UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
ERIC TATE d/b/a PRETTY BABY,	**)**	**Docket No. FIFRA-09-99-0005**
	)	
Respondent	**)**	

ORDER DENYING MOTION TO RECONSIDER

By Order dated June 20, 2000, the Complaint in this proceeding was dismissed with prejudice on the basis of Complainant's default resulting from its failure to comply with an Order of the Presiding Judge. Complainant immediately filed a Motion to Reconsider Order Dismissing Complaint With Prejudice (Motion). For the reasons which follow, Complainant's Motion will be denied.

The Complaint was in this action issued on September 28, 1999. An Answer was filed, and subsequently a Prehearing Order was issued, requiring Complainant to file either a fully executed Consent Agreement and Final Order (CAFO) or its Initial Prehearing Exchange on or before February 1, 2000. The Prehearing Exchange was not filed by Complainant until February 4, 2000, along with a motion for leave to file its Prehearing Exchange out of time alleging a "calendaring error." Respondent submitted a written objection, requesting dismissal of the case for, *inter alia*, Complainant's failure to meet the deadline. The request for dismissal was denied and the motion for leave to file out of time was granted, but the Complainant was specifically "warned that failure to meet any future deadlines set in this proceeding will not be tolerated." Respondent, acting *pro se*, timely filed his Prehearing Exchange.

By Order dated March 14, 2000, the hearing in this matter was scheduled to begin on June 20, 2000. The Hearing Order warned:

> In the event the parties have failed to reach a settlement by that date [March 31, 2000], they shall strictly comply with the requirements of this Order and prepare for a hearing.
> * * * *
> THE RESPONDENT IS HEREBY ADVISED THAT FAILURE TO APPEAR AT THE HEARING, WITHOUT GOOD CAUSE BEING SHOWN THEREFOR, MAY RESULT IN A DEFAULT JUDGMENT BEING ENTERED AGAINST IT. IF EITHER PARTY DOES NOT INTEND TO ATTEND THE HEARING OR HAS GOOD CAUSE FOR NOT BEING ABLE TO ATTEND

THE HEARING AS SCHEDULED, IT SHALL NOTIFY THE UNDERSIGNED AT THE EARLIEST POSSIBLE MOMENT.[1]

By Status Report dated April 7, 2000, the Complainant reported that the parties had reached a settlement in principle, and that the Complainant was preparing a CAFO for signature. The parties failed to meet the deadline of April 21, 2000 for stipulations, as set forth in the Order Scheduling Hearing, filing neither stipulations nor a CAFO by that date. Complainant filed a Status Report on June 7, 2000, stating that the CAFO had been signed by Respondent, and that "[t]he Complainant is routing the Consent Agreement and Final Order for signature."

Complainant filed neither the fully executed CAFO nor a motion to postpone the hearing, prior to the date of the hearing. As a result, the parties were expected to attend the hearing on June 20, 2000. This Tribunal attempted to contact Complainant's counsel by telephone on the date of the hearing, only to be advised that Complainant's counsel was "unavailable" to discuss the matter due to her attendance at a "training program." For Complainant's failure to either file a fully executed CAFO or to request postponement of the hearing before the date of the hearing, and consequently the failure to attend the scheduled hearing, the Complaint was dismissed by Order dated June 20, 2000, finding Complainant in default under 40 C.F.R. § 22.17(a), as amended, 64 Fed. Reg. 40182 (July 23, 1999). This provision states as follows, in pertinent part:

> A party may be found to be in default . . . upon failure to comply with . . . an order of the Presiding Officer or upon 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.

Also considered in dismissing the Complaint were the facts that Complainant failed to file timely its Prehearing Exchange and that the same Assistant Regional Counsel representing Complainant in this case failed to meet filing deadlines in two other cases in the same month. *See*, Order Terminating Proceedings Before the Chief Administrative Law Judge dated June 19, 2000 in *Bayview Environmental Services, Inc.*, TSCA-09-99-0005; and Order Dismissing Complaint With Prejudice dated June 20, 2000 in *Allied Environmental, Inc.*, TSCA-09-99-0004.

The Practice Group Leader and the Branch Chief of the Assistant Regional Counsel immediately entered appearances in this proceeding and filed a Motion to Reconsider the Order Dismissing Complaint with Prejudice, and a Declaration of the Practice Group Leader in support of the Motion. The Motion acknowledged that a CAFO had not been filed as of the date of the hearing. The Motion indicated that the Assistant Regional Counsel is in her first year at the Office of Regional Counsel and that before she left town for a training class, she had submitted the

[1] The Prehearing Exchange Order provided multiple contact methods for the parties to reach this Tribunal including the telephone numbers of the Judge's Staff attorney and legal assistant and the Office fax number.

CAFO, signed only by Respondent, to the Office of Regional Counsel and Cross Media Division for filing. The Motion stated further that she did not communicate to her Office "that the CAFO had to be filed by June 20, and so it inexcusably remained unfiled." The Motion offered apologies for failure to meet the terms of the Prehearing Order, stated that the Office of Regional Counsel "will immediately take steps to ensure that the Court's orders are not missed in the future," and that the Region put a great deal of effort to obtain a settlement in this case, and "humbly asks the Court for an opportunity to correct its error." The Declaration of the Practice Group Leader stated that if the Motion is granted, the CAFO will immediately be submitted to the Regional Judicial Officer for signature and then submitted to the Regional Hearing Clerk for filing. Attached to the Declaration is a copy of the first page and signature page of the CAFO, showing that Respondent signed it on April 28, 2000, *almost two months prior to the scheduled hearing*, and a Senior Associate at EPA Region 9 signed it seven weeks later, on June 22, 2000, *two days after the scheduled hearing*.

