IN THE MATTER OF ASBESTOS SPECIALISTS, INC.

TSCA Appeal No. 92–3

ORDER

Decided October 6, 1993

Syllabus

EPA Region VIII appeals an order of the presiding officer dismissing with prejudice its complaint against Respondent for an alleged violation of the Asbestos Hazard Emergency Response Act. The Region asks the Board, in the alternative, to reverse the dismissal order, to dismiss the complaint without prejudice to re-filing it, or to allow the Region to file an amended complaint.

Held: The Board affirms the dismissal order based on its conclusion that the complaint is sufficiently flawed to warrant its dismissal pursuant to 40 C.F.R. §22.20(a), which provides that the presiding officer may dismiss an action "on the basis of * * * grounds which show no right to relief on the part of the complainant." The dismissal however is without prejudice to amending the complaint. The case is remanded to the presiding officer for further proceedings consistent with this decision.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge McCallum:

EPA Region VIII appeals the dismissal of an administrative complaint that it filed against Asbestos Specialists, Inc., a Utah corporation (hereinafter "the Respondent"), seeking a $13,000 civil penalty for an alleged violation of the Asbestos Hazard Emergency Response Act (hereinafter "AHERA"), 15 U.S.C. §2641 *et seq.*,[1] and implementing regulations at 40 C.F.R. Part 763, Subpart E. The presiding officer issued an order granting Respondent's motion to dismiss the complaint with prejudice on February 13, 1992.[2] His order is reversed in part and remanded.

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[1] AHERA is Subchapter II of the Toxic Substances Control Act (TSCA), 15 U.S.C. §2601 *et seq.*

[2] Region VIII filed its appeal on March 9, 1992, within the regulatory appeals period. *See* 40 C.F.R. §§ 22.07(c) and 22.30. However, it erroneously filed it with

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A.

Respondent is an asbestos inspection and/or removal company located in the State of Utah. From the complaint it appears that Region VIII believes that the Respondent committed some infraction of AHERA with respect to a school building in Murray, Utah on or about June 18, 1990. Under the Agency's procedural rules governing civil penalty proceedings, the complaint is the formal pleading by which the Agency places the Respondent on notice of the violations alleged therein. Specifically, each complaint shall include, *inter alia,* "[s]pecific reference to each provision of the Act and implementing regulations which respondent is alleged to have violated" and "[a] concise statement of the factual basis for alleging the violation." 40 C.F.R. § 22.14(a)(2) and (a)(3). Each complaint shall also contain "[a] statement explaining the reasoning behind the proposed penalty." 40 C.F.R. § 22.14(a)(5). Region VIII's complaint, filed October 7, 1991, failed miserably in these respects. The citations to the regulations and statute, for example, were replete with errors: the complaint cites to a requirement contained in 40 C.F.R. § 763.90(i)(5)(i), but § 763.90(i) does not have a subsection (5)(i);[3] the complaint alleges that Respondent is in violation of TSCA section 15(3)(d), but TSCA section 15(3) does not have a subsection (d);[4] the complaint alleges that Respondent failed to comply with TSCA section 203(b), but that section does not impose any duties on anyone except the Agency;[5]

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the *Regional* Hearing Clerk in Denver, Colorado instead of the Hearing Clerk in Washington, D.C. *See id.;* 40 C.F.R. § 22.03(a) (definitions). The Hearing Clerk did not receive it until March 24, 1992. Although the appeal was technically late, the delay did not prejudice anybody, and does not warrant a dismissal on procedural grounds. *See In re Genesee Power Station,* PSD Appeal Nos. 93–1, *et seq.,* at 6, n.5 (EAB, Oct. 22, 1993); *In re Midwest Bank & Trust Company, Inc.,* RCRA (3008) Appeal No. 90–4, at 5, n.4 (CJO, Oct. 23, 1991).

[3] Paragraph 6 of the complaint reads as follows:

> 6. [The EPA inspector] observed that respondent failed to collect five samples of material which could be assumed to be asbestos containing materials for final clearance as required by AHERA regulations at 40 CFR § 763.90(i)(5)(i).

