UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	**)**	
	)	
LAWRENCE COUNTY AGRICULTURAL SOCIETY,	**)**	**DOCKET NO. TSCA-5-98-90**
	)	
RESPONDENT	**)**	

ORDER DENYING RESPONDENT'S MOTIONS FOR RECONSIDERATION OF ORDER AND FOR EXTENSION OF TIME

Background

Pursuant to Complainant's Motion for Default Judgment Against Respondent ("Motion for Default"), a Default Judgment was issued against Respondent on September 14, 2000. Pursuant to Complainant's Motion for Assessment of Civil Penalty Against Respondent ("Motion for Penalty"), a Default Order and Initial Decision were issued against Respondent on October 26, 2000.

A Memorandum Contra to Complainant's Motion for Assessment of Civil Penalty Against Respondent dated October 27, 2000, was received from Respondent on November 3, 2000. In support of this memorandum, Respondent proffered an affidavit from Doug Clark, the president of the Lawrence County Agricultural Society.

On November 1, 2000, Respondent submitted a Motion for Reconsideration seeking reconsideration of the October 26, 2000, Default Order assessing the proposed civil administrative penalty in the amount of $7,000 against Respondent. Respondent also moves for an extension of time to file its response to the Motion for Penalty "if the response was filed out of time." The Motion for Reconsideration is opposed by Complainant.

Arguments

On Motion for Reconsideration, Respondent states that it received Complainant's Motion for Penalty on October 3, 2000, and that it forwarded its response to the Motion for Penalty on October 27, 2000. Respondent submits that although it is not aware of the time within which it had to respond to the Motion for Penalty, it assumed that it would have a period of at least thirty (30) days. If the time for responding to the motion is less than thirty days, Respondent requests an extension of time to file its response to the Motion for Penalty. Respondent points out that the extensive and lengthy Default Order was prepared and issued within twenty-three (23) days of the motion being received by Respondent. Respondent requests that the Memorandum Contra submitted in response to the Motion for Penalty be reviewed and that the Default Order be reconsidered.

Complainant opposes Respondent's Motions for Reconsideration and for Extension of Time. Complainant believes that Respondent has filed a motion to set aside the default order pursuant to 40 C.F.R. § 22.17(d), and submits that Respondent's consistent unawareness of the Rules of Practice and assumptions do not demonstrate good cause to set aside the Default Order under 40 C.F.R. § 22.17(d). Complainant maintains that the Default Order and Initial Decision should be upheld.

Discussion

The file before me reflects that Respondent has disregarded the federal procedural regulations that govern this proceeding since the inception of this matter. When the proceeding was initiated by the filing of the Complaint against Respondent on September 25, 1998, Respondent was advised that the Consolidated Rules of Practice, 40 C.F.R. Part 22, govern these proceedings, and a copy of the Rules was sent to Respondent with the Complaint. [1/] Respondent failed to file its Answer with the Regional Hearing Clerk as required by the Rules of Practice. 40 C.F.R. § 22.05(a)(1) (1998). Rather, Respondent, filed its Answer and request for

[1/] These rules were revised effective August 23, 1999, by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32. The revised rules are applicable to proceedings commenced before August 23, 1999, unless to do so would result in substantial hardship.

hearing with the Chief of the Pesticides and Toxics Branch for Region 5 of the EPA on November 12, 1998. After several attempts were made by the EPA to have Respondent properly file the Answer with the Regional Hearing Clerk, the Answer was forwarded to the Regional Hearing Clerk for filing by the EPA on February 22, 2000.

When the Prehearing Order was issued on April 4, 2000, Respondent again was reminded that these proceedings are governed by the Rules of Practice, and the Prehearing Order directed the parties to familiarize themselves with these rules. Respondent failed to file its prehearing exchange information as directed in the Prehearing Order, and then failed to timely respond to Complainant's Motion for Default or file a request for extension of time. In the September 14, 2000, Default Judgment, Respondent was specifically advised that a party's response to any written motion must be filed within fiften (15) days after service of such motion and that a party's failure to respond to a motion within the designated period waives any objection to the granting of the motion under Section 22.16 of the Rules of Practice. 40 C.F.R. §§ 22.16(b), 22.5(a), 22.7(c). Default Judgment at 8, n. 11, 12. When Complainant filed its Motion for Penalty on September 29, 2000, Respondent again failed to timely respond to the motion or file a request for extension of time. The Default Order and Initial Decision were issued on October 26, 2000.

Respondent now seeks to introduce additional evidentiary material in support of its claim of inability to pay the penalty after the Default Order and Initial Decision have been entered. Respondent has offered no explanation for its failure to timely respond to the Motion for Penalty other than its claim that it was "not aware of the time within which the Respondent had to respond to the Motion but assumed that the Respondent would have at least a period of thirty days due to the need to gather information and affidavits." In view of the multiple advisements provided Respondent, such claim is disingenuous and it certainly does not constitute good cause for failure to timely respond to the Motion for Penalty. 40 C.F.R. § 22.17(c).

Turning to Respondent's Motion for Reconsideration, I note that the federal regulations governing this proceeding, found at 40 C.F.R. §§ 22.1-22.32, do not specifically provide for motions for reconsideration of any order issued by an Administrative Law Judge, including a default order. The Rules of Practice do provide for motions to set aside a default judgment and to reopen a hearing to take further evidence after the issuance of an initial decision. 40 C.F.R. §§ 22.17(c), 22.28. Also, the Rules of Practice do provide for reconsideration of final orders issued by the Environmental Appeals Board ("EAB"). 40 C.F.R. § 22.32.

