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UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 15-0062 (PQ)

In re:

JULIO ALVAREZ III,

Respondent.

Before:

Janice K. Bullard, Administrative Law Judge

Appearances:

Tracy McGowan, Esq. for Complainant

Julio Alvarez III, pro se

DECISION AND ORDER BY ENTRY OF DEFAULT AGAINST RESPONDENT

PRELIMINARY STATEMENT

The instant matter involves allegations by the USDA Administrator of the Animal Plant Health Inspection Service (APHIS; Complainant) that Julio Alvarez III (Respondent) violated the Plant Protection Act, 7 U.S.C. §§7701 et seq. (the Act). This matter is ripe for adjudication

ISSUES

1. Whether default should be entered in this matter;

2. Whether a hearing is necessary in this matter;

3. Whether Respondent violated the Act; and

4. Whether the sanctions recommended by Complainant should be imposed.

STATEMENT OF THE CASE

I. Procedural History

On January 29, 2015, Complainant filed with the Hearing Clerk, Office of Administrative Law Judges (OALJ; Hearing Clerk), a complaint alleging that Respondent had violating the Act. On January 29, 2015, the Hearing Clerk sent to Respondent, via certified mail and regular mail, a copy of the Notice and a copy of the Rules of Practice Governing Formal Adjudicatory Administrative Proceedings Instituted by the Secretary (7 C.F.R. § 1.130 *et seq.*) (Rules of Practice; Rules). The certified mail return receipt was returned to the Hearing Clerk unclaimed, and the regular mail was not returned as undeliverable.

On February 18, 2015, Respondent contacted counsel for Complainant and provided a new residential mailing address[1], which was forwarded to the Hearing Clerk by correspondence from counsel for the Complainant. Respondent did not file an Answer to the Complaint, and by Order issued February 27, 2015, I directed Respondent to show cause why default should not entered against him, and directed Complainant to file an appropriate motion. The Hearing Clerk sent the Order to Respondent by regular mail to both the originally identified address and to the new address provided by Complainant's counsel. Neither mailing was returned as "undeliverable" or "unable to forward".

Respondent did not file a response to my Order. On March 16, 2015, Complainant filed a motion for entry of a decision and Order by reason of default. The motion was sent to Respondent by certified mail on March 17, 2015. The United States Postal Service (USPS) Tracking System documented that the mailing was delivered to Respondent's address on March 19, 2015, but no one was present to sign the certification of receipt, and a notice of the mail was left at the address. See, ALJ-X 1, attached hereto. On April 6, 2015, the USPS determined that

[1] That address is on record, but shall not be divulged herein to protect Respondent's privacy.

the mail was unclaimed, and delivered the unclaimed receipt to the Office of the Hearing Clerk on April 13, 2015. By regular mail, on April 14, 2015, the Hearing Clerk sent the Motion for Adoption of the Proposed default Decision to the Respondent. No response has been filed with the Hearing Clerk.

II. Statutory and Regulatory Authority

Pursuant to the Rules of Practice, a respondent is required to file an Answer within twenty (20) days after service of a Complaint. 7 C.F.R. § 1.136(a). The Rules also provide that an Answer "shall . . . [c]learly admit, deny, or explain each of the allegations of the Complaint and shall clearly set forth any defense asserted by the respondent." 7 C.F.R. § 1.136(b)(1). The failure to timely file an Answer or failure to deny or otherwise respond to an allegation proffered in the Complaint shall be deemed admission of all the material allegations in the Complaint; in such situation, default shall be appropriate.[2] 7 C.F.R. § 1.136(c).

Additionally, the Rules of Practice prescribe that, when computing the time permitted for a party to file a document or other paper, Saturdays, Sundays, and Federal holidays are to be included except when the time expires on one of those days; should such situation occur, the time period shall be extended to include the next business day. 7 C.F.R. § 1.147(h). The Rules also state that a document sent by the Hearing Clerk "shall be deemed to be received by any party to a proceeding . . . on the date of delivery by certified or registered mail. . ." 7 C.F.R. § 1.147(c)(1).

III. Discussion

1. *Whether Entry of Decision by Reason of Default Without Hearing Is Appropriate*

[2] *See* Morrow v. Dep't of Agric., 65 F.3d (West) 168 (6th Cir. 1995) (per curiam) (unpublished disposition) ("7 C.F.R. Secs. 1.136(c) and 1.139 clearly describe the consequences of failing to answer a complaint in a timely fashion. These sections provide for default judgments to be entered [and] for admissions absent an answer . . . . Furthermore, the failure to answer constitutes the waiver of the right to a hearing.") (internal citations omitted).

