

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
ALASKA PULP CORPORATION; AND) DOCKET NO. 10-97-0042-CAA
TECHNIC SERVICES, INC.,)
)
RESPONDENTS)

ORDER GRANTING MOTION SHOWING CAUSE

ORDER DENYING REQUEST FOR AWARD OF ATTORNEY'S FEES

Introduction

The Respondent's Motion Showing Cause ^{1/} dated October 16, 1997, is Granted as follows.^{2/} The Respondent's Request for Award of Attorney's Fees filed on October 24, 1997, is Denied as follows.^{3/}

Background

The Complaint in this matter was filed on March 17, 1997. In the Complaint, the Respondent was advised that the "Consolidated Rules of Practice, 40 C.F.R. Part 22, govern these proceedings." The Complaint states that a copy of the

^{1/} The Environmental Protection Agency ("EPA") and Respondent Alaska Pulp Corporation have executed a Consent Agreement and Consent Order which was filed April 10, 1997. Henceforth in this order, the term "Respondent" refers to Respondent Technic Services, Inc.

^{2/} There is no proof in the file before me that the Motion Showing Cause was filed with the Regional Hearing Clerk. The Certificate of Service accompanying the Motion Showing Cause reflects service of the motion on the undersigned and EPA counsel on October 20, 1997.

^{3/} The Request for Award of Attorney's Fees was filed with the Regional Hearing Clerk.

Consolidated Rules of Practice accompanied the Complaint. Complaint at 12.

A Prehearing Order was entered by the undersigned on June 4, 1997. In this Prehearing Order, I noted that the proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.01 et seq., and the parties were advised to familiarize themselves with the Rules of Practice. The Rules of Practice, as well as the Prehearing Order of June 4, 1997, specify that all documents must be filed with the Regional Hearing Clerk with copies served on all parties and the Administrative Law Judge.^{4/}

In the Prehearing Order of June 4, 1997, the undersigned directed the parties to file their prehearing exchange. The Complainant, the EPA, timely filed its prehearing exchange by August 27, 1997, as directed.^{5/} After the Respondent failed to

^{4/} Sections 22.05(a)(1) and (2) of the Rules of Practice provide that the original of all documents served in the proceeding shall be filed with the Regional Hearing Clerk, that a certificate of service shall accompany each document filed or served, and that a party filing documents with the Regional Hearing Clerk shall serve copies thereof on all other parties and the Presiding Officer. 40 C.F.R. §§ 22.05(a)(1),(2). The Prehearing Order of June 4, 1997, states that "[t]he original of all pleadings, statements and documents (with any attachments) required or permitted to be filed in this Order (including a ratified Consent Agreement and Consent Order) shall be sent to the Regional Hearing Clerk and copies (with any attachments) shall be sent to the undersigned and all parties." Prehearing Order at 3. Also, Section 22.05(a)(3) of the Rules of Practice provides that parties who correspond directly with the Presiding Officer shall in addition to serving all other parties send a copy of all such correspondence to the Regional Hearing Clerk along with a certificate of service for each document served. 40 C.F.R. § 22.05(a)(3).

The term "Presiding Officer" means the Administrative Law Judge ("ALJ") designated by the Chief ALJ to serve as Presiding Officer. 40 C.F.R. § 22.03(a).

The term "Regional Hearing Clerk" means an individual duly authorized by the Regional Administrator to serve as hearing clerk for a given region. Correspondence may be addressed to the Regional Hearing Clerk, U.S. EPA (address of Regional Office). 40 C.F.R. § 22.03(a).

^{5/} The EPA filed a prehearing exchange addendum on September 2, 1997.

meet the September 27, 1997, deadline for filing its prehearing exchange, the undersigned issued an Order to Show Cause to the Respondent on October 9, 1997. The Respondent's response to the Order to Show Cause and the ensuing responses reflect the following facts.

Discussion and Findings of Fact

Motion Showing Cause

On September 25, 1997, the Respondent served an unopposed Motion for Extension of Time to File Prehearing Exchange ("Motion for Extension") on the EPA Region 10 Office of Regional Counsel.^{6/} However, the Respondent failed to file this Motion for Extension with the Regional Hearing Clerk and to send a copy of the motion to the undersigned. See Prehearing Order at 3-4: see also 40 C.F.R. §§ 22.03(a), 22.05(a), 22.07. On October 10, 1997, the Respondent served its prehearing exchange on the EPA Region 10 Office of Regional Counsel. Again, however, the Respondent failed to file concomitantly this prehearing exchange with the Regional Hearing Clerk and to send a copy of the prehearing exchange to the undersigned as directed in the June 4, 1997, Prehearing Order.^{2/} See Id. These failures on the part of the Respondent resulted in the issuance of the Order To Show Cause against the Respondent on October 9, 1997.

When the Respondent submitted its Motion Showing Cause in response to the Order to Show Cause, the Respondent incorrectly asserted that it had timely filed with the Regional Hearing Clerk

^{6/} The Motion for Extension is date stamped September 25, 1997, by the EPA Region 10 Office of Regional Counsel. Respondent's Exhibit 1. The Declaration of Service accompanying the Motion for Extension reflects service on Respondent Alaska Pulp Corporation and EPA counsel. Respondent's Exhibit 2. An Amended Certificate of Service dated October 15, 1997, reflects that a copy of the Motion for Extension was sent to the undersigned on October 15, 1997. Respondent's Exhibit 4.

