2/22/93

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C. 20460

In the Matter of	:	
	:	
JENNY ROSE, INC.	:	Docket No. IF&R-III-395-C
	:	
Respondent	:	

Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), §§ 12(a)(1)(A) and 14(a)(1), 7 U.S.C. §§ 136j (a)(1)(A) and 136l (a)(1):

(1) In the particular circumstances of this case, no oral evidentiary hearing is required. A decision as to the appropriate penalty herein may be made upon a motion for "accelerated decision."

(2) The appropriate penalty, where respondent has consistently refused to provide credible evidence of inability to pay the penalty proposed, is the penalty proposed by complainant, where (a) that proposal was made in accordance with the Act and applicable U. S. Environmental Protection Agency penalty policies; and (b) the proposal is fair and reasonable based upon the record.

Appearances:

Charles McPhedran, Esquire, Assistant Regional Counsel, Office of General Counsel, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107, for complainant.

Ernest Martus, President, Jenny Rose, Inc., P. O. Box 384, Little Creek, Delaware 19961, for respondent.

BEFORE: J. F. Greene, Administrative Law Judge

Decided February 22, 1993

DECISION AND ORDER

Respondent herein was held liable for the violations charged in the complaint by an Order Granting Partial "Acccelerated Decision" on May 22, 1992. It was held that respondent's product, Good Old Boy Insect Repellant, is a "pesticide" within the meaning of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA," or the Act"), § 2(u), 7 U.S.C. § 136(u);[1] that the product was sold or distributed but had not been registered with the United States Environmental Protection Agency ("EPA") as required by Section 3(a) of FIFRA,[2] 7 U.S.C. § 136a(a), in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A). It was further determined that Good Old Boy Insect Repellant had been "misbranded," as that term is defined at Section 2(q) of FIFRA, 7 U. S. C. § 136(q), in that no establishment or product registration numbers, ingredient statement, directions for use, or net contents were set forth on the label.[3] It was con-

[1] Section 2(u) of FIFRA provides, in relevant portion, that "The term 'pesticide' means (1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest. . . .". 7 U.S.C. § 136(u).

[2] Section 3(a) of FIFRA provides, in part, as follows: Requirement of registration -- . . . no person in any State may distribute or sell to any person any pesticide that is not registered under this subchapter."

[3] See FIFRA §§ 2(q)(1)(D) and (F), 2(q)(2)(A), 2(q)(2)C)(iii) and (iv). [7 U. S. C. §§ 136(q)(1)(D) and (F), 136(q)(2)(A), 136(q)(2)(C)(iii) and (iv)]. See also 40 C. F. R. §§ 156.10(a)(1)(iii), (iv), (v), (vi), and 156.10 (d), (e), (f), and (e).

cluded that the sale of a pesticide which is misbranded is made unlawful by 7 U.S.C. § 136j(a)(1)(E) [FIFRA § 12(a)(1)(E)]. The complaint proposed a civil penalty of $2500 for the sale of an unregistered pesticide, and $2500 for the sale of a misbranded pesticide, for a total of $5000.

At the time the Order Granting Partial "Accelerated Decision"[4] ["Order"] issued, respondent's representative, Mr. Ernest Martus, had consistently failed or declined to provide any information regarding ability to pay the penalty proposed in the complaint,[5] while consistently asserting inability to pay. In fact, Mr. Martus had refused even to provide the correct spelling of his name,[6] and did not accept certified mail sent to him from this

[4] Complainant had moved for "accelerated decision" both as to liability and as to penalty. However, no decision as to the penalty was made in order to give respondent a further opportunity to provide credible financial information. See Order Granting Partial "Accelerated Decision" at 7, 8.

[5] Status reports from complainant dated February 27, 1991, April 12, 1991, April 17, 1991. Statement of complainant in pretrial exchange, September 25, 1991, at page 4 (unnumbered). These efforts included a draft "fill in the blanks" affidavit as to respondent's income, prepared by counsel for complainant and sent to respondent in March, 1991, for complainant's use in the settlement effort. Respondent did not return the affidavit, and did not provide any other information in reliable form. Neither was such information provided in response to the Order for Pretrial Exchange of August 22, 1991, which specifically pointed out that respondent would have to provide evidence of inability to pay. By Order of February 22, 1993, the draft affidavit has been made a part of the public record in this matter.

