IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID B. SHILLMAN, *et al.*,	)	CASE NO. 1:97CV1355
Petitioners,	)	
vs.	)	Judge John M. Manos
UNITED STATES OF AMERICA, ENVIRONMENTAL PROTECTION AGENCY,	)	
Respondent.	)	MEMORANDUM OF OPINION

On May 14, 1997, David B. Shillman, Dorothy L. Brueggemeyer, and J.V. Peters & Company, Petitioners, brought this action seeking judicial review of an administrative decision entered against them and in favor of the United States Environmental Protection Agency ("EPA"). Both petitioners and respondent filed motions for summary judgment. For the reasons provided below, the EPA's, motion as to the complaint and counterclaim is granted, and the petitioners' motion is denied.

I. FACTUAL BACKGROUND

Beginning in May 1980, David Shillman leased property located at 17030 Peters Road in Middlefield Township, Ohio. In June of 1980, a Partnership, "J.V. Peters & Company" ("the

Partnership.

On January 30, 1981, about two weeks after receiving the report, the Partnership was dissolved and its assets were transferred to an Ohio Corporation, the J.V. Peters and Company, Inc. ("the Corporation"), formed by Shillman and Brueggemeyer. The business of the Corporation was identical to that of the Partnership. Shillman served as the Corporation's president and chairman of the board. Brueggemeyer was its secretary and treasurer. (EAB Decision, at 7.)

II. PROCEDURAL HISTORY

On April 17, 1981, the EPA filed an administrative complaint against J.V. Peters and Company and assessed a $25,000 civil penalty against it based upon the findings from the December 1980 inspection, pursuant to 42 U.S.C. § 6928 (a) and 40 C.F.R. § 22.13. On May 12, 1981, Mr. Shillman, in his capacity of president and chairman of the board, answered the complaint. While insisting that the penalty could not stand against the Corporation because it did not exist at the time the alleged violations occurred, he admitted some of the violations and denied others.

Administrative Law Judge ("ALJ") Marvin Jones was assigned to the case. On September 20, 1983, EPA filed a "Motion for Leave to Withdraw Administrative Complaint" without prejudice. ALJ Jones granted this motion pursuant to 40 C.F.R. § 22.14 (e).

On February 2, 1984, EPA filed a new complaint, captioned "First Amended Complaint," alleging the same violations as the original complaint, assessing the same $25,000 civil penalty,

---

permit issued to the violator. 42 U.S.C. § 6928 (c).

and naming only the Corporation. Despite objecting that the "amended" complaint was a new complaint because the original complaint had been dismissed without prejudice, the Corporation answered the complaint and, again, raised the defense that it was not in existence when the violations occurred. ALJ Jones set the matter for an evidentiary hearing pursuant to 42 U.S.C. § 6928 (b).[3]

The hearing lasted from October 23 to 25, 1984. After the EPA presented its case, the Corporation moved for a directed verdict, again asserting that it was not in existence on the date of the alleged violations. The ALJ denied the motion. Afterward, the Corporation put on its case consisting primarily of Shillman's testimony on the nature and the extent of the violations occurring in the December 1980 and the relationship between the Partnership, the Corporation, and the individuals involved with each.

In April of 1985, over five months after the hearing, the EPA filed a motion to amend its complaint in order to add the Partnership and Shillman-- Brueggemeyer was not named. The ALJ did not rule on this motion. Instead, on May 15, 1985, ALJ Jones issued his initial decision, finding the Corporation, the Partnership, and Shillman liable for the violations and imposed the $25,000 civil penalty. All three respondents appealed this decision, and the matter was referred to the Chief Judicial Officer (the "CJO") of the EPA.

On May 9, 1986, the CJO vacated the ALJ's decision on the ground that the Partnership

---

[3] 42 U.S.C. § 6928 states, in pertinent part:

> Any order issued under this section shall become final unless, no later than thirty days after the order is served, the person or persons named therein request a public hearing. Upon such request the Administrator shall promptly conduct a public hearing.

and Shillman were prejudiced by being denied fair notice of their potential liability for the penalty assessed against the Corporation and by being denied an opportunity to contest their liability. The CJO, however, remanded the order and with instructions that the EPA be permitted to amend its complaint to name the Partnership and Shillman and that each should have a hearing to present evidence before being subject to liability for the civil penalty.

