STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION
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In the Matter of the Alleged Violations of Article 17 of the New York State Environmental Conservation Law and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York, - by - **AVIS RENT A CAR SYSTEM, LLC**, Respondent.	**RULING and DEFAULT SUMMARY REPORT** **DEC File Nos. R2-20070103-2, R2-20070104-9, and R2-200801125/16**

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Proceedings

On April 21, 2008, by certified mail, New York State Department of Environmental Conservation (DEC or Department) staff served a motion for order without hearing including a notice of motion, affirmation by counsel, and affidavits of staff upon the respondent Avis Rent a Car System, LLC (Avis). By notice of motion dated May 14, 2008, attorney for respondent Avis served a notice of motion seeking an order 1) quashing the staff's motion for order without hearing or 2) extending the time for Avis to respond to the motion to twenty days from the date of any ruling denying the motion to quash. By affirmation in opposition dated May 19, 2008, staff opposed Avis's motion and by motion dated May 15, 2008, staff moved for a default judgment and order based upon the respondent's failure to serve a timely response to the motion for order without hearing.

By electronic mail on June 5, 2008, the OHMS received the staff's affidavit of service dated June 5, 2008, indicating that the notice of motion for default judgment and supporting papers were served on the respondent and its counsel by certified mail on May 16, 2008. With this affidavit, staff also transmitted copies of the certified mail receipts and U.S. Postal Service tracking confirmation indicating that Avis and its counsel received the motion on May 20, 2008. To date, the Office of Hearings and Mediation Services (OHMS) has not received a response from Avis to the staff's default motion.

All of the above described motion papers were sent to the Chief Administrative Law Judge of the Department's Office of Hearings and Mediation Services (OHMS) James T. McClymonds, who then assigned the matter to me.

Positions of the Parties

Staff's motion for order without hearing alleges a series of violations of the Department's petroleum bulk storage (PBS) regulations at several of the respondent's facilities located in Manhattan. The supporting affidavits of environmental engineers Brian K. Falvey and Veronica Zhune describe the various allegations based upon their respective inspections of these facilities on November 21, 2006, December 5, 2006, January 5 and 9, 2007, December 4, 2007, and January 4, 2008. In addition to the affidavits, the motion for order without hearing includes inspection reports and notices of violation. Exhibits A-C and A-G annexed to Falvey and Zhune affidavits. The notice of motion provides that a response must be filed with the Chief Administrative Law Judge within twenty days following receipt of the motion and that a failure to submit a timely reply will result in a default pursuant to § 622.12(b) of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR).

In the respondent's motion to quash or to extend the time to respond to staff's motion, counsel argues that the Department staff and Avis have been involved in compliance discussions over a period of 15 months and that staff's motion was unexpected. Counsel for Avis, Jon Schuyler Brooks, Esq. argues that Department staff made promises to cease inspections at respondent's facilities in order that Avis could reach compliance and failed to keep such promises and that the staff was late in providing a draft consent order to Avis. Brooks Affirmation (Aff.) ¶¶ 2-14. Mr. Brooks maintains that the Department staff unreasonably provided only 10 days for Avis to agree to the terms of the proposed consent order which was delivered to Mr. Brooks on March 11, 2008. Id., ¶¶ 14-15. Mr. Brooks argues that he requested until March 31, 2008 to respond because he was out of state and staff gave him until March 27. Id., ¶ 16. Avis failed to meet this deadline and Mr. Brooks describes subsequent phone calls to Mr. Urda, Department staff's counsel, on April 15 and 23, 2008, to communicate that the respondent was ready and willing to sign the proposed consent order. Id., ¶¶ 18-20. According to Mr. Brooks, Mr. Urda did not respond to these calls in a timely fashion. Id., ¶¶ 18-20.

Mr. Brooks states that his office received the staff's motion on April 24, 2008 and that based upon the prior history of cooperation and the offer of settlement, the request for a penalty of $178,500.00 is "incredible" and an "abuse of power." Id., ¶¶ 21-24. Mr. Brooks concludes by asking that his affirmation be accepted as Avis's response to the staff's motion for order without hearing in accordance with 6 NYCRR § 622.12(c).

