STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

the Alleged Violations of Article 19 of the Environmental Conservation Law ("ECL") and Part 232 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

- by -

CHRIS BLENMAN,
d/b/a FRENCH NATIONAL CLEANERS

Respondent.

DEC Case No. R2-200050210-34

RULING OF THE ACTING COMMISSIONER

February 14, 2011

RULING OF THE ACTING COMMISSIONER

On August 19, 2010, respondent Chris Blenman, d/b/a French National Cleaners (respondent), filed a motion to reopen the default taken against him in a Commissioner's order dated September 11, 2006 (order). A copy of the order is attached to this ruling.

By the terms of the order, respondent was adjudged to have violated 6 NYCRR 232.6(a)(1) and 6 NYCRR 232.16 at his dry cleaning establishment at 1569 St. Johns Place, Brooklyn, New York (see Order, at 3, par. III). The order imposed a civil penalty, and required that a third-party compliance inspection of the facility be conducted within forty-five days of the service of the order (see id., pars. IV and V).

Staff of the New York State Department of Environmental Conservation (Department) filed an attorney affirmation dated January 5, 2011, with various attachments, in opposition to respondent's motion to reopen the default. The matter was assigned to Administrative Law Judge Edward Buhrmaster, whose report on respondent's motion is also attached to this ruling.

The ALJ recommends that respondent's motion to reopen the default be denied for failure to show good cause. A motion to reopen a default may be granted "upon a showing that a meritorious defense is likely to exist and that good cause for the default exists" (see 6 NYCRR 622.15[d] [emphasis added]). Respondent had ample opportunity to raise his legal arguments and defenses, but failed to do so. As discussed in the ALJ's report, respondent's submittal was insufficient to establish a good cause for his default. Accordingly, the motion to reopen the default is denied, and the Commissioner's order dated September 11, 2006 will continue in full force and effect.

New York State Department
of Environmental Conservation

By: _____/s/_____
Joseph J. Martens
Acting Commissioner

Dated: Albany, New York
February 14, 2011

STATE OF NEW YORK : DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 19 of the Environmental Conservation Law ("ECL") and Part 232 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),	**Report on Motion to Reopen Default Order**
-by-	
CHRIS BLENMAN, d/b/a FRENCH NATIONAL CLEANERS, Respondent.	DEC Case No. R2-200050210-34

Summary

This report recommends that the Commissioner deny the Respondent's motion to reopen the default judgment taken against him in a Commissioner's order dated September 11, 2006.

Proceedings

On September 11, 2006, former Department of Environmental Conservation ("DEC") Commissioner Denise Sheehan signed an order granting DEC Staff's motion for a default judgment against Chris Blenman, d/b/a French National Cleaners ("Respondent"). The order was issued on the basis of Respondent's failure to file a timely response to a motion for order without hearing and its accompanying complaint.

According to the default summary report prepared by former DEC Administrative Law Judge ("ALJ") Susan J. DuBois, DEC Staff served the motion for order without hearing, dated June 28, 2006, upon Respondent by certified mail, which was received on June 29, 2006. The report further states that Respondent failed to file a response to the motion on or before July 19, 2006 (twenty days after the date of service), as required by 6 NYCRR 622.12(c), or at any later time prior to September 1, 2006, when the ALJ signed her report. DEC Staff moved for a default

judgment on August 7, 2006, after the 20 days to respond had expired. According to the affirmation of DEC attorney John Byrne, filed with the motion for default judgment, Respondent failed to file an answer to the complaint or have any other contact with DEC after the motion was served.

According to the report of ALJ DuBois, Respondent was the owner and operator of a dry cleaning business located at 1569 St. Johns Place, Brooklyn. According to DEC Staff's complaint, the sliding vapor barrier entry doors to the dry cleaning equipment were left open during a DEC inspection on January 26, 2005, in violation of 6 NYCRR 232.6(a)(1), and Respondent failed to have a third-party compliance inspection of his facility during the period between January 1 and June 26, 2006, in violation of 6 NYCRR 232.16.

In her order granting the motion for a default judgment, the Commissioner granted DEC Staff's request for a civil penalty of Twenty Five Thousand One Hundred Sixty Dollars ($25,160), including One Thousand Dollars ($1,000) for the one-time violation of 6 NYCRR 232.6(a)(1), and Twenty Four Thousand One Hundred Sixty Dollars ($24,160) for the continuing violation of 6 NYCRR 232.16. With regard to the violation of 6 NYCRR 232.16, the Commissioner's order said that the specific date by which the third-party compliance inspection should have been performed was not clear from the record. However, the order said that no inspection had been conducted by Respondent from the date he acquired the facility (January 17, 2005, according to DEC Staff) to the date of the complaint (June 28, 2006), a period of greater than one year. Furthermore, the order said, DEC Staff had notified Respondent, as owner of the facility, of his failure to comply with the inspection requirement, by a Notice of Violation issued on January 30, 2006, but this did not prompt him to have the inspection done.

