

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

IN THE MATTER OF:)

) DOCKET NO. TSCA-05-2009-0004

Kathryn Y. Lewis-Campbell)
Springfield, Ohio)

Respondent)
_____)

RECEIVED
SEP 17 2009

REGIONAL HEARING CLERK
U.S. ENVIRONMENTAL
PROTECTION AGENCY

COMPLAINANT'S SECOND MOTION FOR PRODUCTION OF INFORMATION

The Administrator's Delegated Complainant, by undersigned counsel, hereby moves that an order be entered directing that, pursuant to the Administrator's Rules, specifically 40 C.F.R. § 22.19(e), and the Administrator's final decision in In Re New Waterbury Ltd., 5 E.A.D. 529 (1994), Respondent be ordered to produce certain financial records.¹

Complainant is asking that an order be entered directing Respondent to submit the following financial documents:

- (a) pay stubs from all her employers during 2009;

¹In 40 C.F.R. § 22.19(e), the Administrator provides that a Presiding Officer may order such other discovery if: (i) it will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party; (ii) the information is most reasonably obtained from the non-moving party and the non-moving party has refused to provide voluntarily the information; and (iii) the information has significant probative value on a disputed issue of material fact relevant to liability or the relief sought. In In Re New Waterbury Ltd., the Administrator, by the Board, held that "in any case where ability to pay is put in issue, the Region [Administrator's Delegated Complainant] must be given access to the respondent's financial records before the start of such hearing." 5 E.A.D., at 542. An "agency['s] rules [and] the agency's policies as laid down in its *published* decisions" are "applicable and controlling precedents" in agency proceedings before an administrative law judge. Iran Air v. Kugleman, 996 F.2d 1253, at 1260 (D.C. Cir. 1993).

- (b) a copy of her signed 2008 federal income tax return, and any amendments to that return;
- (c) a completed and signed Request for Transcript of Tax Return (IRS Form 4506-T); and
- (d) copies of bank statements for all bank accounts of Lewis-Campbell from January 2009 to the present.

The production of this information is necessary to resolve the issue of Respondent's "ability to pay" the penalty amount proposed in the Complaint, an issue raised in Respondent's Amended Answer, submitted on April 22, 2009. Respondent has already submitted certain financial statements and tax records, which have been reviewed by Complainant, and Complainant is of the opinion that a substantial reduction in the penalty amount proposed may be appropriate in this matter. However, certain information submitted by Respondent must be verified to assure the integrity of any such determination, and the information sought by this motion may likely provide that verification.

The information sought by this motion is necessary for a determination of the "ability to pay" issue for the following reasons:

- (1) Pay stubs from all Respondent's employers during and her 2008 signed federal income tax return, and any amendments to that return, will allow an evaluation of the Respondent's 2009 income to date and will corroborate the information the respondent submitted in the Financial Data Request Form.
- (2) The completed and signed Request for Transcript of Tax Return (IRS Form 4506-T) will allow Complainant to verify Respondent's 2008 federal income tax return, and any amendments to that return.
- (3) Copies of bank statements for all bank accounts of Lewis-Campbell from January 2009 to the present will provide verification of information provided by Respondent in her Financial Data Request Form.

As the timeliness of further discovery may be an issue under 40 C.F.R. § 22.19(e), Complainant provides the following timeline identifying her efforts to determine whether Respondent would raise the “ability to pay” issue, and to obtain information from Respondent to address the “ability to pay” issue:

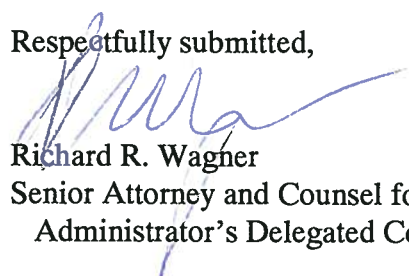
- February 9, 2009 Complainant files a Complaint in this matter, explicitly informing Respondent therein that, if she intended to raise an issue as to her “ability to pay” the penalty amount proposed, she would have to state that in her Answer and submit to Complainant financial information. See Complaint, at 11-12.
- March 18, 2009 Respondent submits her Answer to the Region 5 Hearing Clerk. No “ability to pay” claim is raised in the Answer.
- April 8, 2009 Complainant files Motion for Partial Accelerated Decision under In Re New Waterbury, asking for a finding that Respondent has waived her claim of “ability to pay” should Respondent not file, during the time allotted by rule for responding to the motion, an amended answer raising the claim.
- April 22, 2009 Respondent submits an Amended Answer, raising a claim that she does not have an ability to pay the penalty amount proposed.
- April 28, 2009 Complainant sends to Respondent a request for financial information so as to be able to evaluate her “ability to pay” claim, asking specifically for her income tax returns for the past 3 years, and asking for her to complete a financial statement attached to the letter.
- May 26, 2009 Counsel for Respondent provides Complainant Respondent’s income tax returns for 2007, and informs Complainant that “[a]s soon as my client completes the Statement of Financial Affairs you have requested, I will forward it to your office.”
- July 15, 2009 Complainant has not yet received Respondent’s Statement of Financial Affairs. On this date, Respondent asks Complainant to provide her another Statement of Financial Affairs. Complainant sends out a second Statement of Financial Affairs to Respondent on this day.
- July 27-30, 2009 Complainant receives Respondent’s completed Statement of Financial Affairs, and provides that statement to Industrial Economics, Inc., along with Respondent’s 2007 income tax returns.

- September 8, 2009 Industrial Economics, Inc., provides its initial report to Complainant concerning Respondent's financial circumstances.
- September 11, 2009 In conference with Complainant, Industrial Economics, Inc., states that additional information is needed to complete a financial analysis of Respondent, specifically needed are: (1) pay stubs from all employers of Respondent for 2009; (2) a copy of her signed 2008 federal income tax return; and (3) a completed and signed Request for Transcript of Tax Return (IRS Form 4506-T).

By e-mail, at 10:59am, Complainant requested that Respondent submit those three items to enable the financial analysis to be completed. Complainant sent Respondent the same request, by facsimile mail, and received automated confirmation that the request was received by Respondent.

To date, Complainant has received no response from Respondent to the September 11, 2009, request for further financial information, and given the pending Motion for Accelerated Decision on Liability and Penalty, and hearing date of October 27, 2009, an order for further production is necessary so that the "ability to pay" issue may be timely determined prior to a decision on that motion, or a hearing. Should the evidence support a substantial reduction in the amount of penalty proposed, it is in the best interest of the parties, and the public, that that determination be made prior to everyone incurring the costs of a hearing.

Respectfully submitted,



Richard R. Wagner
Senior Attorney and Counsel for the
Administrator's Delegated Complainant

In Re Kathryn Y. Lewis-Campbell
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CERTIFICATE OF SERVICE

REGIONAL HEARING CLERK
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PROTECTION AGENCY

I hereby certify that today I filed the original of the **Complainant's Second Motion for Production of Information** in the office of the Regional Hearing Clerk (R-19J), United States Environmental Protection Agency, Region 5, 77 W. Jackson Boulevard, Chicago, IL 60604, with this Certificate of Service.


I further certify that I then caused true and correct copies of the filed documents to be mailed to the following:

Honorable William B. Moran
Office of the Administrative Law Judges
U.S. Environmental Protection Agency
Ariel Rios Building, Mailcode: 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

I further certify that I then caused true and correct copies of the filed document to be sent to the following, by mail:

Cassandra Collier-Williams, Esq.
P.O. Box 94062
Cleveland, Ohio 44101

September 17, 2009



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