UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
CORNERSTONE BAPTIST CHURCH,) DOCKET NO. TSCA-V-C-55-90
)
RESPONDENT)

ORDER GRANTING MOTION TO SET ASIDE DEFAULT ORDER AND DISMISSING COMPLAINT WITH PREJUDICE

Under date of July 14, 1999, Complainant filed a motion pursuant to Rules 22.17(d) and 22.14(e) of the Consolidated Rules of Practice (40 C.F.R Part 22) to set aside the Order on Default issued in this matter and to withdraw the administrative complaint.[(1)] The default order in this proceeding under Sections 16 and 207(a) of the Toxic Substances Act ("TSCA" or the "Act"),[(2)] as amended, 15 U.S.C. §§ 2616 and 2647(a), was issued on March 27, 1991. The complaint, filed on May 7, 1990, alleged, inter alia, that Respondent, Cornerstone Baptist Church, Union City, Indiana was a local education agency (LEA) as defined in Section 202 of Act and regulation (15 U.S.C. § 2642(7); 40 C.F.R. § 763.83)[(3)] and had failed to develop an asbestos management plan as required by Section 203(i) of the Act, 15 U.S.C. § 2643(i) and 40 C.F.R. 763.93(a)(1). For this alleged violation, it was proposed to assess Respondent a penalty of $4,000. The complaint was served under cover of a Transmittal Letter which emphasized the hazards of asbestos and the necessity of identifying and abating levels of asbestos in the Nation's schools. This letter also emphasized Respondent's statutory duties as a local education agency. [(4)]

In a letter-answer, dated May 12, 1990, Respondent alleged that, as a religious institution, the Church was protected by the First Amendment of the Constitution and thus, not subject to TSCA nor to EPA's Consolidated Rules of Practice. This letter was interpreted as a request for a hearing by the Regional Hearing Clerk and, pursuant to the Consolidated Rules of Practice, the matter was forwarded to

the Chief Administrative Law Judge, by letter, dated July 16, 1990, for assignment of an ALJ. A copy of this letter was also sent to Respondent. In a letter, dated July 21, 1990, Respondent's Pastor, Mr. Lloyd D. Shepherd, informed Chief Judge Frazier that Respondent had not and would not request a hearing regarding EPA's complaint. Respondent reiterated its contention that EPA had no jurisdiction in the matter.

The undersigned was designated to preside in this matter on July 23, 1990 (Legal Staff Assistant's card file). By a letter, dated August 3, 1990, the ALJ informed Respondent that the matter was before the ALJ because the Church's response to the complaint had been interpreted as an answer contesting either the facts upon which the complaint was based, the appropriateness of the proposed penalty, or both. Additionally, Respondent was informed that if Respondent withdrew the answer, it would be deemed to have admitted the facts alleged in the complaint and may be found to be in default. Respondent was advised that its jurisdictional argument was unlikely to be accepted in any forum and given an opportunity to reconsider its position.

By letter, dated August 23, 1990, Respondent asserted that it was seeking further advice in the matter and that ".....you may expect our answer shortly." The letter was not, however, a reconsideration of the Church's position that it had not and would not request a hearing. Respondent made no further response to the August 3, 1990 letter and by an order dated, October 16, 1990, the period in which respondent might reconsider the withdrawal of its request for hearing was terminated. This order had the effect of allowing Complainant to move for the entry of a default order.

Complainant filed a motion for a default order pursuant to Rule 22.17(a) on January 29, 1991. The motion noted that Respondent had withdrawn its request for a hearing and that the complaint charged Respondent with failing to develop a management plan [for asbestos] for each school building as required by Section 203(i) of the Act and 40 C.F.R. § 763.93. The motion pointed out that, under Rule 22.17(a) of the Consolidated Rules of Practice, a party, upon motion, may be found in default for failing to file a timely answer to the complaint. Respondent's continuing failure to develop a management plan was emphasized and the motion requested that Respondent be found in default and the full amount of the proposed penalty of $4,000 be assessed against it. The Church did not respond to the motion.