The record here reflects that an individual contacted Complainant's counsel to provide a new address for Respondent, thereby showing constructive receipt of documents. All documents were sent to the new address. No answer was filed, regular mail was not returned, and certified mail was not claimed. Respondent failed to respond to my Order to show cause why default should not be entered, and Respondent also failed to respond to Complainant's motion for entry of a decision and Order by reason of default. Neither of the mailings of those documents to Respondent was returned as undeliverable. Accordingly, I find that the Complaint was served upon the Respondent, and Respondent failed to file an answer. Therefore, pursuant to 7 C.F.R. § 1.136(c), Respondent is deemed to have admitted the allegations set forth in the Complaint, and entry of default is appropriate. *See* 7 C.F.R. §§ 1.136(c), 1.139.

Pursuant to the Rules, I find that Respondent has admitted the gravamen of Complainant's allegations, thereby obviating the need for a hearing in this matter. The material allegations of the Complaint are thus adopted as findings of fact. I further find it appropriate to enter a decision on the record by reason of default. This Decision and Order is issued pursuant to section 1.139 of the Rules of Practice (7 C.F.R. § 1.139). A hearing is not required.

2. *Sanctions*

Complainant maintains that Respondent's violations of the ACT warrant the imposition of civil penalties. I find that by failing to answer the complaint, failing to respond to my Order, and failing to object to Complainant's motion for default, Respondent has admitted to fraudulently applying an International Plant Protection Convention (IPPC) stamp to thirty (30) pallets that he sold to several companies in Sussex, Wisconsin. Accordingly, the imposition of sanctions is appropriate.

The Department's sanction policy is set forth in *In re: S.S. Farms Linn County, Inc.*, (Decision as to James Joseph Hickey & Shannon Hansen), 50 Agric. Dec. 476 (U.S.D.A. 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):

> The 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.

S.S. Farms Linn County, Inc., 50 Agric. Dec. at 497. "In assessing penalties, the Secretary is required to give due consideration to the size of the business involved, the gravity of the violation, the person's good faith, and the history of previous violations." *In re Roach*, 51 Agric. Dec. 252, 264 (U.S.D.A. 1992). The purpose of assessing sanctions is not to punish violators but to deter future similar behavior by the violator and others. *In re: Zimmerman*, 57 Agric. Dec. 1038, 1998 WL 799196, at *16 (U.S.D.A. 1998).

Additionally, "[t]he administrative recommendation as to the appropriate sanction is entitled to great weight, in view of the experience gained by the administrative officials during their day-to-day supervision of the regulated industry." *S.S. Farms Linn County, Inc.*, 50 Agric. Dec. at 497. Nevertheless, an administrative official's recommendation is not controlling; in appropriate cases, the sanction imposed may be considerably less than or different from what is recommended. *In re: Shepherd*, 57 Agric. Dec. 242, 1998 WL 385884, at *29 (U.S.D.A. 1998).

FINDINGS OF FACT

1. Respondent Julio Alvarez, III, is an individual whose mailing address shall not be divulged to protect his privacy.

2. Between April 1, 2010, and January 17, 2011, Respondent, or his officer(s), agent(s), or employee(s), applied a fraudulent IPPC ISPM[3] No. 15 stamp to not fewer than thirty (30) pallets sold to Waukesha Tool and Stamping, Inc., d/b/a Waukesha Metal Products in Sussex, Wisconsin.

3. Between April 1, 2010, and December 31, 2010, Respondent, or his officer(s), agent(s), or employee(s), applied a fraudulent IPPC ISPM No. 15 stamp to not fewer than five (5) pallets sold to Color Ink, Inc., in Sussex, Wisconsin.

CONCLUSIONS OF LAW

1. The Secretary has jurisdiction in this matter.

2. Respondent's actions with respect to fraudulently applying an IPPC ISPM No. 15 stamp to wooden pallets violated section 424(b) of the Plant Protection Act (7 U.S.C. § 7734(b).

3. The imposition of sanctions in the form of civil money penalties is appropriate.

ORDER

Respondent is hereby assessed a civil money penalty in the amount of thirty thousand ($30,000.00) dollars. This penalty shall be payable to the "Treasurer of the United States" by certified check or money order, and shall be forwarded within thirty (30) days from the effective date of this Order to:

United States Department of Agriculture
APHIS
Accounts Receivable
P.O. Box 979043
St. Louis, MO 63197-9000

Respondent shall refer to Docket No. 15-0062 (PQ) on the face of the payment.

[3] ISPM-15 is an acronym for International Standards for Phytosanitary Measures: Guidelines for Regulation of Wood Packing Material in International Trade.

This Decision and Order shall have the same effect as if entered after a full hearing.

Pursuant to the Rules of Practice, this Decision and Order shall become final without further proceedings thirty-five (35) days after the date of service upon Respondent, unless it is appealed to the Judicial Officer by a party to the proceeding within thirty (30) days after service pursuant to the Rules. 7 C.F.R. §§ 1.139, 1.145(a).

Copies of this Decision and Order shall be served upon the parties by the Hearing Clerk.

So ORDERED this 12th day of May, 2015 at Washington, D.C.

Janice K. Bullard
Acting Chief Administrative Law Judge