

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

TURNBULL ENTERPRISES, INC.,

DOCKET NO. EPCRA-III-117

RESPONDENT

ORDER DISMISSING COMPLAINT WITH PREJUDICE

By order dated January 10, 1997, the undersigned was redesignated as the Administrative Law Judge to preside in the above cited matter. Previously, another Administrative Law Judge had entered a Prehearing Order in this matter on November 8, 1993, but both parties failed to comply with that order when they failed to provide the preheating exchanges as directed without obtaining extensions of time.^{1/}

On January 28, 1997, the undersigned entered a Prehearing Order which directed the submission of the parties' prehearing exchanges. The Complainant's prehearing exchange was due April 15, 1997. On April 10, 1997, the Complainant filed a Motion for Extension of Time to File a Consent Agreement and Final Order ("CAFO") or Prehearing Exchange. In this motion, Complainant's counsel stated that the parties had held settlement negotiations since the filing of the status report on March 14, 1997, and as a result, the parties had resolved the outstanding issues and were prepared to ratify the CAFO. On April 10, 1997, the undersigned granted the Complainant's motion for a 30 day extension.

When the Complainant, without filing a motion for an extension, failed to file a ratified CAFO or, alternatively, to submit its prehearing exchange by May 16, 1997, as directed in the April 10, 1997, Order, the undersigned issued an Order To Show Cause to the Complainant on May 22, 1997. The Complainant filed a response to the Order To Show Cause dated June 9, 1997. In this response to the Order To Show Cause, counsel for the Complainant states the following:

Complainant's representative was unexpectedly required to be present in Richmond, Virginia on May 15, 1997 on another enforcement matter. Complainant's representative did not become aware of this unexpected travel until the late

afternoon of May 14, 1997. Complainant's representative was expecting to return to the office on May 16, 1997 in time to file the ratified Consent Agreement and Final Order or its prehearing exchange. Unfortunately, Complainant's representative became ill and was out of the office until May 27, 1997.

I find the Complainant's response to the Order To Show Cause is insufficient and inadequate to show good cause for its failure to meet the May 16, 1997, deadline for filing a CAFO or its prehearing exchange, or why this matter should not be dismissed.

Initially, I point out that Complainant's counsel does not identify the "representative" who was unavailable to meet the filing deadline. In fact, the use of the term "representative" is confusing as it does not indicate whether the term refers to counsel for the Complainant or some other individual. The term "representative" can mean someone other than counsel and its use in this context connotes someone other than counsel. See section 22.10 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("Rules of Practice") (stating that a party may appear in person or by counsel or other representative). Therefore, the Complainant's response does not clearly show whether Complainant's counsel or another individual was required to be in another city one day prior to the filing deadline.

Regardless of this perceived lack of clarity in describing the individual who was unavailable to meet the filing deadline, I find that the sequence of events related by counsel for the Complainant does not adequately explain or excuse the Complainant's failure to meet the filing deadline. Counsel for the Complainant states that its representative became aware of unexpected and out-of-town travel late on May 14, 1997, which was only two days before the May 16, 1997, filing deadline. The Complainant's representative did not file a motion for extension of time. Reportedly, even though this representative expected to return to the office on the day of the filing deadline "in time to file the ratified Consent Agreement and Final Order or its prehearing exchange," such person became ill and did not return to the office until May 27, 1997. The Complainant's representative initially allowed less than two days for the preparation and filing of the CAFO or prehearing exchange and then less than one day after the unexpected change in plans. Such action on the part of the Complainant was inadequate to ensure compliance with the order setting the filing deadline, and the later explanation does not reasonably excuse the failure to meet the filing deadline.

Further, I note that no CAFO or prehearing exchange was filed by the Complainant with its response to the Order to Show Cause and that none has been filed to date. The Complainant's representative allowed less than one day for the preparation and filing of the CAFO or prehearing exchange, but has not produced such filing in the 18 days since he or she returned to the office. Moreover, the Complainant does not specify whether the CAFO or prehearing exchange was to be filed, indicating that the Complainant did not contemplate filing either document.

The Complaint in this case was filed on September 16, 1993, more than 3 and 1/2 years before the filing deadline in question. The Complainant failed to meet the prehearing exchange filing deadline set by another judge. In the prior Order of April 10, 1997, the undersigned noted the length of time this matter has been pending and admonished the parties that a further extension would not be granted absent a showing of extraordinary circumstances.

Finally, I note that the Complainant's generalized and conclusory assertions in its response to the Order To Show Cause "that the tentative agreement the parties have reached will greatly benefit the environment" and that "[i]t would be unfortunate to have the efforts of the parties concluded in this manner" do not constitute good cause for not dismissing the Complaint in this matter.

Section 22.17(a) of the Rules of Practice 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 order of the Presiding Officer." Section 22.17(a) further provides that "[d]efault by the complainant shall result in the dismissal of the complaint with prejudice." Based on the above, the undersigned finds that the Complainant has not demonstrated good cause for its failure to meet the filing deadline in question or why this matter should not be dismissed. I further find the Complainant is in default under the provisions of Section 22.17(a) of the Rules of Practice. Pursuant to Section 22.17(a) of the Rules of Practice, the Complaint in the above cited matter is **Dismissed with prejudice.** ^{2/}

Barbara A. Gunning

Dated: 6/20/97 Administrative Law Judge

Washington, DC

^{1/} Complainant's counsel, however, furnished regular status reports. These reports stated that the parties had tentatively reached an agreement in principle and were negotiating the language of the proposed Consent Agreement and Order.

^{2/} Pursuant to 40 C.F.R. §§ 22.17 (a) and 22.27(b), respectively, this Order Dismissing the Complaint with prejudice constitutes an Initial Decision that shall become the Final Order of the Agency unless an appeal is taken pursuant to 40 C.F.R. § 22.30 or the Environmental Appeals Board elects, sua sponte, to review this decision.