[6] Various spellings have been furnished or are of record. In an undated, typed letter received in this office on September 18, 1992, the name typed is "Ernest Martu" (there is no signature). A memorandum from U. S. Senator William V. Roth, Jr., of August 28,
[Footnote 6 continued on page 4]

office.[7] Nevertheless, the Order required respondent to

> . . . . (P)rovide, no later than June 5, 1992, reliable financial information which can form the basis of any claim that respondent cannot afford to pay the penalty proposed. In the alternative, respondent shall provide such other documents or arguments as may be appropriate and relevant to the penalty issue.

The parties were further directed to confer regarding the issue of an appropriate penalty for the violations found to have occurred. After some weeks, during which Mr. Martus did not provide any

---

1992, transmits a letter from Delaware State Senator John C. Still, in which the name of Senator Still's constituent is Ernest Martusus. A Jack Anderson/Dale Van Atta column concerning this matter in The Washington Post on October 30, 1991, uses the Ernest Martusus. In a letter of July 26, 1992, the name typed is "Ernest Martus" (no signature). In an undated letter received here on June 5, 1992, the typed name was "Ernest M."

The spelling used at all times by this office is taken from a September 12, 1989, affidavit signed by Mr. Martus in connection with the inspection of respondent's facility by Mr. David H. Pyne, Delaware Department of Agriculture. That affidavit contains the following statements: "My name is Ernest Martus, President, Jenny Rose Incense Company, Inc. . . . " and "I hereby swear/affirm that the aforegoing statement is true to the best of my knowledge." [Exhibit 1, complainant's pretrial exchange]. Nevertheless, Mr. Martus asserted in a conference call with Lisa Knight, Esq., an attorney advisor to the EPA Office of Administrative Law Judges, that his name was being spelled incorrectly. He refused to provide the correct spelling. By Order of Feruary 22, 1993, a copy of Mrs. Knight's memorandum of the call is made a part of the public record in this case.

[7] See certified mail postmarked May 22, 1992, and May 27, 1992, which transmitted the May 22, 1993 Order Granting Partial "Accelerated Decision" and May 27, 1993, Errata Sheet to respondent. Although respondent declined to receive these mail items, it is clear that he received a copy of the Order, as evidenced by a typed three page letter in which he pointed out typographical errors and made various comments respecting it. (A copy of the Order had also been sent by regular mail). By Order of February 22, 1993, the certified mail items and Mr. Martus's three page letter have been made a part of the public record.

credible information of inability to pay the proposed penalty to this office, it was reported that respondent had not returned telephone calls from counsel for complainant,[8] that the parties had not conferred as ordered, and that respondent had not furnished ability to pay information to complainant.[9] Complainant moved for, and was given, additional time in which to make further attempts to contact respondent. [10]

A preliminary issue here is whether respondent, a Delaware corporation, is entitled to an oral evidentiary hearing in connection with a determination as to the appropriate penalty for the violations found. That issue ultimately reduces itself, on the facts of this case, to whether the respondent corporation and its apparently sole owner have a right to argue the case orally where there has not only been no cooperation with government counsel or with this tribunal in furnishing material to support bald allegations of insufficiency of funds, but where respondent's activities respecting this matter border upon being contumacious.

Upon review of this record, it is clear that the government's basis for requesting imposition of a penalty in the

---

[8] Complainant's Memorandum Regarding Penalty of August 12, 1992, at 2-3.

[9] Id., at 2, 6. No information relating to ability to pay was received by this office in response to the Order of May 22, 1992.

[10] Motion for Extension of Time of June 26, 1992; Order Granting Motion for Extension, June 29, 1992.

amount of $3000[11] is unrebutted and that failure of respondent to participate meaningfully in supplying any underlying material to support his totally unsubstantiated inability to pay assertions leaves these defenses as nothing other than naked unsupported arguments which do not constitute a dispute over material facts at issue that would require an oral hearing. These defenses, if they were to be stated orally without supporting data, would require no more weight than can be accorded now on the written record. For example, respondent's reasons for not supplying tax records, copies of which are easily obtainable by him either from the State of Delaware or from the U. S. Internal Revenue Service, even if his own records were in fact lost or destroyed, is not credible. Respondent has the burden of showing that there is something to be gained by going to trial. No such showing has been made. Furthermore, any party to a suit, including the federal government, is entitled not to be sandbagged by evidence produced for the first time in the courtroom. Despite a clear order to disclose his evidence, respondent here has failed to do so. It must be assumed that there is no evidence beyond mere unsupported statements, or, in the alternative, that respondent chooses not to reveal it. In either case, the result at this point in the proceeding is the same.

