7/14/92

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
HAWAIIAN INDEPENDENT REFINERY, INC.,	)	Docket No. RCRA-09-91-0007
	)	
	)	
Respondent	)	

ORDER DENYING IN PART AND GRANTING IN PART MOTION FOR DISCOVERY

For the reasons stated in its motion served March 10, 1992[1], respondent seeks an order from the undersigned Administrative Law Judge (ALJ) to compel complainant to respond to interrogatories and document requests. In substance, it seeks to have complainant produce its entire penalty calculation file for inspection and copying and to disclose the last known mailing address of Ms. Peggy Garties (sometimes Garties), who is represented by respondent to be the original pre-complaint author of the proposed penalty calculations in this matter. Complainant served its response in opposition to the motion on March 20, and respondent served a reply to the response on April 8. By order, served April 30, complainant was directed to respond to the reply, which it did in a submission served May 10. The arguments of the parties will not be repeated

[1] Unless indicated otherwise, all dates are for the year 1992.

here except to the extent deemed necessary by the ALJ for this order.

Before reaching the issues raised in the motion, some threshold thoughts are apposite. A large amount of discretion is accorded the ALJ in questions concerning discovery, a practice which may have salutary results. Stated broadly, it may lead to admissible evidence; it may define more precisely and narrow the issues; it may result in a more expedited hearing or the settlement of the matter. Notwithstanding these vaunted virtues, discovery as a litigation art may also be put to inappropriate uses to the disadvantage of justice. Therefore, let it be emphasized here that neither party will be permitted, under the guise of discovery, to engage in delaying, paper-producing, action-avoiding tactics. Further, discovery in an administrative hearing is different from federal civil proceedings. There is no basic constitutional right to pretrial discovery in administrative hearings. Silverman v. Commodity Futures Trading Commission, 549 F.2d 28, 33 (7th Cir. 1977); Klein v. Peterson, 696 F. Supp. 695, 697 (D.D.C. 1988). It has been held, however, that an administrative agency must grant discovery if "a refusal to do so would so prejudice a party as to deny him due process." McClelland v. Andrus, 606 F.2d. 1278, 1285-86 (D.C. Cir. 1979).

Administrative agencies, however, are not bound by the standards of the Federal Rules of Civil Procedure and they traditionally enjoy "wide latitude" in fashioning their own rules of procedure. In the Matter of Katzson Brothers, Inc., FIFRA

Appeal No. 85-2 (Final Decision, November 13, 1985); Oak Tree Farm Dairy, Inc. v. Block, 544 F. Supp. 1351, 1356 n.3 (E.D. N.Y. 1982). Under the Consolidated Rules of Practice (Rules), the parties are required only to exchange the names of the expert and other witnesses along with a "brief narrative" summary of their testimony, and documents which each party intends to introduce into evidence. 40 C.F.R. § 22.19(b). Beyond this, the parties are not obligated to complete any other discovery. Although voluntary discovery is strongly encouraged, it is not mandatory. After the prehearing exchanges, if the parties are not able to complete discovery voluntarily, then they may motion for further discovery pursuant to 40 C.F.R. § 22.19(f).

The significant language of section 22.19(f)(1) concerns delay, the obtainability of the information elsewhere and the probative value of the information sought. In pertinent part, the aforementioned provides:

> (f) Other discovery. (1) Except as provided by paragraph (b) of this section, further discovery, under this section, shall be permitted only upon determination by the Presiding Officer:
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> (i) That such discovery will not in any way unreasonably delay the proceeding;
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> (ii) That the information to be obtained is not otherwise obtainable; and
>
> (iii) That such information has significant probative value.

The stated basis for the motion is to acquire information concerning the proposed penalty. In this regard, one of the arguments advanced by respondent is that it have access to complainant's preliminary calculations in order to determine whether these resulted in inaccuracies in the final penalty calculations; and that "due process" requires respondent be allowed to review the data. The ALJ will return to the document request more fully below. For the moment, however, respondent is reminded that due process is not an immutable concept; it is not a fixed star in the constitutional constellation. The essence of due process is that "a person in jeopardy of serious loss [be given] notice of the case against him and the opportunity to meet it." Mathews v. Eldridge, 424 U.S. 319, 348 (1976). Due process of necessity varies with the circumstances of the individual case, and, of course, respondent is not entitled to privileged material.

