Office
U.S. Department of Agriculture
1400 Independence Avenue, SW
Room 1031 South Building
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