[4] Paragraph 8 of the complaint reads as follows:

> 8. [R]espondent's failure to adequately sample for asbestos, or assume [sic] to be asbestos containing building material, all locations of friable and friable suspect asbestos-containing material in the above-listed school building constitutes failure to comply with Section 203(b) of TSCA, and 40 CFR § 763.90, and respondent is thereby in violation of Section 15(3)(d) of TSCA.

[5] *Id.* TSCA section 203(b) directs the Administrator to issue regulations prescribing procedures "for determining whether asbestos-containing material is present in a school building * * *."

and the complaint also charges Respondent with a failure to collect asbestos containing materials, yet the only sample collecting requirement by the Region in the regulation cited in the complaint or in the penalty calculation worksheet refers to the collection and analysis of *air samples* ("to monitor air for clearance" after asbestos containing building materials have been removed from a school building).[6] As to the proposed penalty, the Region's sole statement explaining the reasoning behind the proposed penalty was a statement that the penalty was based on "the facts alleged in this complaint" and the statutory penalty factors.

On November 12, 1991, because of the obvious deficiencies in the complaint, Respondent moved for the complaint's dismissal or, in the alternative, for a more definite statement from the Region.[7] Respondent also filed an answer to the complaint at the same time and requested a hearing. In its answer, it raised as an affirmative defense, *inter alia,* the allegation that the information in the complaint was not sufficiently detailed to enable Respondent to prepare a response to the complaint. But before there was any real opportunity for the Region to respond to Respondent's submissions, the presiding officer, referring to the "vague" nature of the complaint and agreeing that it did not provide "sufficient factual specifics to allow Respondent to make a reasoned answer," issued an order on November 19, 1991, in which he directed the Region to identify both the school building and the EPA inspector who supposedly "observed" the alleged violation, since neither was identified in the complaint.[8] He also directed Region VIII to document the rationale for the proposed penalty amount. The Region responded to these directives by submitting the name of the school and the inspector, a copy of a worksheet titled *AHERA PROPOSED PENALTY CALCULATION* (hereinafter "penalty calculation worksheet"), and excerpts from EPA's Interim Final Enforcement Response Policy for AHERA (Janu-

[6] As noted in the text above, the regulation cited in the complaint, 40 C.F.R. § 763.90(i)(5)(i), does not exist. The penalty calculation worksheet prepared by the Region refers to § 763.90(i)(5), which does exist. That fact does not clarify the complaint, for § 763.90(i)(5) does not impose any sampling requirements *per se,* nor does it refer to sampling of "materials," the term used in the complaint. Section 763.90(i)(5) provides, instead, that "[a]t any time, a local education agency may analyze *air monitoring samples* collected for clearance purposes by [the method of] phase contrast microscopy * * *." (Emphasis added.)

[7] *See* Respondent's Ex Parte Motion to Dismiss or in the Alternative for More Definite Statement, dated October 31, 1991 (mailed under cover letter dated November 8, 1991).

[8] The presiding officer's order did not mention Respondent's motion to dismiss.

ary 31, 1989) (hereinafter "the Penalty Policy"). *See* Region's Response, November 27, 1991.

The Region's penalty calculation worksheet is not substantially more informative than the complaint. The worksheet is a single page consisting of a few handwritten notations and one typed paragraph, which states that the signing official certifies that the penalty has been calculated properly. The handwritten notations identify the violation as "40 C.F.R. § 763.90(i)(5)," categorize it as "level 2" and "extent B," and state that the penalty amount is $13,000.[9] The spaces for "adjustments" and "discussion" are left blank. The typed text includes the apparently irrelevant statement that "[t]he undersigned hereby certifies that the Agency has considered * * * the ability of the respondent to continue to provide educational services to the community." (Nothing in the record suggests that Respondent provides educational services.)

