

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
TURNBULL ENTERPRISES, INC.,) DOCKET NO. EPCRA-III-117
)
)
RESPONDENT)

ORDER GRANTING MOTION TO SET ASIDE ORDER
DISMISSING COMPLAINT WITH PREJUDICE

On June 20, 1997, the undersigned entered an Order Dismissing the Complaint With Prejudice in the above captioned matter. In this dismissal order, the undersigned found the Complainant to be in default upon its failure to comply with the undersigned's April 10, 1997, Order of Extension directing the Complainant to file by May 16, 1997, either its prehearing exchange or a fully executed Consent Order and Final Order ("CAFO"). The undersigned further found that the Complainant, in its response to the May 22, 1997, Order To Show Cause, had failed to demonstrate good cause for its failure to meet the filing deadline or why this matter should not be dismissed.

Subsequent to the entry of the order of dismissal on June 20, 1997, the Respondent filed on June 20, 1997, a letter stating that it would be "unduly hard-pressed to produce a detailed prehearing submission without first having the benefit of Complainant's submission." ⁽¹⁾ In this letter, the Respondent also stated: "While Respondent does not object to having the Complainant's case dismissed, if that is the Court's pleasure, Respondent believes that the parties have reached a settlement, not just in 'principle,' but virtually a final settlement in all respects except for the necessary signatures. Under these circumstances, Respondent submits that in the interest of justice to all parties, the Court permit the settlement requiring merely signatures to be executed at this time."

On June 30, 1997, the Complainant filed a Motion to Set Aside the Order Dismissing the Complaint With Prejudice and a memorandum in support of the motion.⁽²⁾ In the memorandum, Complainant's counsel "acknowledges that it is without sufficient excuse for failing to file its prehearing exchange or a fully ratified CAFO" but "contends that it has a meritorious case on the merits of this matter and that the performance of one person should not result in the dismissal of this matter." Memorandum at pgs. 4-5. The Complainant argues that dismissal is a harsh penalty and is to be imposed only in extreme circumstances, and that the application of the factors in determining whether to dismiss a case for failure to comply with a court order justify setting aside the dismissal order. With regard to the later assertion, the Complainant argues that setting aside the dismissal would not result in prejudice to the Respondent as the Respondent, in its letter responding to the Order To Show Cause, states that justice would be served by permitting the parties an opportunity to obtain the required signatures for the CAFO. The Complainant further argues that public policy favors disposition of this case on the merits and that the "Court" could impose lesser sanctions for the Complainant's failure to timely file a prehearing exchange or ratified CAFO.

The Respondent, in a letter dated July 9, 1997, states that it does not intend to file a response to the Complainant's Motion to Set Aside the Order Dismissing the Complaint With Prejudice. See Section 22.16(b) of the Rules of Practice.⁽³⁾

Section 22.17(d) of the Rules of Practice provides that "[f]or good cause shown the Regional Administrator or the Presiding Officer, as appropriate, may set aside a default order."⁽⁴⁾ The term "good cause" is not defined by the governing regulations. The Environmental Appeals Board ("EAB"), however, has held that as setting aside a default order is essentially a form of equitable relief, the term "good cause" within the meaning of Section 22.17(d) of the Rules of Practice can be interpreted more broadly than relating solely to the specific facts and circumstances that resulted in the entry of the default order. Matter of Midwest Bank & Trust Company, Inc., Rockland Mineral Processors, Inc., John E. Suerth, RCRA Appeal No. 90-4 (CJO, Oct. 23, 1991). Thus, facts and circumstances other than those relating to a party's failure to respond to a prehearing exchange order may be relevant and persuasive when making the good cause determination. Id. In Matter of Midwest Bank & Trust Company, Inc., supra, the EAB found that it is appropriate to

examine whether fairness and a balance of the equities dictate that a default order be set aside.

Based on the representations made by both the Respondent and the Complainant regarding the parties' attainment of a CAFO which only required the necessary signatures at the time of the dismissal and their position that justice would be served by permitting the settlement which required only the signatures to be executed, I find the requisite "good cause" for setting aside the default order under Section 22.17(d) of the Rules of Practice. Id. While I have found previously that the Complainant has not demonstrated good cause for its failure to comply with my April 10, 1997, prehearing Order, I now find that fairness and a balance of the equities warrant setting aside the default order. Accordingly, the Complainant's Motion To Set Aside the Dismissal With Prejudice is Granted.

