**UNITED STATES**
**ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

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| **In the Matter of:** | **)** | |
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| **G&C Food Distributors & Brokers, Inc.,** | **)** | **Docket No. EPCRA-02-2000-4001** |
| | **)** | |
| **Respondent** | **)** | |

## Order on Complainant's Motion to Preclude the Admission of Testimony

This is a proceeding under Section 325(c) of the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA" ), 42 U.S.C. § 11001 *et seq.*, involving four counts for violations[1] of EPCRA Sections 311 and 312, 42 U.S.C. §11021 and §11022. Subsequent to the prehearing exchange ordered by this Court on January 8, 2001, Complainant, the United States Environmental Protection Agency ("EPA") on April 25, 2001, filed a motion to preclude the testimony of the Respondent, G&C Food Distributors & Brokers, Inc.'s, attorney, Kevin C. Murphy.

Specifically, EPA's motion argues that the testimony of Mr. Murphy should be precluded because it concerns the "conduct of settlement negotiations between Respondent and the Complainant." *See* Complainant's Memorandum of Points and Authorities in Support of Motions for Partial Accelerated Decision as to Liability and to Preclude the Admission of Testimony ("Motion to Preclude Testimony") at 14 (quoting Respondent's Prehearing Exchange, ¶ 3). The EPA argues that such testimony is inadmissible under Section 22.22(a) of the Consolidated Rules of Practice Governing the Assessment of Civil Penalties and the Revocation or Suspension of Permits ("Rules of Practice").

Section 22.22 (a) of the Rules of Practice provides in pertinent part:

> (a) General. (1) The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value, except that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence (28 U.S.C.) is not admissible.

40 C.F.R. 22.22(a)(1)

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[1]In its June 12, 2001 Order, the Court granted EPA's uncontested Motion for Accelerated Decision as to liability.

Rule 408 of the Federal Rules of Evidence, in turn, states:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Fed. R. Evid. 408.

EPA argues that the admission of Mr. Murphy's testimony would be improper on two grounds. First, the admission of such testimony would inhibit the freedom of communication with respect to compromise and thus would be contrary to the promotion of the public policy that favors compromises and settlement of disputes. Motion to Preclude Testimony at 14. Second, the testimony regarding the content or conduct of the settlement would be irrelevant as to either the issue of liability or the appropriate amount of penalty. *Id.* EPA asks that Mr. Murphy's testimony be precluded and if the evidence is allowed, that EPA be allowed to amend its witness list to include a witness to rebut Mr. Murphy's testimony. *Id.* at 15.

The Respondent, in its Memorandum in Opposition to Complainant's Motion to Preclude Testimony, argues that the testimony is admissible under Rule 408 because the evidence is offered "for another purpose," namely the "such other matters as justice may require" prong of the EPA's penalty assessment policy.[2] These matters include "Respondent's attitude, its

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[2]EPA argues that the factors used to calculate the penalty for EPCRA Sections 311 and 312 are not found in 42 U.S.C. § 11045(b)(1)(C), as the Respondent suggests in its Opposition Memorandum, but rather, that they are listed in the relevant penalty policy. Enforcement Response Policy for Sections 304, 311, and 312 of the Emergency Planning and Community-Right-To-Know Act and Section 103 of the Comprehensive Environmental Response Compensation and Liability Act ("Penalty Policy"). Complainant's Memorandum in Reply to Respondent's Response to Complainant's Motion to Preclude the Admission of Testimony at 2-3; *see* Respondent's Memorandum in Opposition to Complainant's Motion for Preclude Testimony at 2. The Court notes that neither assertion is entirely correct. While, in the first instance, the Court must consider the relevant agency penalty policy, it may then decide to depart from that policy upon articulating a rational basis for such departure. Should this occur the Court would then turn to the section referred to by the Respondent. There is ample precedent for applying the criteria listed at Section 11045(b)(1)(C), as the particular statutory section provides only that the penalty is not to exceed $25,000 for each violation. *See*, e.g., *Bituma-Stor*,

willingness to perform a supplemental environmental project and the alleged bad faith of the Agency during the negotiation process." *Id.* at 2 (quoting Declaration of Kevin C. Murphy at ¶ 4). The thrust of the Respondent's argument appears to be that EPA's conduct during the negotiation conference was inapposite to both the public policy favoring settlement and the EPA's own settlement policy.