Following receipt of the Region's submissions, Respondent filed an amended answer to the complaint on December 16, 1991. In its answer, Respondent did not refer to the erroneous citations but instead treated the complaint as if Region VIII had alleged a violation of a regulatory duty to collect air samples. Respondent's motives for taking this course of action are unclear. At any rate, even though there is no § 763.90(i)(5)(i), Respondent answered that it had no legal duty to collect air samples because "§ 763.90(i)(5)(i)" only imposes a duty to perform air sampling on Local Education Agencies (hereinafter "LEAs") and not on their delegatees. Amended Answer at 3. Respondent further argued that "§ 763.90(i)(5)(i)" could not be construed to require Respondent to collect air samples because the regulations prohibit the abatement contractor who performs an asbestos response action from collecting the required air samples after the work has been completed.[10] *Id.* at 4. Respondent also answered, in the alternative, that it had collected air samples and that these samples satisfied any air sampling duty it might have under "§ 763.90(i)(5)(i)." As to the penalty proposed in the complaint, Respondent averred that: (1) the complaint is defective because it fails to state the basis for the proposed penalty amount, (2) the proposed penalty is excessive and inconsistent with the penalty guidelines,

[9] We assume the categorization refers to penalty classifications in the Penalty Policy.

[10] It relied on Appendix A to Subpart E, titled "Interim Transmission Electron Microscopy Analytical Methods * * *," which includes the statement that: "[s]ampling operations must be performed by qualified individuals completely independent of the abatement contractor to avoid possible conflict of interest." Appendix A to Part 763, Subpart E, at II., B., 2. *Id.* at 4.

and (3) Respondent lacks the ability to pay a penalty of that magnitude.

On January 13, 1992, Respondent filed a second motion to dismiss the complaint, asserting that the complaint should be dismissed *with prejudice* because:

> [C]omplainant has alleged that respondent has violated a nonexistent statute [sic]; that if respondent had performed in compliance with the regulation it allegedly violated, it would have performed an illegal action; and that complainant has failed to meet threshold requirements in bringing this action.

It also filed a lengthy Memorandum in Support of Motion to Dismiss elaborating on the three arguments in its motion. Among other things, Respondent pointed out § 763.90(i)(5)(i) did not exist (not that the statute did not exist); that the factual allegations were not clearly worded; that to the extent the allegations in the complaint can be understood to correspond to any part of § 763.90, the abatement contractor does not have any responsibility to take final clearance samples; and that various threshold requirements were not met.

Region VIII did not file a response to the motion, nor did it request additional time to prepare a response.[11]

On February 7, 1992, Respondent filed a written Request for Ruling asking the presiding officer to grant its motion to dismiss and arguing that the Region had waived its right to object to the January 9 motion because it had failed to file a timely response.

The Region filed a short (barely more than a page) Response to Respondent's Request for Ruling on February 7, 1992, stating that "there is no requirement that [it] respond to a motion to dismiss" and listing four reasons why Respondent's motion was "unsustainable on its face."[12] The Region did not elaborate on the reasons or other-

[11] On January 13, 1992, the same date as Respondent filed its second motion to dismiss, the Region filed a Status Report in response to the presiding officer's prehearing order of December 23, 1991, stating that "settlement negotiations are ongoing." It also filed another such statement on January 23, 1992, in which it represented that it was prepared to meet the presiding officer's January 27, 1992 deadline for filing a prehearing statement.

[12] It asserted that: (1) "the motion is premised on the theory that either or both [TSCA and AHERA] are 'nonexistent statute[s]';" (2) "the motion is premised on the theory that compliance with 40 C.F.R. § 763.90 would 'cause (the respondent) to per-

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wise explain either the basis for or the relevance of any of its assertions. It concluded by expressing the hope that the parties would negotiate a settlement.

On February 18, 1992, the presiding officer filed an order granting Respondent's Motion to Dismiss with prejudice. He noted that because the Region had neither filed a timely response nor requested an extension of time to respond, he had authority under 40 C.F.R. § 22.16(b) to deem Respondent as having waived any objections to granting the motion to dismiss.[13] Pursuant to section § 22.16(b):

> A party's response to any written motion must be filed within ten (10) days after service of such motion, unless additional time is allowed for such response. * * * *If no response is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion.*

