4/9/96

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
S. PAUL HOBBS,	)	DOCKET NO. CWA-III-091
	)	
	)	
RESPONDENT	)	

ORDER DENYING MOTION TO DISMISS

Under date of November 20, 1995, Respondent, Hobbs, filed a motion to dismiss the complaint in this civil penalty proceeding under section 309(g) of the Clean Water Act (33 U.S.C. § 1319(g)), citing the numerous continuances of the hearing date, at least two of which were granted on Complainant's motion. Alternatively, Hobbs claims reimbursement for the sum of $1,251.18, fees and expenses incurred as a result of the most recent continuance.

Hobbs recites, inter alia, that a hearing on this matter was initially scheduled to commence in Newport News, Virginia on May 2, 1995; that on March 7, 1995, Complainant filed a motion for a continuance, alleging that a key witness would be unavailable on the trial date [for medical reasons]; thereupon the hearing was rescheduled to commence in Newport News on July 11, 1995; that [on June 6, 1995] Complainant again moved for a continuance [alleging medical problems as the reason for the unavailability of two witnesses]; thereupon the hearing was rescheduled to commence on October 10, 1995; that prior to October 10, 1995, counsel for Complainant again moved for a continuance alleging the possibility

that the government would be shut down [for lack of appropriations] as the reason;[1] and that the hearing was once more rescheduled, this time to commence in Newport News on November 14, 1995.

It being what Hobbs characterizes as "more or less firmly established" that the hearing would, in fact, commence on November 14, 1995, Hobbs says that he moved for and was granted subpoenas for the attendance of numerous witnesses. Hobbs alleges that he incurred costs of $210 in serving the subpoenas. Hobbs' counsel, Mr. Richard Nageotte, states that he contacted counsel for Complainant on November 13, 1995, to determine if the hearing would again be continued in view of the possibility that the government would be shut down. He asserts that, upon being informed that the ALJ had departed for Newport News and that the hearing would be conducted as scheduled, he made arrangements to proceed to Newport News. According to Mr. Nageotte, Complainant's counsel made it clear in this telephone conversation that she had no intention of going to Newport News for the trial of this matter commencing on November 14.

Mr. Nageotte further states that, in the afternoon of November 13 as he was preparing to leave his office to travel to Newport News, a call was received from counsel for Complainant to the effect that a senior ALJ had ordered the ALJ not to proceed

[1] The file available to the ALJ does not contain a formal motion from Complainant for this continuance, nor does Hobbs cite any such motion. The ALJ recalls, however, that, at the direction of the Administrator, the Chief Judge ordered that hearings scheduled for October 1995 be continued.

with the trial, but that the ALJ was contesting the order. Based on this information, Mr. Nageotte says that he continued with preparations to depart for Newport News. At approximately 5:00 p.m. on November 13, while en route to Newport News, Mr. Nageotte states that he was informed by his office that a call had been received from counsel for Complainant which stated that the hearing had been canceled. Because this information allegedly could not be confirmed by an order or phone call from the ALJ, Mr. Nageotte asserts that he had no alternative but to continue to Newport News and advise his client to be in court for the hearing.as scheduled.[2/] This resulted in asserted total costs incurred by Hobbs, including attorney's fees and the costs of serving subpoenas, of $1,251.18 for which claim is made.

Complainant has opposed the motion, asserting that it lacks a factual and legal basis (Response To Motion, dated January 19, 1996). Complainant points out that the Rules of Practice do not provide for the recovery of costs and states that Respondent's sole avenue for such recovery is an action in U.S.

[2/] The ALJ had several phone conversations from his hotel on the afternoon of November 13 with Ms. Janet Williams, counsel for Complainant, as to whether the hearing would proceed as scheduled. Ms. Williams stated that Mr. Nageotte was in Washington, DC or the Washington, DC area and could not be reached. While the ALJ adhered to the position that the hearing should proceed, the assertion that he was contesting the order of the Chief Judge to cancel the hearing is inaccurate. At approximately 3:30 p.m. on November 13, the ALJ was called by the Chief Judge and directed to cancel the hearing. Immediately thereafter, the ALJ called his office, leaving instructions to make certain that the parties, and particularly Mr. Nageotte, were notified that the hearing had been canceled.