As indicated at the outset of this order, an order on default assessing Respondent a penalty of $4,000 was issued on March 27, 1991. The order included findings that Respondent, Cornerstone Baptist Church, owns, leases or otherwise uses a building located at 933 N. Howard Street, Union City, Indiana; that this building is a "school building" as defined in TSCA § 202(13), 15 U.S.C. § 2642(13)[(5)]; that Respondent is a "local education agency" as defined in TSCA § 202(7), 15 U.S.C. § 2642(7) and 40 C.F.R. § 763.83; and that Respondent had failed to develop and submit an asbestos management plan as required by TSCA § 203(i), 15 U.S.C. § 2643(i) and 40 C.F.R. § 763.93. The order also included findings that Respondent's failure to develop an asbestos management plan was a violation of TSCA § 15[(6)] and that Complainant had provided evidence that the proposed penalty was properly determined in accordance with TSCA §§ 16 and 207, 15 U.S.C. §§ 2615 and 2647. The argument in Respondent's letter-answer that because of the First Amendment, the Act and regulation were not applicable was discussed and rejected for the reason that AHERA, together with its implementing regulation (40 C.F.R. Part 763, Submit E), was a facially neutral law of general applicability and thus within Supreme Court precedent that such a law is not unconstitutional merely because it may incidentally effect or restrict religious activities. To support this statement, the order cited the then very recent case of Employment Division v. Smith, 110 S.Ct. 1595, 108 L.Ed. 2d 876 (1990) (free exercise clause did not prohibit the State of Oregon from applying its drug laws to the religious use of peyote). Also cited was St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2nd Cir. 1990), cert. denied, 59 U.S.L.W. 3433 (March 4, 1991) (New York City's Landmark's law prohibiting alteration or demolition of buildings without approval of Commission did not impose an unconstitutional burden on the free exercise of

religion).

By a memorandum, dated May 28, 1991, the Chief Judicial Officer returned the file on this matter to the Hearing Clerk. The memorandum stated that no appeal had been filed, that the time for sua sponte review expired on May 17, 1991, and that the Order on Default thus becomes the Administrator's final order in accordance with 40 C.F.R. § 22.27(c).

Complainant's motion to set aside default order and to withdraw administrative complaint sets forth briefly the background of this proceeding and that the order on default was issued on March 27, 1991. The motion points out that TSCA § 202, 15 U.S.C. § 2642, provides that the term "local educational agency" means, among other things, "any local educational agency as defined in section 8801 of Title 20" and that the term "school" means "any elementary or secondary school as defined in section 8801 of Title 20."[(7)] The motion emphasizes that Section 8801 of Title 20 references the definitions in the Elementary and Secondary Education Act of 1965, which defines the terms "elementary school" and "secondary school" with reference to schools providing elementary and secondary education as determined under State law. The motion states that the State of Indiana defines "elementary" and "high school" at Indiana Code (IC) §§ 20-10.1-1-15 and 20-10.1-1-16 and that IC § 20-10.1-1-0.5 provides that "(t)he provisions of this article (Article 10.1) concerning schools only apply to public and nonpublic schools that voluntarily have become accredited under IC 20-1-1-6." According to Complainant, Respondent has not voluntarily become accredited under IC § 20-1-1-6.

The motion recites that on or about January 1991, the Indiana Department of Environmental Management (IDEM) requested an opinion from the Attorney General for the State of Indiana as to whether a church which provides elementary or secondary education but fails to voluntarily become "accredited" is a "school" under Indiana law. Additionally, the motion states that it was the practice of IDEM to use the annual directory of Indiana Schools published by the Indiana Department of Education to identify schools subject to AHERA, that on or about January 1991, the Indiana Department of Education published its annual directory of Indiana Schools and that Respondent was not on the list. Complainant says that based upon its expectation that the Indiana Attorney General would issue an opinion clarifying the definition of a "school" under Indiana law, it postponed enforcement of the default order.[(8)] No such opinion had been issued to the date of the motion. As an additional factual basis for its motion, Complainant says that in or about February 1992, an EPA inspector visited Union City, Indiana, for the purpose of determining whether Respondent was engaged in elementary or secondary school education. Based upon that visit, it appeared that Respondent was not engaged in any elementary or secondary school education [activities] at the location [identified in the complaint]. For all of these reasons, Complainant moves to set aside the Order on Default and to withdraw the complaint.