In June of 1986, EPA filed a "Motion for Reconsideration", which was denied by the CJO. On December 17, 1986, the ALJ issued an order instructing the EPA to notify him of how it wished to proceed, given the CJO's opinion. The EPA did not respond. Subsequently, the ALJ dismissed the case with prejudice on the ground that the EPA was in default for failing to comply with his December 17th order. In September of 1987, EPA sought relief from the dismissal. On October 16, 1987, the ALJ issued an order granting the EPA's motion for relief from default and permitting it to file a second amended complaint.

In November of 1987, EPA filed a "Second Amended Complaint" naming the Corporation, the Partnership, Shillman, Brueggemeyer, and Vasi. All except Vasi[4] filed answers denying the allegations. Once again, the Corporation asserted the defense that it did not exist on the date the violations occurred. The others asserted that the statute of limitations had expired and therefore the claims were time-barred according to the five year statute of limitations set out in 28 U.S.C. § 2462.[5]

---

[4] Because Vasi never answered the second amended complaint, the ALJ found him to be in default and determined that he admitted all of the allegations against him. Vasi did not appeal the decision. He is now deceased.

[5] § 2462 provides that no action shall be entertained "unless commenced within five years from the date when the claim first accrued." 28 U.S.C. § 2462.

On April 13, 1988, the EPA moved for an accelerated decision, pursuant to 40 C.F.R. § 22.20[6], against each of the respondents on the ground that the testimony and evidence adduced at the October 1984 hearing established that all of those named in the second amended complaint were liable for the December 1980 violations.

On September 30, 1988, the ALJ granted the EPA's motion for an accelerated decision. Relying on the testimony from the hearing held in October 1984 and the answers to the second amended complaint, the ALJ found Shillman, Brueggemeyer, Vasi and the Partnership jointly and severally liable for the $25,000 civil penalty. He detailed that Shillman was liable as the "operator" of the Facility, and Brueggemeyer and Vasi were liable as the Facility's "owners". He did not find the Corporation liable. He also rejected the statute of limitations defense as not applying to the government and not applying to the type of civil penalty assessed (remedial in nature rather than a sanction).

On October 24, 1988, the Partnership, Shillman, and Brueggemeyer appealed to the CJO. On August 7, 1990, the CJO issued a decision affirming the ALJ's granting of an accelerated decision in favor of the EPA. He also found that the second amended complaint was filed timely under the "relation back" doctrine of the Federal Rules of Civil Procedure 15(c).

On September 4, 1990, the Partnership, Shillman, and Brueggemeyer appealed to the United States Court of Appeals for the Sixth Circuit, pursuant to the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 704, 706. On December 13, 1990, the case was

---

[6] 40 C.F.R. § 22.20 provides that the ALJ may issue an accelerated decision without conducting a hearing if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.

transferred to this Court, pursuant to 28 U.S.C. § 1631.[7] The Court affirmed the CJO's ruling on the statute of limitations issue, but remanded the case on the ground that the Partnership, Shillman, and Brueggemeyer were entitled to a public hearing, and ordered the ALJ to conduct an evidentiary hearing allowing them the opportunity to present evidence to contest their liability for the penalty. See 42 U.S.C. § 6928(b).

On remand, the case was heard by ALJ Gerald Harwood. In September of 1993, ALJ Harwood informed the parties that he would accept as evidence testimony from the 1984 hearing. In October of 1994, he held the evidentiary hearing. The EPA did not present new witnesses, but made its witnesses who testified in 1984 available for cross-examination. During the hearing, the petitioners, for the first time, objected to EPA's reliance upon the testimony from the 1984 hearing. They argued that EPA could not establish a *prima facie* case by merely relying on prior testimony and not examining live witnesses. Despite ALJ Harwood's offer to permit Petitioners to cross-examine the witnesses, the petitioners declined to do so, and refused to present any defense. The ALJ reviewed the 1984 transcript *de novo*.

In July of 1995, ALJ Harwood issued his decision, finding the Partnership, Shillman, and Brueggemeyer jointly and severally liable for the violations and assessing a civil penalty of

---

[7] Section 1631 provides:

> Whenever a civil action is filed in a court as defined in section 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such a court and that court shall, if it is in the interest of justice, transfer such action or appeal to any court in which the action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it is was actually filed in or noticed for the court from which it is transferred.

