BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Ag-Air Flying Services, Inc.	)	FIFRA Appeal No. 06-01
Docket No. FIFRA-10-2005-0065	)	

FINAL DECISION AND ORDER

I. *INTRODUCTION*

On March 2, 2006, Ag-Air Flying Services, Inc. ("Ag-Air") filed a notice of appeal along with an appellate brief with this Board[1] from a default order issued by Chief Administrative Law Judge Susan L. Biro ("ALJ") based on her finding that Ag-Air failed to comply with an Order for Additional Discovery issued pursuant to the Consolidated Rules of Practice ("CROP"), 40 C.F.R. part 22, the rules that govern this proceeding. *See* Order Granting Complainant's Motion for Default for Failure to Submit Additional Discovery (Jan. 27, 2006) ("Default Order"). The ALJ found that Ag-Air violated Section 12(a)(2)(G) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136j(a)(2)(G), by using a registered pesticide in a manner inconsistent with its labeling during an aerial application. Default Order at 9-10. The Default Order assessed a penalty against Ag-Air of $3,120. *Id.* at 11.

[1] *See* Notice of Appeal Pursuant to 40 C.F.R. Part 22, Subpart F, Sec 22.30 (Mar. 2, 2006); Appellate Brief Filed Pursuant to 40 C.F.R. Part 22, Subpart F, Sec 22.30 (Mar. 2, 2006) ("Ag-Air Brief").

Ag-Air contends that the facts of this case do not support the sanction of a Default Order. In addition, the company asserts that certain *ex parte* communications between a staff attorney in the Office of Administrative Law Judges and Ag-Air's counsel led to a bias against the company on the part of the ALJ.

For the reasons stated below, we uphold the Default Order.

II. *PROCEDURAL HISTORY AND PROCEEDINGS BELOW*

On January 21, 2005, the Complainant in this matter, U.S. EPA Region 10 ("EPA"), filed a complaint alleging that Ag-Air used a registered pesticide in a manner inconsistent with its labeling. Specifically, EPA alleged that during aerial application, the pesticide "Warrior" was applied to a crop for which the pesticide was not registered. Ag-Air filed an answer, denying the violation and asserting affirmative defenses. Default Order at 1. A prehearing order was issued on March 22, 2005, which set deadlines for the parties to exchange information, including proposed exhibits and a list of proposed witnesses. *Id.* EPA timely complied with the prehearing order. Respondent, Ag-Air, failed to submit its prehearing exchange by the June 3, 2005 due date, and failed to file a motion for an extension of that deadline. *Id.*

On June 17, 2005, EPA filed a Motion for Default, citing Ag-Air's failure to comply with the prehearing order. *Id.* at 2. Thirteen days later, on June 30, Ag-Air filed a request for a three-day extension of the time for filing a response to EPA's default motion. That request was

granted, giving Ag-Air until July 11, 2005, to file its response. *Id.* Ag-Air mailed its "Objection to Motion for Default, and Request for Leave to File, Late, the Respondent's Discovery, with Disclosure of Expected Evidence and Experts at Time of Hearing" ("Objection") on July 11, 2005, which included a list of proposed exhibits, and a summary of testimony for some, but not all, of Ag-Air's proposed witnesses at trial. *Id.* Notably, the Objection requested an additional extension of ten days to respond to the Motion for Default, and raised arguments in defense of the alleged violation.

By order of July 20, 2005, the Administrative Law Judge denied the Motion for Default and granted Ag-Air an additional extension, until August 19, 2005, to file a complete prehearing exchange. *Id.* That order cautioned that "'[i]n the event * * * that Respondent fails to strictly abide by the requirements of this Order or the Rules regarding proceedings in this case, Complainant's Motion for default may be revived or refiled.'" *Id.* (quoting Order on Motion for Extensions at 3 (July 20, 2005). Ag-Air mailed, but did not file,[2] its prehearing exchange by August 19, resulting in yet another late filing. *Id.*

In response to Ag-Air's prehearing exchange, EPA filed a Motion for Additional Discovery requesting the "'full data file from the 'GPS SATLOC system' for the flight on June 22, 2004," and "other documents which may show pertinent facts about the aerial application of *Warrior* by Respondent on the morning of June 22, 2004.'" *Id.* at 2-3 (quoting Motion for

[2] *See* 40 C.F.R. § 22.5(a) ("A document is filed when it is received by the appropriate Clerk.").