Assertions of negative impact of a penalty assessment upon

---

[11] Complainant reduced its proposal from $5000 to $3000 (see pages 9-10, infra), based upon an unsupported written statement as to the size of respondent's business, despite respondent's unwillingness to cooperate in producing "ability to pay" information.

ability to continue in business have been construed under FIFRA as affirmative defenses, which respondent must establish by producing credible evidence.[12] This interpretation is consistent with the Administrative Procedure Act, 5 U.S.C. § 551, § 556, and with EPA regulations.[13] Assertions of inability to pay must likewise be considered affirmative defenses (the establishment of which are peculiarly within respondent's ability) and for the same reasons. Not unreasonably, it is up to respondent to show inability to pay, after a decision finding liability has issued.
issued.

The question of whether an opportunity must be afforded to present evidence orally on the penalty issue in FIFRA matters has been addressed previously, and it has been held that in appropriate cases no oral oral evidentiary hearing is required.[14] An oral evidentiary hearing convened to hear further unsupported

---

[12] Helena Chemical Company, FIFRA Appeal No. 87-3, at 14-19, slip opinion.

[13] Id. See also 40 C.F.R. § 22.24, which provides that ". . . . complainant has the burden of going forward with and of proving . . . that the proposed civil penalty is appropriate. Following establishment of a prima facie case, respondent shall have the burden of presenting and of going forward with any defense to the allegations set forth in the complaint."

[14] See In the Matter of Bestech, Inc., Docket No. IF&R-004-91-7073-C, March 13, 1992, at 4-5 slip opinion; Environmental Protection Agency v. Streeter Flying Service, Inc., IF&R VII-612C-85P, August 27, 1985, at 6-7 slip op.; In re World Wide Industrial Supply, FIFRA 1085-01-13-012P, January 9, 1986, at 4. See also Rainbow Paint and Coatings, Inc., EPCRA Docket No. VII-89-T-609, to the effect that respondent is not entitled to a hearing concerning the penalty question under all circumstances.

argument would be unproductive; opportunity to confront the government's witnesses serves no purpose for the parties or trier of fact when the issue is whether respondent can afford to pay a penalty, and when respondent has failed or refused to produce any credible evidence to support that assertion. Further, respondent stated that he has no witnesses "at this time."[15] Where the ultimate decision will not be enhanced or assisted by the receipt of evidence in an oral evidentiary hearing, an agency is not required to provide one, as opposed to "some form of hearing," in the absence of remarkable circumstances;[16] and due process does not mandate that a party be given an oral hearing as opposed to the opportunity to submit written comments.[17] It is sufficient in this case that respondent on more than one occasion has been given a "meaningful opportunity to present [its] case."[18]

A review of the facts and law here reveals no denial of respondent's rights. What is revealed, instead, is near contempt for lawful process.

This case represents an area of federal government enforcement which may be considered by some to be less urgent than much other

---

[15] Respondent's letter of September 19, 1991.

[16] See 2 Fed. Proc. LEd § 2:103; Mathews v. Eldridge, 424 U. S. 319, 332. See also discussion at 333-335, 343-349.

[17] 2 Fed. Proc. LEd §2.106; Allied Van Lines v. United States, 303 F. Supp. 742 (C. D. Cal. 1969).

[18] Id. at 349. See also 333: "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner,'" quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965). See also the discussion at 348-349.

government activity in protecting the public health and safety. But enforcement efforts must not be nibbled away even by "small" violations of the Act. It is quite possible -- even likely -- that complainant here could have agreed to a significant reduction of the penalty in exchange for a cease and desist order -- if reliable evidence of inability to pay had been produced and that a small corporate respondent whether represented by counsel or appearing pro se could anticipate a somewhat sympathetic review by a judge or agency upon review. What is present here, however, is a contempt of law and an abuse of process by one who professes his "rights" but who is sophisticated enough to incorporate his business and to marshall both political and media support.[19] After significant attempts over many months on the part of complainant and this office to make the production of credible evidence of inability to pay as simple and easy as possible, this matter must come to an end without needless expenditure of public resources. Respondent has made no good faith effort to cooperate and has resisted efforts intended to assist him in producing credible evidence. There is no entitlement to further consideration. There is no legal or evidentiary reason in the current posture of this case to have an oral evidentiary hearing.