DISCUSSION

The first issue presented by the motion is whether the ALJ has any jurisdiction to grant the relief requested. Ordinarily, an ALJ's jurisdiction in a proceeding terminates when an initial decision is issued.[(9)] Exceptions to this rule are motions to reopen the hearing pursuant to Rule 22.28 and motions to set aside a default order pursuant to Rule 22.17(d). Pursuant to Rule 22.17(b), default orders are treated as initial decisions. This is reflected in the Chief Judicial Officer's memorandum dated, May 28, 1991, which returned the file in the matter to the Hearing Clerk and which states that no appeal was filed, that the time for sua sponte review expired on May 17, 1991, and that the Order on Default thus became the final order of the Administrator in accordance with Rule 22.27(c).

Notwithstanding the foregoing, there is no express time limitation on an ALJ's authority to set aside a default order.[(10)] In Midwest Bank & Trust Company, Inc. et al., RCRA (3008) Appeal No. 90-4, 3 E.A.D 696, 1991 EPA App. LEXIS 29, *7 (CJO, October 23, 1991), the Chief Judicial Officer recognized the essentially equitable nature of motions to set aside default orders and the Administrator's discretion to

relax procedural rules when the ends of justice so require. Although the relief sought was denied, the fact that the motion to set aside the default order was filed more than two months after the order was served and that the appeal from the ALJ's decision denying the motion was not filed within 20 days of service of the decision were held not to preclude addressing the merits of the motion. The Chief Judicial Officer stated that "(i)t is appropriate to examine whether fairness and a balance of the equities dictate that a default order be set aside." 3 E.A.D. at 699. It is, of course, recognized that the motion to set aside the default order filed "more than two months" after issuance of the order in Midwest Bank & Trust, supra, bears little or no relationship to the instant matter where the motion to set aside the default order was filed over eight years after the order became final.

Although it is well settled that an agency is bound by its own regulations where to disregard such regulations would prejudice persons otherwise affected thereby,[(11)] no such prejudice to Respondent is apparent here and there would appear to be little doubt that the Administrator has the authority to disregard the procedural rules and to set aside the default order notwithstanding the fact that the order became final more than eight years ago. Indeed, the length of time since the order became final indicates that the reason for the rule that an ALJ loses jurisdiction over a proceeding when an initial decision, or a decision which is treated as an initial decision, is issued is not applicable, because there is no little or no likelihood of conflicting orders from the Administrator or her delegatee, the EAB. Moreover, the view that the Part 22 Rules delegate to ALJs all of the adjudicative powers personally held by the Administrator has been sustained by the Chief Judicial Officer. Arcom, Inc., Drexler Enterprises, Inc. et al., RCRA (3008) Appeal No. 86-6, Final Decision, 2 E.A.D. 203 (CJO, May 19, 1986). It is concluded that the ALJ does have jurisdiction to address the issues raised by the motion and to grant the motion, if appropriate.

The motion, as we have seen, is based upon the notion that the order on default was erroneously issued because under Indiana law, a church which provides elementary or secondary education, but does not become voluntarily accredited, is not a school subject to AHERA and implementing regulations. Section 203(i) of the Act requires the Administrator to promulgate regulations which require each "local educational agency" to develop an asbestos management plan for school buildings under its authority. The regulation, 40 C.F.R. § 763.83, differs from the statute (supra note 3) only that it defines a "local education agency" in paragraph (1) with reference to section 198 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. § 3381), which appears to have been superseded and incorporated into 20 USCS 6301 et seq.

