

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
)
ALLEN OVERBY) Docket No. CWA-04-2000-1505
)
)
Respondent)

ORDER DENYING COMPLAINANT'S MOTION FOR DEFAULT JUDGMENT
ORDER GRANTING COMPLAINANT'S MOTION FOR
ACCELERATED DECISION ON LIABILITY

On April 4, 2000, pursuant to 40 C.F.R. Part 22.16 and 22.17, of the Consolidated Rules of Practice, Complainant, U.S. Environmental Protection Agency filed a Motion for Default Judgment in the above-docketed proceeding. In support of its motion, Complainant asserted that Respondent's Answer did not deny that the violation occurred as set forth in the Complaint. Rather, Complainant stated that Respondent's Answer sought to only contest the amount of penalty and sets forth information "to be considered in assessment and/or reduction of any penalties charged to Overby". As such, Complainant submits that pursuant to Section 22.15(d) of the Rules, the "failure to admit, deny or explain any material factual allegations contained in the complaint constitutes an admission of the allegation".

Thereafter, on April 14, 2000, Complainant filed a Supplement To Motion For Default Judgment, wherein Complainant stated that it had contacted Respondent's attorney and "confirmed that Respondent does not intend to oppose Complainant's Motion for Default Judgment". In its Supplement, Complainant asserts that Respondent's attorney further confirmed that its Answer 'was intended to request a hearing with respect to amount of penalty only and that Respondent will not object to the issuance of a default order with respect to liability only". For the following reasons Complainant's Motion as supplemented is DENIED.

Section 22.17(a) of the Rules of Practice provide that a party "may be found to be in default (1) after motion, upon failure to file a timely answer to the complaint, (2) after motion or sua sponte, upon failure to comply with a prehearing order or hearing order of the Presiding Officer, or (3) after

motion or sua sponte, upon failure to appear at a conference or hearing without good cause being shown....Any motion for a default order shall include a proposed default order and shall be served upon all parties".

Here, Complainant's Motion does not allege any of the three grounds noted above which would support issuance of a default order. Nor has Complainant submitted a proposed default order with its motion. As such, Complainant's motion, as presently constituted, must fail as improperly filed. Rather, the Motion should properly be offered as a Motion for Accelerated Decision on Liability as provided at Section 22.20(a).

Standard For Accelerated Decision

Section 22.20(a) of the Rules of Practice, 40 C.F.R. Section 22.20(a), authorizes the Administrative Law Judge (ALJ) to "render an accelerated decision in favor of the Complainant or Respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law as to any part of the proceeding. In addition, the ALJ, upon motion of the Respondent, may dismiss an action on the basis of "failure to establish a prima facie case or other grounds which show no right to relief."

A long line of decisions by the Office of Administrative Law Judges (OALJ) and the Environmental Appeals Board (EAB), has established that this procedure is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure (F.R.C.P.). See, e.g., In re CWM Chemical Serv., Docket No. TSCA-PCB-91-0213, 1995 TSCA LEXIS 13, TSCA Appeal 93-1 (EAB, Order on Interlocutory Appeal, May 15, 1995); and Harmon Electronics, Inc., RCRA No. VII-91-H-0037, 1993 RCRA LEXIS 247 (August 17, 1993).

The burden of showing there exists no genuine issue of material fact is on the party moving for summary judgment. Adickes v. Kress., 398 U.S. 144, 157 (1970). In considering such a motion, the tribunal must construe the factual record and reasonable inferences therefrom in the light most favorable to the non-moving party. Cone v. Longmont United Hospital Assoc., 14 F. 3rd 526, 528 (10th Cir., 1994). The mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,


256 (1986). Similarly, a simple denial of liability is inadequate to demonstrate that an issue of fact does indeed exist in a matter. A party responding to a motion for accelerated decision must produce some evidence which places the moving party's evidence in question and raises a question of fact for an adjudicatory hearing. In re Bickford, Inc., TSCA No. V-C-052-92, 1994 TSCA LEXIS 90 (November 28, 1994).

"Bare assertions, conclusory allegations or suspicions" are insufficient to raise a genuine issue of material fact precluding summary judgment. Jones v. Chieffo, 833 F. Supp 498, 503 (E.D. Pa. 1993). The decision on a motion for summary judgment or accelerated decision must be based on the pleadings, affidavits and other evidentiary materials submitted in support or opposition to the motion. Calotex Corp. V. Catrett, 477 U.S. 317, 324 (1986); 40 C.F.R. Sec. 22.20(a); F.R.C.P. Section 56(c).

Upon review of the evidence in a case, even if a judge believes that summary judgment is technically proper, sound judicial policy and the exercise of judicial discretion permit a denial of such a motion for the case to be developed fully at trial. See, Roberts v. Browning, 610 F. 2d 528, 536 (8th Cir. 1979).

Here, it is clear that Respondent does not contest the underlying issue of liability but requests a hearing with respect to amount of penalty only. As such, the undersigned, sua sponte, shall treat Complainant's Motion for Default Judgment as a Motion For Accelerated Decision on Liability and GRANTS said Motion for the reasons stated.

Accordingly, by separate order this case will be set for evidentiary hearing on the issue of the appropriateness of the proposed civil penalty.

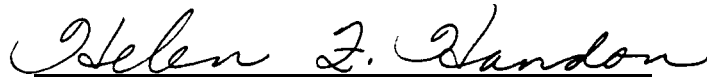


Stephen J. McGuire
Administrative Law Judge

May 3, 2000
Washington, D.C.

CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of this ORDER DENYING COMPLAINANT'S MOTION FOR DEFAULT JUDGMENT/ORDER GRANTING COMPLAINANT'S MOTION FOR ACCELERATED DECISION ON LIABILITY, dated May 3, 2000, IN RE: ALLEN OVERBY, DKT. NO. CWA-04-2000-1505, were mailed to the Regional Hearing Clerk, Reg. IV, and a copy was mailed certified mail, return receipt requested to Respondent and Complainant (see list of addressees).



Helen F. Handon
Legal Staff Assistant

Date: May 3, 2000

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