Apart from assessing the civil penalty, the Commissioner granted Staff's request that Respondent be ordered to have a third-party compliance inspection conducted at his facility. This inspection was to be done within 45 days of the order's service upon Respondent, which, according to a U.S. Postal Service green card provided by DEC Staff, occurred on September 13, 2006.

After Respondent failed to pay the civil penalty within the 20 days allotted in the Commissioner's order, and also failed to ensure completion of the compliance inspection, which was to have been done by October 28, 2006, DEC referred the matter to the New York State Attorney General's Office for enforcement. The Attorney General's office then commenced an action to enforce the order in New York State Supreme Court, Kings County, personally serving Respondent with a verified complaint on February 29, 2008. As part of this action, the Attorney General's Office, on behalf of DEC, moved for summary judgment on April 21, 2010, noting that Respondent had not challenged DEC's order and is therefore deemed to have admitted to the factual allegations at issue in the administrative proceeding. The summary judgment order would, among other things, (1) find Respondent liable on DEC's claims, (2) grant DEC judgment for the $25,160 penalty plus statutory interest, late payment, and other statutory charges, and (3) direct Respondent to cease operation of his business unless and until he complies with 6 NYCRR 236.16. Respondent's counsel, Elliott S. Martin, filed an affirmation dated August 19, 2010, in opposition to the motion for summary judgment, attached to which was an affidavit of Respondent, dated August 18, 2010. The motion remains pending, with a return date that has been adjourned until February 17, 2011.

Motion to Reopen Default

On August 19, 2010, Respondent, by Mr. Martin, submitted a letter to ALJ DuBois as a formal request to reopen DEC's default judgment pursuant to 6 NYCRR 622.15(d). That provision states that "[a]ny motion . . . to reopen a default judgment must be made to the ALJ. A motion to reopen a default judgment may be granted consistent with [Civil Practice Law and Rules] ("CPLR") section 5015. The ALJ may grant a motion to reopen a default upon a showing that a meritorious defense is likely to exist and that good cause for the default exists."

Attached to Mr. Martin's letter were copies of submittals from both parties to the pending motion for summary judgment. In the letter, he asked that the default judgment be opened "so that [Respondent] may fully develop the record, put forth his

defenses and begin negotiations with the goal of resolving this matter amicably."

Upon receipt of the motion, DEC Chief Administrative Law Judge James T. McClymonds forwarded a copy of it to Mr. Byrne, as it appeared that Mr. Martin had not served it upon DEC Staff. By letter of August 27, 2010, he also authorized DEC Staff to file a response to the motion, to be sent directly to him, as ALJ DuBois was scheduled to retire from state service on September 2, 2010. On behalf of DEC Staff, Mr. Byrne filed an affirmation dated January 5, 2011, opposing the motion to reopen the default, with various attachments. Judge McClymonds then assigned this matter to me for the purpose of a report and recommendation to the Commissioner.

Position of Respondent

Both a meritorious defense and good cause for the default exists. Respondent was the manager of French National Cleaners on January 26, 2005, the date of the alleged violation of 6 NYCRR 232.6(a)(1), but did not formally become the legal owner and operator of the dry cleaning facility until on or about July 14, 2006, after a lengthy transition process. On January 26, 2005, the legal owner and operator of French National Cleaners was Samuel Lee, for whom Respondent worked beginning in approximately late 2004.

Respondent was not present at the time of DEC's January 26, 2005, inspection, but knows that the Victory 5000 dry cleaning machine, which used the chemical perchloroethylene (commonly known as "perc"), was obscured by a curtain and two sliding doors.

In late January or early February 2005, Respondent had several conversations with a DEC air resources engineer, Niranjan Gandhi, who told him that the Victory machine was not in full compliance with DEC guidelines. After these discussions and a DEC compliance conference on April 11, 2005, it became clear to Respondent that, due to the costs and headache involved with maintaining the machine and arranging for compliance inspections, he should reconfigure the business and have all dry cleaning completed offsite. As a consequence, in early June 2005, the Victory 5000 machine was turned off and its active use

discontinued. Subsequently, all dry cleaning requiring the use of hazardous chemicals, including perc, has been completed by various outside vendors, and the only machine that has been used by French National Cleaners and is physically located on the premises is a steam press machine that is entirely non-toxic.