As has been noted above, the origial penalty proposed in the complaint was $5000. This calculation was based in part upon the

---

[19] Three page typed letter of comment upon the Order of May 22, 1992, received in this office on June 5, 1992. Copies are shown to Senator William [sic] Biden, "Mr. Jack Anderson, Journalist," "Mr. William Reilly, Loudoun County, Virginia," "Editor, Delaware State News," and others.

assumption that respondent's business fell into "business category" I [see EPA Enforcement Response Policy for FIFRA, at 21] in the absence of information as to the size of respondent's business. Even after respondent was found liable and was ordered both to supply reliable information relating to ability to pay and to confer with complainant to attempt to settle the penalty issue, respondent failed to provide such information. However, in an unsigned letter dated July 26, 1992, respondent stated that "It's none of your business how much money I make," and then stated that his personal papers had been destroyed in a flood.[20] However, to the best of his recollection he made $6200 in 1990 and $5700 in 1991. Based upon this statement, complainant reduced its proposal to $1500 per count because the EPA Enforcement Response Policy for FIFRA places gross revenues of zero to $300,000 in "business category" III.[21] Complainant is unwilling to reduce the proposal further because of respondent's failure to cooperate in supporting his statements of inability to pay.[22]

Section 14(a)(4) of the Act [7 U.S.C. § 136l(a)(4)] provides that:

> In determining the amount of the penalty, the

---

[20] Respondent said in the September 12, 1989, affidavit attached to the inspection report of Mr. David Pyne [contained in complainant's pretrial exhibit 1] that he "does not maintain any records on the sale and distribution of the product."

[21] Attachment 2 to complainant's Statement Regarding Penalty, filed August 14, 1992.

[22] Complainant's Statement Regarding Penalty of August 14, 1992, at 7. See generally, 1-7, relating to complainant's repeated efforts to obtain information from respondent.

> Administrator shall consider the appropriateness of penalty to the size of the business of the person charged, the effect upon the person's ability to continue in business, and the gravity of the violation . . . .

It is concluded that the $3000 proposal has been made in consonance with the Act and the applicable penalty policy. It is concluded further that there is no substantial evidence in this record to justify a reduction of that amount.

An Order will be entered providing for payment for the full penalty proposed by complainant with a provision that, if respondent produces income tax records within fifteen (15) days, the amount of the penalty will be reconsidered.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent is a Delaware corporation.

Respondent has been found liable for violations of Section 12(a)(1)(A) of FIFRA (see Order Granting Partial Accelerated Decision of May 22, 1993 and errata sheet of May 27, 1993).

Respondent has provided no credible evidence upon which a finding of inability to pay all or any portion of the penalty proposed by complainant could be based.

In these circumstances, respondent is not entitled to an oral evidentiary hearing. Mere statements that respondent cannot afford to pay the penalty sought are not a sufficient basis, in this case, for a finding that respondent cannot afford to pay the penalty. Respondent was informed that it was necessary to furnish income tax returns or other credible evidence, and was subsequently ordered to do so, but has not.

Respondent has been given numerous opportunities to present its case.

The penalty proposed in the complaint was determined in accordance with EPA policy regarding penalties proposed to be assessed pursuant to FIFRA for violations thereof.[23] Complainant reduced its penalty proposal to $3000 from the $5000 originally sought in the complaint based upon respondent's written unsupported statements of inability to pay.

No further reduction of the penalty is warranted, on this record.

There being no credible evidence upon which to base any finding of inability to pay, the penalty proposed by complainant in its motion for "accelerated decision" on the penalty issue is hereby assessed.

A civil penalty may be imposed for the violations found, FIFRA § 14(a)(1), 7 U.S.C. 136l(a)(1).

ORDER

Accordingly, it is ORDERED that respondent shall pay a civil penalty of $3000 for violations determined herein, within sixty (60) days from the date of service of this Order, by forwarding to the Regional Hearing Clerk and a cashier's check or a certified check for the said amount payable to the United States

[23] See Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) issued by EPA on July 2, 1990. See also section of the complaint labelled "PROPOSED CIVIL PENALTY" at (unnumbered) page 4.

of America which shall be mailed to:

U. S. Environmental Protection Agency
Regional Hearing Clerk
P. O. Box 360515M
Pittsburgh, PA 15251

PROVIDED, HOWEVER, that if, within fifteen (15) days from the date of this Order, respondent produces copies of state or federal income tax returns for the years 1990 and 1991, and if these documents show inability to pay a $3000 penalty, such assessment will be reconsidered.

J. F. Greene
Administrative Law Judge

February 22, 1993
Washington, D. C.