$23,500 against them.[8] He concluded that incorporating the testimony from the 1984 hearing into the record did not deprive the petitioners of their due process rights because the petitioners were provided the opportunity to cross-examine witnesses and present evidence in their defense, even though they declined to do so. Petitioners appealed to the Environmental Appeals Board ("EAB"), the successor to the CJO.

On April 14, 1997, the EAB issued a decision rejecting the petitioners' argument that the complaint was time-barred, deferring to this Court's prior ruling as binding precedent. The EAB found that Judge Harwood correctly followed the Court's ruling rejecting the statute of limitations defense and, thus, affirmed Judge Harwood's refusal to dismiss. The EAB also found no due process violations after considering the numerous opportunities the petitioners had to present their case and the wide latitude accorded the ALJ in structuring hearings. The EAB described the evidence from the hearing held in 1984 as "probative, relevant, and reliable, and thus properly admitted against Respondents." (EAB Decision, at 31.)

On May 14, 1997, Petitioners filed a complaint seeking judicial review of the final decision of the EPA imposing liability and assessing a $23,500 fine. On October 20, 1997, the EPA filed an amended answer and counterclaim seeking a judgment of $23,500 plus accrued interest, penalties, and costs since June 17, 1997 against J.V. Peters and Company, Shillman, and Brueggemeyer, jointly and severally. On February 3, 1998, the EPA moved for summary judgment on the complaint and its counterclaim. On April 1, 1998, Petitioners filed a cross-motion for summary judgment.

---

[8] The initial penalty of $25,000 was reduced by $1500 by Judge Harwood.

III. STANDARD OF REVIEW

A. Motion for Summary Judgment

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

The party moving for summary judgment bears the initial burden of production under Rule 56. The burden may be satisfied by presenting affirmative evidence that negates an element of the non-movant's claim or by demonstrating "an absence of evidence to support the non-moving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986).

If the movant meets this burden, the non-movant must "set forth the specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The substantive law identifies which specific facts are material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). To avoid summary judgment, the non-movant must "make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322.

"The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson, 477 U.S. at 256 (citing Adickes v. Kress & Co., 398 U.S. 144, 158-59 (1970)). However, the non-movant must "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). "[T]he mere existence of some alleged factual disputes between the parties will not defeat an otherwise properly supported motion" for summary judgment.

Anderson, 477 U.S. at 247-48.

B. Judicial Review of a Final Administrative Decision

Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706, provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of agency action. The reviewing court shall —
>
> . . . .
>
> (2) hold unlawful and set aside agency action, findings and conclusions found to be-
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706.

IV. STATUTE OF LIMITATIONS

A. LAW

The applicable statute of limitations, 28 U.S.C. § 2462, imposes a five year time limitation on the commencement of any action to recover civil penalties. An action may, however, survive the statute of limitations restriction if it "relates back" to a complaint filed within the proper time period.

The doctrine of relation back, found in Federal Rules of Civil Procedure 15 (c), allows amendments to pleadings if they "relate back" to the original pleading. An amendment "relates back" to the date of the original pleading when:

> 1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or
> 2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or
> 3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

Fed. R. Civ. P. 15(c) (West, 1998).[9]

The language of 15(c) requires that four factors be present in order for an amendment to relate back:

(1) the basic claim must have arisen out of the conduct set forth in the original pleading;

---

[9] In 1991 Fed. R. Civ. P. 15 (c) (3) was amended to expand the time frame required for notice of the lawsuit to be given to defendants by providing that relation back was to be allowed where notice was received within 120 days after the expiration of the limitations period. This added the time allowed for service of the complaint under Rule 4 (m) to the time period established by Schiavone. This change, however, is not applicable in this case. The same standard for relation back that governed the Court's 1991 decision is relevant here.

(2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense;
(3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and
(4) the second and third requirements must have been fulfilled within the prescribed limitations period.

Schiavone v. Fortune, 477 U.S. 21, 29 (1986).

