BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NO. 0121015397:

DANIEL SCYPHERS,	)	Case Nos. 147-2013 and 165-2013
	)	
Charging Party,	)	
	)	
vs.	)	**ORDER DISMISSING CASE**
	)	
TRI-PAC (IVAN ANDRICK),	)	
	)	
Respondent.	)	

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The hearing officer has had under advisement his show cause order regarding the charging party's failure to respond to a motion for summary judgment and failure to timely file a final prehearing statement. The parties have been given the opportunity to fully brief the issue. In light of the charging party's repeated failure to adhere to this tribunal's orders, and in light of the fact that the charging party has utterly failed to address this tribunal's concerns regarding the impact of M.R.Civ.P. Rule 56 (e), the hearing officer is now constrained to dismiss charging party's complaints, both to sanction his failure to comply with orders of the Hearing Officer and to respond to the motion for summary judgment.

PROCEDURAL HISTORY OF THE CASE:

On March 1, 2012, the charging party filed a complaint against the respondent alleging discrimination in housing based upon familial status. On June 11, 2012, the charging party also filed a complaint of retaliation against the respondent related to the alleged discrimination. Both cases were received in the Hearings Bureau for contested case hearing on July 26, 2012.

On July 31, 2012, the Hearings Bureau issued a Notice of Hearing directing the parties to file preliminary prehearing statements no later than 20 days after the date of the notice, in this case no later than August 24, 2012. The respondent timely filed its preliminary prehearing statement, but the charging party failed to do so. As a result, on September 19, 2012, the respondent field a motion to dismiss based

upon the charging party's failure to file a preliminary prehearing statement. The motion was timely provided to charging party's counsel (as demonstrated by the mailing certificate on the motion).

On August 24, 2012, the hearing officer issued an order setting contested case hearing date and prehearing schedule. In that order, the hearing officer clearly set forth that the Montana Rules of Civil Procedure apply to this hearing. In addition, the hearing officer set forth, among other things, the need for the charging party to secure a hearing site, the date for filing final list of witnesses, exhibits and contentions, and the date of the final prehearing and hearing. The date for filing final list of witnesses, exhibits and contentions was November 19, 2012. The date for the final prehearing conference was November 29, 2012 and the date for the hearing was December 6, 2012.

On September 21, 2012, the charging party himself contacted the Hearings Bureau to advise that his counsel had given him the preliminary prehearing statement to prepare and that he was still working on it. At that time, the hearing officer's legal assistant, Sandra Page, advised the charging party that a response to the respondent's motion to dismiss needed to be filed no later than October 3, 2012.

On September 27, 2012, charging party's counsel filed the charging party's response to the motion to dismiss and the charging party's preliminary prehearing statement. In that pleading, charging party's counsel effectively acknowledged that the failure to file a timely preliminary prehearing statement was "the failure of their attorney." Response in Opposition to Motion to Dismiss, Page 2. No excuse was cited for the failure to timely file the preliminary prehearing statement and in light of counsel's admission of the failure, the hearing officer can only presume that it was a failure to properly calendar the deadline for filing a preliminary prehearing statement.

On October 18, 2012, this tribunal denied the respondent's motion because, in this tribunal's opinion, the legal standard for dismissal as a sanction had not been met. However, this tribunal admonished charging party's counsel that "any future instances of failure to regard this tribunal's orders will not be treated so leniently."

On October 29, 2012, the hearing officer on his own motion reset the November 29, 2012 final prehearing conference to November 28, 2012 at 9:00 a.m. Notice of this scheduling change was served upon both parties by regular United States mail that same day.

On November 8, 2012, the respondent filed a motion for summary judgment on both the discrimination and retaliation claims arguing that no material fact issue existed as to either claim and that on the basis of the indisputable facts, the respondent was entitled as a matter of law to summary judgment. The motion also cited an additional basis for dismissing the claims against Ivan Andrick, arguing that he was protected from liability on the basis of the corporate shield under which he was acting at the time of the alleged discriminatory and retaliatory acts. The motion was properly supported by affidavits and a brief in support of the motion citing pertinent legal authority. The motion and the brief were served on charging party's counsel both by regular United States mail and by e-mail. The motion was received in the Hearings Bureau by e-mail on November 8, 2012 and in the regular mail on November 9, 2012.

The charging party's response to the motion for summary judgment was due no later than 10 business days after the motion was filed, in this case, November 23, 2012, as detailed on page 4 of the order setting contested case hearing.[1] Despite the admonition to the charging party contained in this tribunal's October 18, 2012 order, charging party's counsel did not respond to the motion for summary judgment nor did he request an extension of time to file a response.