District Court or the Court of Claims under the Equal Access to Justice Act.[3] Looking to the Federal Rules of Civil Procedure for guidance as to the standards to be applied in considering Respondent's motion to dismiss, Complainant refers to FRCP Rule 12 and states that none of the grounds therein [e.g., 12(b)(6), failure to state a claim upon which relief can be granted] has any bearing on the facts of this matter.

Complainant denies any responsibility for the continuance of the hearing scheduled to commence on October 10 or the cancellation of the hearing scheduled to commence on November 14. According to counsel for Complainant, she contacted Respondent's counsel for the purpose of obtaining agreement to a one-day continuance so that the status of the looming government shut down would be known prior to the parties or their witnesses committing to travel. Mr. Nageotte assertedly refused to agree to any continuance. Complainant alleges that Respondent is relying solely on principles of "fairness and equity" to support his motion, but argues that these principles, considered in the light of the unique and unfortunate facts, require denial of the motion and rescheduling of the hearing at the earliest possible date.

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[3] The assertion that an award under the Equal Access to Justice Act may only be obtained in a judicial action is erroneous. See 5 U.S.C. § 504 and 40 CFR Part 17. A successful claimant under the Act must, inter alia, be the prevailing party in whole or in part and must demonstrate that the government's action was not "substantially justified."

DISCUSSION

Although Hobbs has not set forth any specific basis for his motion to dismiss, the only apparent ground for such a motion is a default by Complainant or the "failure to prosecute." Because two continuances of the hearing granted at the instance of Complainant due to serious medical problems encountered by its witnesses, a third continuance ordered sua sponte because of concern over an impending government shut down, and a fourth continuance or cancellation of the hearing mandated by a government shut down, afford no support for any contention that Complainant has defaulted or is failing or refusing to prosecute this action, the motion to dismiss will be denied.

The only apparent basis for Hobbs' claim for fees and expenses incurred in preparing for and traveling to Newport News for the November 14 hearing is the Equal Access to Justice Act. As we have seen, this statute (5 U.S.C. § 504) requires, among other things, that Hobbs be the "prevailing party" in order to receive an award. Because the proceeding has not reached the stage where Hobbs could be determined to be a prevailing party, the claim may not be entertained at this time. The problem with notification in this matter stems largely from the fact that counsel for Hobbs or his office had informed EPA counsel that he was out of the office and could not be reached. Moreover, although more could perhaps have been done to assure that Hobbs received notification of the cancellation from the ALJ's office, even under Hobbs' version of the facts, he disregarded a clear indication from EPA counsel that

the hearing might be canceled, and an actual notice from EPA counsel, received at approximately 5:00 p.m., that the hearing was, in fact, canceled. Acceptance of the notion that the ALJ could or would disregard an order from the Chief Judge and disregard of actual notice from EPA counsel that the hearing had been canceled without any apparent attempt to confirm these facts by calling the ALJ's office have not been shown to be reasonable.[4] The claim for fees and expenses will be denied.

<u>O R D E R</u>

Hobbs' motion that the complaint herein be dismissed and his claim for fees and expenses are denied.

Dated this 9th day of April 1996.

Spencer T. Nissen
Administrative Law Judge

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[4] The ALJ recognizes the difficult nature of trial preparation, e.g., availability of witnesses, created by uncertainty as to whether a hearing will proceed as scheduled and agrees with Complainant's characterization of the facts herein as "unfortunate."

CERTIFICATE OF SERVICE

I hereby certify that the original of this **ORDER DENYING MOTION TO DISMISS**, dated April 9, 1996, **in re: S. Paul Hobbs**, Dkt. No. **CWA-III-091**, was mailed to the Regional Hearing Clerk, Reg. III, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Helen F. Handon
Legal Staff Assistant

Date: April 9, 1996

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