

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

February 28, 2018

In the Matter of

Elpakco, Inc.

OADR Docket Nos. 2017-032 (PAN) &
2017-039 (UAO)
DEP File Nos. 00000366 & 00000367
RTNs 2-0000812 & 2-0016437
Worcester, MA

RECOMMENDED FINAL DECISION

INTRODUCTION

In these consolidated appeals, the Petitioner Elpakco, Inc. (“Elpakco”) challenges a \$33,000.00 Penalty Assessment Notice (“the PAN”) and a Unilateral Administrative Order (“UAO”) issued by the Central Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) on September 6, 2017. Both the PAN and the UAO allege that Elpakco violated the Massachusetts statute and regulations governing the cleanup of contaminated waste sites, M.G.L. c 21E and the Massachusetts Contingency Plan (“MCP”), 310 CMR 40.000. The alleged violations occurred at 69 Armory Street in Worcester, Massachusetts, where Elpakco used to operate its manufacturing business (“the Site”). The Department has moved to dismiss the appeals because Elpakco: (1) failed to file Pre-Filed Testimony as required by the Pre-Hearing Conference Report and Order that I issued on November 22, 2017; (2) failed to comply with other orders that I have issued in the case; and (3) has failed to prosecute the appeals.

As discussed below, the Department's arguments are persuasive. From the time Elpakco filed its appeals, it has failed to comply on multiple occasions with the requirements of a Scheduling Order that I issued on October 23, 2017 and a Pre-hearing Conference Report and Order that I issued on November 22, 2017. Therefore, I recommend that the Department's Commissioner issue a Final Decision: (1) dismissing the appeals for failure to prosecute, failure to comply with multiple orders, and failure to file pre-filed testimony; (2) affirming the \$33,000.00 penalty; and (3) affirming the Unilateral Administrative Order.

BACKGROUND

Elpakco is the former operator of the Site. The Site was owned by John Grant, president of Elpakco, Inc., from December 18, 1998 until he transferred the property to Armory Street, LLC on May 26, 2005. Elpakco, Inc. began operations at the property in or about December 1998. The Site is contaminated with trichloroethylene (TCE) (RTN 2-0000812) and arsenic, lead and polychlorinated biphenyls (PCBs) (RTN 2-0016437). Elpakco conducted Response Actions¹ during the time it operated at the Site. The PAN and UAO allege multiple violations of the MCP, including failures to meet performance standards and failures to submit required documentation of response actions. The PAN assesses a civil administrative penalty in the amount of \$33,000.00 for the alleged violations. The UAO requires Elpakco to conduct certain specified Response Actions pursuant to the MCP.

In its Appeal Notice, Elpakco generally asserts that the penalty is excessive and the company does not have the financial ability to pay it; that Elpakco did not cause the contamination at the Site; and that Elpakco has no control over the current owner, whom Elpakco

¹ "Response Action" refers to assessments, containments and/or removals, all of which are defined in 310 CMR 40.000.

believed was conducting Response Actions. Elpakco does not deny that it failed to conduct the Response Actions identified in the PAN and the UAO.

PROCEDURAL BACKGROUND

The appeals were filed on September 18, 2017. They were initially delayed because Elpakco had paid only one filing fee, although the Appeal Notice contained allegations that challenged both the PAN and the UAO. It was evident that Elpakco intended to appeal both documents. I ordered Elpakco to pay the filing fee for the PAN, which it did.