In staff's opposition to Avis's motion, Mr. Urda states that the settlement discussions ended when Avis failed to accept or respond to the order on consent within staff's stated time frame. Urda Aff., ¶ 2. Mr. Urda explains that staff determined that Avis would not come into compliance even after staff provided an informal grace period for the company to rectify the alleged violations. Id., ¶¶ 3-4. Staff counsel Urda maintains that staff made its offer for settlement after the discussions concluded and provided the standard 10-day period that is given in all PBS enforcement matters. Id., ¶ 5. He notes that the consent order was sent with a clear deadline that the respondent failed to meet. Id., ¶¶ 6-7. Mr. Urda emphasizes that respondent's counsel did not attempt to reach Department staff at any time while the offer for settlement was pending and disputes Mr. Brooks' claims with respect to the timing of his telephone calls to Mr. Urda. Id., ¶¶ 7-8.

Concerning the service of respondent's motion, Mr. Urda disputes the timeliness saying Avis had twenty days from April 23, 2008 to serve its response - by May 13, 2008. The respondent's motion was served on the following day - May 14, 2008. Id., ¶¶ 9-13. Mr. Urda also describes his discussion with Mr. Brooks regarding the respondent's offer to execute the consent order in which staff counsel advised that the offer had been withdrawn "weeks before and the Department staff had taken his silence as a rejection of the proposed settlement terms, and had therefore commenced an enforcement action . . ." Id., ¶ 14.

In response to Mr. Brooks' claim that the staff's penalty request is "incredible," Mr. Urda states that the settlement offer was within the range provided in Department guidance DEE-22 but that once the settlement was not accepted by Avis staff used the DEE-22 to select a penalty within the given ranges and tripled the figure for each alleged violation. Id., ¶ 15.

Discussion

According to the Department's hearing regulations, a respondent's failure to file a timely answer to a complaint or response to a motion for order without hearing constitutes a default and waiver of respondent's right to a hearing. 6 NYCRR §§ 622.12(b), 622.15(a). In such circumstances, Department staff may move for a default judgment, such motion to contain:

(1) proof of service of the notice of hearing and complaint or motion for order without hearing;
(2) proof of the respondent's failure to file a timely answer; and
(3) a proposed order. 6 NYCRR § 622.15(b).

Staff has submitted a copy of the affidavit of service indicating that staff mailed the respondent and Mr. Brooks the notice of motion for order without hearing and supporting papers by certified mail on April 21, 2008. Copies of the green card, certified receipt, and tracking confirmation indicate that respondent received the papers on April 23, 2008. See, Exhibit B to Urda affirmation in support of motion for default judgment and order.

The respondent asserts that it filed a timely response by virtue of its service of the motion to quash or to extend the time to answer. This motion is dated May 14, 2008 - one day after the 20 day period for service of an answer had elapsed. Mr. Brooks submits a tracking confirmation from the U.S. Postal Service to indicate that he received staff's motion for order without hearing on April 24, 2008. See, Exhibit 2, annexed to Brooks affirmation. However, the respondent Avis received it on April 23, 2008 as indicated by the green card. See, Exhibit B to Urda Aff. Therefore, pursuant to 6 NYCRR § 622.15, the respondent did not meet the relevant deadline.

As Mr. Brooks notes, 6 NYCRR § 622.6(f) gives the ALJ discretion to modify time frames in order "to avoid prejudice to any of the parties." However, the submission of the motion to quash or to extend the time to reply does not meet the requirements of an answer. The respondent does not address the substance of the staff's allegations in these papers. Section 622.12 of 6 NYCRR requires that ". . . the respondent must file a response with the Chief ALJ which shall also include supporting affidavits and other available documentary evidence." Avis has not submitted any factual information to rebut the specific allegations in the motion for order without hearing. Rather, Avis's motion is comprised of arguments as to whether or not the respondent had adequate time to comply with the PBS requirements, to review the consent order, or to respond to staff's motion for order without hearing and to dispute the fairness of the penalty. Based upon the lack of any substantive response to the allegations and the lengthy period that the respondent has had to address the allegations, I do not find these arguments persuasive to overcome the default.

As for the respondent's characterizations of surprise and bad faith in light of the negotiations it had previously engaged in with DEC staff, Mr. Brooks does not contest the fact that staff gave the respondent a deadline of March 27, 2008 to respond to the order on consent. Moreover, given the undisputed fact that the parties had commenced discussions in January 2007, I do not find any grounds to support these claims.