The Respondent correctly argues that in certain circumstances, evidence of conduct and statements made during settlement negotiations are admissible under Rule 408. However, for evidence to be admissible under Section 22.22 of the Rules of Practice, the evidence must not only be admissible under Rule 408 of the Federal Rules of Evidence, but must also be relevant to the issues at hand. Therefore, in order for Mr. Murphy's testimony to be admissible, it must fall under an exception to the general rule against admitting evidence concerning settlement negotiations and must go to prove or controvert an element concerning liability or the propriety of the civil penalty sought by EPA.

The Court notes that while Section 22.18(b) of the Rules of Practice encourages settlements, neither the Rules of Practice nor the relevant EPA Enforcement Response Policy, based on which the proposed penalty was calculated, require the EPA to settle with respondents with respect to either liability or penalty. *See* 40 C.F.R. Part 22; Enforcement Response Policy for Sections 304, 311, and 312 of the Emergency Planning and Community-Right-To-Know Act and Section 103 of the Comprehensive Environmental Response Compensation and Liability Act ("Penalty Policy"). Furthermore, while factors such as Respondent's attitude[3] (including Respondent's cooperation and willingness to settle) and willingness to conduct supplemental environmental projects are factors listed in the Penalty Policy as those to be considered in determining the appropriate penalty, the policy does not require the EPA to give credit for these concessions against the amount of penalty sought. *See* Penalty Policy at 1, 28-29.

As noted, in determining the appropriateness of a proposed penalty, an administrative law judge is not necessarily bound to the Penalty Policy under which the proposed penalty was calculated. *See Landfill Inc.*, RCRA Appeal No. 86-8, 3 E.A.D. 461 at 470 (EAB, Nov. 30, 1990). However, the judge is obligated to consider the Penalty Policy and, if departing from it, to explain the reasons for that action. *Id.* Therefore, while the EPA is not required to settle or to reduce penalties in accordance with the factors listed in the Penalty Policy, the party's conduct and statements made during the negotiation process may very well be material evidence admissible under Rule 408 because the Penalty Policy specifically references factors related to

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*Inc.*, No. EPCRA 7-99-0045, January 22, 2001, 2001 WL 66547 (E.P.A.) and *Tebay Dairy Company*, No. EPCRA III 236, November 28, 2000, 2000 WL 1877875 (E.P.A.).

[3]Section VIII, G: "attitude," provides for consideration of the respondent's cooperation throughout the entire process and affords a 25 percent reduction of the penalty when EPA deems it is warranted. According to EPA's Attachment 2, Respondent received no reduction on this basis.

settlement negotiations as affecting the determination of the appropriate size of a penalty.

The brevity of Respondent's Memorandum in Opposition to the Complainant's Motion to Preclude Testimony makes specific determinations premature at this time. With an eye toward consideration of whether questions pertain to EPA's proper application of its own policy, the Court will consider the testimony of the Respondent's witness, Kevin C. Murphy, (as well as his cross-examination, and the testimony of EPA witnesses on these matters) and rule on specific objections to questions as they are posed. Questions concerning specific settlement figures or offers will not be permitted. Should the Court determine from this testimony that EPA did not adhere to its policy and consequently that departure[4] from the policy is appropriate, the Initial Decision will proceed to assess penalties for the Counts upon application of the appropriate criteria.

No further motions will be entertained. The case will now be set for a hearing, which will be limited to the issue of the appropriate penalty for each of the four counts.

**So Ordered.**

William B. Moran
United States Administrative Law Judge

Dated: August 29, 2001

[4]This is not to suggest that such testimony would be the only basis to depart from the proposed penalty. A court may depart from the agency's computation under its policy upon articulating the rationale basis for the departure.

In the Matter of G&C Food Distributors & Brokers, Inc., Respondent
EPCRA-02-2000-4001

CERTIFICATE OF SERVICE

I certify that the foregoing **Order on Complainant's Motion to Preclude the Admission of Testimony**, dated August 29, 2001, was sent this day in the following manner to the addressees listed below:

Original by Regular Mail to:

Karen Maples
Regional Hearing Clerk
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Copy by Facsimile & Regular Mail to:

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Rachele D. Jackson
Legal Staff Assistant

Dated: August 29, 2001