A "mistake" under 15 (c) (3) refers to an error concerning the proper identification of a party, and relation back is only permitted to correct a misnomer of a defendant where the proper defendant is already before the court. Worthington v. Wilson, 8 F.3d 1253, 1256 (1993). A mere lack of information on the identity of a party, such as naming a John Doe defendant and seeking to add the correct party after the statute of limitations has expired, is not sufficient to constitute a mistake. Id; see also Cox v. Treadway, 75 F.3d 230, 240 (1996). A mistake must be an error in naming the correct party. The effect of correcting such a mistake is merely to change the name under which a defendant is sued. Worthington v. Wilson, 8 F.3d at 1256.

B. ANALYSIS

The first issue before this Court is whether the CJO's decision that the second amended complaint was not time-barred is correct. Petitioner argues that the CJO's decision was incorrect because the complaint was filed outside of the five-year statute of limitations and did not relate back to the previously filed action. Respondent counters that the CJO correctly determined that the second amended complaint related back, and, thus, was timely filed. In 1991, the Court reviewed this issue and affirmed the decision of the CJO.

After a thorough review of this case, the Court finds, as it did in 1991, that the CJO's determination that the second amended complaint related back was correct.

The CJO applied Rule 15(c) to resolve the statute of limitations question by determining whether the doctrine of relation back was applicable. In 1991, in accordance with section 10(e) of the A.P.A., 5 U.S.C. § 706, which requires the reviewing court to set aside any action taken that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," the Court considered whether the CJO's rejection of petitioners' time-bar argument was neither arbitrary and capricious, nor an abuse of discretion or violation of a constitutional right held by Petitioners and found that it was not.

The Court reiterates that the CJO had wide latitude in making such decisions, and properly concluded that the application of Rule 15 was proper. Furthermore, the CJO applied Rule 15 in a reasonable manner that was consistent with notions of fundamental fairness. As the Court stated in its Memorandum of Opinion issued in 1991,

> Rule 15(c) is an established rule of federal practice; its proper application is consistent with fundamental concepts of fairness and notice. Moreover, the rule was applied in a reasonably fair manner by the CJO in this case: it is not disputed that the claim arose out of the conduct set forth in the first amended complaint; the additional parties, Shillman, Bruggemeyer, and the partnership, had sufficient notice of the USEPA action before April 1985 that they could properly maintain a defense; and they should have been aware by April 1985 that, notwithstanding the fact that the USEPA brought its action against the corporation, that they could be potentially liable for the violations.

J.V. Peters and Co., Inc v. William K. Reilley, Adm'r U.S. Environmental Protection Agency, No. 1:90CV2246, slip op. at 12 (N.D. Ohio Aug. 13, 1991).

Although Rule 15(c)(3) was amended in 1991, the parties agree that the portion of the rule applicable to this case was not altered by the amendment. [10] The parties also agree that first

---

[10] Prior to December 1991, subsection (3) of Rule 15(c) did not contain the language "within the period provided by rule (m) for the service of the summons and complaint." Instead

two criteria of 15(c)(3) have been met: (1) the claims against the petitioners arose out of the same conduct and that (2) the petitioners received notice within the statute of limitations. (Petitioners' Cross-Motion for Summary Judgment, at 20.) They disagree however, as to whether "the Petitioners knew, or should have known that, but for a mistake in identity of the proper party, EPA would have named them as respondents within the limitations period." (Id.)

The Sixth Circuit has stated that the failure to name a proper party to a lawsuit must result from a mistake in name only, and is fixed by "correct[ing] of misnomers ... but not the addition or substitution of new parties after the statute of limitations has expired." In Re Kent Holland, 928 F.2d 1448, 1450 (6th. Cir 1991), citing Ringrose v. Engelberg Huller, 692 F.2d 403, 405 (6th Cir. 1982).

The CJO found that Petitioners knew or should have known that but for a mistake in naming the parties, the EPA would have named them as the parties responsible for the violations. The record supports that conclusion. The EPA intended to bring a lawsuit against those responsible for the violations at the Facility. When the original complaint was filed in April of 1981, the Corporation was the owner and operator of the Facility, Shillman was the president and chairman of the board, and Bruggemeyer was the secretary and treasurer. Shillman answered the evidentiary hearing held in 1984, it was established that the Partnership had transferred all of its assets and liabilities to the Corporation. In April 1985, the EPA filed a motion to amend in order

