

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
GWINNETT COUNTY DEPARTMENT) Docket No. CWA-404-97-109
OF PUBLIC UTILITIES)
)

Default Order

The undersigned issued a Prehearing Order in this case on August 21, 1997. By this Order, the EPA's prehearing exchange was due not later than October 6, 1997. Three days *after* its prehearing exchange was due, EPA submitted a "Motion for Stay of Prehearing Exchange."

In this motion, counsel for EPA, while recognizing that the deadline had passed, nevertheless requested a stay "in order to continue with settlement discussions."

EPA counsel presents alternative and mutually exclusive reasons in support of its Motion for Stay of Prehearing Exchange. First, counsel represents that, through inadvertance attributable to a heavy caseload, he recorded the *Respondent's* prehearing exchange due date in his calendar. Counsel does not reveal what alerted him to his mistake or when this occurred, but it could not have been the Respondent who called it to his attention, as counsel for EPA declares that he was not able to even reach Counsel for the Respondent before filing the instant motion and despite the assertion that the parties have been "actively involved in settlement discussions." In any event, even if the claimed basis for inadvertance is accepted, such a reason does not amount to a legitimate basis to excuse the failure to comply with the Prehearing Order. Legal counsel is expected to correctly record critical information, such as the date a prehearing exchange is due.

Further, EPA's Motion violates the Rules governing this proceeding by (a) failing to indicate that the notice of

intention to file an extension was given to Respondent; and (b) by being filed out of time, that is, after the deadline sought to be extended. See, In the Matter of Shawano County, V-5-CAA-013 (Order Denying Motion for Extension of Time Motion to Stay Proceedings, August 7, 1997).

40 C.F.R. § 22.07 (b), "*Extensions of time,*" states in pertinent part:

[t]he Presiding Officer ... may grant an extension of time for the filing of any pleading, document, or motion (1) upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties . . . Such a motion by a party may only be made after notice to all other parties, unless the movant can show good cause why serving notice is impracticable. The motion shall be filed in advance of the date on which the pleading, document or motion is due to be filed, unless the failure of a party to make timely motion for extension of time was the result of excusable neglect.

In addition to failing to give notice to Respondent and not filing its motion in a timely manner, EPA counsel has failed to show "excusable neglect." See, Spang and Company, RCRA-III-169 (Order on Motions, August 20, 1997). EPA counsel's assertion that the delay was caused by a "heavy caseload" and because he "inadvertently missed the date for this matter by recording the date for Respondent's exchange" is manifestly insufficient.

Counsel's second basis for obtaining a stay is more troubling. In it Counsel states:

Complainant would also represent that expending resources on prehearing exchanges when the expectations for settlement are very high would not be an efficient use of limited federal and county resources." (italics added).

Several points need to be made about this statement. First, as noted above, either party may ask for an extension of time to comply with a prehearing order and such requests are often granted when they are submitted in a timely fashion in advance of the date of compliance and sufficient reasons are advanced to justify the granting of an extension. Sections 22.07 and 22.16(a) of the EPA Rules of Practice, 40 C.F.R. Sections 22.07 and 22.16(a). No such qualifying request was made in this case.

Second, counsel confuses his role with that of the judge. It is not for counsel to pass upon whether expending resources on

prehearing exchanges is wise. The Respondent has filed an answer to the EPA's complaint and requested its right to a hearing. The procedural rules do not provide that such right is held in abeyance nor that prehearing exchanges are stayed in instances when counsel feels that expectations for settlement are very high. As set forth in my Prehearing Order: "...the continuation of settlement negotiations will not provide good cause for not meeting the ...schedule set in this Prehearing Order." (Order at 1.)

Counsel for EPA has not set forth an adequate basis to excuse his failure to comply with the Prehearing Order, nor does counsel's views on the efficient expenditure of federal resources justify noncompliance with the Order. EPA regulations governing default orders are instructive here. 40 C.F.R. § 22.17(a) provides, in pertinent part, that "[a] party may be found to be in default . . . after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer." (emphasis supplied). See also, In the Matter of Mountain States Asbestos Removal, Inc. And Housing Authority of the City of Newark, CAA-II-94-0106, (Default Order and Initial Decision and Order Dismissing Complaint, May 1997).

Having failed to set forth, in a timely manner, sufficient grounds to excuse EPA's failure to comply with the August 21, 1997 Prehearing Order, the undersigned, sua sponte, finds the EPA in default, and consistent with Procedural Rule 22.17(a)(2), dismisses the complaint with prejudice.

So Ordered.

William B. Moran

Administrative Law Judge

Dated: October 21, 1997

Washington, DC

IN THE MATTER OF GWINNETT COUNTY DEPT. OF PUBLIC UTILITIES,
Respondent

CWA-404-97-109

CERTIFICATE OF SERVICE

I certify that the foregoing **Default Order** dated October 21, 1997, was sent in the following manner to the addressees below:

Original by Pouch Mail to: Julia P. Mooney

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Dated: October 21, 1997

Washington, DC