

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:)	
)	
Kent Hoggan, Frostwood 6 LLC, and)	Docket No. CWA-08-2017-0026
David Jacobsen,)	
)	
Respondents.)	

Reply to Respondent Kent Hoggan’s Opposition to Motion for Default

I. INTRODUCTION

Despite warnings that Respondent Kent Hoggan could be held in default for missing prehearing exchange deadlines, he lacks good cause for not filing his prehearing exchange by September 7, 2018. The Prehearing Order made clear that “*only* [a filed CAFO] *or an order of the undersigned* [ALJ], *excuses noncompliance with filing deadlines*” and that “*failure to comply with the prehearing exchange requirements . . . may result in the entry of a default judgment[.]*” OALJ Index Document 18 at 1-2, 5. The stated reason for Mr. Hoggan’s noncompliance—“waiting for critical 2017 project tax returns to be finished by his cpa [sic]”—is neither good cause nor an excuse for failing to file *any* timely prehearing exchange or a timely motion for an extension. It also does not explain why Mr. Hoggan waited until September 20, 2018 to provide his counsel with an additional twenty documents that were unrelated to the LLC’s 2017 tax filings. Further, Complainant has requested up-to-date tax returns since December 2016, and as of the July 5, 2017 Prehearing Order, Mr. Hoggan knew his prehearing exchange had to include “any and all” documents supporting an inability-to-pay argument. Mr. Hoggan produced no evidence that he could not have prepared the “critical” tax returns before the September 7, 2018 deadline, and he provided no reason why he did not timely exchange the remaining documents at his disposal. These recent examples of Mr. Hoggan’s pattern of noncompliance warrant default.

II. FROSTWOOD 6 LLC AND MR. JACOBSEN SHOULD BE HELD IN DEFAULT AND WAIVED ANY OBJECTION TO THE MOTION FOR DEFAULT

Before addressing Mr. Hoggan, Complainant reiterates that Respondents Frostwood 6 LLC and David Jacobsen should be held in default, as they have not filed a prehearing exchange or a response to Complainant's Motion for Default. 40 C.F.R. § 22.17(a); *id.* at §22.16(b).

Here, the documents speak for themselves. Exclusive references to "Respondent"; "Hoggan"; and "his" on each page of "Respondent Kent Hoggan's Initial Prehearing Exchange" show that the prehearing exchange was not filed on behalf of Frostwood 6 LLC or Mr. Jacobsen. Hoggan's Exchange at 1-6. The same is true for "Respondent Kent Hoggan's Opposition to Motion for Default[.]" which refers exclusively to "Respondent"; "Kent Hoggan"; and "his"—and states that only Mr. Hoggan filed a prehearing exchange. Hoggan's Opposition at 1-2. "Respondent Kent Hoggan's Motion for Late Filing of Respondent's Initial Prehearing Exchange" corroborates that only "Respondent, Kent Hoggan" filed "his Initial Prehearing Exchange[.]" Hoggan's Motion for Late Filing at 1.

Frostwood 6 LLC and Mr. Jacobsen could have joined Mr. Hoggan's filings, OALJ Index Document 18 at 2, but they did not. They should be held in default accordingly.¹

III. THE TOTALITY OF THE CIRCUMSTANCES SHOWS THAT MR. HOGGAN SHOULD BE HELD IN DEFAULT

When ruling on a motion for default, the tribunal applies the totality of the circumstances test: "whether a procedural requirement was indeed violated, whether a particular procedural violation is proper grounds for a default order, and whether there was a valid excuse or justification for not complying with the procedural requirement." *In the Matter of Peace Indus.*

¹If Kent Hoggan's Initial Prehearing Exchange and Kent Hoggan's Opposition to Motion for Default are attributed to all Respondents, then Section III applies to all Respondents as well.