Additional Discovery at 2-3 (Nov. 22, 2005)).[3] The ALJ granted the Motion for Additional Discovery on December 19, 2005, setting a deadline of January 6, 2006, for Ag-Air to submit the additional discovery documents and data. Ag-Air failed to meet this deadline. On January 20, 2006, however, Ag-Air sent EPA an e-mail that contained certain information about, *inter alia,* the type and specification of nozzle used in the aerial pesticide application, but did not include any of the requested documents or the data file for the aircraft's computerized tracking system. *Id.* at 3-4. This belated submission did not explain why the submission was incomplete. On the same date, January 20, 2006, EPA filed a Motion for Default. By order dated January 24, 2006, the ALJ ordered Ag-Air to respond to the Motion for Default by January 26, 2006.[4] *Id.* at 5. Ag-Air failed to file a response by that date or to timely request an extension of time. Thereafter, the ALJ issued the Default Order at issue this matter. Ag-Air's appeal followed.

III. *ANALYSIS*

The ALJ issued a default order in this case based upon Ag-Air's failure to comply with her discovery order of December 19, 2005. She determined that Ag-Air's failure to disclose computerized data information regarding the aerial pesticide application at issue, which Ag-Air stated that it intended to rely upon as a defense to the alleged violation, compromised EPA's

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[3] EPA requested these additional documents in response to Ag-Air's claim that computerized records of its aircraft would show that it had not sprayed the registered pesticide on a crop other than that targeted for spraying.

[4] The ALJ explained that this shortened time period for a response was due to "the impending hearing scheduled to start on February 14, 2006." Default Order at 5. The January 24, 2006 order was served by facsimile and by e-mail that same day.

ability to prepare for cross-examination of Ag-Air's witnesses and hampered the Agency's ability to rebut the company's defense of the violation. Default Order at 8-9. Moreover, as the ALJ explained, Ag-Air's failure to comply with the December 19, 2005 order to submit additional discovery was preceded by numerous failures to meet ordered deadlines for the submission of a prehearing exchange of information. Default Order at 6-9. The contemporaneous explanation offered as to why Ag-Air failed to comply with the ALJ's discovery order was that counsel for Ag-Air was ill. *See id.* at 6. More recently, Ag-Air states that counsel's office was closed for a "previously planned shut-down" of his law practice from December 20, 2005, until January 23, 2006, "for vacation and for personal health reasons." Ag-Air Brief at 5. Upon review of the entire record before us, we find that the ALJ did not abuse her discretion in issuing a default order under the circumstances of this case.

A. *Issuance of Default Orders Under the CROP*

The CROP provides that a party's failure to adhere to procedural requirements may be grounds for a finding of default by a Presiding Officer. Specifically, the CROP states, *inter alia*, that a "party may be found to be in default: after motion, * * * upon failure to comply with the information exchange requirements of §22.19(a) or an order of the Presiding Officer." 40 C.F.R. § 22.17(a). The CROP further provides that "[d]efault by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." *Id.*

Once the Presiding Officer makes a default finding, the CROP directs the Presiding Officer to "issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default should not be issued." 40 C.F.R. §22.17(c). In addition, the CROP provides that once default has been entered, "[f]or good cause shown, the Presiding Officer may set aside a default order." *Id.* Thus, "good cause" informs both whether a default order should issue, and once issued, whether a default order should be set aside. *See In re JHNY, Inc., a/k/a Quin-T Technical Papers & Board ("JHNY"),* CAA No. 04-09, slip op. at 16 (EAB Sept. 30, 2005), 12 E.A.D. ____; *In re Pyramid Chemical Co.,* 11 E.A.D. 657, 661 (EAB 2004). Further, the Board has observed that "when fairness and balance of the equities so dictate, a default order will be set aside," and we have endorsed the general principle of law disfavoring default as a means of concluding cases. *In re Thermal Reduction Co., Inc.*, 4 E.A.D. 128, 131 (EAB 1992); *accord In re Rybond, Inc.*, 6 E.A.D. 614, 616 (EAB 1996).

