

6/12/95

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
PERSONA, INCORPORATED,) Docket No. CWA-VIII-94-21-
) PII
)
Respondent)

ORDER GRANTING EXTENSION OF TIME

On May 22, 1995, Respondent filed a motion requesting an extension of time to submit its prehearing exchange. The prehearing exchange had been due May 15, 1995 and the Respondent had construed the February 14, 1995 order requiring the submission of the prehearing exchange as establishing a discretionary rather than a mandatory filing date. Respondent also states that it was engaged in settlement negotiations until May 15, 1995 and, because of this, was unable to meet the May 15, 1995 deadline for submission of the prehearing exchange. Respondent also relies on Section 22.07(b) of the EPA Rules of Practice (Rules), 40 C.F.R. §22.07(b,) as authority for extending a deadline if the failure to make a timely motion for extension was the result of excusable neglect. Further, Respondent takes the position that the extension of time will not prejudice the Complainant since the hearing date has not been set. In addition, the Respondent attached its prehearing exchange to the motion for extension of time.

Complainant opposes the motion for extension of time on the basis that it is not timely; that the Respondent has not shown excusable neglect for missing the deadline; that the Respondent has not shown good cause why the extension should be granted; and that the Respondent's failure to file its prehearing exchange on time has prejudiced the Complainant. In the latter regard, the alleged prejudice is that the Respondent had the Complainant's prehearing exchange before having to prepare its own prehearing exchange. Complainant also contests Respondent's interpretation of the February 14, 1995 order as setting an optional rather than a mandatory filing date for the prehearing exchange. If the extension is granted, Complainant asks that, it be given additional time to reply to the Respondent's prehearing exchange.

Complainant has correctly construed the February 14, 1995 Order Setting Prehearing Procedures as establishing a mandatory, not an optional, date for filing of prehearing exchanges. The overall context of the order makes this clear and Respondent's position on this point is rejected.

However, the issue is whether the untimeliness of the Respondent's request for extension was the result of excusable neglect. Under the circumstances of this case, it is warranted to consider the untimely filing of the motion for extension the result of excusable neglect. Respondent misinterpreted the February 14, 1995 order, but apparently did so in good faith. Further, the prehearing exchange was submitted with the motion for extension of time, only a week after the deadline, so apparently the actions of the Respondent cannot be considered an effort to delay this proceeding.

Moreover, the Complainant's contention that it has been prejudiced because Respondent had its prehearing exchange prior to submission of Respondent's prehearing exchange is non-specific. Complainant does not point to any particular advantage that Respondent gained from this situation. In fact, since Complainant has the burden of proof in establishing the violations alleged in the Complaint, it would not be unreasonable to require the Complainant to file its prehearing exchange first. While the general Agency practice, which was followed in the February 15, 1995 order, is to have the prehearing exchanges filed simultaneously, this arrangement is only customary, not mandatory. As a result, no specific prejudice to Complainant has been established in the prehearing exchange situation in this proceeding.

Further, since the Respondent apparently acted in good faith and without any specific intent to delay, there is good cause for the extension, and the Respondent's motion for an extension is hereby granted. Therefore, the Respondent's prehearing exchange attached to the motion is accepted for filing. Further, Complainant's request for additional time to respond to the Respondent's prehearing exchange is not unreasonable and Complainant is given until June 15, 1995 to submit a reply.¹

SO ORDERED.

Daniel M. Head
Administrative Law Judge

Dated: _____
Washington, D.C.

¹ The parties were notified by telephone on June 6, 1995 of the ruling herein on the Respondent's motion for extension and of the additional time for the Complainant to reply.

IN THE MATTER OF PERSONA, INCORPORATED, Respondent
Docket No. CWA-VIII-94-21-PII

CERTIFICATE OF SERVICE

I certify that the foregoing Order Granting Motion for Extension, dated _____, was sent in the following manner to the addressees listed below:

Original by Pouch Mail to:

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Regional Hearing Clerk
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Copy by Certified Mail to:

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Dated: _____
Washington, DC