Group (USA), 2016 EPA ALJ LEXIS 48, *9-10 (E.P.A. March 29, 2016) (internal citations omitted). The tribunal also considers “a defaulting respondent’s likelihood of success on the merits; however, it is that party’s burden to demonstrate not just the possibility of a defense but a strong probability that litigating the defense will produce a favorable outcome.” *Id.* at 10.

A. Mr. Hoggan violated the Prehearing Order’s prehearing exchange deadline.

Mr. Hoggan violated the deadline to submit his prehearing exchange, which the Prehearing Order set as September 7, 2018. OALJ Index Document 18 at 4. Mr. Hoggan did not file any prehearing exchange until September 20, 2018. Mr. Hoggan also failed to follow the rules and file either a timely prehearing exchange with the available documents or a timely motion for an extension. 40 C.F.R. § 22.7(b) (“Any motion for an extension of time shall be filed sufficiently in advance of the due date[.]”); OALJ Index Document 18 at 4 (“[A]ll motions must be submitted in sufficient time to permit the filing of a response, a reply, and/or the issuance of a ruling on the motion before any relevant deadline set by this or any subsequent order.”).

B. Mr. Hoggan’s noncompliance is proper grounds for default.

Mr. Hoggan filed his prehearing exchange on September 20, 2018—thirteen days late. His noncompliance is proper grounds for default, and his Opposition to Motion for Default provides no support for a contrary argument. *See In the Matter of Jiffy Builders, Inc.*, 8 E.A.D. 315, 319 (E.P.A. May 25, 1999) (“[T]he Presiding Officer unquestionably has the authority to issue a default order for failure to comply with a prehearing order, particularly where, as here, noncompliance has occurred more than once.”); *In the Matter of Detroit Plastic Molding Co.*, 3 E.A.D. 103, 104-105 (E.P.A. March 1, 1990) (upholding ALJ’s default order when respondent filed a prehearing exchange six days late); *In the Matter of Turner Copter Servs.*, 2 E.A.D. 96, 97 (E.P.A. November 05, 1985) (upholding ALJ’s default order when respondent filed a prehearing exchange eight days late); *In the Matter of Gwinnett Cnty. Dep’t of Pub. Util.*, 1997 EPA ALJ

LEXIS 9, *1, 5 (E.P.A. October 21, 1997) (holding Complainant in default for not filing its prehearing exchange by three days after the deadline).

The instant noncompliance is the latest in a consistent pattern. Prior to Complainant's Motion for Default, Mr. Hoggan violated every filing deadline in this case. His Answer, Preliminary Statement, and Prehearing Exchange were late. His recent Motion for Late Filing of Respondent's Initial Prehearing Exchange was untimely. *See* 40 C.F.R. § 22.7(b); OALJ Index Document 18 at 4. And his untimely Prehearing Exchange, the subject of the Motion for Default, violates multiple requirements of Part 22 and the Prehearing Order.

C. Waiting for tax documents does not justify noncompliance with deadlines.

Mr. Hoggan's reason for not complying with the prehearing exchange deadline—that “he was waiting for critical 2017 project tax returns to be finished by his cpa [sic], and did not have those tax returns until September 17, 2018”—is an insufficient excuse that does not justify his noncompliance. Hoggan's Opposition at 1.

Mr. Hoggan had ample notice that he would need to exchange these tax returns as part of his ability-to-pay defense. Complainant has requested comprehensive, up-to-date tax returns from Mr. Hoggan and other relevant parties in December 2016, January 2017, May 2018, June 2018, and August 2018. CX 23 at 1, CX 24 at 6, CX 25 at 6, CX 48 at 1-3, CX 56 at 2, CX 58 at 2, and CX 60 at 2. Moreover, the July 5, 2017 Prehearing Order explained the requirements of prehearing exchanges to Mr. Hoggan:

[I]f Respondents takes the position that a penalty should be reduced or eliminated on any grounds, such as an inability to pay, then provide a detailed narrative statement explaining the precise factual and legal bases for their position and a copy of any and all documents upon which they intend to rely in support of such position.