The definition of "local educational agency" in Section 8801 of Title 20 is limited to public authorities having jurisdiction over public elementary and secondary schools.[(12)] and it is clear that Respondent, not being a public authority, is not a local educational agency under that definition. Accordingly, if Respondent is subject to AHERA, it is because it is "the owner of any nonpublic, nonprofit elementary, or secondary school building" (TSCA § 202(7)(B); 40 C.F.R. § 763.83). TSCA § 202(9) entitled "Non-profit elementary or secondary school" refers to section 8801 of Title 20 for the definition of "elementary or secondary school" which, as we have seen (supra note 7), refers to "elementary or secondary schools" as determined under State law. Although the definition of a "school building" is seemingly in and of itself sufficiently all encompassing to include Respondent (supra note 5), the Church cannot be the owner or operator of a "school building" unless it operates a school. TSCA § 202(12) provides that the term "school" means any "elementary" or "secondary" school as defined in Section 8801 of Title 20, which again refers to "elementary and secondary" education as determined with reference to State law.

Indiana Code Title 20 is entitled "Education" and Article 10.1 is entitled "School Programs-Calendar, Curriculum, Textbooks" and Chapter 1 is entitled "Definitions". Section 20-10.1-1-0.5 is entitled "Applicability of article" and provides that "(t)he provisions of this article concerning schools only apply to public schools and nonpublic schools that have voluntarily become accredited under IC 20-1-1-6."

Section 20-1-1-6 refers to the powers of the State Board of Education which, at § 20-1-1-6(a)(5), include a provision requiring the establishment of standards for the accreditation of public schools and a provision stating that nonpublic schools may request an inspection for classification purposes, if they desire to do so. The State Board of Education clearly has the authority to establish accreditation standards for private schools; § 20-1-1-6(a)(8), however, prohibits the Board from establishing an accreditation system for nonpublic schools that is less stringent than the accreditation system for public schools. It will be recalled that Complainant alleges that Respondent has not voluntarily become accredited under IC § 20-1-1-6.

IC § 20-10-1-15 is entitled "Elementary school" and provides that "(a)s used in this article, "elementary school" means any combination of grades kindergarten, 1, 2, 3, 4, 5, 6, 7, or 8." IC § 20-10.1-1-16 is entitled "High school" and provides that "(a)s used in this article, "high school" means any combination of grades 9, 10, 11, or 12." The foregoing provisions are applicable only to public schools and nonpublic schools which have voluntarily become accredited. Respondent is not a nonpublic school which has voluntarily become accredited under Indiana law and thus is not a local educational agency subject to AHERA and its implementing regulations. The basic showing necessary to set aside a default order, i.e., that a different result is likely if the order were set aside, has therefore been satisfied. Midwest Bank & Trust Company, supra. Moreover, the fact that Complainant has taken no action to enforce the default order indicates that setting aside the order will have little practical effect and the motion appears to have been made merely to clear the record of an outstanding judgment. The default order will be set aside.

Complainant's motion includes a request to withdraw the complaint. Although the motion does not specify whether the proposed withdrawal is to be with or without prejudice, the effect of withdrawal of the complaint in this instance will be "with prejudice", because it appears that Respondent is no longer engaged in educational activities of any kind at the location identified in the complaint and the five-year limit provided by 28 U.S.C. § 2462 for the enforcement of penalties for alleged violations of TSCA resulting from those activities has long since expired. Under the Rules of Practice, Complainant is generally free to withdraw the complaint with prejudice at any time as the ALJ's consent is only required where the proposed withdrawal is without prejudice (Rule 22.14(e), supra note 1). While for the reasons stated, it is to be doubted whether the ALJ's consent to withdraw the complaint, the default order having been set aside, is required, the motion will be granted in order to bring this protracted proceeding to a conclusion. The complaint will be dismissed with prejudice.

ORDER

The Order on Default, dated March 27, 1991, is set aside and the complaint is dismissed with prejudice.

Dated this 10th day of August 1999.

Original signed by undersigned

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Spencer T. Nissen
Administrative Law Judge

1. Rule 22.17(d) provides that "(f)or good cause shown, the Regional Administrator or the Presiding Officer, as appropriate, may set aside a default order." Rule 22.14(e) provides in part: "....after the filing of an answer, the complainant may withdraw the complaint, or any part thereof, without prejudice, only upon motion granted by the Presiding Officer or Regional Administrator, as appropriate."