Counsel for the charging party also failed to file the charging party's final list of exhibits, witnesses, contentions and requests for relief. Those filings were due no later than November 19, 2012 as made clear on page 4 in this tribunal's order setting contested case hearing.

On November 28, 2012, the hearing officer contacted the charging party's counsel for the scheduled final prehearing conference and charging party's counsel, though having ample notice of the final prehearing, was caught off guard by the hearing officer's call. Charging party's counsel acknowledged that he had failed to calendar any of the dates contained in the August 24, 2012 order setting contested case hearing. No excuse for failing to file a timely response to the motion for summary judgment was offered. At that time, the hearing officer advised the parties that he was going to undertake a show cause proceeding due to the charging party's

[1]In his November 28, 2012 order to show cause order, the hearing officer erroneously indicated that the response to the motion for summary judgment was due no later than November 28, 2012. In fact, as made plain by the Motions paragraph on page 4 of the order setting contested case hearing, the charging party's response was due no later than November 23, 2012 (10 business days after the respondent's motion was filed).

repeated failure to comport with this tribunal's orders and the failure to timely respond to the motion for summary judgment.

This tribunal issued an order on November 28, 2012 to show cause as to why this matter should not be dismissed due to charging party's repeated failure to adhere to this tribunal's orders and the failure to file a response to the motion for summary judgment. The order explicitly advised counsel to address both the issue of charging party's repeated failure to comport with the hearing officer's orders as well as the charging party's failure to respond to the respondent's motion for summary judgment. The order also directed counsel to serve the written memorandum upon the respondent and the hearing officer by both United States mail and by e-mail . The purpose of having the charging party serve his written memorandum by e-mail was to afford adequate time for response given the fact that the respondent was ordered to respond within one week.

The hearing officer also vacated the hearing date as the charging party had not filed his final list of exhibits, witnesses, contentions and requests for relief. His failure to do so would unquestionably have put the respondent in an untenable situation of having to proceed forward to hearing on December 6, 2012 without adequate notice of the charging party's final list of exhibits, witnesses, contentions and requests for relief.

On December 6, 2012, the charging party filed his written memorandum on the order to show cause on both the hearing officer and the respondent by United States mail, but not by e-mail as he had been ordered. In his response, charging party's counsel conceded he had missed the deadlines. He ascribed the problem to moving his office and his misplacing of his file for this case. He also acknowledged that he could have at any time read the scheduling order and recorded the dates on a back up paper, but did not and he did "not have a particularly good explanation why he did not." Page 2. He also recognized that he could have filed a motion to continue this matter but did not. *Id.* Charging party's counsel also ascribed his failure to comport with this tribunal's orders as a result of his reorganizing his life due to overcoming a substance abuse problem. Importantly, however, he did not ascribe his failure to his former substance abuse problem, but merely to his failure to properly record the dates in this matter and to misplacing the file. Likewise, counsel, while contending that his client "has done nothing wrong, " (page 3) did not set forth any facts regarding his client's knowledge of the procedural posture of this case or lack thereof nor did he set forth any facts that would show that indeed his client was blameless for the missed filings.

The charging party's response contained no argument regarding the failure to timely file a response to the motion for summary judgment and the impact of M.R. Civ. Pro. Rule 56 (e). Instead, charging party filed a response to the motion for summary judgment even though he had been explicitly instructed at the time of the November 28, 2012 final pre-hearing conference not to file a response to the motion for summary judgment until the show cause was resolved. His response to the summary judgment motion contained no response to that portion of the respondent's motion which argued that the case against Andrick had to be dismissed because Andrick was acting within the corporate shield.

DISCUSSION

Charging party's counsel has on three separate occasions missed deadlines that were of critical importance to the timely progression of this case. In the first instance, counsel inexplicably failed to file a preliminary pre-hearing statement. After a strong admonition to the charging party not to miss any further deadlines, counsel again failed to meet the deadline for filing the charging party's final list of witnesses, exhibits and contentions and failed to respond to a timely filed motion for summary judgment. He also obviously did not calendar the date for the final pre-hearing conference in this matter as the hearing officer's telephone call for the final prehearing conference caught counsel completely off guard on November 28, 2012 (as counsel acknowledged at the time of the call). He then failed to respond in any way to this tribunal's directive that he must show cause as to why the respondent's motion for summary judgment should not be granted under the auspices of M.R. Civ. Pro. 56(e). Counsel, through his repeated actions of failing to follow this tribunal's directives to timely file documents and to be prepared for the final prehearing, even in the face of a specific admonition from this tribunal, has essentially flaunted this tribunal's orders. He has offered no excuse except his failure to properly calendar his time for filing documents and responses even after he had once been admonished to be diligent in his filings and warned that future failure to do so would have consequences. His conduct merits dismissal of this case.