---

the rule said "within the limitations period." The 1991 Amendment enlarged the relevant time period by providing that relation back was to be allowed where notice was received within 120 days after the expiration of the limitations period, thereby, adding the time allowed for service for the complaint under Rule 4(m) to the time period established by Schiavone v. Fortune, 477 U.S. 21 (1986). E.g., Lovelace v. O'Hara, 985 F.2d 847, 850 (6th Cir. 1993).

to include Shillman and the Partnership. Though the ALJ did not rule on this motion, the EPA had made the effort to name the correct parties while still within the statute of limitations. When the EPA filed its "Second Amended Complaint," it did name the proper parties: the Partnership, Shillman, Brueggemeyer, and Vasi. Given the fact that the parties were so interrelated and that Shillman and Brueggemeyer were intricately involved in the case from its inception, the CJO correctly found that an "identity of interests" existed between the Corporation and the Partnership. This "identity of interests" was so close that, the CJO concluded, Petitioners should have known that but for a mistake by EPA, they would have named the correct party in the lawsuit. Schiavone v. Fortune, 477 U.S. at 28.

The parties were essentially one and the same. The Court does not find credible Petitioners argument that there was no way they could have known of EPA's true intention to sue the Partnership until the "Second Amended Complaint" had been filed in late 1987. Given that there was such a close commonality of interest and identity, but for the EPA's misdesignation in name only, the Partnership, Shillman, and Brueggemeyer knew or should have known that they were involved in the lawsuit. Thus, the Court affirms the rulings of the CJO finding that the doctrine of relation back applies and that the second amended complaint was filed timely.

V. DUE PROCESS VIOLATIONS

A. LAW

According to 40 C.F.R. § 22.24, "the complainant has the burden of ... proving that the violation occurred ... and that the proposed civil penalty ... is appropriate. Following the establishment of a prima facie case, respondent shall have the burden of presenting and of going forward with any defense." 40 C.F.R. § 22.24. Thus EPA had the burden of establishing a *prima*

facie case before Petitioners were obligated to present any defense.

The fundamentals of due process require only that Petitioners be given the opportunity to be heard in a "meaningful time and in a meaningful manner." Matthews v. Eldridge, 424 U.S. 319, 333 (1976), citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965). However, a presiding officer possesses "wide discretion to control the order and format of administrative hearings." EAB Decision at 26. The Agency's Consolidated Rules of Practice ("the Rules") gives a presiding officer the authority to "do all ... acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules." 40 C.F.R. § 22.04 (c) (10).

Additionally, the Rules clearly allow for the use of written statements in lieu of live testimony. See 40 C.F.R. §§ 22.22 (c) & (d).[11] (See also EAB Decision at 26.) However, even when the rules do not specifically provide for non-oral testimony, the presiding officer has explicit authority to allow it. Section 22.22 (b) states that witnesses shall be examined orally, "*except as otherwise provided* in these rules of practice or *by the Presiding Officer*." 40 C.F.R. § 22.22 (b) (emphasis in the original).

Courts have found that declarations and exhibits may be accepted in lieu of live testimony consistent with due process as long as "the parties [a]re afforded 'ample opportunity to submit their evidence.'" See In Re Adair, 965 F.2d 777, 779 (1992) (upholding bankruptcy

---

[11] § 22.22 (c) states, in relevant part: "The Presiding Officer may admit an insert into the record as evidence, in lieu of oral testimony, statements of fact or opinion prepared by a witness." 40 C.F.R. § 22.22 (c).
§ 22.22 (d) states, in relevant part: "The Presiding Officer may admit into evidence affidavits of witnesses who are unavailable. The term 'unavailable' shall have the meaning accorded to it by Rule 804(a) of the Federal Rules of Evidence." 40 C.F.R. § 22.22 (d).

court's standard procedure requiring written direct testimony and oral cross and redirect examinations as not violative of due process). Fed.R.Evid. 611 (a) permits courts to exercise "reasonable control over the mode and order of interrogating witnesses and presenting evidence" to ensure that: 1) truth is ascertained; and 2) needless consumption of time is avoided. Fed.R.Evid. 611.

Additionally, Fed. R. Civ. P. 43 (a)[12] "ensures that the accuracy of witness statements may be tested by cross-examination and ... allow[s] the trier of fact to observe the appearance and demeanor of the witnesses." See In Re Adair, 965 F.2d at 779; see also Saverson v. Levitt, 162 F.R.D. 407 (1995) (admitting direct testimony by way of declaration or written affidavit in lieu of the usual method of direct examination, as long as a full cross-examination was permitted).