The ALJ will address the Privacy Act more fully below, but before doing so another preliminary matter clamors for attention. Complainant makes the statement that "the purpose and logic of the Privacy Act would be substantially undercut if one agent of EPA could order another agent of EPA to release information explicitly covered by the Act" (emphasis added). (Complainant's submission served May 10, 1992, at 15-16.) As understood, complainant has characterized the undersigned, and apparently any other ALJ, as an "agent" of the agency in which he serves. This is grossly in error. Complainant and others who harbor similar thoughts should be disabused immediately of their misconceptions. First, and

without attempting to be exhaustive, counsel (agents) appearing for the Environmental Protection Agency (EPA) are frequently subject to orders of the ALJ. In this regard, complainant's attention is invited simply to the Rules. An ALJ occupies a unique adjudicatory position within the federal administrative judicial system. They are not to be confused with "administrative judges," "presiding officials" or any other person, by whatever designation, who has not met the rigorous selection process for appointment as an ALJ. The scope of this canvas is not sufficiently broad for the ALJ to treat this matter with the breadth and depth it deserves. Sparing the reader, the ALJ will just touch upon a few salient considerations. The position of ALJs (formerly called Hearing Examiners) was created by the Administrative Procedure Act of 1946, 5 U.S.C. § 551. This legislation sought to insure fairness and due process in federal rulemaking and adjudication proceedings. It provided interested parties and the public, whose affairs are controlled or regulated by agencies of the federal government, an opportunity for a "formal" hearing on the record before an impartial hearing officer. There are also statutory provisions concerning tenure, pay and prohibition against inconsistent duties. 5 U.S.C. §§ 7521, 5372 and 3105. These and other statutory provisions vest decisional independence in ALJs. The work of an ALJ is "functionally comparable" to that of a trial judge. Butts v. Economu, 438 U.S. 478, 513-14 (1978). Further, "[A]n agency's departure from the ALJ's finding is vulnerable if it fails to reflect attentive consideration to the ALJ's decision." East

Tennessee Natural Gas Company v. Federal Energy Regulatory Commission, 953 F.2d 675, 681 (D.C. Cir. 1992). If the aforementioned authorities show anything, it is that an ALJ is absolutely not an "agent" of the particular arm of government in which he is holding an appointment.

The ALJ now turns to that portion of the motion in which respondent seeks EPA's "entire penalty calculation file for inspection and copying . . . ." In respondent's view, the denial of the requested penalty documentation would deprive it of its constitutional right to due process, and if EPA fails to produce same it should be barred from introducing the penalty calculation in evidence at the hearing. (Motion at 1.) Respondent concedes that complainant's penalty calculating worksheet has been produced, but maintains this is inadequate for its defense for the reasons, among others, that the worksheets do not show the method of calculating economic benefit using the BEN computer model. (Motion at 1, 4.) "BEN" is a shorthand expression to represent the use of penalty standards and a computer model that purportedly calculates a respondent's economic benefit derived from the alleged violation. Here, there are four counts in the complaint for a total penalty of $621,200. The penalty worksheets are contained in Exhibit 6 of complainant's prehearing exchange. As understood at this time, the $358,600 penalty sought for Count 2 contains a BEN amount of $116,400. A penalty of $255,800 is sought for Count 4, which includes a BEN figure of $29,600. Thus, the total BEN amount is

$146,000 or 23 percent of the total penalty sought. The worksheets do not reflect a BEN for Counts 1 and 3.

Complainant maintains that much of the penalty documentation sought (the "entire penalty calculation file") by respondent is subject to the deliberative process, and attorney-work product privileges; and for that reason the motion should not be granted. The privilege issue was met recently in a final decision of EPA. The Chief Judicial Officer of EPA ruled that the deliberative process concerning the formulation by a final rule or penalty is privileged and shielded from documentary discovery. In the Matter of Chautauqua Hardware Corporation, (Chautauqua), EPCRA Appeal No. 91-1, at 12 (June 24, 1991). The test for deliberative process has been further explained in Jordan v. United States Department of Justice, 591 F.2d 753, 772-74 (D.C. Cir. 1978). First, the deliberative process must be predecisional. The privilege only protects those communications that occur before the adoption of the final policy. Second, the communication must be deliberative; that is, it must somehow reflect the mental processes by which a final policy was formulated. For public policy reasons, the deliberative process privilege is available in administrative proceedings governed by Part 22 of the Rules.[2] In Chautauqua, at 16, it was held that EPA did not have to assert affirmatively this privilege.

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[2] The deliberative process serves, among others, to assure that subordinates within an agency will feel free to provide the decision maker with their uninhibited opinions and recommendations without fear of later being subject to public ridicule or criticism. See Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

"It is sufficient that the Region vigorously opposed the release of the documents. It can be safely assumed that the Region would have invoked the privilege had it known this tribunal would recognize it."

Among its preachments, Chautauqua makes it clear that to the extent that respondent seeks discovery to challenge the substance of the penalty policy, the information does not have significant probative value within the meaning of section 22.19(f)(1)(iii). Such a request is not designed to prove a fact that bears on the appropriateness of the proposed penalty. Chautauqua, at 10-11.