2. Title II of TSCA, commonly referred to as the Asbestos Hazard Emergency Response Act ("AHERA"), 15 U.S.C. §§ 2642 et seq., was enacted for the purpose of protecting America's school children and school employees from serious health risks which may result from exposure to asbestos. AHERA requires, inter alia, that local education agencies (LEA) develop asbestos management plans for the identification and abatement of hazardous asbestos-containing material in school buildings. 15 U.S.C .§ 2643(i); 40 C.F.R. § 763.93.

3. Section 202(7) of the Act is entitled "Local educational agency" and provides that "(t)he term "local educational agency" means-

> (A) any local educational agency as defined in section 8801 of Title 20,
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> (B) the owner of any private, nonprofit elementary or secondary school building, and
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> (C) the governing authority of any school operated under the defense dependents' education system provided for under the Defense Dependents' Education Act of 1978 (20 U.S.C. 921 et seq.)."

4. Unless otherwise noted, findings herein are based on the order on default, the ALJ's file in the matter having been long since been discarded.

5. TSCA § 202(13) is entitled "School building" and provides in pertinent part: "The term 'school building' means (A) any structure, suitable for use as a classroom, including a school facility such as a laboratory, library, school eating facility, or facility used for the preparation of food,.....(C) any other facility used for the instruction of students, or for the administration of educational or research programs, and......." The regulation, 40 C.F.R. § 763.83, repeats and expands this definition, including, for example, facilities for the "housing of students" within its scope.

6. TSCA § 15, 15 U.S.C. § 2614, provides in pertinent part that it shall be unlawful for any person to "(1) fail or refuse to comply with....(D) any requirement of subchapter II of this chapter [Asbestos Hazard Emergency Response] or any rule promulgated or order issued under subchapter II of this chapter;...."

7. Section 8801(14) of Title 20, 20 USCS § 8801(14), provides that: "The term 'elementary school' means a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under State law." Section 8801(25), 20 USCS § 8801(25) provides that: "The term 'secondary school' means a nonprofit institutional day or residential school, including a public secondary charter school, that provides secondary education as determined under State law, except that such term does not include any education beyond grade 12."

8. Enforcement options include referral of the matter to the Attorney General in accordance with TSCA § 16(a)(4) for the institution of an action to recover the

penalty in an appropriate U.S. District Court.

9. There is no provision in the rules for motions for reconsideration of initial decisions as there is for final orders of the EAB (Rule 22.32). See also Rule 22.16(c) providing in pertinent part that the Environmental Appeals Board shall rule on all motions filed or made after service of the initial decision on the parties. In Asbestos Specialists, Inc., TSCA Appeal No. 90-4, 4 E.A.D. 819, 1993 EPA App. LEXIS 7*13 (EAB, OCTOBER 6, 1993), the EAB observed that the reason for rule that an ALJ's jurisdiction terminates upon issuance of an initial decision is to avoid the possibility of conflicting orders from the ALJ and the Administrator (Id. note 15).

10. The Consolidated Rules of Practice have been revised effective August 23, 1999 (64 Fed. Reg. 40138, 40176, July 23, 1999). Although Rule 22.17 entitled "Default" has been rewritten, the ALJ's authority to set aside a default order for good cause shown has not been changed (Rule 22.17(c)). Rule 22.27 is entitled "Initial Decision" and Rule 22.27(c) provides that an initial decision shall become a final order within 45 days after its service upon the parties, unless, inter alia, "(3) A party moves to set aside a default order that constitutes an initial decision;..." The revised rule implies, but does not expressly provide, that the ALJ's jurisdiction to set aside a default order expires when the order becomes final.

11. See United States v. Nixon, 418 U.S. 683 (1974); Vitarelli v. Seaton, 359 U.S. 535 (1959).

12. This section, 20 USCS § 8801(18), is entitled "Local educational agency" and provides:

> (A) The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools.
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> (B) The term includes any public institution or agency having administrative control and direction of a public elementary or secondary school....