

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HEALTH

In the Matter of the Administrative Penalty
Order Issued to American Property
Services, LLC

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION
UPON DEFAULT**

This matter was scheduled to come before Administrative Law Judge LauraSue Schlatter for a hearing on October 7, 2015, at 9:30 a.m., pursuant to an Order on Remand dated January 29, 2015, issued by Patricia Winget, Adviser to the Commissioner of Health, and subsequent prehearing orders dated March 18, 2015, April 23, 2015, and May 8, 2015.

David F. Strohkirch, Assistant Attorney General, appeared on behalf of the Minnesota Department of Health (Department). American Property Services, LLC and its representative, Troy Parker (Respondent), failed to appear at the hearing. The Department made an oral Motion for Default on October 7, 2015. The Respondent's Response to the Motion was due on October 21, 2015. Respondent failed to submit a response to the Motion and the record closed on October 21, 2015.

STATEMENT OF THE ISSUES

1. Whether Respondent violated the statutes and rules governing asbestos abatement as set forth in the allegations on pages 2 through 6 of the Notice and Order for Hearing and Prehearing Conference (NOH) and pages 1 through 3 of the Administrative Penalty Order dated March 18, 2014.¹

2. Whether the Commissioner is authorized to take enforcement action against Respondent for violations of the Act using remedies available pursuant to Minn. Stat. §§ 144.989-.993 (2014).

SUMMARY OF RECOMMENDATION

The Administrative Law Judge concludes that Respondent is in default and recommends that the allegations in the Notice and Order for Prehearing Conference and Hearing be accepted as true and deemed proven.

¹ See Attachment (Att.) A, Notice and Order for Hearing and Prehearing Conference and Minn. Stat. §§ 326.70-.81 (2014); Minn. R. 4620.3000-.3724 (2015).

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Pursuant to the Commissioner's January 29, 2015 Order on Remand, following two prehearing conferences with the parties, this matter was scheduled for a hearing to be held on October 7, 2015.

2. The Administrative Law Judge issued the Third Prehearing Order on May 8, 2015. The Third Prehearing Order included a detailed prehearing schedule, including a deadline of September 30, 2015 for the parties to exchange and file with the Office of Administrative Hearings their witness lists and hearing exhibits. In addition, the Third Prehearing Order stated that "failure to appear at a prehearing conference or hearing without the prior consent of the Administrative Law Judge shall be considered a default by that party" and that the allegations contained in the Department's original Notice and Order for Prehearing Conference or Hearing may be accepted as true, and the Department's proposed action upheld.²

3. As of October 1, 2015, the Respondent had not filed a witness list or any exhibits. The Administrative Law Judge contacted Respondent via e-mail, requesting that it file the required documents, or otherwise advise the Administrative Law Judge and the Department of its intentions regarding the contested case hearing.³

4. On Monday, October 5, 2015, Respondent replied to the Administrative Law Judge that it had no witnesses or exhibits to submit. The Administrative Law Judge forwarded the e-mail to the attorney for the Department, copying Respondent. The e-mail closed with "I expect to see you both on Wednesday morning."⁴

5. Respondent failed to appear at the hearing on October 7, 2015.

6. When contacted by telephone at approximately 10:00 a.m. on October 7, 2015, Respondent denied knowledge of the date, time or place of the hearing.⁵ While the Respondent remained on the telephone line, the Department moved for a Default Order pursuant to Minn. R. 1400.6000 (2015).⁶

7. The Administrative Law Judge instructed the Respondent that he could have ten working days, until the end of business on October 21, 2015, to respond in writing to the Department's Motion for Default.⁷ The Respondent failed to submit a response to the Department's Motion for Default.

² See Attachment B, Third Prehearing Order at 2-3.

³ See Attachment C.

⁴ *Id.*

⁵ Recording.

⁶ *Id.*

⁷ *Id.*

8. Respondent's failure to appear at the hearing was without consent of the Administrative Law Judge.

9. Because Respondent failed to appear at the hearing, Respondent is in default.

10. Pursuant to Minn. R. 1400.6000, the allegations contained in the Notice and Order for Hearing, a copy of which is attached as Attachment A, are taken as true, deemed proven without further evidence, and incorporated by reference into these Findings of Fact.⁸

Based on the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Minnesota Department of Health and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 144.991 (2014).

2. The Respondent received timely and proper notice of the hearing in this matter when the Administrative Law Judge scheduled the hearing in a prehearing telephone conference with the Respondent's Representative and served a copy of the Third Prehearing Order on the Respondent.

3. The Minnesota Department of Health has complied with all relevant procedural requirements of statute and rule.

4. Under Minn. R. 1400.6000, the Respondent is in default as a result of its failure to appear at the scheduled hearing.

5. Under Minn. R. 1400.6000, when a party defaults by failing to appear at a hearing without the prior consent of the judge, the allegations and the issues set out in the Notice and Order for Prehearing Conference and Hearing may be taken as true and deemed proved. The Administrative Law Judge therefore deems the allegations to be true.

