5/22/96

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
B. NEIL DAVIS, d/b/a	)	Docket No. SARA 6-94-032
AMERICAN SALES COMPANY	)	
	)	
Respondent	)	

ORDER DENYING MOTION FOR DEFAULT

The Environmental Protection Agency ("EPA") has filed a motion requesting that a default order be issued against B. Neil Davis, d/b/a American Sales Company ("American Sales"). EPA's motion is denied.

A brief procedural account of this case is in order. EPA initiated this matter against American Sales by issuing a complaint pursuant to Section 325(c) of the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA"), 42 U.S.C. § 11045(c). In the complaint, EPA sought a civil penalty of $25,000 for the cited EPCRA violation. An answer to the complaint was filed by Neil Davis, appearing *pro se* in this matter. Mr. Davis generally denied the allegations raised in the EPA complaint, waived his right to an administrative hearing, and demanded a jury trial.

Thereafter, Judge Frank W. Vanderheyden was designated as the Presiding Officer in this matter. On May 9, 1995, Judge Vanderheyden issued an Order to Show Cause directing American Sales to explain why it had not submitted a prehearing exchange, listing witnesses and proposed exhibits, as had been ordered by the court. In response to the show cause order, Mr. Davis again waived his right to an administrative hearing and demanded a jury trial.[1]

On September 15, 1995, Judge Vanderheyden issued an order concluding that American Sales was in default for failing to comply with the court's prehearing exchange order. Judge Vanderheyden directed EPA to submit a draft default order for the court's "review, possible revision and signature." EPA complied with the court's direction and submitted a proposed default order. Judge Vanderheyden, however, retired from Federal service without issuing a default order in this matter. Pursuant to order dated March 6, 1996, the undersigned was redesignated as the Presiding Officer in this case.

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[1] Mr. Davis' response also contained statements which Judge Vanderheyden properly found to be "intemperate in tone." Those statements, however, are not relevant to the present motion for a default order.

Following the redesignation of this case to the undersigned, the parties were advised that this matter would be going to hearing. It is against this background that EPA requests the issuance of a default order. Essentially, EPA argues that this court lacks authority to set a hearing in this case as Judge Vanderheyden has already found American Sales to be in default and that it is this court's task to follow through and issue a default order. EPA further argues that, in any event, the respondent has waived its right to an administrative hearing. EPA's arguments for the issuance of a default order are not persuasive.

First, as EPA acknowledges by the very nature of its present request, there has been no issuance of a default order against American Sales in this case by Judge Vanderheyden.[2] While Judge Vanderheyden concluded that respondent was in default, and while he directed EPA to submit a proposed default order, the fact of the matter is that such an order was never issued by the court. At the time of Judge Vanderheyden's retirement the issue as to whether American Sales was to be defaulted had not been formally resolved. Indeed, even as EPA prepared to file its proposed draft default order, the Agency nonetheless continued to inform Judge Vanderheyden as to the status of settlement negotiations with respondent. The fact that EPA continued to consider settlement with American Sales after Judge Vanderheyden's comments regarding default undercuts its argument that this case already had been resolved and all that needed be done was the routine issuance of a default order.

Second, and more importantly, upon the retirement of Judge Vanderheyden and the reassignment of this case by the Chief Administrative Law Judge, the undersigned Presiding Officer has not found American Sales to be in default. In fact, this court is of the view that a respondent cannot be found to be in default for failing to submit a prehearing exchange, at least not under the facts of this particular case. While such a failure may well result in a respondent being foreclosed from calling witnesses and introducing exhibits into evidence at a subsequent hearing, the respondent may still challenge at that hearing exhibits sought to be introduced into evidence by EPA, as well as cross-examine the complainant's witnesses.[3] In other words, even if a respondent does not file a prehearing witness and exhibit list exchange, it may still defend at the hearing by showing that EPA cannot carry its burden of proof because it cannot establish a *prima facie* case as to the alleged violations.

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[2] EPA submits that after finding American Sales in default, Judge Vanderheyden stated that "the default constituted an 'initial decision' under 40 C.F.R. §22.17(b)." EPA Mem. at 3-4. Section 22.17(b), however, speaks of a default order as constituting an initial decision. Here, of course, no default order has been issued. Therefore, there has been no initial decision in this case.

[3] American Sales has since retained legal counsel who was advised of this fact during a conference call on May 13, 1996, in which the court and the parties participated. Counsel also was advised that any late-filing of a prehearing exchange by American Sales could be challenged by EPA.

Finally, despite the tone of Mr. Davis' responses to the court, and despite his repeated assertions that he did not want an administrative hearing, the record nonetheless establishes that this respondent does indeed wish to be heard. It would be an unfair reading of this record to conclude that respondent's inarticulate expressions constituted a true waiver of his due process right to an administrative hearing in this matter. This is particularly so given respondent's *pro se* status at the time of those responses. Moreover, Mr. Davis' newly obtained counsel has confirmed the fact that his client desires to be so heard.[4]

Accordingly, because the issuance of a default order under the facts of this case would be contrary to the interests of justice, the motion for default filed by EPA is denied, and its argument that this court lacks authority to set a hearing in this case is rejected. In that regard, a second Notice of Hearing will be issued setting the time and place for hearing.[5]

Carl C. Charneski

Carl C. Charneski
Administrative Law Judge

Issued: May 23, 1996
Washington, D.C.

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[4] For these reasons, it is concluded that Judge Vanderheyden's finding of default is not supported by the record and, therefore, it is not adopted by the Presiding Officer. See 40 C.F.R. § 22.17(d)("For good cause shown ... the Presiding Officer ... may set aside a default order.")

[5] Inasmuch as respondent's counsel has not yet filed a notice of appearance, as had been directed during the May 13, 1996, conference call, this order and the Notice of Hearing are being served upon Mr. Davis.

In the Matter of B. NEIL DAVIS, d/b/a AMERICAN SALES COMPANY,
Respondent
Docket No. SARA 6-94-032

Certificate of Service

I certify that the foregoing **ORDER DENYING MOTION FOR DEFAULT**, dated May 23, 1996, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

Ms. Lorena Vaughn
Regional Hearing Clerk
U.S. EPA, Region 6
1445 Ross Avenue
Dallas, TX 75202-2733

Copy by Regular Mail to:

Attorney for Complainant:

Laura Whiting, Esquire
Terry Sykes, Esquire
Enforcement Counsel
U.S. EPA, Region 6 (6EN-LH)
1445 Ross Avenue
Dallas, TX 75202-2733

Copy by Certified Mail, Return Receipt Requested and by Regular Mail to:

Respondent:

Mr. Neil Davis
Box 352
Hartford, AR 72938

Marion Walzel
Marion Walzel
Legal Staff Assistant

Dated: May 24, 1996