I issued a Scheduling Order on October 23, 2017. The Scheduling Order required Elpakco to take three actions before the Pre-hearing Conference “(Conference)” scheduled for November 14, 2017. First, Elpakco was required to initiate settlement discussions with the Department by at least ten days prior to the Conference. Second, Elpakco was required to file a written statement with OADR confirming that it had initiated and conducted these discussions, and reporting the result. Finally, Elpakco was required to file a pre-hearing statement with OADR no later than three business days prior to the Conference that contained a brief summary of its appeals, the relief it was seeking, a list of disputed factual and legal issues, and a list of its witnesses. The Scheduling Order plainly stated the consequences for failing to comply with these requirements, including the possibility that the appeals could be dismissed, a sanction authorized by 310 CMR 1.01(10). See Scheduling Order, ¶¶ 4.²

² The Scheduling Order stated the possible sanctions authorized by 310 CMR 1.01(10) to include, without limitation:

- (a) taking designated facts or issues as established against the party being sanctioned;
- (b) prohibiting the party being sanctioned from supporting or opposing designated claims or defenses, or introducing designated matters into evidence;
- (c) denying summarily late-filed motions or motions failing to comply with requirements of 310 CMR 1.01(4);

Elpakco did not comply with any of the requirements described above, but did attend the Conference that I conducted with the parties on November 14, 2017 in the Department's Central Regional Office in Worcester. Elpakco was represented at the Conference by its president, John Grant, who was accompanied by his wife. The Department was represented by counsel. At the Conference, I addressed Elpakco's failure to comply with the Scheduling Order. Mr. Grant had no explanation. I advised Mr. Grant at the Conference that it was important to read carefully everything he receives from the Office of Appeals and Dispute Resolution ("OADR") and from the Department's counsel, and that while I understood that he is not an attorney, I still expected him to comply with all orders that are issued in these appeals and with the rules governing this proceeding, the same as any other party.³ I impressed upon him the possible sanctions that could result if he failed to do so.

I explained to the parties the procedures for resolving the issues in these appeals, including the Department's burden of proof in enforcement appeals and Elpakco's need to

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- (d) striking the party's pleadings in whole or in part;
 - (e) dismissing the appeal as to some or all of the disputed issues;
 - (f) dismissing the party being sanctioned from the appeal; and
 - (g) issuing a final decision against the party being sanctioned.

In addition to the dismissal authority conferred by 310 CMR 1.01(10)(e) above, under 310 CMR 1.01(11)(a)2.f, a "Presiding Officer may [also] summarily dismiss [an appeal] sua sponte," when the appellant fails to prosecute the appeal or fails to comply with an order issued by the Presiding Officer. For the same reasons, the Presiding Officer may also dismiss an appeal pursuant to the Officer's appellate pre-screening authority under 310 CMR 1.01(5)(a)15 which authorizes the Officer to "issu[e] orders to parties, including without limitation, ordering parties to show cause, ordering parties to prosecute their appeal by attending prescreening conferences and ordering parties to provide more definite statements in support of their positions."

³ Although a party's pro se status in an appeal accords the party some leniency from the litigation rules, the party is not excused from complying with those rules because "[litigation] rules bind a pro se litigant as they bind other litigants." In the Matter of Gary Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision (August 28, 2014), 2014 MA ENV LEXIS 76, at 45-46, adopted as Final Decision (September 23, 2014), 2014 MA ENV LEXIS 77, citing, Mmoe v. Commonwealth, 393 Mass. 617, 620 (1985) (pro se litigants are required to file court pleadings conforming to the Massachusetts Rules of Civil Procedure); Rothman v. Trister, 450 Mass. 1034 (2008) (pro se litigants are required to comply with appellate litigation rules); Lawless v. Board of Registration In Pharmacy, 466 Mass. 1010, 1011 (2013) (same).

support its claims with sworn, written testimony from witnesses. We discussed the issues for resolution and Elpakco's claims that it cannot afford to pay the penalty nor afford to perform Response Actions. The Department was willing to consider additional financial information from Elpakco that might affect the Department's position in the appeals. I directed the Department to provide to Mr. Grant the Department's forms and directions for claiming both an Inability to Pay the penalty and Financial Inability pursuant to 310 CMR 40.0172. The Department's counsel provided the Inability to Pay forms and directions to Mr. Grant via email on November 17, 2017. See Email from Lucas Rogers, Esq. to John Grant (c/o Marlene Weise), Friday, November 17, 2017 2:27 PM.⁴ I set a deadline of December 8, 2017 for Elpakco to submit the Inability to Pay (penalty) documentation to the Department's counsel. I set a deadline of January 5, 2018 for Elpakco to submit its application for Financial Inability (Response Actions) to the Department's counsel.⁵