B. ANALYSIS

Petitioners claim that ALJ Harwood erred in allowing EPA to establish its *prima facie* case against them in 1994 by relying on testimony from the 1984 hearing and making witnesses available for cross-examination.

In September of 1993, thirteen months before the hearing took place, ALJ Harwood notified the parties that 1984 testimony would be accepted. Petitioners expressed no objections until the day the hearing commenced, at which point they argued that due process required EPA to present live witness testimony in order to establish its *prima facie* case. This argument lacks merit.

---

[12] Rule 43 (a) states: "[i]n all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court."

An ALJ, like any presiding officer, has wide latitude in structuring the hearing as long as both sides are given the opportunity to present evidence on their behalf. ALJ Harwood's procedures were consistent with due process. In fact, he conducted the 1994 hearing in accordance with the Court's 1991 Opinion requiring that the petitioners be given the "opportunity to present evidence" in defense of the penalty assessed against them. J.V. Peters v. Reilly, No. 1:90 CV 2246 (N.D. Ohio Aug 13, 1991) (Order). He allowed the EPA to submit the 1984 testimony in lieu of live witness testimony; however, he required that witnesses be made available for cross-examination. Petitioners had the opportunity to cross-examine each witness as well as present their own evidence, but chose to do neither. They cannot now claim a violation of due process.

Petitioners contend they were denied the opportunity to object to the 1984 evidence, but did not specify to what they would have objected if they had been given the chance. They also contend the ALJ was not able to assess the credibility of witnesses. The ALJ noted in his decision that had Petitioners conducted cross-examinations of witnesses, he would have had that opportunity.

Petitioners further contend that the evidence against them was inadmissable hearsay because they were not parties to the lawsuit at the time of the 1984 hearing. The EAB Decision correctly stated that the "controlling inquiry in determining whether particular evidence is admissible is whether the evidence is relevant, probative and reliable." EAB Decision at 30. See also 40 C.F.R. § 22.22 (a).[13] The Court is not persuaded by these arguments.

---

[13] 40 C.F.R. § 22.22 (a) states, in pertinent part: " The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of

The EAB Decision correctly found that the acceptance of written testimony with the opportunity for live cross-examination comports with the requirements of due process and are within the discretion of the presiding officer. The Court finds the EAB correctly concluded that the Presiding Officer had afforded Petitioners "all that was required by due process," and Petitioners' "failure to take advantage of these opportunities simply did not rise to the level of a due process violation." EAB Decision at 20.

Because the Presiding Officer has wide discretion in deciding what evidence is admissible, the EAB Decision correctly found that his decisions are accorded "substantial deference." EAB Decision at 30. The Presiding Officer's decision to admit the 1984 testimony because it was relevant, reliable, and probative was not an abuse of discretion.

VI. CONCLUSION

For the foregoing reasons, Respondent's Motion for Summary Judgment is granted as to the complaint and counterclaim and Petitioners' Motion for Summary Judgment is denied. Accordingly, a judgment for $23,500.00 plus interest accrued since June 17, 1997, penalties, and costs is hereby entered against Petitioners, David B. Shillman, Dorothy L. Bruggemeyer, and J.V. Peters and Company, jointly and severally.

IT IS SO ORDERED.

John M. Manos
UNITED STATES DISTRICT JUDGE

---

little probative value."

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID B. SHILLMAN, *et al.*,	)	CASE NO. 1:97CV1355
	)	
Petitioners,	)	
	)	
vs.	)	Judge John M. Manos
	)	
UNITED STATES ENVIRONMENTAL, PROTECTION AGENCY,	)	
	)	
Respondent.	)	ORDER

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, the United States Environmental Protection Agency's Motion for Summary Judgment is granted as to the complaint and counterclaim and Petitioners' Motion for Summary Judgment is denied. Accordingly, a judgment for $23,500.00 plus interest accrued since June 17, 1997, penalties, and costs is hereby entered against Petitioners, David B. Shillman, Dorothy L. Bruggemeyer, and J.V. Peters and Company, jointly and severally.

IT IS SO ORDERED.

John M. Manos
UNITED STATES DISTRICT JUDGE