^{2/} The Declaration of Service accompanying the prehearing exchange date stamped October 10, 1997, by the EPA Region 10 Office of Regional Counsel, reflects service of the prehearing exchange only on EPA counsel. The Respondent has submitted another copy of the October 10, 1997, Declaration of Service for the prehearing exchange which is date stamped October 14, 1997, by the Regional Hearing Clerk. Respondent's Exhibit 3. An Amended Certificate of Service for the prehearing exchange dated October 15, 1997, and date stamped October 16, 1997, by the Regional Hearing Clerk reflects the prehearing exchange was sent to the undersigned on October 15, 1997. Respondent's Exhibit 5.

an unopposed motion to extend the deadline for its prehearing exchange until October 10, 1997, and then filed its prehearing exchange with the Regional Hearing Clerk on October 10, 1997. Respondent's Motion Showing Cause at 1. The Respondent further confused matters by submitting as a supporting exhibit for its claim that it filed its prehearing exchange with the Regional Hearing Clerk on October 10, 1997, a Declaration of Service for its prehearing exchange dated October 10, 1997, but date stamped by the Regional Hearing Clerk on October 14, 1997, four days after the filing of its prehearing exchange with the EPA Region 10 Office of Regional Counsel. Respondent's Exhibit 3. This incorrect assertion on the part of the Respondent led to the EPA's Response to the Respondent's Motion Showing Cause.

In the EPA's Response to the Motion Showing Cause, the EPA pointed out that a Motion for Extension from the Respondent was not on file with the Regional Hearing Clerk and that the date stamp on the Declaration of Service for the Respondent's prehearing exchange (Respondent's Exhibit 3) reflects that it was filed with the Regional Hearing Clerk on October 14, 1997, and not October 10, 1997, as alleged by the Respondent in its Motion Showing Cause. The EPA did not dispute that it was served with the Respondent's Motion for Extension on September 25, 1997. EPA's Response to the Order Showing Cause at 2, n.1. The EPA noted that the date stamp on Respondent's Exhibit 1 (Respondent's Motion for Extension) did not match the style of the automated stamp used by the EPA Region 10 Hearing Clerk. The EPA also insinuated that there was some discrepancy with the date stamp on Respondent's Exhibit 1, noting that "insofar as it is readable, the date stamp found on Exhibit 1 appears to be a close, but not exact, approximation of the hand press date stamp used by the front desk in the EPA Region 10 Office of Regional Counsel." The EPA declined to address the merits of the Respondent's Motion Showing Cause.

The Respondent then, in its Supplemental Materials in Support of the Motion Showing Cause and Request for Award of Attorney's Fees, reproved the EPA, arguing that the EPA's response was misleading. In particular, the Respondent maintains that the EPA's statement that it was served with the Motion for Extension but that filing with the Regional Hearing Clerk was never made is both disingenuous and untenable. The Respondent contends that it intended to and did file the Motion for Extension by delivering the original document to personnel at the proper location at the EPA Region 10 on September 25, 1997, and that this sufficed to constitute filing pursuant to 40 C.F.R. § 22.05(a). In this regard, the Respondent maintains that the EPA disingenuously treats the filing of documents with the Regional Hearing Clerk and service of documents on EPA counsel as entirely distinct and unrelated functions when, in fact, filing and service are made simultaneously to the same person at the same desk in the EPA Office of Regional Counsel.

Although I am not without sympathy for the Respondent in its confusion concerning the dual role of the EPA's Hearing Clerk as both the Regional Hearing Clerk and Clerk for the Regional Counsel, particularly when using the services of a messenger, the fact remains that the Respondent did not properly file its Motion for Extension or its prehearing exchange with the Regional Hearing Clerk as provided in the governing Rules of Practice and as directed in my June 4, 1997, Prehearing Order. See Id. In this regard, I point out that there is no documentary proof that the Respondent contemplated filing the Motion for Extension with the Regional Hearing Clerk.^{8/} The initial certificates of service accompanying the Motion for Extension and prehearing exchange do not reflect service of the documents on the Regional Hearing Clerk or the undersigned, and there are no transmittal letters addressed to the Regional Hearing Clerk accompanying these documents.^{9/} Although the Respondent is correct in arguing that such proof is not required, I note that such proof is necessary in the absence of other proof that the documents were actually filed with the Regional Hearing Clerk. Contrary to the Respondent's assertions, service of documents on the EPA does not constitute filing with the Regional Hearing Clerk. Also, service on the EPA does not constitute service on the ALJ.