(Emphasis added.) The presiding officer stated that the Region offered reasons why the motion to dismiss should be denied "only * * * after the Respondent filed a request for ruling." Order at 2. He added that the Region's arguments were "non responsive to the merits of Respondent's arguments." *Id.* He characterized the Region's assertion that it had no duty to respond to a motion to dismiss with prejudice as "precedent-breaking" and the Region's hope that the case would be settled as irrelevant. *Id.* at 1–2. He closed by stating, "given all of the above [,] * * * the Respondent's motion to dismiss the Complaint should * * * be GRANTED."[14] *Id.* The Region's appeal followed.[15]

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form an illegal action';" (3) "the motion is premised on the theory that the present action is somehow defective in that the complaint allegedly did not receive the required concurrence of various EPA headquarters offices and suboffices;" and (4) Respondent does not deny that it "is an accredited asbestos contractor" or that it removed asbestos at the McMillan School.

[13] This provision, which appeared in the 1991 version of C.F.R., was omitted in the 1992 version. The omission has been corrected. 57 Fed. Reg. 60129 (Dec. 18, 1992).

[14] The Region's susceptibility to typographical errors was apparently contagious: the Presiding Officer inadvertently dismissed "the Complainant" with prejudice instead of "the Complaint." The presiding officer rectified the error by issuing a correction to his original Order on March 13, 1991. The quotation in the text above reflects the Presiding Officer's remarks, as corrected.

[15] Region VIII also filed a Request for Reconsideration with the presiding officer on March 9, 1992, which he denied on March 16, 1992. The Board notes that the presiding officer's jurisdiction over this matter terminated on February 18, 1992, when he filed his order dismissing the complaint, and therefore, he was without authority

B.

On appeal, the Region asks for one of the following alternative forms of relief: (i) a denial of Respondent's motion to dismiss, (ii) a dismissal of its complaint without prejudice to re-filing it, or (iii) an opportunity to amend its complaint. Notice of Appeal at 4. In response, Respondent urges that the dismissal with prejudice be upheld, arguing, *inter alia,* that the complaint did not allege facts sufficient to enable it to prepare a defense, did not allege that the Region had complied with regulatory concurrence requirements, and did not propose a penalty consistent with the Agency's penalty guidelines for violations of AHERA. Respondent's Response, March 30, 1992. Respondent further maintains that "the history of the litigation," including the Region's failure to respond to its motion, justifies dismissal of the complaint with prejudice.

We also believe that dismissal of the complaint is justified in this instance. There are two regulations relevant to our analysis: § 22.16(b), which authorizes the presiding officer to grant any motion to which an opposing party does not object, and § 22.20(a), which authorizes the presiding officer to dismiss a complaint for cause. As to the first regulation, the tenor of the presiding officer's order suggests that he may have believed that Region VIII was required as a matter of law to respond to the Respondent's motion. If so, he was mistaken. The regulation does not require the Region to file a response; rather, it merely creates a fiction that allows the presiding officer to infer that the Region does not in fact oppose the motion. More specifically, it provides that the party who failed to respond to the motion "may be deemed to have waived any objection to the granting of the motion." The obvious purpose of this provision is to clear the path for a ruling on the motion when no response has been filed and the time for responding to the motion has lapsed.[16] It lets the presiding officer rule as he sees fit based solely on the presiding officer's assessment of the merits of the motion. In that way the presiding officer can rule promptly with assur-

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to rule on the merits of a motion for reconsideration. *See In re New York City Transit Authority,* RCRA (3008) Appeal No. 87–1 (June 12, 1987); *In re LTV Steel Company,* RCRA (3008) Appeal No. 87–10 (June 12, 1987); *In re O.M. Scott & Sons,* RCRA (3008) Appeal No. 87–2 (June 12, 1987). The rationale for terminating the presiding officer's jurisdiction, articulated in the cited decisions, is to avoid the possibility of conflicting orders from the presiding officer and the Administrator. Although other means probably exist to prevent such an occurrence, the interpretation is sufficiently established that we see no compelling reason to change it.