OALJ Index Document 18 at 3 (emphasis added). Despite this notice, Mr. Hoggan did not have the tax documents prepared in time. And while he argues that he was waiting for the documents,

he makes no argument and provides no “evidentiary support” that the documents *could not have been completed* by the September 7, 2018 deadline. See *In re B&L Plating, Inc.*, 11 E.A.D. 183, 188 (E.P.A. October 20, 2003) (upholding default when respondent provided “no evidentiary support” of reasons for noncompliance); *In re JHNY, Inc.*, 12 E.A.D. 372, 382-383 (E.P.A. September 30, 2005) (upholding a default order when respondent asserted, “without support or elaboration, that certain financial issues prevented it from filing earlier” and the “paucity of the explanation suggest[ed] that the oversight was the product of neglect rather than good cause”).

If Mr. Hoggan is arguing that his accountant caused the delay, he cites no supporting authority that an accountant’s delay is good cause. To the contrary, tribunals repeatedly hold that a hired professional’s failure to timely complete and submit documents does not constitute good cause. *In re Rocking BS Ranch, Inc.*, 2010 EPA App. LEXIS 11, *20-21 (E.P.A. April 21, 2010) (finding Respondent’s “claim that its accountant was supposed to, but did not, send a financial report to the Region is also unpersuasive because it is the [Respondent]’s ultimate responsibility to ensure that any documentation in support of its position is properly submitted.”) (emphasis added); *In re Pyramid Chem. Co.*, 2004 EPA App. LEXIS 56, *24 (E.P.A. September 16, 2004) (“[U]nder Board precedent an attorney stands in the shoes of his or her client, and ultimately, the client takes responsibility for the attorney’s failings.”).

Further, Mr. Hoggan provides no explanation why he waited until September 20, 2018, to provide an additional twenty documents to his counsel that that were unrelated to the LLCs’ 2017 tax returns. Compare Attachment 1 (first service of Mr. Hoggan’s prehearing exchange, RX 1-51), with Attachment 2 (second service of Mr. Hoggan’s prehearing exchange, adding RX 52-71 because Mr. Hoggan “brought in some more documents today”). Mr. Hoggan lacks good cause for this noncompliance.

D. Mr. Hoggan is unlikely to succeed on the merits or his ability-to-pay defense.

Mr. Hoggan argues that he deserves his day in court, but his bare challenges to the claims against him are unsupported by documents in his prehearing exchange. In contrast, Complaint provided ample support in the record for the claims against Mr. Hoggan. And while he claims that “principles of fairness dictate that [his] inability to pay defense be heard on the merits.” Hoggan’s Motion for Late Filing at 3, the record shows that this defense would likely lose.

Mr. Hoggan continues to claim he does not have the ability to pay the penalty in this matter, Hoggan’s Exchange at 4, but he has yet to provide the documentation EPA has repeatedly requested as necessary to substantiate his claim. *Compare id.*, with CX 56 (June 22, 2018), CX 58 (Aug. 2, 2018), and CX 60 (Aug. 13, 2018) (all requesting, for example, an updated INDIPAY form and tax returns for Mrs. Hoggan). Mr. Hoggan has promised to provide these documents to Complainant on many occasions, but repeatedly failed to do so. Complainant evaluates *complete* ability to pay claims. And as demonstrated in this case with Mr. Jacobsen, Complainant applies a just penalty when warranted by a legitimate ability to pay defense. OALJ Document Index 25 at 23. Despite Complainant’s best efforts—which included analysis by internal and external experts—Complainant cannot substantiate Mr. Hoggan’s ability to pay claim without the requested documents.

Because Mr. Hoggan has not provided the needed documents, he has chosen to move forward with an incomplete, unsubstantiated ability to pay claim that would be unlikely to succeed at hearing. *In re Rocking BS Ranch, Inc.*, 2010 EPA App. LEXIS at *20-21 (As “[t]he record clearly reflects the Region’s multiple attempts to obtain tax returns from [Respondent to] assist the Region in assessing whether [Respondent] had an inability to pay the penalty . . . [and a]t no point did [Respondent] comply, . . . its general claims of financial instability ring

especially hollow.”) *citing JHNY*, 12 E.A.D. at 383 (“Even financially challenged entities need to toe the line of compliance, and only those entities *demonstrating* a genuine inability to pay should be removed from the compliance-inducing influence that civil penalty assessment affords.”) (emphasis added by *In re Rocking BS Ranch*).