All litigants are expected to follow procedural rules. *Greenup v. Russell*, 2000 MT 154, ¶15, 300 Mont. 136, 3 P.3d 124. The Montana Supreme court has spoken directly to the problem brought on by a litigant's utter lack of regard for a tribunal's orders. The court has specifically held:

> Where it is determined that counsel or a party has acted willfully or in bad faith in failing to comply with rules of discovery or with court orders enforcing the rules ***or in flagrant disregard of those rules or***

> ***order***, it is within the discretion of the trial court to dismiss the action or to render judgment by default against the party responsible for the default.

First Bank v. Heidema, 219 Mont. 373, 376, 711 P.2d 1384 (1986)(emphasis added), citing *G-K Properties v. Redevelopment Agency,* 577 F.2d 645, 647 (9th Cir. 1978).

Counsel's conduct cannot be considered as anything other than a flagrant disregard for this administrative tribunal's orders. While it may be understandable that counsel could miss one deadline, it is completely incomprehensible that counsel could then miss two more deadlines, even after a specific admonition to be careful in the future and that further acts would not be dealt with leniently. Indeed, counsel's statement in his response to the order to show cause that he misplaced and/or mislabeled his client's file does not at all explain why he did not bother to respond in a timely fashion to the motion for summary judgment. Under the circumstances, the only rational conclusion that this tribunal can come to regarding counsel's conduct is that counsel literally could care less about complying with this tribunal's procedural orders. Such conduct cannot be tolerated if orderly adjudication is to take place.

Counsel's suggestion that the respondent has not been prejudiced by his conduct and therefore this matter should proceed to a hearing on the merits misses the point. First, the issue here is counsel's flagrant disregard for this tribunal's orders, not necessarily prejudice to the rights of the respondent. Moreover, prejudice does in fact exist in this case. The respondent timely comported with this tribunal's orders. The respondent did all that was required to be ready for hearing on December 6, 2012. The specter of litigation is the equivalent of the sword of Damocles being left suspended above the respondent's head. The respondent could have gone to hearing on December 6 and at least have had that anxiety lifted. Instead, the sword remains suspended above the respondent because charging party's counsel flagrantly disregarded two more filing deadlines. Thus, contrary to the charging party's suggestion, prejudice has accrued to the respondent because of charging party's counsel's conduct.

Seemingly aware that his conduct is subject to sanctions, charging party's counsel has attempted to shift the focus to cases surrounding excusable neglect as a basis for setting aside default judgments where an attorney's neglect has resulted in the entry of such judgment. The question in those cases has focused on whether the attorney's neglect should or should not be attributed to the client. The rule is that the neglect of an attorney generally may be attributed to the client except where the

attorney's actions constitute "actual misconduct." The standard under those cases is whether "the reasons given for the neglect are such that reasonable minds might differ in their conclusions concerning excusable neglect. If so, doubt should be resolved in favor of a trial on the merits." *Griffen v. Scott* ,(1985), 218 Mont. 410, 412, 710 P.2d 1337, 1338, *accord, Puhto v. Smith Funeral Chapels, Inc.*, 2011 MT 279, ¶12, 362 Mont. 447, 264 P.3d 1142. In both *Griffen* and *Puhto*, the court noted that the attorney's failure to properly calendar deadlines does not justify relieving the client from bearing the consequences for counsel's conduct. The instant case is no different. Charging party's counsel has not provided any factual basis for not attributing counsel's conduct to his client. Dismissal as a sanction is merited under the circumstances of this case.

In arriving at his determination that dismissal is warranted in this case, the hearing officer has carefully and dispassionately reflected on the conduct of charging party's counsel, its impact upon the efficient administration of justice and the prejudice to the parties. The hearing officer is fully cognizant of the fact that the sanction of dismissal is indeed a severe remedy and not to be lightly undertaken. However, after careful and due consideration of the extent of charging party's counsel's disregard of this tribunal's orders, the hearing officer is convinced that nothing short of dismissal is appropriate. Counsel's flagrant disregard for this tribunal's orders cannot be countenanced.