In determining on appeal whether there were adequate grounds for the issuance of a default order, the Board applies a "totality of the circumstances" test. *See Rybond*, 6 E.A.D. at 625. In applying the "totality of the circumstances" test, we have considered whether a procedural violation has in fact occurred, whether that violation is proper grounds for a default order, and whether there is a valid justification for not complying with the procedural requirement. *See JHNY*, slip op. at 17, 12 E.A.D.___. In addition, we have considered whether the defaulted party would likely succeed on the merits if a hearing were held. *JHNY*, slip op. at 17, 12 E.A.D. ___; *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 319 (EAB 1999). Finally, we have

determined whether the penalty assessed in the default order is a reasonable one. *JHNY*, slip op. at 17, 12 E.A.D. ___.

In reviewing a default order, the Board recognizes that the law disfavors the resolution of a case based upon default. *Id.*; *Thermal Reduction*, 4 E.A.D. at 131. At the same time, we accord substantial deference to the administrative law judge who conducted the proceeding. *JHNY*, slip op. at 17-18, 12 E.A.D. ___..

B. *The ALJ Did Not Abuse Her Discretion In Issuing The Default Order*

Ag-Air does not argue that it has fully complied with the EPA requests for additional discovery, which the ALJ ordered to be submitted by January 6, 2006. The company also does not dispute that failure to comply with a discovery order may constitute grounds for default under 40 C.F.R. § 22.17(a). Ag-Air does contend that the facts of this case do not warrant such a sanction. We find that Ag-Air has not demonstrated good cause for its failure to comply with the ALJ's discovery order, nor has the company demonstrated a likelihood of success on the merits of the case. Accordingly, we find that the default order does not constitute an abuse of the ALJ's discretion.

1. *The Procedural Omission By Ag-Air Constitutes Grounds For Default*

Under the terms of the CROP, the ALJ "shall conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay." In carrying out these duties, the ALJ may, *inter alia*, "rule upon motions" and "issue all necessary orders," including "order[ing] a party * * * to produce testimony, documents, or other non-privileged evidence, and failing the production thereof without good cause being shown, draw adverse inferences against that party." 40 C.F.R. § 22.4 (c)(2), (5).

The basis of the Default Order at issue here is Ag-Air's failure to comply with the ALJ's order of December 19, 2005, granting EPA's November 22, 2005 Motion for Additional Discovery, and setting a due date of January 6, 2006, for Ag-Air to submit the requested responses and documents. *See* Order on Complainant's Motion for Accelerated Decision on Liability and Penalty, Motion to Supplement Complainant's Prehearing Exchange, and Motion for Discovery (Dec. 19, 2005); Default Order at 2-3. On January 20, 2006, hours after EPA filed its Motion for Default for Failure to Submit Additional Discovery, Ag-Air sent an e-mail to EPA counsel reciting numeric figures, some of which did not indicate unit measures, that apparently were meant to correspond to items included in EPA's request for additional discovery. Default Order at 3-4. The ALJ found that "the e-mail attachment does not include all of the information that Respondent was ordered to provide, as it does not include 'the full data file from the GPS SATLOC system for the flight on June 22, 2004,' nor does it explain Respondent's failure to produce such information." Default Order at 4. The ALJ also noted that the e-mail was sent two

weeks after the deadline established by the ALJ's order, no motion for extension had been sought, and Ag-Air did not provide any justification for the untimeliness of the incomplete response. *Id.*

The ALJ, in her Default Order, noted that "Respondent expects to release the information only during the hearing, which undermines the purposes of discovery and the policies of avoiding surprise at hearing." *Id.* at 6. The ALJ found that requiring EPA to go to hearing without the requested information "would severely hamper the Complainant's case and it would be unfair to require Complainant to proceed to hearing, facing such surprise evidence." Default Order at 6-7. In addition, the ALJ found that the company's failure to meet the ordered deadlines "caused Complainant as well as this Tribunal to unnecessarily expend significant amounts of time and effort[,] * * * [d]elay[ed] the smooth progress of this case[,] and increas[ed] the costs of the litigation to opposing party, this Tribunal, and thus the public in general." *Id.* at 7.