Complainant has already furnished respondent with copies of the Penalty Policy (CX 7) and penalty calculation worksheets (CX 6). This is sufficient for respondent to comprehend the basis for the proposed penalty, and be able to defend itself against same, except to the extent mentioned below concerning the issues of BEN and Garties' last known address. Staff recommendations to decision makers concerning the prosecution of this case, and work prepared in anticipation of litigation by or at the direction of the attorney, are either privileged as attorney work products, the attorney-client privilege or come within the deliberative process privilege. This latter privilege applies to administrative proceedings and "that some, if not all, documents [sought by a respondent] pertaining to the Penalty Policy are protected by this privilege." Chautauqua, at 13.

Respondent asserts, however, that complainant, in voluntarily and knowingly disclosing inspection reports and penalty

calculations, has waived any privilege or work product protection. (Motion at 6.) It has not been waived. Complainant is correct that the authorities cited by respondent, purported to support its position, are inapposite. Further, complainant makes a trenchant point when it observes that "a ruling that introducing evidence concerning an agency's final decision waives the agency's claim to deliberative process privilege would defeat the purpose of the privilege, which is to protect from disclosure that deliberative process." (Response at 22.) It is concluded that complainant's arguments concerning the asserted privileges are correct.

In its response, complainant sets forth the penalty documentation provided to respondent. One of these is "(4) the economic benefit that Respondent gained from non-compliance, with a specific discussion of how EPA arrived at that amount, according to the BEN computer program." (Response at 15.) However, respondent alleges that the penalty worksheets do not disclose "(3) the method of calculating economic benefit using the BEN computer model." (Motion at 4.) As observed above, in CX 6 of complainant's prehearing exchange, it sets out the BEN worksheets for Counts 2 and 4. At this juncture, the parties are reminded of the telephone prehearing conference (PHC) initiated by the ALJ with the parties on June 18. As respondent may recall, complainant provided further explanation orally concerning the BEN calculations. Additionally, and pursuant to the oral order of the undersigned during the PHC, complainant was to furnish respondent with a further written explanation of how the BEN was calculated.

The next issue raised in the motion is the demand by respondent of the last known address of Garties, a former employee of EPA and who respondent maintains was primarily responsible for calculating the proposed penalty in this proceeding. (Motion at 1, 2.) Complainant counters by asserting that the release of any information concerning Garties is prohibited by the Privacy Act of 1974, 5 U.S.C. § 552a. Further, complainant argues that while Garties was involved in the penalty calculation, others who will be available at the hearing also engaged in the penalty process. For example, Ms. Rajagopalan (Rajagopalan), while not involved in the penalty calculation does have "first hand knowledge" of the subject matter, in particular the "factual basis of the prepared penalty since she received all information that forms the basis for this enforcement action . . . and the rationale for the prepared penalty." (Opposition at 10, 24-26; Lind Declaration of March 20, at 6.) Additionally, complainant argues that Garties "was not the sole author of the penalty calculation but was assisted by Matthew Hagemann (Hagemann) in this task; and that the calculations do not represent the single opinion of one person but the view of the agency." (Complainant's submission of May 10, at 6; Lind Declaration of May 8, at 1.) At this juncture, it is observed that the complainant's prehearing exchange states that Hagemann and Rajagopalan are listed among complainant's witnesses to appear at the hearing. However, in a telephone PHC with the parties on June 18, and as recalled, complainant conceded that Garties was the

person involved primarily in the penalty calculation prior to issuance of the complaint.

The respondent faces a proposed penalty of $621,200 in this proceeding, not an inconsequential sum of money. It may very well be that respondent will be able to comprehend how the penalty sought was arrived at, and be in a position to defend against its imposition by examination solely of Hagemann and Rajagopalan. However, in light of the important part played by Garties in calculation of the penalty before the complaint was issued, the ALJ is of the firm view that the examination of Garties by respondent should not be foreclosed, if it can be legally and practicably accomplished. Respondent should not be confined to the examination of two witnesses concerning the penalty issue when there is another witness who may be able to enlighten the penalty calculation question.

Respondent has met the requirements of 40 C.F.R. § 22.19(f)(1). The information sought concerning Garties will not unreasonably delay the proceeding. Though two other witnesses of complainant will testify concerning the penalty calculations, the information Garties possesses is not otherwise obtainable because her last known address has not been disclosed. (In the PHC of June 18, respondent stated that it has attempted to locate the last residence address through its own efforts but has been unsuccessful.) Further, the information that Garties possesses may be of significant probative value on the penalty issue.

Chautauqua is not a barrier to the request for the last known address of Garties. That case concerned matters of privilege as they related to the penalty policy. Here, respondent does not seek to challenge the policy but rather its goal is to obtain facts concerning how the penalty was calculated, hardly an unreasonable request.