⁴ The e-mail from the Department's counsel to Mr. Grant provides as follows:

Dear Mr. Grant,

To substantiate your claim that Elpakco, Inc. does not have the financial ability to pay all or some portion of the \$33,000 penalty assessed to it pursuant to the Notice of Intent to Assess a Civil Administrative Penalty dated September 6, 2016 (Enforcement Document Number: 00000366) issued to Elpakco, Inc., you must submit:

1. Copies of federal tax returns for 2016, 2015, and 2014;
2. An executed 4506-T with Elpakco's information on line 5, attached.

MassDEP's policy is to require tax returns in order to recognize an entity's claim that it is unable to pay some or all of a penalty. If we do not receive Elpakco Inc.'s tax returns, MassDEP likely will be unable to reach the conclusion that Elpakco, Inc. is unable to pay some or all of the penalty.

I recommend that you retain an attorney in this matter.

Lucas Rogers
Senior Counsel

⁵ Elpakco did not submit any documentation to substantiate its claim that it cannot pay the penalty. See Pre-Filed Direct Testimony of Jason Ward at ¶¶ 69, 84, 99 and 114 ("More recently, Elpakco, Inc. failed to submit an application for Inability to Pay the penalty assessed under the PAN by December 8, 2017, contrary to the Presiding Officer's instruction at the November 14, 2017 Pre-Hearing Conference").

I issued a Pre-hearing Conference Report and Order (“PHC Report and Order”) on November 22, 2017 which contained a detailed schedule for the filing of witness testimony and set a date for the hearing of February 21, 2018. The PHC Report and Order repeated my admonition to Mr. Grant about complying with orders and schedules, and described the potential consequences for noncompliance. See PHC Report and Order at pp. 6-7.

As the party with the burden of proof in these appeals, the Department was required to file its pre-filed testimony and memorandum of law on the issues for resolution first, and did so on January 5, 2018, in accordance with the schedule in the PHC Report and Order. The PHC Report and Order required Elpakco to submit its pre-filed testimony (“PFT”) and memorandum of law no later than February 5, 2018. Elpakco did not do so.

On February 13, 2018, the Department moved to dismiss the appeals citing Elpakco’s failure to comply with the PHC Report and Order, failure to file PFT or a memorandum of law, and failure to prosecute its appeals. Recognizing these failures as worthy of a sanction of dismissal, I nonetheless exercised my discretion to allow Elpakco a chance to explain itself. I suspended the hearing scheduled for February 21 and ordered Elpakco to respond to the Department’s motion. Elpakco filed its response on February 21, 2018. In its response, Elpakco did not address the points made by the Department. Instead, Elpakco asserted that it had “...been sending requested information to Wanda Kopczyk on a timely basis regarding financial inability annalyst [sic]. I assumed I was following directions.” Elpakco did not append any documents to its response to substantiate this assertion. The response fails to address the Department’s motion. Rather, it restates Elpakco’s position regarding liability for the Site. After stating “I was hoping the fine would be dropped”, Mr. Grant, on behalf of Elpakco, stated that his witnesses “were

strictly to help with [his] poor hearing.” No explanation was provided for Elpakco’s failure to file its testimony or otherwise comply with the orders that I have issued in these appeals.

DISCUSSION

Multiple bases are present for dismissal of these appeals. An appeal may be dismissed when "a party fails to file documents as required, . . . comply with orders issued and schedules established in orders or otherwise fails to prosecute the adjudicatory appeal; . . . demonstrates an intention to delay the proceeding or a resolution of the proceedings; or fails to comply with any of the requirements set forth in 310 CMR 1.01 . . ." 310 CMR 1.01(10) and (11)(d)1; see Matter of Mangano, Docket No. 94-109, Final Decision (March 1, 1996); Matter of Town of Brookline Department of Public Works, Docket No. 99-165, Final Decision (June 26, 2000); Matter of Bergeron, Docket No. 2001-071, Recommended Final Decision (February 5, 2002), adopted by Final Decision (February 25, 2002).