Moreover, I point out that the Respondent improperly assumed that the Motion for Extension would be granted and, thus, its prehearing exchange would be deemed timely filed. First, I note that the motion was "filed" only two days before the filing deadline for the prehearing exchange and that this late filing did not give me sufficient time to rule on the motion. See 40 C.F.R. §§ 22.07(b), (c), 22.16(a), (b). The fact that the motion was unopposed is not determinative of whether I would grant the motion. See 40 C.F.R. § 22.07(b). Second, the reasons given by the Respondent for the requested extension were not compelling

^{8/} The Respondent, in its Supplemental Materials in Support of Motion Showing Cause, submitted a photocopy of a legal courier service's returned messenger slip dated September 25, 1997, and date stamped September 25, 1997, by the EPA Region 10 Office of Regional Counsel. This slip reflects that Respondent's counsel instructed the service to serve the Motion for Extension on EPA counsel and "[f]ile with the EPA Director, also on the 15th floor." Exhibit 1 attached to Affidavit of Sharman Loomis.

^{9/} The Respondent has submitted a photocopy of a "messenger instructions & disbursement request" form from Respondent's counsel date stamped October 10, 1997, by the EPA Region 10 Office of Regional Counsel, which reflects that the messenger was instructed to file the Respondent's prehearing exchange "with the office of regional counsel 1st, then with hearings clerk's office also on floor 15." Exhibit 1 attached to Affidavit of Tracey Taylor.

and did not necessarily constitute good cause for granting the motion for an extension. See Id. The Respondent could not assume that the unopposed motion for extension would be automatically granted.

Regardless of the foregoing, I find no adequate grounds that might support a default order in this matter at this time.^{10/} The Respondent's violations of the Rules of Practice were de minimis and the Complainant suffered no prejudice as a result. A default order is a harsh sanction, reserved only for the most egregious behavior,^{11/} and to impose such a penalty in this situation would be most inappropriate. Accordingly, the Respondent's Motion Showing Cause is granted.

Request for Award of Attorney's Fees

In addition to its Motion Showing Cause, the Respondent has filed a Request for Award of Attorney's Fees. The Respondent maintains that it should be awarded \$1,875 for attorney's fees incurred in responding to the Order to Show Cause. The Respondent argues that "the errors made by Complainant in the processing of the Technic's documents, and Complainant's eagerness to see Technic lose its opportunity to fairly pursue its case because of minor technical deficiencies, supports an award to Technic of its attorney's fees." Respondent's Supplemental Memorandum in Support of Motion Showing Cause at 7-8. The Respondent contends that the EPA's argument that its request for attorney's fees as a sanction is untimely fails because its request is one for attorney's fees as a sanction rather than a prevailing party's request for an award under the Equal Access to Justice Act ("EAJA").

^{10/} The EPA has not moved for a default order in this matter, but a party may be found in default sua sponte upon failure to comply with a prehearing order of the ALJ. See 40 C.F.R. § 22.17 (a).

^{11/} Scenarios that typically warrant default orders include the failure of respondents to file any answer at all and failure to offer any response to ALJ orders. This restraint also has been championed by the federal courts. See e.g. Davis v. Parkhill-Goodloe Co., 302 F.2d 489, 495-96 (5th Cir. 1962).

I find no basis for an award of attorney's fees in this matter. First, I am unaware of any statutory or regulatory provision that explicitly authorizes me to award attorney's fees outside the Equal Access to Justice Act.^{12/} The Respondent cites 40 C.F.R. § 22.04(c)(10) in support of the proposition that an ALJ may award attorney's fees as a sanction against the EPA. Section 22.04 (c)(10) states, in pertinent part, that the ALJ shall have the authority to "[d]o all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules." However, I need not reach the question of whether Section 22.04 (c)(10) authorizes me to impose attorney's fees as a sanction as I otherwise am able to dispose of the issue of attorney's fees.

Even if I assume arguendo that I am authorized to award attorney's fees, there is no basis for such award in this matter. The Respondent incurred additional work and attendant expense only because of its failure to file documents properly with the Regional Hearing Clerk in accordance with the governing Rules of Practice and the Prehearing Order of June 4, 1997, and its ongoing misunderstanding of the filing and service requirements. Accordingly, the Respondent's Request for Award of Attorney's Fees is denied.

Comment

Finally, I note my dismay that the instant motions are before me. While the Respondent's failure to comply with the filing requirements led to this adjudication, the EPA has not been presented as a sympathetic party. First, I note that the EPA's insinuation that the date stamp on Respondent's Exhibit 1 is not genuine was inappropriate. Second, the EPA should not be able to benefit from the Respondent's filing mistakes, particularly when it had been properly served with the documents in question and may have been aware of the confusion and unilateral mistakes on the part of the Respondent. To the extent that this proceeding continues toward hearing, both parties would be well served by acting in a more professional and considered manner.

^{12/} The EAJA, 5 U.S.C. § 504, may entitle the Respondent to an award of attorney's fees if the Respondent prevails and the Government's action was not substantially justified. The procedures for submitting and adjudicating a claim under the EAJA are set forth at 40 C.F.R. Part 17.

ORDERS

The Respondent's Motion Showing Cause is Granted.

The Respondent's Request for Award of Attorney's Fees is Denied.

original signed by undersigned

Barbara A. Gunning
Administrative Law Judge

Dated: 1-26-98
Washington, DC