

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY



BEFORE THE ADMINISTRATOR

IN THE MATTER OF )  
 )  
B & L PLATING, INC., ) DOCKET NO. CAA-5-2000-012  
 )  
 )  
RESPONDENT )

**ORDER DISMISSING RESPONDENT'S MOTION FOR  
RECONSIDERATION OF INITIAL DECISION**

On April 5, 2002, the undersigned entered a Default Order and Initial Decision in this civil administrative penalty proceeding brought under Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d).<sup>1</sup> Respondent was found to be in default<sup>2</sup> and was assessed a civil administrative penalty of \$42,600.

In a Memorandum dated May 9, 2002, the Environmental Appeals Board advised the undersigned that no appeal was filed from the Default Order and Initial Decision and that the Board elected not

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<sup>1</sup> The Certificate of Service for the Default Order and Initial Decision reflects that it was sent to Attorney Allender, Respondent's attorney then of record, by certified mail, return receipt requested. The decision was not returned to the Office of Administrative Law Judges as undeliverable mail.

<sup>2</sup> Respondent, B & L Plating, Inc., was found to be in default because of its failure to comply with the Administrative Law Judge's Prehearing Order without good cause, and such default by Respondent constituted an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. As such, Respondent was found to have violated Section 112 of the Clean Air Act, as amended, 42 U.S.C. § 7412, and the regulations of the National Emission Standards for Hazardous Air Pollutants for Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks, 40 C.F.R. Part 63, Subpart N.

to review the case sua sponte and, thus, the Default Order and Initial Decision becomes the Board's final order.

On June 17, 2002, an undated Notice of Substitution of Counsel was received from Attorney Philip G. Tannian.<sup>3</sup> Then, on August 8, 2002, Attorney Tannian submitted an undated Motion for Reconsideration of Initial Decision requesting that the default judgment be withdrawn.<sup>4</sup> In the Motion for Reconsideration, Attorney Tannian, claims that "Ms. Allender [Respondent's attorney then of record] was on personal leave from her law firm for health reasons as of September 1, 2001 and the law firm effectively ceased functioning at this time. Kathleen Allender never returned to her firm."<sup>5</sup> Attorney Tannian also claims that he attempted to contact Complainant's counsel concerning the substitution of counsel in this matter in April and May 2002.

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-32. Under Section 22.16(c) of the Rules of Practice, 40 C.F.R. § 22.16(c), an Administrative Law Judge "shall rule on all motions filed or made after an answer is filed and before an initial decision has become final or has been appealed."<sup>6</sup> Pursuant to Section 22.27(c) of the Rules of Practice, 40 C.F.R. § 22.27(c), the initial decision of the Administrative Law Judge becomes "a final order 45 days after its service upon the parties and without further proceedings unless: (1) A party moves to reopen the hearing; (2) A party appeals the initial decision to the Environmental Appeals Board; (3) A party moves to set aside a default order that constitutes an initial decision; or (4) The Environmental Appeals Board elects to review the initial decision

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<sup>3</sup> The Notice of Substitution of Counsel was not filed with the Regional Hearing Clerk. See 40 C.F.R. § 22.5(a).

<sup>4</sup> The Motion for Reconsideration of Initial Decision, postmarked August 8, 2002, was filed with the Regional Hearing Clerk on August 13, 2002, and was received in the Office of Administrative Law Judges on August 14, 2002.

<sup>5</sup> Attorney Allender did not file a withdrawal of representation. See American Bar Association Model Rules of Professional Conduct, Rule 1.16.

<sup>6</sup> Section 22.17(d) of the Rules of Practice, 40 C.F.R. § 22.17(d), provides that "[f]or good cause shown, the Presiding Officer may set aside a default order."

on its own initiative." Service of an initial decision may be accomplished by sending a copy of the decision by "first class mail (including by certified mail or return receipt requested, Overnight Express and Priority Mail)." 40 C.F.R. § 22.6.

In the instant matter, a copy of the Default Order and Initial Decision was sent to Respondent's attorney then of record, Kathleen Allender, by certified mail, return receipt requested on April 5, 2002. The Motion for Reconsideration of Initial Decision does not set forth the claim that Respondent's attorney then of record, Ms. Allender, and/or Respondent did not receive the Default Order and Initial Decision. The claims concerning Ms. Allender's situation and her representation of Respondent are not presented in affidavit form by either Ms. Allender or Respondent, and there is no evidentiary support for these claims.<sup>7</sup> Although the return receipt for the Default Order and Initial Decision sent by certified mail is not in the record before me, the decision was not returned to the Office of Administrative Law Judges as undeliverable mail. The Notice of Substitution of Counsel submitted by Mr. Tannian was not received until more than two months after the issuance of the Default Order and Initial Decision. As such, the record before me does not demonstrate that the Default Order and Initial Decision entered on April 5, 2002, has not become final.<sup>8</sup>

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<sup>7</sup> Attorney Tannian's averments concerning Attorney Allender's representation in this matter are tantamount to a claim of incompetent representation.

<sup>8</sup> The question arises as to whether the Administrative Law Judge or the Environmental Appeals Board has jurisdiction over the instant motion which requests that the default order be set aside. An appeal was never filed and the Environmental Appeals Board elected not to review the Initial Decision on its own initiative. In essence, Respondent claims that the Initial Decision has not become final because service was not perfected. An Administrative Law Judge has jurisdiction over any motion filed before an initial decision has become final unless an appeal is filed or the Environmental Appeals Board elects to review the decision. See 40 C.F.R. §§ 22.16(c), 22.27(c).

Accordingly, the Motion for Reconsideration of Initial Decision is **Dismissed** for lack of jurisdiction. See 40 C.F.R. §§ 22.6, 22.7, 22.16(c), 22.27(c), 22.31(b).

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Barbara A. Gunning  
Administrative Law Judge

Dated: August 20, 2002  
Washington, DC

In the Matter of B & L Plating, Inc., Respondent  
Docket No. CAA-5-2000-012

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order Dismissing Respondent's Motion For Reconsideration Of Initial Decision**, dated August 20, 2002 was sent this day in the following manner to the addressees listed below.

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Mary Keemer  
Legal Staff Assistant

Dated: August 20, 2002

Original and Copy by Pouch Mail to:

Sonja Brooks-Woodard  
Regional Hearing Clerk  
U.S. EPA  
77 West Jackson Boulevard, E-19J  
Chicago, IL 60604-3590

Copy by Pouch Mail to:

Mark Geall, Esquire  
Assistant Regional Counsel  
U.S. EPA  
77 West Jackson Boulevard, C-14J  
Chicago, IL 60604-3590

Copy by Certified Mail Return Receipt to:

Philip G. Tannian, Esquire  
Environmental Legal Services  
P.O. Box 32121  
Detroit, MI 48232-0121

Kathleen Allender, Esquire  
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