Generally, in adjudicating motions for reconsideration before the EAB, consideration has been limited to intervening changes in the controlling law, new evidence, or the need to correct a clear error or to prevent manifest injustice. *See In the Matter of Southern Timber Products, Inc. D/B/A/ Southern Pine Wood Preserving Company, and Brax Batson*, RCRA Appeal No. 89-2, 3 E.A.D. 880, 888-890 (JO, Feb. 28, 1992); see also In the Matter of Cypress Aviation, Inc., RCRA Appeal No. 91-6, 4 E.A.D. 390, 392 (EAB, Nov. 17, 1992). As noted by the Judicial Officer in *Southern Timber Products*,

> A motion for reconsideration should not be regarded as an opportunity to reargue the case in a more convincing fashion. It should only be used to bring to the attention of this office clearly erroneous factual or legal conclusions. Reconsideration is normally appropriate only when this office has obviously overlooked or misapprehended the law or facts or the position of one of the parties.

Southern Timber Products, supra, at 889 (quoting In re City of Detroit, TSCA Appeal No. 89-5, at 2 (CJO, Order on Motion for Reconsideration, July 9, 1991)).

Therefore, assuming that a motion for reconsideration from a default order and initial decision may be brought properly before an Administrative Law Judge, such motion would be subject to the same standard of review as that of the EAB. In the instant matter, I am not persuaded that Respondent's Motion for Reconsideration meets that standard. First, Respondent has made no proffer of newly discovered evidence and there has been no intervening change in the law that is pertinent to the instant matter. Respondent has made no claim of error of fact or law or that the evidence proffered on Motion for Reconsideration was not previously available to Respondent. Additionally, Respondent has not met the standard of review by demonstrating manifest injustice. Although the assessment of a $7,000 penalty against Respondent, a non-profit organization that serves the public and provides support for charitable activities within Lawrence County, is most unfortunate, there is no showing that there is a need to reconsider the Default Judgment or the Default Order in order to prevent manifest injustice.

The EPA suggests that Respondent's Motion for Reconsideration be deemed a motion to set aside the default order. Section 22.17(c) of the Rules of Practice provides that "[f]or good cause shown the

Presiding Officer may set aside a default order." [2/] The term "good cause" is not defined by the governing regulations. The EAB, however, has held that setting aside a default order is essentially a form of equitable relief and the term "good cause" within the meaning of Section 22.17(d) of the Rules of Practice can be interpreted more broadly than relating solely to the specific facts and circumstances that resulted in the entry of the default order. *In the Matter of Midwest Bank & Trust Company, Inc., Rockland Mineral Processors, Inc., John E. Suerth*, RCRA Appeal No. 90-4, 3 E.A.D. 696, 699 (CJO, Oct. 23, 1991). Thus, facts and circumstances other than those relating to a party's failure to respond to a prehearing exchange order may be relevant and persuasive when making the good cause determination. *Id*. *In the Matter of Midwest Bank & Trust Company, Inc., supra*, the EAB found that it is appropriate to examine whether fairness and a balance of the equities dictate that a default order be set aside. Thus, the standard for evaluating a motion to set aside a default order enunciated in *Midwest Bank & Trust Company, supra*, provides a more expansive interpretation of the term "good cause," and is more liberal than that for evaluating a motion for reconsideration.

Even if I were to construe Respondent's Motion for Reconsideration as a motion to set aside a default order and applied the more expansive and generous standard for evaluating a motion to set aside, there is no basis for granting such motion under the circumstances presented in this case. Respondent has failed to demonstrate the requisite "good cause" to set aside the default order for the purposes of 40 C.F.R. § 22.17(c). First, I again emphasize that the facts in this case do not involve a situation where the Default Order was entered following a single incident of minor violative conduct or nonperformance. Rather, the Default Order was entered after several failures on Respondent's part to comply with the governing rules concerning responses to orders and motions.

Moreover, in the Default Order, consideration was ultimately given to Respondent's substantive claim of inability to pay and the evidentiary material submitted in support of that claim. Default Order and Initial Decision at 10-12. The instant motion essentially duplicates the previously considered arguments and the proffered affidavit is considered cumulative. Mr. Clark states that "[t]he imposition of a $7,000.00 penalty would have a

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[2/] The term "Presiding Officer" means the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as the Presiding Officer. Section 22.3(a) of the Rules of Practice.

substantial financial impact upon the Agricultural Society and the ability of the Society to maintain the same standard of services for the youth, Agricultural Community and general citizenry of Lawrence County." Again as found in the Default Order, Respondent has not shown that the Agricultural Society is in severe financial distress. There is no showing of a meritorious argument sufficient to constitute "good cause" for setting aside the Default Order or that there is a strong probability that there would have been a different outcome had there been a hearing. Thus, I find that the facts and circumstances in this case other than those relating to Respondent's failure to meet its filing deadlines are not sufficiently persuasive to making the requisite finding of "good cause" for setting aside the Default Order under 40 C.F.R. § 22.17(c).

Accordingly, Respondent's Motions for Reconsideration and for Extension of Time will be denied.

Order

Respondent's Motions for Reconsideration of Order and for Extension of Time are denied.

Original signed by undersigned
_____
Barbara A. Gunning
Administrative Law Judge

Dated: 11-22-00
Washington, DC