[16] Pursuant to 40 C.F.R. § 22.16, "A party's response to any written motion must be filed within ten (10) days after service of such motion, unless additional time is allowed for such response." 57 Fed. Reg. 60129 (Dec. 18, 1992).

ance that the ruling does not have to be reconsidered if the other party subsequently expresses misgivings about not opposing the motion prior to entry of the ruling. In the instant case, however, we are presented with a situation where at the time of the presiding officer's ruling he knew that the other party, *i.e.*, the Region, did in fact oppose the motion. *See* Region's Response to Request for Ruling, dated February 7, 1992. That actual knowledge of the Region's position should have made the presiding officer chary of relying on § 22.16(b) as a basis for dismissing the complaint. When the rule is properly construed and applied, the fiction created by § 22.16(b) should not be accepted uncritically if the known facts prior to entry of the ruling irrefutably contradict it. Accordingly, we are of the view that the presiding officer erred in relying upon this regulation to dismiss the complaint.

This conclusion does not mean however that there were no grounds for granting the motion. There is little doubt that the presiding officer saw scant merit to the complaint even though his reasons for dismissing it were built upon the faulty premise of § 22.16(b). In this regard, we believe that adequate grounds existed for the presiding officers to dismiss the complaint pursuant to § 22.20(a), which provides that the presiding officer, "upon motion of the respondent, may at any time dismiss an action * * * on the basis of * * * grounds which show no right to relief on the part of the complainant." Region VIII's complaint is defective in that it does not give the Respondent fair notice of the charges against it and also, by reason thereof, lacks an adequate rationale for the proposed penalty.[17] Therefore, no error *per se* resulted from the complaint's dismissal.[18]

[17] The Eleventh Circuit Court of Appeals' description of another defective complaint applies as well to the complaint filed herein. As the Circuit Court stated:

> The complaint is vaguely-worded and omits crucial allegations. [It] * * * is simply not specific enough to permit an accurate determination regarding whether a claim is stated.

Bank v. *Pitt,* 928 F.2d 1008 (11th Cir. 1991).

[18] The Region claims on appeal that it had no duty to respond to Respondent's motion to dismiss simply because "the so-called grounds for dismissal barely dignified a response, so ludicrous were they." Notice of Appeal, at 3. The Region variously characterizes Respondent's allegations as "ludicrous" (*id.*), "ridiculous" (*id.* at 4), "absurd" (Memorandum of Law at 4) and "frivolous" (*id.* at 7)—all without explanation. Such arguments serve no useful purpose. Moreover, without passing on the merits of any specific contention of Respondent's, the Board is of the opinion that the motion to dismiss was sufficiently meritorious to have warranted a considered response from the Region. Finally, contrary to the Region's assertion, it is clear from the context of the motion to dismiss that the Respondent was not arguing that the Region was

That aside, we turn now to whether the dismissal should be with prejudice. Because § 22.20(a) does not address this subject, the Board is free to set its own course in deciding what practice to follow.[19] We therefore look to the Federal Rules of Civil Procedure (FRCP) and related case law as an aid in interpreting the Agency's rules.[20] Rule 12(b)(6) of the FRCP, which is analogous to § 22.20(a), provides that a complaint filed in federal District Court may be dismissed for "failure to state a claim upon which relief can be granted." The case law under Rule 12(b)(6) generally holds that leave to amend a dismissed complaint shall be freely given, whereas denial of such leave "without any justifying reason"[21] constitutes an abuse of discretion. *Foman* v. *Davis,* 371 U.S. 178 (1962); see *Bank* v. *Pitt,* 928 F.2d 1108 (11th Cir. 1991); 3 Moore's Federal Practice, Para. 15.08[4] and cases cited therein. Additionally, "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman* v. *Davis, supra,* at 182. The Eleventh Circuit Court of Appeals more recently stated that:

> Where a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice.

Bank v. *Pitt,* 928 F.2d at 1112. Leave to amend a complaint is generally available even where the plaintiff did not ask for it at an earlier stage in the proceeding. *Id.*

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relying on a nonexistent statute; rather Respondent was referring to the nonexistent regulation cited by the Region in its complaint.

[19] 40 C.F.R. § 22.01(c) provides:

> Questions arising at any stage of the proceeding which are not addressed in these rules or in the relevant supplementary procedures shall be resolved at the discretion of the Administrator [Environmental Appeals Board], Regional Administrator, or Presiding Officer, as appropriate.