IV. MR. HOGGAN’S NONCOMPLIANCE IS PREJUDICIAL

While Mr. Hoggan’s repeated noncompliance prejudices Complainant, the greatest prejudice is to the tribunal itself. Mr. Hoggan did not file a timely prehearing exchange. “Given the key role of the prehearing exchange to administrative practice, it is not surprising that the regulations recognize that failure to comply with an ALJ’s order requiring exchange is one of the primary justifications for entry of default.” *In re JHNY, Inc.*, 12 E.A.D. at 382. This is the latest in a series of failures—from months of undelivered ability-to-pay documents to habitually late filings—that unnecessarily divert Complainant’s limited resources from other matters.

Complainant recognizes that the greatest prejudice from Mr. Hoggan’s failures is to the Presiding Officer’s ability to maintain order in administrative cases. As explained by the EAB:

The efficient and timely exchange of information pursuant to 40 C.F.R. § 22.19 is central to achieving timely administrative case resolutions. Further, the efficiency of administrative adjudications depends upon the ability of the ALJ to exercise her discretion in order to conduct proceedings in a fair manner that assures that facts are elicited and issues adjudicated without delay, as prescribed by 40 C.F.R. § 22.4(c).

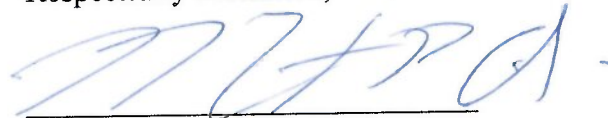
Ag-Air Flying Services, Inc., 2006 EPA App. LEXIS 40 at *12-13 (upholding default when a respondent’s exchange of discovery information “was sent two weeks after the deadline established by the ALJ’s order” and without a timely motion for extension). Here, the delay from Mr. Hoggan’s repeated noncompliance “frustrates the streamlined purpose of this administrative litigation.” *In re Peace Indus. Group (USA)*, 2016 EPA ALJ LEXIS 48 at *17. Presiding Officers have “an interest in bringing finality to the Agency’s administrative proceedings[.]” and the

tribunal here should “preserve its limited resources for parties who are diligent enough to follow its procedural rules.” *In re B&L Plating, Inc.*, 11 E.A.D. at 191.

V. CONCLUSION

Mr. Hoggan has not demonstrated good cause for failing to submit a timely prehearing exchange, so his actions warrant default under 40 C.F.R. § 22.17(a). “Although this regulatory language regarding the entry of a default order is discretionary in nature, the application of the regulation should be applied as a general rule in order to effectuate its intent, particularly when based on a motion for default.” *In the Matter of Mt. States Asbestos Removal, Inc.*, 1997 EPA ALJ LEXIS 112, *20 (E.P.A. May 01, 1997). Mr. Hoggan did not have the tax documents at issue prepared before the Prehearing Order’s deadline, and he gave no reason for producing RX 52 - RX 71 on September 20, 2018, rather than by September 7, 2018. These actions evidence neglect, not diligence, and are part of a pattern that extends both before and after the failure at issue. For these reasons, Complainant respectfully requests its Motion for Default be granted.

Respectfully submitted,



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Oct. 9, 2018

Date

CERTIFICATE OF SERVICE

I certify that the foregoing Complainant's Reply to Respondent Kent Hoggan's Opposition to Motion for Default in In the Matter of Kent Hoggan, Frostwood 6 LLC, and David Jacobsen, Respondents, Docket No. CWA-08-2017-0026, dated October 9, 2018, was sent this day in the following manner to the addressees listed below:

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