By a Notice of Violation dated January 30, 2006, Respondent was cited for failing to conduct an annual third party compliance inspection for 2005. After providing DEC written notice dated September 20, 2006, that the Victory 5000 machine had been fully shut down since June 2005, a DEC inspector, a Mr. Alexander, visited French National Cleaners in approximately June 2009 to confirm that all electricity running to the machine was shut off and all appropriate exhaust pipes disconnected. At the time of his visits, Mr. Alexander led Respondent to believe that once the machine was not being used, the third party compliance inspection was no longer necessary and that Respondent had no further obligations as long as the machine was not operating actively. In approximately January 2010, the Victory 5000 machine was completely removed from French National Cleaners.

The economic downturn has severely affected the business and Respondent is barely making ends meet. A penalty of the magnitude sought by DEC will force the business to close, whereas not enforcing the entire penalty, and allowing Respondent to establish his defenses, will allow Respondent to hold onto the business he has worked very hard to acquire and maintain.

Position of DEC Staff

CPLR 5015 has no applicability, since it applies only to judgments and orders issued by a court, whereas this matter involves a Commissioner’s order of a State administrative agency. Furthermore, Respondent is time-barred from challenging the Commissioner’s order, as he failed to bring an Article 78 proceeding within four months of his receipt of the order on September 13, 2006, consistent with CPLR 217, but instead waited almost four years to move to reopen the default.

Respondent has had ample opportunity to raise his legal arguments and defenses, and should have done so when served with

the motion for order without hearing. The motion was sent to him by certified mail/return receipt on June 28, 2006, and was received by him on June 29, 2006, based on a U.S. Postal Service certified mail green card. The Notice of Motion clearly stated that Respondent had to serve his response to DEC's Chief ALJ within twenty days of his receipt of said motion. Respondent inexplicably never responded to the motion, which prompted DEC Staff to seek a default judgment.

Respondent was apprised of the violations alleged in this matter by DEC Staff sending him Notices of Violations dated January 27, 2005 and January 30, 2006. Respondent also attended a compliance conference that was conducted by DEC Staff on April 11, 2005, to attempt settlement of the violations. Subsequent to the compliance conference, DEC Staff sent Respondent two orders on consent, on April 27 and May 10, 2005, which Respondent inexplicably never signed. Respondent could have resolved this matter with DEC prior to the initiation of the administrative enforcement action, if he had wanted to do so.

The transfer of French National Cleaners from Samuel Lee to Respondent occurred on January 17, 2005, before the violations alleged in this matter, according to an application for transfer of the facility's permit, which was signed by Respondent himself. Furthermore, DEC's registration certificate for the Victory 5000 dry cleaning machine was issued to Respondent effective April 26, 2005. The alleged turning off of the machine and the discontinuance of its active use, alleged to have occurred in early June 2005, were never communicated to DEC Staff, orally or in writing, and Respondent never sought to cancel the machine's registration. Furthermore, DEC did not receive the notice of the machine's shutdown in June 2005, which Respondent said that he sent to DEC on September 20, 2006, after the Commissioner's order was issued.

A DEC inspector, Alexander Becker, went to the facility on September 18, 2006, to determine what was occurring with the operation of the dry cleaning machine. On that date, he noted that the machine had been shut down and its power disconnected, that the perc had been removed from the machine and was stored in drums, and that the facility was operating as a drop shop. This was DEC's first indication that any of these things had

happened, as Respondent had not communicated them before the Commissioner's order was issued. Mr. Becker was not at the facility on any other date, including during June 2009, and cannot recall any conversation that he may have had with Respondent during the one time he was there, more than four years ago.

Discussion

According to 6 NYCRR 622.15(d), a motion to reopen a default judgment may be granted consistent with CPLR 5015, upon a showing that a meritorious defense is likely to exist and that good cause for the default exists. Here, the motion can be denied solely on the basis that Respondent has shown no good cause for his default, leaving aside consideration of his so-called defenses.

As ALJ DuBois concluded in her report, DEC Staff served its motion for order without hearing and complaint by certified mail, return receipt requested, received by Respondent on June 29, 2006. More particularly, Staff mailed its papers to his business address on June 28, 2006, and on July 3, 2006, received the return receipt with a delivery date of "6-29" entered on the receipt. The papers provided notice that Respondent must, within 20 days following receipt of the motion, serve a response upon the Chief ALJ at DEC's Office of Hearings and Mediation Services, and that failure to timely reply to the motion would result in a default and a waiver of Respondent's right to a hearing.