In granting the motion to set aside, the undersigned emphasizes that little, if any, weight has been placed on most of the legal arguments set forth by the Complainant in its memorandum

filed in support of the motion. The Complainant cites a variety of tests, with overlapping or similar factors, that have been announced by the federal circuit courts to evaluate the propriety of a dismissal action.⁽⁵⁾ The Order Dismissing the Complaint with Prejudice was properly and appropriately entered in this matter as the Complainant failed to demonstrate good cause for its failure to comply with the prehearing order. The Motion to Set Aside in the instant case is granted only under the more generous standard for evaluating a motion to set aside on the basis of good cause enunciated in Matter of Midwest Bank & Trust Company, supra. Facts and circumstances other than those relating to the Complainant's failure to respond to the prehearing order warrant the granting of the motion to set aside.

Inasmuch as the Motion To Set Aside the Order Dismissing the Complaint With Prejudice is granted, the proceedings in this matter are reinstated. If the case is settled, the fully ratified Consent Agreement and Final Order must be filed no later than **August 4, 1997**, with a copy sent to the undersigned. If the case is not settled by that date, the Complainant's prehearing exchange shall be filed on or before **August 4, 1997**. The Respondent's prehearing exchange is due **September 4, 1997**, and the Complainant's rebuttal, if any, is due **September 18, 1997**. The procedures directed in my Prehearing Order of January 28, 1997, remain in effect.

If the case is not settled, I expect the parties to meet the prehearing deadlines set by this order. The Complainant is hereby warned explicitly that its failure to timely file either the fully ratified CAFO or its prehearing exchange as ordered above shall result in the entry of a dismissal of the Complaint with prejudice and that no motion to set aside the dismissal order will be entertained.

original signed by undersigned

Barbara A. Gunning

Administrative Law Judge

Dated: 7-11-97

Washington, DC

1. The Respondent's facsimile transmission was received on June 20, 1997, at 4:57 p.m., and the filing deadline for its prehearing exchange was June 16, 1997, with an additional 5 days granted for service by mail. Sections 22.07(a) and (c) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice"). The June 20, 1997, Order Dismissing the Complaint With Prejudice mooted the deadline for the filing of the Respondent's prehearing exchange. Thus, contrary to the Complainant's assertion in its memorandum filed in support of its Motion to Set Aside, the Respondent did not fail to timely meet its filing deadline. Memorandum at p. 8, fn. 1.

2. On July 3, 1997, the Complainant filed a letter correcting the memorandum filed in support of the Motion to Set Aside the Order Dismissing the Complaint With Prejudice. In this correction, the Complainant stated that the Respondent did not decline to sign the CAFO following the issuance of the Order To Show Cause as stated in the supporting memorandum.

3. The Respondent's July 9, 1997, letter confirmed a telephone conversation on that same date between the Administrative Law Judge's legal assistant and Respondent's counsel.

4. The term "Presiding Officer" means the Administrative Law Judge designated by the Chief Administrative Law Judge to serve

as the Presiding Officer. Section 22.03 (a) of the Rules of Practice.

5. The cited tests and factors include the imposition of lesser sanctions, such as the assessment of fines, costs, or damages, attorney disciplinary measures, conditional dismissal, dismissal without prejudice, and explicit warnings. With the exceptions of a dismissal without prejudice and an explicit warning, the cited sanctions are not considered to be within the scope of my authority and, thus, are not considered to be relevant factors. See Section 22.04 (c) of the Rules of Practice; Section 558 (b) of the Administrative Procedure Act (the "APA"), 5 U.S.C. § 558 (b). The Complainant also refers to possible alternative sanctions such as to "recommend management controls or other means to address counsel performance" or to "seek information about steps taken by Agency attorney management." I find such suggested action would clearly violate my role as an impartial and independent Administrative Law Judge and would violate the impartiality provisions of the APA. See Sections 554-559 of the APA. In the instant case, I reject the Complainant's other suggested lesser sanctions, such as limiting the Complainant's opportunity to adduce evidence, or limiting the scope of the Complainant's case or the range of available penalty relief as inappropriate sanctions under the circumstances presented in this case.