

interrogatories and that it had attempted on numerous occasions in early January 1998 to contact Complainant regarding the interrogatories. Complainant replied to Respondent's response on January 23, 1998, disputing Respondent's claims that it had not been served with the interrogatories and that Complainant had been uncommunicative concerning Respondent's efforts to answer the interrogatories.

Complainant's Motion to Compel

In its January 6, 1998, Motion, Complainant requests that the undersigned order Respondent to provide the documents requested in Complainant's first set of interrogatories. Complainant also requests that the undersigned draw inferences adverse to the Respondent concerning Respondent's financial condition and ability to pay the proposed penalty. Finally, Complainant moves that Respondent be barred from admitting any evidence concerning its financial situation.

Since Respondent received Complainant's interrogatories before receiving the undersigned's Order to respond, the thirty (30) day response period was tolled until Respondent received the undersigned's November 5, 1997, Order. Even allowing for five extra days for mail delivery, however, Respondent still was required to respond by December 10, 1997. Nevertheless, despite the fact that Respondent's January 6, 1997, response to the interrogatories clearly was untimely, Complainant has shown no prejudice. Accordingly Complainant's Motion will be denied. [\(1\)](#)

Respondent's Request for Attorneys' Fees

No basis for an award of attorney's fees exists in this matter. First, no statutory or regulatory provisions explicitly authorize a presiding officer to award attorneys' fees outside the Equal Access to Justice Act. [\(2\)](#) In fact, Respondent cites no authority at all in support of the proposition that a Presiding Officer may award attorneys' fees as a sanction against the EPA. The Consolidated Rules state, in pertinent part, that the Presiding Officer shall have the authority to "[d]o all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules." 40 C.F.R. §22.04 (c)(10). This language may be interpreted to argue that a presiding officer has the authority to impose attorneys' fees as a sanction. Nevertheless, given the absence of affirmative language granting such authority, such a sanction should be reserved for only the most egregious activity.

Even if Respondent's allegations concerning Complainant's behavior were true, such behavior would be unlikely to justify the imposition of attorneys' fees. However, the undersigned need not make that determination as Respondent has offered no support for its claims that the interrogatories were never served and that

Complainant refused to answer Respondent's phone calls. [\(3\)](#) Respondent has incurred additional work and attendant expense only because of its failure to respond to Complainant's First Set of Interrogatories in a timely manner, and this failure cannot be attributed to Complainant. Accordingly, the Respondent's Request for Award of Attorneys' Fees is denied.

ORDER

Accordingly, it is ORDERED:

- 1) Complainant's Motion to Compel Discovery is **Denied**.
- 2) Respondent's Request for Attorneys' Fees is **Denied**.

Susan L. Biro

Chief Administrative Law Judge

Dated: _____
Washington, D.C.

1. My denial of Complainant's Motion rests upon the fact that Respondent filed its response prior to the filing of Complainant's Motion and the lack of prejudice, not on any perceived lack of authority. Had the response been more untimely or incomplete, I would have had the authority to impose the requested sanctions. *See*, 40 C.F.R. § 22.04(c)(10) (authorizing the presiding officer to take all actions necessary to maintain orderly, efficient, and fair proceedings) and 40 C.F.R. § 22.04(5) (authorizing the presiding officer to order the production of evidence, and to draw adverse inferences should such evidence not be produced). *See also, In Re New Waterbury, Ltd.*, TSCA Appeal No. 93-2, 5 E.A.D. 529, 542 (1994).
2. The Equal Access to Justice Act, 5 U.S.C. §504 *et seq.*, may entitle the Respondent to an award of attorney's fees if the Respondent prevails and the Government's action was not substantially justified. The procedures for submitting and adjudicating a claim under that Act are set forth at 40 C.F.R. Part 17.
3. Although it is possible that Respondent was never served with Complainant's interrogatories, the certificate of service accompanying Complainant's discovery request and interrogatories creates the presumption that such service was effected. Respondent needs to do more than simply deny receipt in order to overcome that presumption. Additionally, Complainant's reply to Respondent's response indicates that the blame for the lack of communication between the two parties lies with Respondent. Wherever that blame lies, Respondent's unsubstantiated, and refuted, claims do not convince the undersigned of any malfeasance by Complainant.

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