We agree that Ag-Air's failure to comply with the ALJ's discovery order is an appropriate basis for imposition of default pursuant to 40 C.F.R. § 22.17. As we have previously stated, federal administrative adjudications developed as a truncated alternative to Article III courts and are intended to provide expedition. *See JHNY*, slip op. at 14, 12 E.A.D. ___. The efficient and timely exchange of information pursuant to 40 C.F.R.§ 22.19 is central to achieving timely administrative case resolutions. Further, the efficiency of administrative adjudications depends upon the ability of the ALJ to exercise her discretion in order to conduct proceedings in a fair manner that assures that facts are elicited and issues adjudicated without delay, as prescribed by

40 C.F.R. § 22.4(c). Therefore, we find that the ALJ did not abuse her discretion in ordering default based upon Ag-Air's failure to comply with the ALJ's order to provide discovery.

2. *Ag-Air Did Not Come Forward With "Good Cause" for Failure To Comply With The Discovery Order*

The CROP directs the Presiding Officer to issue a default order "as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued." 40 C.F.R. § 22.17. Ag-Air has variously explained the failure to comply with the ALJ's discovery order as due to "illness" and due to "vacation" and "a previously planned shut-down" of counsel's law practice. Opposition to Default at 3, Ag-Air Brief at 5. The ALJ found that counsel's rationale does not constitute "good cause" within the meaning of 40 C.F.R. § 22.17(c). Default Order at 5-6. We agree.

As stated by the ALJ, "Respondent's only argument relevant to its failure to comply timely with the December 19th Order is his counsel's bald statement that he was ill." *Id.* at 6. While counsel stated in his Opposition to Default that he was not in his office from December 20, 2005 until January 23, 2006, this statement does not explain why the discovery ordered to be produced by January 6, 2006, was not submitted. It is undisputed that the order directing Ag-Air to produce additional discovery was faxed to counsel's office on December 19, prior to counsel's shut-down of his law practice. Despite counsel's knowledge of EPA's November 22, 2005 Motion for Additional Discovery, and his office's receipt of the December 19 order requiring

production of that discovery, counsel did not move for an extension of the January 6 deadline or make other arrangements for compliance with the ALJ's order. This lapse is even more inexplicable given Ag-Air's explanation provided in its Appellant Brief, stating that counsel's office was closed for a "previously planned shut-down * * * for vacation and for personal health reasons." Ag-Air Brief at p. 5. Ag-Air's statement verifies that counsel's office absence was neither an emergency nor unexpected, but planned in advance, at least in part for vacation.

In addition, Ag-Air states in its Opposition to Default that the company was having difficulty retrieving and downloading the SATLOC computer data file for the aerial flight requested, and that the file needed to be taken to a computer professional. Default Order at 6. As the ALJ noted, "Respondent does not state when [the computer file] was submitted to the computer professional, or when the information will be submitted to Complainant." *Id.* at 6. The ALJ further noted that this issue was not raised to the ALJ until January 23, 2006, and that Ag-Air had never filed a motion for extension of the discovery due date based on this rationale or any other.[5] *Id.*

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[5] Ag-Air complains that the staff attorney for the Office of the Administrative Law Judges had inappropriate *ex parte* contact with counsel for the parties and that these conversations allegedly resulted in a bias against the company on the part of the ALJ. However, Ag-Air misapprehends the applicable regulations regarding *ex parte* communications. The CROP prohibits the Board, the Presiding Officer, or any advisor to the Board or Presiding Officer to "discuss *ex parte* the merits of the proceeding with any interested person outside the Agency * * * or with any representative of such person." 40 C.F.R. § 22.8. As Ag-Air admits in its Appellant Brief, the discussions at issue "did not relate to the material issues before the presiding judge * * * and were not substantive matters in this case." Ag-Air Brief at 6. Thus, the discussions were not prohibited *ex parte* communications concerning "the merits of the proceeding" within the meaning of 40 C.F.R. § 22.8. Further, Ag-Air does not explain how it was prejudiced by these communications or how they relate to the central issue underlying the default – the company's failure to comply with the ALJ's order. In any event, to the extent Ag-