The ALJ does not share complainant's thinking that the Privacy Act prevents EPA from disclosing the last known address of Garties to respondent. The ALJ is led ineluctably to this conclusion for the following reasons: This is not a situation where some person is prying out of mere curiosity or seeks the information for some questionable end. Here, a litigant seeks a piece of information, hardly of a highly personal nature, to assist it in contesting the imposition of a large penalty. In such a context, it should not be contended that the Privacy Act prohibits the release of the information. A balance must be reached between the private interest of not disclosing Garties' last known address[3] and the benefit to the public interest of having her testimony in a legal proceeding.

It is not necessary now to reach and decide whether this forum is a "court of competent jurisdiction" which would permit disclosure under subsection (b)(11) of the Privacy Act, though the ALJ is of a mind, when and if necessary, a persuasive argument can be made to support same. Also, it may be appropriate to mention in

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[3] Complainant relates that Garties is no longer an employee of EPA, and it believes that she is out of the country. (Submission of May 10, at 15 n.12).

passing that the regulations of the Office of Personnel Management (OPM), an agency having special competence in federal personnel matters, provide that disclosure need not be limited to compulsory process served by a court of competent jurisdiction. In pertinent part, OPM's regulation provides for disclosure without prior consent "pursuant to an order signed by the appropriate official of a court of competent jurisdiction or a quasi-judicial agency." 5 C.F.R. § 297.402 (emphasis added). It is beyond question that this ALJ's duties embrace, at the very least, those of a quasi-judicial nature. At this time, however, the ALJ does not choose to premise the conclusions reached below upon the quasi-judicial nature of his duties, but rather upon the rationale and authority below.

The Privacy Act was designed to restrict the collection, maintenance, use or dissemination by federal agencies of personal information about individuals. Stated broadly, it prohibits the non-consensual disclosure of information which is contained in an agency's records unless such disclosure comes within one of the stated exceptions. One of the exceptions is that stated in section 5 U.S.C. § 552a(b)(2), where disclosure would be "required under section 552 of this title." Section 552 is the Freedom of Information Act (FOIA), a statute in many ways interrelated with the Privacy Act.

The Garties question has arisen many times under FOIA in the labor relations context (citations omitted). Though there is a difference in thinking between the Federal Circuit Courts on the

issue, the ALJ is of the opinion that a more logical and equitable result, and one that supports respondent's discovery request, is that expressed in United States Department of Navy v. Federal Labor Relations Authority, 840 F.2d 1131 (3rd Cir. 1988). There, a union representing collective bargaining employees at a naval shipyard sought information concerning the names and home addresses of bargaining unit members. In significant part, it was held "that in determining whether the release of such data is barred by Exemption 6 [of FOIA][4], we must determine whether the material sought is subject to privacy protection and, if so, whether the invasion is not clearly unwarranted . . . ." We are mindful, however, that any consideration of exemptions under FOIA begins with "a well-known presumption in favor of disclosure." (At 1135.) The court held that "the minimal invasion of privacy effected by disclosure of the unit employees' names and addresses is far outweighed by the public interest to be served by such disclosure." (At 1137.) It is concluded that the request for the last known residence address comes within the exception of 5 U.S.C. 552(b)(2). In the instant matter, the name of the witness is known already, and respondent merely seeks Garties' last known address reflected in the EPA personnel files. Not only the public interest, but also the ends of justice, will be served by her appearance as a witness in this proceeding, or by way of deposition if that is deemed appropriate

[4] Exemption 6 of FOIA precludes the release of information concerning "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

by the ALJ, assuming, of course, that the witness can be located and is available.

IT IS ORDERED that:

1. Respondent's motion to have complainant produce its entire penalty calculation file be **DENIED**.

2. Respondent's oral motion during the PHC of June 18 requesting further information from complainant concerning how the BEN penalty was calculated, to the extent not complied with already, be **GRANTED**. Such information shall be provided to respondent within 15 days of the service date of this order.

3. Respondent's motion to be provided with the last known mailing address of Peggy Garties be **GRANTED**. Complainant shall provide respondent, in writing, with this information within 15 days of the service date of this order.

Frank W. Vanderheyden
Administrative Law Judge

Dated: July 14, 1992

IN THE MATTER OF HAWAIIAN INDEPENDENT REFINERY, INC., Respondent,
Docket No. RCRA-09-91-0007

Certificate of Service

I certify that the foregoing Order, dated 7/14/92, was sent this day in the following manner to the below addressees.

Original by Regular Mail to:

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Regional Hearing Clerk
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Marion I. Walzel
Secretary

Dated: July 14, 1992