Staff has also met the requirement to submit a proposed order. See, Exhibit C to Urda Aff.

With respect to respondent's motion to quash or to extend the time to answer, I do not find any basis in the regulations to "quash" a motion by staff for order without hearing or default. And, as noted by staff, this matter has been pending for a long enough time and the respondent did not provide any meaningful reason as to why additional time was necessary to respond to staff's motion. The PBS regulations are key to ensuring the safety of New York's citizens from the effects of pollution caused by the mishandling of petroleum. Therefore, expeditious processing of noted violations of the PBS regulations is necessary to an effective enforcement program.

Penalty Considerations

Although I find the respondent in default with respect to establishing liability, the staff's requested monetary penalty of $178,500.00 is significant enough that I have determined a hearing should be convened solely to hear staff's evidence to support its request and the respondent's evidence to mitigate same, if any.[1] 6 NYCRR § 622.12(f). While staff's affirmation in support of its request does detail each cause of action and the recommended penalty, I find that there needs to be some explanation of the reasoning for each fine particularly where several of them vary significantly from the others (e.g., 12th and 22nd causes of action). While staff provides a mathematical explanation in its papers for its calculations (see, Urda affirmation in opposition to motion, ¶ 15), it does not cite to

[1] As I ruled in the Matter of Blank, Blank & Jacobi, it is not appropriate for the ALJ to consider the settlement offer in determining the penalty. 2003 WL 87914 (February 4, 2003). However, based upon the Third Department's opinion in Matter of Vito v. Jorling, 197 AD2d 822 (3rd Dep't 1993) (Appellate Division overturned DEC penalty based upon lack of support and disparity between settlement offer and penalty), it is imperative that the Commissioner's order is based on an evidentiary record.

the various factors pursuant to the Department's civil penalty policy that should form the bases for all of DEC's penalties. As decided by Commissioner Sheehan in Matter of Hunt, 2006 WL 2105981 (July 25, 2006), " . . . when a respondent defaults, only liability for the violations alleged . . . is established as a matter of law. Damages must still be proven." Consistent with Hunt, the Department staff must present sufficient proof in support of the requested penalty so that the ALJ can determine that it is consistent with Department policy and the specific circumstances. See, Siegel, New York Practice, p. 477 (4th ed., 2005).

Conclusion

The respondent, Avis, did not submit an answer to staff's motion for order without hearing and therefore, it is in default. I find that Avis is liable for violations of Article 17 of the Environmental Conservation Law § 17-0303(3) and 17-1001, *et seq.* and 6 NYCRR § 612.2(failure to register or to maintain accurate registration); 612.2(e)(failure to display facility registration certificate on premises); 613.3(b)(failure to mark fill port); 613.3(c)(failure to properly install a shear valve for spill prevention), 613.3(c)(3)(ii)(failure to mark design capacity, working capacity and identification of above ground tank and tank gauge); 613.3(d)(failure to properly install or maintain spill prevention equipment); 613.4 (failure to reconcile inventory records every ten days); 613.4(a)(failure to reconcile inventory records); 613.5(a)(failure to perform tightness tests); 613.5(b)(4)(failure to maintain annual monitoring records for cathodic protection system on premises); 613.6(a) (failure to perform monthly inspections of above ground storage facility); 613.6(c)(failure to maintain and make available to Department staff monthly inspection reports for a period of ten years); 613.8(failure to report leak, spill or discharge); 613.9(a) (failure to secure, cap, or plug the fil line of a temporarily out of service above ground storage tank); 614.3(a)(2)(failure to label); and 614.7(d)(failure to maintain site drawings). The respondent committed all or some of the aforesaid violations at their facilities located on 217 -223 East 43rd Street; 304-310 East 64th Street; 216 West 76th Street; 240 East 54th Street; 515 West 43rd Street; 153-155 West 54th Street; 424 East 90th Street; and 68-70 East 11th Street in Manhattan.

I deny respondent's motion to quash or to extend the time to answer.

I will convene a hearing to hear the parties' evidence with respect to staff's request for a $178,500.00 penalty. I direct the parties to contact my office in order to set up a conference call for the week of June 16, 2008 to discuss scheduling.

Dated: June 6, 2008
Albany, New York

_____/s/_____
Helene G. Goldberger
Administrative Law Judge

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