

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

2008 AUG 27 PM 1: 25

IN THE MATTER OF: )  
)  
Libra Industries, Inc., )  
)  
) DOCKET NO. EPCRA-05-2008-0005  
)  
Respondent. )

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**DECISION AND ORDER DENYING MOTION FOR  
DEFAULT ORDER AND GRANTING LEAVE TO FILE ANSWER**

This matter is before the Presiding Officer on two motions, Complainant's Motion for Default Order and Respondent's Motion to File Answer Instanter. For the reasons set forth below, I hereby grant Respondent's motion and deny Complainant's.

I. Background

Complainant filed an Administrative Complaint pursuant to the Emergency Planning and Community Right-To-Know Act of 1986 on January 3, 2008. The Complaint was received by Respondent on January 7, 2008, and an answer or responsive pleading by Respondent was thus due February 6, 2008. Respondent served its Answer on the Regional Judicial Officer and Complainant's counsel on February 8, 2008. The Answer, however, was not filed with the Regional Hearing Clerk.<sup>1</sup>

No other pleadings or documents were filed in this matter until June 30, 2008, when Respondent filed a Motion to File Answer Instanter with the Regional Hearing Clerk. A copy of that motion was served on Complainant's counsel, but not on the Regional Judicial Officer, as required by the Consolidated Rules of Practice at 40 C.F.R. § 22.5(b). On July 7, 2008, Complainant filed a Motion for Default Order and shortly after that on July 11, a Supplemental Motion for Default Order. On July 16, 2008, Respondent served the Presiding Officer with a copy of its Motion to File Answer Instanter.

II. Discussion

Section 22.17 of the Consolidated Rules of Practice which govern this proceeding provides in pertinent part as follows:

- (a) *Default.* A party may be found to be in default: after motion, upon failure file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the presiding officer, or upon

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<sup>1</sup> See Declaration of Sonja Brooks-Woodard, Attachment 7 to Complainant's Memorandum in Support of Motion for Default Order.

failure to appear at a conference or hearing. . . . Default by complainant constitutes a waiver of complainant's right to proceed on the merits of the action, and shall result in the dismissal of the complaint with prejudice.

\* \* \*

(c) *Default order.* When the Presiding Officer finds that default has occurred, he shall 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 order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. . . .

Default is generally disfavored as a means of resolving Agency enforcement proceedings. *In re JHNY, Inc.*, 12 E.A.D. 372, 384 (EAB 2005); *In re Thermal Reduction Co.*, 4 E.A.D. 128, 131 (EAB 1992). In close cases, doubts are typically resolved in favor of the defaulting party so that adjudications on the merits, the preferred option, can be pursued. *Thermal Reduction*, 4 E.A.D. at 131. That being said, the Environmental Appeals Board has not hesitated to enter or affirm default orders in cases where circumstances clearly indicate that the imposition of such a remedy is warranted. *See, e.g., JHNY*, 12 E.A.D. at 385-91.

Complainant argues that default is appropriate in this matter because Respondent failed to file an Answer and the record does not show good cause why a default order should not be issued. Complainant maintains that it has established a prima facie case on liability against Respondent and that the penalty it seeks is appropriate. Complainant further argues in its Supplemental Motion that default should be ordered because Respondent did not serve its Motion to File Answer Instantly on the Presiding Officer. Complainant states that it assumed that the Answer had been properly filed with the Regional Hearing Clerk when it was served with a copy in February and that Respondent's repeated failure "to comply with the timing and service of process requirements of the Consolidated Rules. . . has led to extreme and unnecessary delay in this matter, all to Respondent's benefit."

Respondent, on the other hand, maintains that it acted in good faith and that its failure to file its Answer was a "technical" error resulting in no unfair burden on or prejudice to Complainant. Respondent points out that it rectified its error almost immediately upon discovery by filing its Motion to File Answer Instantly. In addition, Respondent argues that default should only be ordered where a party willfully ignores the judicial process, and that is not the case here. Respondent questions whether Complainant was able to review a docket or had other means available to it to determine the cause of the delay in this matter.

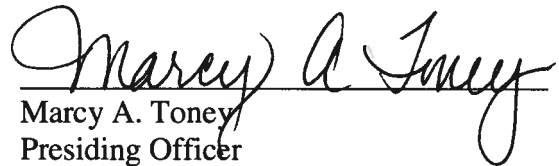
On the basis of these facts, I conclude that good cause exists for denying Complainant's Motion for Default Order. It is clear that Respondent did not timely file its Answer with the Regional Hearing Clerk, that it served the Answer on Complainant two days after it was due, and that it failed to serve the Presiding Officer with a copy of its motion. Upon realizing its mistakes, however, it appears that Respondent took prompt action to correct the errors. While Respondent's failure to properly file its Answer on time has now resulted in a several month delay in this matter, that delay could have been mitigated had either party inquired of the Regional Hearing Clerk regarding the unusually long delay in the assignment of the matter to an

administrative law judge, which routinely occurs very soon after an answer is filed. Respondent has committed several procedural errors in this case and has been advised that adherence to the requirements of the Consolidated Rules is important and expected. The issuance of a default order on these facts, however, would be too harsh a consequence given Respondent's prompt efforts to file its Answer with the Regional Hearing Clerk once it realized it had not properly done so.

Complainant's Motion for Default Order and Supplemental Motion for Default Order are hereby DENIED. Respondent's Motion to File Answer Instantly is GRANTED. The Regional Hearing Clerk should now forward this matter to the Office of Administrative Law Judges for further proceedings.

IT IS SO ORDERED.

Date: August 27, 2008

  
Marcy A. Toney  
Presiding Officer

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US EPA REGION V

IN THE MATTER OF Libra Industries, Inc.,  
Docket No. EPCRA-05-2008-0005

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CERTIFICATE OF SERVICE

I certify that the foregoing Decision and Order Denying Motion for Default Order and Granting Leave to File Answer dated August 27, 2008, was sent this day in the following manner to the addressees:

Original hand delivered to:

Regional Hearing Clerk  
U.S. Environmental Protection  
Agency, Region 5  
77 West Jackson Boulevard  
Chicago, Illinois 60604-3590

Copy hand delivered to  
Attorney for Complainant:

Ann L. Coyle  
U.S. Environmental Protection  
Agency, Region 5  
Office of Regional Counsel  
77 West Jackson Boulevard  
Chicago, Illinois 60604-3590

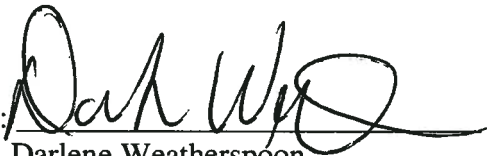
Copy by U.S. mail and  
fax (216) 621-3415 to:

Harold O. Maxfield, Jr.  
Max E. Dehn  
Cavitch Familo Durkin & Frutkin  
Fourteenth Floor  
1717 East Ninth Street  
Cleveland, OH 44114-2876

Dated:

8/27/08

By:



Darlene Weatherspoon  
Administrative Program Assistant