In the papers associated with his motion to reopen the default, Respondent does not deny that he received the papers sent to him by DEC Staff, and does not explain why he failed to respond to them within the 20 days allotted, or at any time prior to the default judgment against him.

For that reason alone, he has not demonstrated good cause for his default, and his motion to reopen the default should be denied.

Even if good cause for the default existed, Respondent has not shown that a meritorious defense exists with regard to the allegation that the sliding vapor barrier entry doors to the dry

cleaning equipment were left open during a DEC inspection on January 26, 2005. Respondent claims he was not present that day, and has not offered any evidence to refute the observation made by DEC's inspector. Respondent also claims he was not then the legal owner and operator of the facility, yet the permit transfer application on file with DEC indicates otherwise.

The other allegation is that Respondent failed to comply with a requirement at 6 NYCRR 232.16(a)(2) that mixed-use dry cleaning facilities must be inspected at least annually when only non-vented equipment is operated. As a defense to the charge that he failed to have such inspection conducted during the period between January 1 and June 26, 2006, Respondent now asserts that in early June 2005, his Victory 5000 machine was turned off, and that since then all dry cleaning involving the use of hazardous chemicals, including perc, has been done by outside vendors. According to Mr. Martin's letter of August 19, 2010, Respondent specifically relied in good faith on representations made by a DEC inspector that once the dry cleaning machine using perc was shut off and no longer in active use, an annual compliance inspection was no longer necessary. Respondent's affidavit refers to the inspector as a Mr. Alexander, apparently a mistaken reference to Alexander Becker, who Staff says was at the facility only once, on September 18, 2006, after the Commissioner's order was issued.

The requirements of Part 232, including the compliance inspection requirements at 6 NYCRR 232.16, apply to perc dry cleaning facilities [see 6 NYCRR 232.1(a)], so the conversion of the business to something other than a perc dry cleaning facility would have some bearing on the need for subsequent inspections. On the other hand, as Staff points out, there is no evidence that Respondent alerted DEC to the shutting off of the Victory 5000 machine when it allegedly occurred, in June 2005, or at any time prior to issuance of the Commissioner's order. In fact, as DEC points out, Respondent never sought to cancel the machine's registration, and by his own admission, his notice of the machine's shutdown was not sent to DEC until September 20, 2006, after the period of the alleged violation. According to DEC Staff, it was only during a September 18, 2006, inspection that DEC learned that the machine had been shut down and its power disconnected, that the perc had been removed from

the machine and was stored in drums, and that the facility was operating as a drop shop. If he wanted to be relieved of the inspection requirement, Respondent should have alerted DEC Staff to his change in operations when it happened, and certainly when he received the motion for order without hearing. By not responding to the motion, Respondent defaulted, and the allegations against him, as contained in the complaint, were deemed to have been admitted.

While the CPLR governs in the State's civil courts, DEC's Part 622 regulations, which apply to DEC's administrative enforcement proceedings, refer to CPLR 5015 in relation to the granting of a motion for a default judgment. In particular, CPLR 5015(a) allows for an order to be vacated upon various grounds, including excusable default. The courts are liberal in vacating default judgments so that disputes are resolved on their merits, but not where the default is beyond all excusing. Here, there is no excuse for Respondent's failure to respond to the motion for order without hearing, and no claim that he did not receive it. Under these circumstances, there is no good cause for reopening the default.

DEC Staff claims that Respondent is time-barred from filing a court challenge to the Commissioner's order; however, DEC's regulations do not limit when a motion to reopen a default may be made to the agency. Respondent claims that his application to reopen the default is actually premature, because while he did receive a copy of the ALJ's report and the Commissioner's order, he was never served with a written notice of the order's entry. CPLR 5015(a)(1) allows for a judgment or order to be vacated upon various grounds, including excusable default, "if such motion is made within one year after service of a copy of the judgment or order with written notice of its entry." However, DEC's administrative orders are effective upon service; there is no notice of entry, as there would be in a court. Therefore, the motion is timely, and should be denied for lack of merit.

Conclusion

Respondent has not shown good cause for his default in this matter.

Recommendation

Respondent’s motion to reopen the default should be denied.

_____/s/_____

Edward Buhrmaster
Administrative Law Judge

Dated: Albany, New York
February 11, 2011