We have previously determined that "the neglect of a party or of a party's attorney does not excuse an untimely filing, nor does lack of willfulness, by itself, affect the determination." *In re Pyramid Chem. Co.*, 11 E.A.D. 657, 667 (EAB 2004). Here, counsel's failure to comply with the discovery order, or to file for a motion for extension of the order's due date, does not excuse the company's conduct. The record indicates that Ag-Air simply failed to comply with the terms of the ALJ's order, and has not articulated good cause for its failure to do so. To set aside the default order under facts such as these would "seriously undermine the capacity of the ALJs to administer the proceedings before them." *JHNY*, slip op. at 15, 12 E.A.D. ___. Therefore, we find that Ag-Air has not met its burden in demonstrating good cause for its noncompliance.

3. *Ag-Air Has Not Demonstrated A Likelihood Of Success On The Merits*

As stated above, under the "totality of the circumstances" test, the Board may take into consideration the defaulting party's likelihood of success on the merits if, in fact, the case had proceeded to hearing. *JYNY*, slip op. at 27; *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 319 (EAB 1999). However, the burden to show likelihood of success on the merits falls to respondent to demonstrate that there is "more than the mere possibility of a defense, 'but rather a strong probability' that litigating the defense will produce a favorable outcome." *JHNY*, slip op. at 27 (quoting *In re Pyramid Chemical Co.*, 11 E.A.D. 657, 669 (EAB 2004)). Ag-Air has not argued

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Air's complaints were offered as an excuse for non-compliance with the December 19, 2005 order, we find that these allegations do not constitute good cause. Moreover, if Ag-Air believed the ALJ to be biased, the rules governing this proceeding provide for a mechanism for a party to move to disqualify, withdraw, or re-assign the ALJ, which was not followed here. *See* 40 C.F.R.§ 22.4(d).

as part of its appeal to this Board that the record contains sufficient evidence to show a strong likelihood that, if the case had proceeded to hearing, the company would have prevailed,[6] nor does the record support such a conclusion.[7] Therefore, the Default Order should not be set aside on this basis.

4. *The ALJ's Determination Of Liability And Penalty Assessment Are Uncontested And Are Supported By The Record*

As the CROP provides, a default by Respondent constitutes, for purposes of this proceeding, "an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." 40 C.F.R. § 22.17(a). The ALJ therefore examined whether EPA has stated allegations of fact in the Complaint that support the elements of the violation alleged. Default Order at 9-10. Having determined that the Complaint's allegations set forth a *prima facie* case of violation of FIFRA's terms, the ALJ assessed a monetary penalty based upon the applicable statutory factors. *Id.* The ALJ's findings are uncontested. Ag-Air does not argue on appeal that the ALJ erred in her determination that EPA had alleged a *prima facie* case, or that the ALJ erred in her application of FIFRA's statutory factors for assessing a civil penalty. The

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[6] *See* Ag-Air Brief at 2 (Statement of Issues).

[7] In response to the complaint, Ag-Air raised a general defense that the computerized data file, SATLOC, would show that the June 22, 2004 aerial spraying did not include application of the pesticide Warrior on the non-target crop. However, these computer data are exactly the information that Ag-Air failed to disclose. Ag-Air failed to disclose the SATLOC information as part of its prehearing exchange or in response to the ALJ's December 19 order. The company has not advanced these general allegations on appeal, and as such, these allegations are not properly before this Board. *See* 40 C.F.R. § 22.30(a) (appeals from an initial decision must state the issues for review, the relevant record support, and argument on the issues presented).

record supports the ALJ's determinations, and we uphold the ALJ's findings and penalty assessment.

