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- Statutes Administered by the Administrative Law Judges
- Rules of Practice & Procedure
- Environmental Appeals Board
- Employment Opportunities

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	
GARD PRODUCTS, INC. , 005)	DOCKET NO. I FFRA- 98- 005
)	
)	
RESPONDENT)	

ORDER DENYING COMPLAINANT'S MOTION FOR DEFAULT JUDGMENT

ORDER ON RESPONDENT'S REQUEST FOR LEAVE TO FILE
AMENDED ANSWER AND PREHEARING EXCHANGE

In a Prehearing Order dated October 7, 1998, the parties were directed to file their respective prehearing exchanges. Prior to filing its prehearing exchange, the Complainant filed a Motion to Amend Complaint, which was Granted by Order entered on March 4, 1999.⁽¹⁾ At the time the Complainant filed its Motion to Amend the Complaint, Complainant's counsel noted that Respondent's counsel was no longer acting as Respondent's counsel due to a conflict of interest.⁽²⁾ The Complainant timely filed its prehearing exchange on March 11, 1999. The Respondent did not file an Amended Answer. The Respondent failed to file its prehearing exchange on April 11, 1999, as directed.

On April 21, 1999, the Complainant filed the instant Motion for Default Judgment.⁽³⁾ On May 13, 1999, the Respondent filed its Response to the Complainant's Motion for Default Judgment and requested leave to file an Amended Answer and its prehearing

exchange.

In opposing the motion for default judgment, the Respondent states that after its former counsel withdrew from this case, Mr. Howard Klehm, Vice President of Gard, was advised that Complainant's counsel intended to file a new complaint. Allegedly, Mr. Klehm believed that the filing of a new complaint would start a new process and cancel any deadlines previously set in this matter. The Respondent has submitted an undated affidavit from Mr. Klehm attesting to this belief on his part. Further, according to his affidavit, Mr. Klehm did not receive the Amended Complaint or the January 20, 1999, Order extending the deadlines for filing the prehearing exchange until April 21, 1999. The Respondent retained new counsel on May 3, 1999. [\(4\)](#)

The Respondent maintains that Mr. Klehm was unaware that an Amended Complaint had been filed and that he was mistaken as to the Respondent's obligation to file its prehearing exchange. The Respondent asserts that there was no bad faith or intentional misconduct on behalf of the Respondent, and that the Complainant does not allege any prejudice resulting from the Respondent's failure to file an Amended Answer or its prehearing exchange. Thus, the Respondent argues that the Complainant's Motion for Default Judgment should be denied.

The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 22 C.F.R. Part 22 ("Rules of Practice") at Section 22.17(a), 40 C.F.R. § 22.17(a), provide that an Administrative Law Judge may find a party in default upon failure to comply with a prehearing order. As pointed out by the Respondent, the Administrative Law Judge has broad discretion in ruling upon a motion for default. A default order is a harsh sanction, reserved only for the most egregious behavior. [\(5\)](#)

In the instant matter, the Complainant has not demonstrated that it suffered prejudice as a result of the Respondent's failure to file an Amended Answer or comply with the Prehearing Order. The record does not demonstrate bad faith or continued dilatory conduct on the part of the Respondent. As such, imposition of the harsh sanction of default is not appropriate in this matter at this time. Accordingly, the Complainant's Motion for Default Judgment is **Denied**.

Next I address the Respondent's request for leave to file an Amended Answer and its prehearing exchange. Although the record reflects that the Motion to Amend Complaint, along with the Amended Complaint, and the March 4, 1999, Order Granting the Motion to Amend Complaint were served on Respondent's counsel then of record, Mr. Klehm states in his affidavit that he did not receive the motion, Amended Complaint, or March 4, 1999, Order until April 21, 1999. The Respondent retained new counsel on May 3, 1999. Based upon these representations made by Mr. Klehm, the Respondent is granted twenty (20) days from the date of service of this order to file its Amended Answer, if any. In addition, sufficient cause is shown to grant the Respondent's request for leave to file its prehearing exchange, in part. [\(6\)](#) The Respondent's prehearing exchange shall be filed on or before August 9, 1999, and the Complainant's rebuttal prehearing exchange, if any, shall be filed on or before August 23, 1999. The procedures directed in my Prehearing Order of October 7, 1998, remain in effect.

Original signed by undersigned

Barbara A. Gunning
Administrative Law Judge

Dated: 6-2-99
Washington, DC

1. In an Order entered on January 20, 1999, the Complainant's Request for Extension of the Prehearing Schedule was granted.
2. No motion to withdraw as attorney of record was filed by Respondent's former counsel. When the Complainant filed the Motion to Amend Complaint, Complainant's counsel stated that Respondent's former counsel stated that he had notified the Respondent of the motion. See Order Granting Motion to Amend Complaint, fn. 1. The Complainant's Motion to Amend Complaint and the March 4, 1999, Order Granting Motion to Amend Complaint were served on Respondent's former counsel.
3. The Motion for Default Judgment was served on Respondent's former counsel and Mr. Howard Klehm, II of Gard Products, Inc.
4. The Respondent's Response to Motion for Default Judgment is accompanied by a Motion to Substitute Counsel.
5. Scenarios that typically warrant default orders include the failure of respondents to file any answer at all and failure to offer any response to Administrative Law Judge orders. This restraint also has been championed by the federal courts. See e.g. Davis v. Parkhill-Goodloe Co., 302 F.2d 489, 495-96 (5th Cir. 1962).
6. The Respondent requests ninety (90) additional days in which to file its prehearing exchange but this Order grants only 67 days.

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Last updated on March 24, 2014