There is no provision in the Consolidated Rules of Practice, 40 C.F.R. part 22, for reconsideration of an order, except under 40 C.F.R. § 22.32, which does not apply here. The appropriate remedy for a party who has been found in default is 40 C.F.R. § 22.17(c), which provides, "[f]or good cause shown, the Presiding Officer may set aside a default order." Complainant=s Motion is flawed for its failure to cite to the appropriate rule and request the appropriate relief.

Moreover, even assuming Complainant had cited to 40 C.F.R. ' 22.17(c), the Motion offers no facts at this point which could arguably support any assertion of Agood cause.@ In particular, it is noted that Respondent did not contribute to the delay in Complainant executing and/or filing the CAFO or appearing at the hearing, as Respondent signed the CAFO - doing all that was required of him at that point in terms of settling and avoiding hearing - close to two months before the trial was scheduled to begin. The failure to respond to the hearing deadline in any way is solely due to the neglect of Complainant=s inexperienced counsel and that of her supervisors. The fact that counsel is inexperienced does not render her neglect excusable, or a basis for good cause, particularly where all that was asked of her was to comply, or timely file an explanation of her inability to comply, with the explicit written Orders served directly upon her as attorney of record in the case. The neglect occurred despite the specific warnings about meeting deadlines in the Order Scheduling Hearing, dated March 14, 2000 and the Order on Complainant's Motion for Leave to File Prehearing Exchange Out of Time and Respondent's Request for Dismissal, dated February 11, 2000. It is noted that this is not a case where an inexperienced attorney is unfamiliar with informal or local court procedures or unpublished or antiquated precedent, which more seasoned attorneys have garnered through experience. Further, there is no assertion that the inexperienced counsel was led astray by erroneous advice given to her by anyone else. Moreover, the inexperienced counsel=s neglect appears not to be based upon counsel=s absence from the office, as the Motion does not assert that counsel was out of the office in the weeks immediately preceding the hearing date, when the CAFO or a motion to cancel the hearing should have been filed.

Additionally, the failure can be attributed equally to the inexperienced counsel=s

supervisors. Upon receiving the Consent Agreement -- signed only by Respondent -- from their inexperienced subordinate *who had previously missed a deadline in this case*, the supervisors apparently never took it upon themselves to inquire as to any filing deadline and did not act upon the CAFO in an efficient manner. Moreover, those supervisors were bound by due diligence and professional ethics to adequately train and closely supervise their inexperienced subordinates to avoid just the type of neglect which occurred here. No good cause is offered as to their failures in this regard.

Finally, the Consolidated Rules of Practice make it clear that until a Final Order is signed by the Regional Judicial Officer, Regional Administrator or Environmental Appeals Board, a CAFO does not dispose of a proceeding and the "settlement" is thus only tentative. 40 C.F.R. 22.18(b)(3). The record shows that the CAFO in this case has yet to be fully executed by the Regional Judicial Officer and thus, there is a possibility that the Regional Judicial Officer may yet reject the Consent Agreement and not sign the Final Order, leaving open the potential for a hearing to occur -- after all this, and for a proposed penalty of only $470 - if the default were set aside.[2]

It is recognized that a default order is a harsh remedy. However, Complainant has offered no viable explanation for the neglect of counsel, has evidenced disregard for the administrative litigation process, and has not yet provided evidence that the settlement is final.[3] The delays caused by counsel's inattention to deadlines has resulted in a waste of Government resources -- including both judicial resources, in issuing three otherwise unnecessary orders, and

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[2] This is why a CAFO which has not been fully executed does not automatically result in cancellation of the hearing. The parties are expected to appear at the hearing unless both parties have stated or demonstrated that they are waiving their right to a hearing due to settlement, and an Order is issued by the Judge acknowledging such waiver and canceling the hearing.

[3] The "good cause" test for setting aside default under Rule 55(c) of the Federal Rules of Civil Procedure, and those Rules in general, are not applicable to these proceedings. *Midwest Bank & Trust Co., Inc.*, RCRA (3008) Appeal No. 90-4, 3 E.A.D. 696, 699 & n. 7 (CJO October 23, 1991). Under the Consolidated Rules of Practice, "[i]t is appropriate to examine whether fairness and a balance of the equities dictate that a default order be set aside." *Id.* For sake of comparison, Federal Rule of Civil Procedure 60(b) provides that relief from a court's judgment may be granted on the basis, *inter alia*, of the party's mistake, inadvertence, surprise or excusable neglect. Federal courts have recognized that the rule should be liberally applied in the context of a default judgment, especially where such judgments result from honest mistakes, rather than willful misconduct, carelessness or negligence. *Ellingsworth v. Chrysler*, 665 F.2d 180, 185 (7th Cir. 1981). It has been stated that courts should refuse to vacate a default judgment where a party has evidenced disregard for the judicial process or where hardship would result. *Kinnear Corp. v. Crawford Door Sales Co.*, 49 F.R.D. 3, 7 (D. S.C. 1970). It has also been held that carelessness by the litigant or his counsel does not afford a basis for relief from judgment under Rule 60(b). *Pelican Production Corp. v. Marino*, 893 F.2d 1143, 1146 (10th Cir. 1990).

the resources of the Regional Office. Moreover, there is no indication in the record that there is any Supplemental Environmental Project, penalty of great magnitude, or compliance order at stake in the settlement. In these circumstances, and based upon the Motion and supporting documents offered at this point, it cannot be concluded that Complainant has shown good cause for setting aside the dismissal of the Complaint.

Accordingly, Complainant's Motion to Reconsider Order Dismissing Complaint with Prejudice is **DENIED.**

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Susan L. Biro
Chief Administrative Law Judge

Dated: July 3, 2000
Washington D.C.