[20] The Federal Rules are not applicable to Agency proceedings conducted under 40 C.F.R. Part 22; however, "[in] some cases, the experience of federal courts in applying a federal rule can offer an instructive example." *See, e.g., In re Detroit Plastic Molding Co.,* TSCA Appeal No. 87–7, at 7 (CJO, March 1, 1990); *In re Wego Chemical & Mineral Corporation,* TSCA Appeal No. 92–4, at 19, n.10 (EAB, Feb. 24, 1993).

[21] According to the Eleventh Circuit Court of Appeals, a "substantial reason" is required to deny leave to amend a complaint. *Municipal Utilities Board of Albertville* v. *Alabama Power Co.,* 928 F.2d 1385, 1394 (11th Cir. 1991).

The philosophy behind these holdings is explained by the U.S. Supreme Court as follows:

> The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Conley v. *Gibson,* 355 U.S. 41, 48, 78 S. Ct. 99, 103 (1957). Similar views are reflected in the Agency's decisions respecting its own procedural rules. For example, it has been stated that administrative pleadings are intended to be "'liberally construed' and 'easily amended.'" *Yaffe Iron and Metal Company, Inc.* v. *U.S. Environmental Protection Agency,* 774 F.2d 1008, 1012 (10th Cir. 1985), affirming *In re Yaffe Iron and Metal Company, Inc.,* TSCA Appeal No. 81–2 (JO, Aug. 9, 1982).[22] It is only where the defect in the complaint is not curable by amendment that leave to amend should be denied. 3 Moore's Federal Practice, Para. 12.14 and cases cited therein. For example, leave to amend is properly denied where the facts show that the claim is barred by the relevant statute of limitations. *Hoover* v. *Langston Equipment Associates, Inc.,* 958 F.2d 742 (6th Cir. 1992), citing *Martin* v. *Associated Truck Lines, Inc.,* 801 F.2d 246, 248 (6th Cir. 1986) (refusal to allow amendment sustained where "the pleading as amended could not withstand a motion to dismiss"), and *Albrecht* v. *Lund,* 845 F.2d 193, 195 (9th Cir.), *modified,* 856 F.2d 111 (1988) (same, if "amendment would be futile"). In *Foman* v. *Davis, supra,* the Supreme Court listed several examples of circumstances under which it may be appropriate to deny leave to amend a flawed complaint: "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposite party by virtue of allowance of the amendments, futility of amendments * * *." *Foman* v. *Davis,* 371 U.S. 178 (1962). Of these considerations, the most significant consideration appears to be prejudice to the Respondent.[23]

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[22] In the Agency's decision in *Yaffe,* the Judicial Officer affirmed the Administrative Law Judge's ruling permitting a post-hearing amendment of the complaint.

[23] The Ninth Circuit Court of Appeals has stated in another context that "[t]he crucial factor in determining whether leave to amend should be granted [under Rule 15(b)] is the resulting prejudice to the opposing party." *Jordan* v. *County of Los Angeles,* 669 F.2d 1311, 1324 (1982) (plaintiff sought leave to amend its complaint to add another claim.)

The Board does not think that Respondent will be unduly prejudiced if the Region is allowed to file an amended complaint. No hearing has yet taken place. Presumably, an amended complaint would state more clearly both the allegations against Respondent and the Region's rationale for the proposed penalty. Respondent would then have an opportunity to answer and to present its defense. Moreover, none of the other four circumstances described by the Supreme Court exist here:

(1) The Region's two week delay in raising objections to the motion to dismiss is not so long as to constitute "undue delay;"[24]

(2) While the record reveals that the Region did not handle this case properly, it provides no basis for the conclusion that it acted in bad faith;

(3) The Region has filed no previous amendments to its complaint;

(4) Although the presiding officer described the Region's initial complaint as "vague," neither his Order Granting Motion for Clarification nor his dismissal order gave the Region notice of the specific deficiencies in the complaint.[25] There is no basis for assuming that the Region will not correct the pleading errors noted in this decision and otherwise file a complaint that shows a right to relief under AHERA and the procedural rules governing civil penalty proceedings.