6. Minnesota Statutes section 144.99 (2014) provides that the Minnesota Department of Health may discipline a licensee who engages in conduct that violates the rules or law applicable to a licensee.

7. The Department has grounds to take disciplinary action against the Respondent's license based upon the allegations set forth in the Notice and Order for Hearing.

8. An order by the Department taking disciplinary action against the Respondent's license is in the public interest.

⁸ See Attachment A, Notice and Order for Hearing.

Based upon the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner take reasonable and appropriate disciplinary action against American Property Services.

Dated: October 29, 2015

s/LauraSue Schlatter
LAURASUE SCHLATTER
Administrative Law Judge

Reported: Digitally Recorded. Default

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Health will make the final decision after a review of the record. The Commissioner may adopt, reject or modify the Findings of Fact, Conclusions of Law, and Recommendations. Under Minn. Stat. § 14.61 (2014), the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Edward Ehlinger, Commissioner, Minnesota Department of Health, 85 East Seventh Place, P.O. Box 64975, St. Paul, MN 55164, to learn the procedure for filing exceptions or presenting argument.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2014). The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1 (2014), the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

The Commissioner remanded this matter to the Office of Administrative Hearings because the Respondent raised questions concerning whether it received adequate notice of the First Prehearing Conference in 2014 and of the first Recommended Default Order. On remand, Mr. Parker appeared on behalf of Respondent at the telephone prehearing conference on May 6, 2015, and actively participated in discussing dates for the steps needed to complete the contested case. Based on the dates agreed to by the parties and the Administrative Law Judge, the Administrative Law Judge issued the Third Prehearing Order establishing the calendar for the remainder of the proceeding, including prefiling of witness lists and exhibits on September 30, 2015, and the hearing date of October 7, 2015, beginning at 9:30 a.m.

When Mr. Parker failed to file a witness list or any exhibits by Thursday, October 1, 2015, the Administrative Law Judge contacted him via e-mail to let him know that the Office of Administrative Hearings had not received anything from him. The Administrative Law Judge requested in the e-mail that Mr. Parker inform the Administrative Law Judge whether he intended to pursue his appeal and, if so, that he file his witness list and exhibits. The e-mail, which was copied to counsel for the Department, instructed Mr. Parker to copy the Assistant Attorney General on any response he made.⁹

Mr. Parker's response on Monday, October 5, 2015, which was not copied to Assistant Attorney General Strohkirsch, read "Thank you for your time on this matter, i (sic) dont (sic) have any witnesses or exhibits to submit." Later on the same date, the Administrative Law Judge forwarded the message to the Assistant Attorney General, copying Mr. Parker. The brief forwarding message included the reminder "I expect to see you both on Wednesday morning."¹⁰

Assistant Attorney General Strohkirsch and two witnesses for the Department, Mr. Locher and Mr. Boysen, appeared for the hearing on Wednesday, October 7, 2015, at the appointed time. Mr. Parker did not appear and did not contact the Department, the Attorney General's Office, or the Administrative Law Judge prior to or during the hearing. The Administrative Law Judge contacted Mr. Parker via telephone while the Assistant Attorney General and Department witnesses were still present, but Mr. Parker was not en route to the hearing. He alleged that he was not aware of the date, time, or place of the hearing. Mr. Parker requested that he be allowed to proceed with the hearing via telephone.

The Assistant Attorney General objected to the request to proceed by telephone and instead moved the Administrative Law Judge for a recommendation for default judgment pursuant to Minn. R. 1400.6000. The Administrative Law Judge did not rule on the record on October 7, 2015, but rather informed Mr. Parker that he had ten working days in which to respond to the motion for default. Mr. Parker never responded to the motion. Because there is no doubt that Respondent had ample notice of the

⁹ Att. B.

¹⁰ Att. B.

hearing in this matter and of the consequences of his failure to appear at the hearing, the Administrative Law Judge recommends that the Commissioner grant the Department's Motion and issue an Order Granting the Default Judgment and imposing disciplinary action as the Commissioner deems appropriate.¹¹

L. S.

¹¹ After Mr. Parker was no longer on the telephone, Assistant Attorney General Strohkirch also moved for admission of the Department's Exhibits, numbered 1 through 11. The Administrative Law Judge was unsuccessful in her attempt to re-establish contact with Mr. Parker by telephone. The Administrative Law Judge suggested that, if Mr. Strohkirch wished to offer his prefiled exhibits, he could submit a brief written motion which would include written notice to Mr. Parker. Because Mr. Strohkirch's "motion" to admit the Department's exhibits consisted of only a one-sentence letter and did not include the elements required by Minn. R. 1400.6600 (2015), the Administrative Law Judge has not considered it and has not included the exhibits in question in the record in this matter.