Additionally, 310 CMR 1.01(3)(e) provides that "[p]arties who do not conform to time limits or schedules established by the Presiding Officer shall, absent good cause shown, summarily be dismissed for failure to prosecute the case." See also Matter of Tucard, LLC, OADR Docket No. 2009-076, 2010 MA ENV LEXIS 211, Recommended Final Decision (September 2, 2010), adopted by Final Decision (September 28, 2010).

Finally, under 310 CMR 1.01(12)(f), a party’s “[f]ailure to file pre-filed direct testimony within the established time, without good cause shown, [will] result in summary dismissal of the party and the appeal if the party being summarily dismissed is the petitioner.” In the Matter of Ross and Marilyn Wescott, OADR Docket No. 2006-154, Recommended Final Decision (December 8, 2014), adopted as Final Decision (December 22, 2014), 21 DEPR 150, 151 (2014); In the Matter of Autobody Solvent Recovery Corp., OADR Docket No. 2013-046,

Recommended Final Decision (May 29, 2014), 2014 MA ENV LEXIS 39, at 8, adopted as Final Decision (June 2, 2014), 2014 MA ENV LEXIS 41; In the Matter of Stephen W. Seney, OADR Docket No. 2012-019, Recommended Final Decision (March 25, 2013), 2013 MA ENV LEXIS 27, at 19, adopted as Final Decision (April 2, 2013), 2013 MA ENV LEXIS 26. “[A] petitioner’s failure to file written direct testimony is a serious default,” and “the equivalent of failing to appear at a [judicial proceeding] where the testimony is to be presented live.” Id., citing In the Matter of Gerry Graves, OADR Docket No. 2007-149, Recommended Final Decision, 2007 MA ENV LEXIS 66, at pp. 2-3 (November 26, 2007), adopted as Final Decision (February 22, 2008). Under 310 CMR 1.01(10) a party’s failure to file proper Direct Examination or Rebuttal Testimony is subject to sanctions for “failure to file documents as required, . . . comply with orders issued and schedules established in orders[,] . . . [or] comply with any of the requirements set forth in 310 CMR 1.01.” Wescott, supra, 21 DEPR at 151; Autobody, supra, 2014 MA ENV LEXIS 39, at 8-9. Under 310 CMR 1.01(10), the Presiding Officer may “issu[e] a final decision against the party being sanctioned, including dismissal of the appeal if the party is the petitioner.” Id.

These appeals are subject to dismissal for all of the above bases. Elpakco failed to comply with the Scheduling Order by failing to initiate settlement discussions with the Department and failing to file either a settlement statement or a pre-hearing statement. Elpakco provided no “good cause” explanation for these failures. I advised Mr. Grant verbally at the Conference, and in writing in the PHC Report and Order, that any failures to comply with future orders or to file PFT might result in dismissal of the appeals. See supra at pp. 4 and 6. Even with these clear warnings, Elpakco again failed to comply with the PHC Report and Order by failing to file PFT and a memorandum of law, without any explanation. These actions evidence an

intention not to prosecute the appeals. As noted above, Elpakco's response to the Department's Motion to Dismiss contained no substantive response and no explanation for its failures to comply with multiple orders and to file PFT. Elpakco offered nothing that would constitute good cause for its noncompliance.

CONCLUSION

For the foregoing reasons, I recommend that the Department's Commissioner issue a Final Decision (1) dismissing the appeals for failure to prosecute, failure to comply with multiple orders, and failure to file pre-filed testimony; (2) affirming the \$33,000.00 penalty; and (3) affirming the Unilateral Administrative Order.

Date: 2/28/2018



Jane A Rothchild
Presiding Officer

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

SERVICE LIST

In the Matter of
Elpakco, Inc.

OADR Docket No. 2017-032 & 2017-039
DEP File No. 00000366 & 00000367
Worcester, MA

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