We note that a federal court's discretion to dismiss a complaint is constrained by Rule 15(a) of the Federal Rules of Civil Procedure, which states that leave to amend a complaint "shall be freely given

[24] Based on the case law, it appears that delays considered excessive are those of several months or years. *See* cases cited in 3 Moore's Federal Practice, Para. 15[4].

[25] By contrast, in *Friedlander* v. *Nims*, 755 F.2d 810 (11th Cir. 1985), the circuit court upheld the district court's order denying plaintiff a second chance to amend its complaint because the "appellant deliberately chose to forego his opportunity to cure the defects of his complaint despite specific and repeated warnings from the trial judge that such amendment was necessary to avoid dismissal * * *." 755 F.2d at 812. The court added:

> It is difficult to imagine how the district court could have been more explicit in expressing its concern over the complaint's deficiencies and in recommending the changes necessary to correct them.

755 F.2d 810, 813.

when justice so requires."[26] Since the Agency's rules do not contain a similar provision, it could be argued that the above-noted decisions interpreting Rule 12(b)(6) may be less analogous to the Agency's rules than might otherwise be the case. Nevertheless, the rationale behind Rule 15(a) is as much an expression of policy as it is a rule, and therefore it is our view that the policy component of Rule 15(a) should apply to Agency practice. The objective of the Agency's rules should be to get to the merits of the controversy. *In re Wego Chemical & Mineral Corporation,* TSCA Appeal No. 92–4, at 15, n.11 (EAB, Feb. 24, 1993) ("administrative pleadings should be liberally construed and easily amended to serve the merits of the action"); *see also In re Port of Oakland and Great Lakes Dredge and Dock Company,* MPRSA Appeal No. 91–1, at 41–42 (EAB, Aug. 5, 1992) ("The philosphy [of allowing liberal amendments under] * * * the Federal Rules applies to administrative proceedings as well as judicial proceedings."). Therefore, as a general rule, dismissal with prejudice under the Agency's rules should rarely be invoked for the first instance of a pleading deficiency in the complaint; instead, it should be reserved for repeat occasions or where it is clear that a more carefully drafted complaint would still be unable to show a right to relief on the part of the complainant.

C.

In conclusion, we see no basis in this case for dismissing Region VIII's complaint with prejudice. There is no reason to believe that the Region's carelessly prepared document cannot be rewritten to state a right to relief. There is nothing in the complaint or the record to suggest that amendment would be futile. Also, granting the Region an opportunity to amend the complaint will not unduly prejudice Respondent since no hearing has taken place. At most, Respondent may be inconvenienced. Lastly, the record reveals no other substantial reason for denying leave to amend. The judicial policy favoring liberal leave to amend a defective complaint is sound, and the factors that argue against giving the Region a chance to amend its complaint do not outweigh the application of that policy in this situation. Accordingly, we affirm the dismissal of the complaint but reverse the decision of the presiding officer insofar as it dismisses the complaint with prejudice. We remand the case so

[26] The Eleventh Circuit Court of Appeals specifically stated in *Bank* v. *Pitt* that "a district court's discretion to dismiss a complaint without leave to amend is 'severely restrict[ed]' by Fed. R. Civ. P. 15(a) * * *." *Bank* v. *Pitt, supra* at 1112. *Accord, Thomas* v. *Town of Davie,* 847 F.2d 771, 773 (11th Cir. 1988).

that the Region may file an amended complaint, leave for which is hereby granted.[27]

So ordered.

[27] Even though we recognize that the presiding officer is ordinarily the one who grants leave to amend complaints, *see* 40 CFR § 22.14(d), we nevertheless conclude that no meaningful purpose would be served by relegating that task to the presiding officer as part of the remand. Having the presiding officer grant leave to amend the complaint would be entirely pro forma in this instance since denying the Region an opportunity to amend its complaint would not be a permissible option under our decision.

As a separate but somewhat related matter, we note that the presiding officer assigned to this case has subsequently retired from federal employment; therefore, it will be necessary for the Chief Administrative Law Judge to appoint a new presiding officer. Upon appointment the new presiding officer should issue an order directing the Region, should it seek to pursue this matter, to file its amended complaint within a reasonable, but fixed, period of time. Any such amended complaint will, of course, be subject to the provisions governing dismissal for cause under § 22.20(a).