10/8/91

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
MALONE SERVICE CO.,	)	Docket No. RCRA-VI-102-H
	)	
Respondent	)	

ORDER DENYING MOTION FOR ACCELERATED DECISION

In its motion, served August 12, 1991, together with affidavits and attachments, respondent seeks an accelerated decision granted in its favor for the reason that "as a matter of law upon each alleged violation in the Complaint . . . no material issues of fact exist." Motion at 2. Respondent also requests that "a hearing be held on all issues herein." Motion at 10. Complainant served its response to the motion on September 13, 1991. The Consolidated Rules of Practice provide only for a motion and response thereto, unless otherwise ordered by the Administrative Law Judge (ALJ). 40 C.F.R. § 22.16. Notwithstanding, respondent served a voluntary reply to the response on October 2, 1991.

To be decided here is whether or not there exists a "genuine issue of material fact" concerning liability which would preclude the granting of the motion pursuant to 40 C.F.R. § 22.20(a). The respective arguments of the parties are well known to them and will

not be repeated here except to the extent deemed necessary by this order.

The pertinent section of the Consolidated Rules of Practice, 40 C.F.R. § 22.20(a), states that the ALJ may grant an accelerated decision at any time:

> without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgement as a matter of law, as to all or any part of the proceeding. (emphasis added).

The ALJ may look to the Federal Rules of Civil Procedure (Fed. R. Civ. P.) for guidance in interpreting the Consolidated Rules of Practice. Here, the equivalent of an accelerated decision is Fed. R. Civ. P. 56 addressing summary judgment, which permit a final decision to be rendered without the time or expense of an evidentiary hearing, provided there are no genuine issues of material fact in controversy. Material facts are those which establish or refute an essential defense asserted by a party.[1] Although reasonable inferences may be drawn from the evidence, they must be viewed in the light most favorable to the party opposing the motion.[2]

Parenthetically, in light of the great number of cases on this ALJ's hearing docket, there may exist justifiably the temptation to be liberal in granting motions for accelerated decisions. Notwithstanding, an accelerated decision is a harsh remedy; it

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[1] Words and Phrases, "Material Fact."

[2] United States v. Diebold, 369 U.S. 654, 655 (1962). See also, 6 Moore's Federal Practice ¶ 56.15[1-00].

should be approached with circumspection. The solution would appear to be to appoint more ALJs, or to increase the support staff for same, rather than proceed in haste in an attempt to control one's docket.

The complaint contains three counts which, stated broadly, allege violations concerning ground water monitoring, financial assurance, and permit provisions. These purported violations are challenged in the motion. For the reasons stated therein, respondent argues with iron-hard insistence, that it complied with ground water monitoring requirements, sending all required information concerning same to the Texas Water Commission (TWC); that it maintained adequate financial assurance; and that it was not engaged in unauthorized permit activities. Respondent's reply essentially echoes its motion. However, complainant, in its response, disputes persuasively respondent's claims at every point.

The burden rests on the motioning party to demonstrate there are no material issues of fact in controversy. Here, respondent is requesting that the complainant's evidence be overlooked. It is a firmly-etched principle of law that for the purpose of summary judgment, once it is determined that there is an issue of material fact, the inquiry ends.[3] The ALJ is not empowered to resolve that issue or to weigh the evidence supporting each argument.[4] With regard to the affidavit of Arthur Malone, attached to the motion,

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[3] Homan Mfg. Co. v. Long, 242 F.2d 645, 656 (7th Cir. 1957).

[4] Cox v. American Fidelity & Casualty Co., 249 F.2d 616, 618 (9th Cir. 1957).

and concerning affidavits generally, it is observed that issues of credibility cannot be resolved by such documents. A party cannot cross-examine a piece of paper.

The motion, response, and reply show luminously that this matter is ladened with genuine issues of material fact, and flat-out is not one susceptible to an accelerated decision. The ALJ is led ineluctably, and reluctantly, to conclude that at this stage it is plain as a plate that an evidentiary hearing will be necessary to resolve the wrenching questions posed in the proceeding. Further, respondent's request for a hearing on the issues raised in the motion would be an arid exercise. The questions should be resolved by the evidentiary hearing.

IT IS ORDERED that:

1. Respondent's request for a hearing on the motion be DENIED.

2 Respondent's motion for an accelerated decision be DENIED.

3. No further pleadings concerning an accelerated decision shall be submitted.

4. The parties continue good faith efforts to settle this matter.

Frank W. Vanderheyden
Administrative Law Judge

Dated: October 8, 1991

IN THE MATTER OF MALONE SERVICE CO., Respondent,
Docket No. RCRA-VI-102-H

Certificate of Service

I certify that the foregoing Order Denying Motion for Accelerated Decision, dated 10/8/91, was sent this day in the following manner to the below addressees:

Original by Regular Mail to:

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Secretary

Dated Oct. 9, 1991