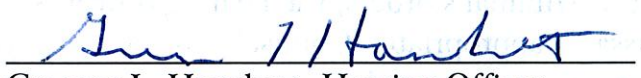
As the hearing officer is dismissing the case as a sanction for failure to follow this tribunal's orders, it is perhaps unnecessary to analyze the issue of the implications of M.R. Civ. Pro. Rule 56 (e) to this case in light of the charging party's failure to timely respond to the motion for summary judgment. The hearing officer, however, feels compelled to comment on that issue. Rule 56 (e) states that if an adverse party does not respond to a properly supported motion for summary judgment, summary judgment shall be entered against that party. The Montana Supreme Court has recognized that the rule means exactly what it says and that where a party fails to file a timely response to a motion for summary judgment "summary judgment, if appropriate, shall be entered if the opposing party does not respond and set forth specific facts . . ." *Joyner v. Onstad*, (1989), 240 Mont. 362, 363, 783 P.2d 1383, 1385.

Here, the charging party should have filed a response to the motion for summary judgment no later than November 23, 2012. He did not bother to respond by that date and had the hearing officer not issued the order to show cause, it is likely that charging party's counsel might never have responded to the motion.

Charging party's counsel has not even bothered to discuss how this tribunal is at liberty to ignore the clear requirement of Rule 56 (e) in light of charging party's failure to timely respond to the motion for summary judgment. The respondent's motion for summary judgment, properly supported by affidavits, demonstrates that there is no material dispute of fact in this case and that as a matter fact and law, the respondent would be entitled to judgment on the charging party's claims. The hearing officer, had he not decided to dismiss the matter as a sanction, would have been compelled to grant summary judgment to the respondent on all claims due to charging party's counsel's failure to timely respond to the motion.

In light of the above, this matter is hereby dismissed with prejudice subject only to the right of the Human Rights Bureau to intervene to seek affirmative relief only. Should the Human Rights Bureau wish to seek affirmative relief in this matter, it must do so by filing notice of such intent no later than January 28, 2013. As between the charging party and the respondent, judgment is entered in favor of the respondent on all claims presented by the charging party.

DATED: January 18, 2013



Gregory L. Hanchett, Hearing Officer
Hearings Bureau, Montana Department of Labor and Industry

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NOTICE OF ISSUANCE OF ADMINISTRATIVE DECISION

To: Gregory Tomicich, attorney for Daniel Scyphers, and Eric Nord, attorney for Tri-Pac (Ivan Andrick), Respondent.

The decision of the Hearing Officer, above, which is an administrative decision appealable to the Human Rights Commission, issued today in this contested case. Unless there is a timely appeal to the Human Rights Commission, the decision of the Hearing Officer becomes final and is not appealable to district court. Mont. Code Ann. § 49-2-505(3)(c)

TO APPEAL, YOU MUST, WITHIN 14 DAYS OF ISSUANCE OF THIS NOTICE, FILE A NOTICE OF APPEAL, WITH 6 COPIES, with:

Human Rights Commission
c/o Marieke Beck
Human Rights Bureau
Department of Labor and Industry
P.O. Box 1728
Helena, Montana 59624-1728

You must serve ALSO your notice of appeal, and all subsequent filings, on all other parties of record.

ALL DOCUMENTS FILED WITH THE COMMISSION MUST INCLUDE THE ORIGINAL AND 6 COPIES OF THE ENTIRE SUBMISSION.

The provisions of the Montana Rules of Civil Procedure regarding post decision motions are NOT applicable to this case, because the statutory remedy for a party aggrieved by a decision, timely appeal to the Montana Human Rights Commission pursuant to Mont. Code Ann. § 49-2-505 (4), precludes extending the appeal time for post decision motions seeking relief from the Hearings Bureau, as can be done in district court pursuant to the Rules.

The Commission must hear all appeals within 120 days of receipt of notice of appeal. Mont. Code Ann. § 49-2-505(5).

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CERTIFICATE OF MAILING

The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by depositing them in the U.S. Mail, postage prepaid, and addressed as follows, as well as to the indicated e-mail addresses:

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The undersigned hereby certifies that true and correct copies of the foregoing document were, this day, served upon the parties or their attorneys of record by means of the State of Montana's Interdepartmental electronic mail service.

MARIEKE BECK, BUREAU CHIEF
HUMAN RIGHTS BUREAU

DATED this 18th day of January, 2013.