

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

In re:)	
)	A. Q. Docket No. 03-0002
VEGA NUÑEZ,)	
)	Decision and Order
Respondent)	by Reason of Admission of Facts

[1] This proceeding was instituted under the Animal Health Protection Act (7 U.S.C. § 8301 et seq.), by a complaint filed on November 7, 2002 by the Administrator of the Animal and Plant Health Inspection Service, United States Department of Agriculture (APHIS), alleging that the respondent, Vega Nuñez, violated that Act and the regulations promulgated thereunder (9 C.F.R. § 94.0 et seq.).

[2] The complaint seeks a civil penalty, as authorized by 7 U.S.C. § 8313(b). The complaint alleges specifically that on or about January 17, 2001, the respondent, Vega Nuñez, illegally imported approximately four pounds of meat sausage from Germany into the United States at Chicago, Illinois.

[3] The respondent, Vega Nuñez (herein frequently called “Respondent Nuñez”), was served with a copy of the complaint on November 14, 2002. Her answer was due no later than December 4, 2002, twenty days after service of the complaint. 7 C.F.R. § 136(a).

[4] Respondent Nuñez filed an answer to the complaint, dated November 20, 2002, which was received by the Hearing Clerk on December 9, 2002, but was postmarked November 29, 2002. I consider Respondent Nuñez’s answer to be timely filed. I find that the delay in receipt

by the Hearing Clerk was probably due to the mail being diverted for irradiation, a routine security procedure. Respondent Nuñez's answer includes the following:

I did NOT "import" approx. 4 lbs. of meat sausage from Germany.

- a) Two sausages of unknown weight (to me) were put in my luggage, UNKNOWN TO ME, by a well-meaning relative.
- b) These precise 2 sausages were taken out of my suitcases(s) by customs officials.
- c) I was told and agreed and did PAY \$50 in fine by mail in cash.
- d) I have already sent a copy of the payment instructions given me at the airport in Chicago, Ill., by customs official to USDA as proof of such instructions.
- e) A USDA official has replied to me and chided me for sending cash as per instructions w/out stating whether these funds were ever received.

[5] While I am sympathetic to Respondent Nuñez's predicament, I find that her answer fails to deny the material allegations of fact contained in the complaint. For purposes of this proceeding, that failure to deny is deemed an admission of said allegations. 7 C.F.R. §1.136. The admission by the answer, of all the material allegations of fact contained in the complaint, constitutes a waiver of hearing. 7 C.F.R. § 1.139.

[6] Respondent Nuñez's "OBJECTION TO Motion for Adoption of Proposed Default Decision and Order" was timely filed on April 13, 2004. In her OBJECTION, Respondent Nuñez "respectfully moves for the dismissal of the above referenced complaint." She

meticulously and articulately details her encounter with the “issuing officer (badge #3063)”. She shows the paper with the mailing instruction for “MONEY ORDER OR CASH,” with the notation “Sent 1/26/01.” Her OBJECTION is thorough and includes, “Respondent sent \$50 cash (one \$50 bill) to the address provided by #3063 (USDA APHIS PPQ, POBox 66192, Chicago, IL 60666.”

[7] While I will not dismiss the complaint, and I instead enter this Decision, adopting the material allegations in the complaint as the Findings of Fact, I do find persuasive Respondent Nuñez’s insistence that nearly 3 years ago she mailed \$50 cash to resolve the issue of the “two pieces of meat sausage brought from Germany and representing a gift to respondent.”

[8] An APHIS official has advised the staff attorney in my office that APHIS has no record of receiving the \$50.

[9] This Decision and Order by Reason of Admission of Facts, is issued pursuant to the Rules of Practice. *See* 7 C.F.R. § 1.130 et seq.; especially 7 C.F.R. § 1.136 and 7 C.F.R. § 1.139.

Findings of Fact

[10] Respondent Vega Nuñez is an individual whose mailing address is HCR 58 Box #12, Ritter, Oregon 97872. (Respondent Nuñez shows her zip code to be 97856.)

[11] On or about January 17, 2001, Respondent Vega Nuñez imported into the United States of America at Chicago, Illinois, approximately four pounds of meat sausage from Germany, in violation of 9 C.F.R. §§ 94.11(a), (b), and (c), because the meat product did not comply with the requirements necessary for such meat to be imported into the United States.

Conclusion

[12] By reason of the Findings of Fact set forth above, Respondent Vega Nuñez has violated the Animal Health Protection Act (7 U.S.C. § 8301 et seq.); and the regulations issued under that Act, specifically, 9 C.F.R. §§ 94.11(a), (b), and (c).

[13] The consequences of a violation of the Animal Health Protection Act can be catastrophic. Respondent Vega Nuñez is in error when she asserts that any disease carrying agents are destroyed in the “boiled and otherwise heat processed” sausage. 7 U.S.C. § 8302(13).

[14] I accept as credible those assertions of the answer and the OBJECTION filed by Respondent Vega Nuñez that she followed the instructions given to her by “issuing officer (badge #3063)”, and that she was unaware the sausages were in her luggage. Those assertions persuade me that she has attempted to deal responsibly with her violation of the Animal Health Protection Act, and that her degree of culpability is minimal. The statutory factors in determining a civil penalty are enumerated in 7 U.S.C. § 8313(b).

[15] This is a unique case. Taking into account the nature, circumstance, extent, and gravity of Respondent Vega Nuñez's violation of the Animal Health Protection Act, I determine that a \$50.00 civil penalty is adequate and appropriate. Therefore, the following Order is issued.

Order

[16] Respondent Vega Nuñez is hereby assessed a civil penalty of \$50.00. Respondent Vega Nuñez shall pay the \$50.00 by cashier's check or money order, 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 Vega Nuñez shall indicate that payment is in reference to **A.Q. Docket No. 03-0002**.

[17] I will not credit Respondent Vega Nuñez for a payment that APHIS has no record of receiving.

This Decision and Order shall have the same force and effect as if entered after a full hearing and shall be final and effective thirty five (35) days after service upon of this Decision and Order upon Respondent Vega Nuñez, unless an appeal to the Judicial Officer is filed 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 10th day of May 2004

Jill S. Clifton
Administrative Law Judge

APPENDIX A

7 C.F.R.:

TITLE 7—AGRICULTURE

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE

PART 1—ADMINISTRATIVE REGULATIONS

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