The ALJ determined that EPA had properly alleged a FIFRA violation in that she found that the Complaint adequately set forth the following facts: (1) that the company is a "person" and a "commercial applicator," (2) who used the registered pesticide Warrior in a manner inconsistent with its labeling. Default Order at 9. Specifically, the Complaint alleges that, in violation of FIFRA Section 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G), Ag-Air made an aerial application of the registered pesticide Warrior on June 22, 2002, during which Ag-Air sprayed grape vines on the property of Heidi Bolong. *Id.* The Complaint further alleges that the label for Warrior does not allow application to grape vines. *Id.* The ALJ concluded that EPA submitted proposed evidence in support of these allegations in its prehearing exchange. *Id.*[8]

Having determined that EPA had properly alleged a *prima facie* case of the FIFRA violation at issue, the ALJ determined an appropriate penalty. In doing so, she relied upon the factors for assessment of a civil penalty at Section 14 of FIFRA, 7 U.S.C. § 136l, specifically, the size of the business, the effect on the person's ability to continue in business, and the gravity of the violation. *Id.* at 10. The ALJ also relied upon EPA's penalty analysis under the 1990

[8] As EPA states in its response brief, "an eye witness * * * observed application by Ag-Air to non-target property." Response Brief of the United States Environmental Protection Agency, Region 10 at 9 (Mar. 21, 2006) (citing Complainant's Exhibits 1, 5, 9-14, attached to EPA's Initial Prehearing Exchange; Declaration of Heidi Bolong; Declaration of Rodney M. Guske attached to Motion for Accelerated Decision on Liability and Penalty; Second Declaration of Rodney M. Guske; Second Declaration of Heidi Bolong attached to Reply in Support of Motion for Accelerated Decision on Liability and Penalty).

Enforcement Response Policy for FIFRA ("FIFRA ERP"). Based on the FIFRA ERP, EPA proposed a base penalty of $3,900, which reflects the category for the smallest businesses, a mid-range gravity factor, and a high pesticide toxicity (reflecting the fact that Warrior is a restricted use pesticide). That base penalty was then lowered by EPA in the amount of $780 to reflect low penalty levels attributable to potential harm to human health and to the environment, and no history of noncompliance. *Id.* This calculation resulted in a proposed penalty of $3,120.

In assessing the civil penalty of $3,120, the ALJ noted that EPA had included in its prehearing exchange financial information from *American Business Directory* showing Ag-Air's annual sales to be $84,000. *Id.* The ALJ further noted that Ag-Air had not submitted any documents in support of any reduction of the penalty based on the proposed penalty's effect on Ag-Air's ability to continue in business.[9] *Id.*

We find the ALJ's determination of liability, and her assessment of the modest penalty of $3,120, to be consistent with the record.

[9] Apparently, Ag-Air generally raised an ability to pay claim. *See* Response Brief of the United States Environmental Protection Agency, Region 10 (Mar. 21, 2006). However, the record before us does not contain any documentation supporting such a claim, nor does Ag-Air raise this issue on Appeal.

III. *CONCLUSION*

For the foregoing reasons, and pursuant to FIFRA sections 12 and 14(a), 7 U.S.C. §§136j,136l(a), we affirm the Default Order and hereby assess a civil penalty of $3,120.

Ag-Air shall pay the full amount of its penalty within 30 days of receipt of this final order. Payment shall be made by forwarding a cashier's or certified check payable to the Treasurer, United States of America, to the following address:

U.S. EPA - Region 10
Regional Hearing Clerk
Mellon Bank
P.O. Box 360903M
Pittsburgh, PA 15251

So ordered.[10]

Dated:
9/1/06

ENVIRONMENTAL APPEALS BOARD

Anna L. Wolgast
Environmental Appeals Judge

[10] The panel deciding this matter is comprised of Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Anna L. Wolgast.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Final Decision and Order in the matter of Ag-Air Flying Services, Inc., FIFRA Appeal No. 06-01, were sent to the following persons in the manner indicated:

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for Annette Duncan
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