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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of)
)
Del Val Ink & Color, Inc.,)
)
Respondent.)
)
Proceeding under Section 3008)
of the Solid Waste Disposal Act,)
as amended.)

Docket No.
II RCRA-91-0104

Order on Application for Attorney's Fees and Other Expenses under
the Equal Access to Justice Act.

Background

The EPA's complaint in this proceeding was for civil penalties under the Solid Waste and Disposal Act, as amended, ("RCRA"), section 3008, 42 U.S.C. 6928. It charged Respondent, Del Val Ink & Color, Inc., as a generator of hazardous waste, with two violations of RCRA and the regulations thereunder.

Count 1 of the complaint charged that Del Val had shipped hazardous waste restricted from land disposal to an off-site facility without notifying the facility in writing of the appropriate treatment for the waste as required by 40 C.F.R. 268.7(a).

Count 2 of the Complaint charged that Del Val's classification of its waste on manifests accompanying the shipment did not comply with the State of New Jersey's regulations.¹

¹ Count 1 of the complaint charged a violation of the Federal land disposal regulations, since New Jersey had not yet been authorized to enforce RCRA's land disposal restrictions. Count 2 of

Del Val in its answer denied the violations, asserting that proper notices for wastes restricted from land disposal were attached to the manifests and that the wastes were "correctly classified" on the shipping manifests.

In the pre-trial proceedings that ensued, Del Val produced documentary evidence supporting its claims with respect to the specific shipments mentioned in the complaint. The proceeding was finally terminated by an order entered without objection by complainant dismissing the complaint with prejudice.

The proceedings following the issuance of the complaint can be summarized in greater detail as follows:

Following the filing of Del Val's answer, the parties initially engaged in settlement discussions that were unproductive. Accordingly, in November 1991, the parties filed their respective prehearing exchanges as directed by Chief Judge Frazier, then presiding. It was in this exchange supplemented by an amended prehearing exchange that Del Val produced the documentary evidence rebutting the charges to the complaint.

Complainant sought to obtain further evidence through discovery and by further investigation, and also requested that it be given additional time to allow it to make this investigation. Complainant was only partially successful in these efforts, and the case was finally scheduled for hearing on March 10, 1993.

the complaint charged a violation of the New Jersey regulations, N.J.A.C. 7.26-7.4(a)(4)(vii), since New Jersey had been granted authority to administer this part of RCRA. The EPA, however, retained authority to enforce violations of the New Jersey regulations. See complaint and answer.

Instead of proceeding with the hearing, Complainant moved to dismiss the complaint without prejudice. Dismissal without prejudice was denied and Complainant was directed to show cause why the case should not be dismissed with prejudice. In its response, Complainant, although questioning whether such dismissal was proper, stated that it has no objection to a dismissal with prejudice. Accordingly, the complainant was dismissed with prejudice by my order of May 26, 1993.

Del Val's Application for Fees and Expenses Must be Denied
Because It was Untimely.

The Equal Access to Justice Act ("EAJA"), 5 U.S.C. 504, allows to a party who prevails against an agency of the United States in an adjudicative proceeding, reasonable attorney's fees and expenses incurred by the party. The EPA's regulations governing applications under the EAJA are found at 40 C.F.R. Part 17.

Del Val is clearly a prevailing party in this case. It's right to attorney's fees and expenses, however, is dependent upon Del Val complying with the procedural requirements for such applications.

An application for attorney's fees and expenses must be filed no later than 30 days after a final disposition of the proceeding.² A "final disposition" is defined under the Agency's rules as

² 40 C.F.R. 17.14(a); EAJA, 5 U.S.C. 504(a)(2).

follows:

Final disposition means the later of: (1) The date on which the Agency decision becomes final, either through disposition by the Environmental Appeals Board of a pending appeal or through an initial decision becoming final due to lack of an appeal or (2) the date of final resolution of the proceeding, such as settlement or voluntary dismissal, which is not subject to a petition for rehearing or reconsideration.³

The 30-day limitation for filing applications is jurisdictional and restricts the Agency's ability to award fees and expenses against the government.⁴

The order dismissing the complaint with prejudice was issued and served upon Respondent by regular mail on May 26, 1993. Where service is by mail, the rules of practice allow for five additional days for the filing of a responsive pleading.⁵ Assuming that the five additional days would apply also to filing applications under the EAJA, the application should have been filed by June 30, 1993,

³ 40 C.F.R. 17.14(b).

⁴ Biddle Sawyer Corporation (Docket No. II TSCA TST-88-0244), TSCA Appeal No. 91-5, slip op. at 12 (EAB Nov 17, 1993)

⁵ 40 C.F.R. 22.07(c). Service was made by regular mail and not by certified mail, return receipt requested, as specified in the rules for service of orders. 40 C.F.R. 22.06. Unlike the case with respect to complaints, however, where service is complete when the return receipt is signed, service of an order is complete upon mailing. 40 C.F.R. 22.07(c). Consequently, it does appear that while service by certified mail is considered desirable to establish proof of mailing and time of receipt, it is not a mandatory prerequisite for valid service. Here, there is an affidavit of service as to when the order was mailed. In addition, Del Val admits to receiving the order, and the time sheets submitted with the application disclose that its counsel began working on the order on June 2, 1993. Application, Exhibit G at 15. I do not regard the service by regular mail, accordingly, as affecting either the validity of the service or the time for filing an application under the EAJA.

if, as Complainant EPA contends, the order was a final disposition of the matter.

DEl Val, for its part, contends that the rules regarding the finality of initial decisions should be followed here. An initial decision, if appealed, does not become final until the appeal is disposed of. If the decision is not appealed, the Environmental Appeals Board is still given 45 days to decide whether to review the decision on its own motion.⁶ Thus, an initial decision does not become final until the 45-day period has expired. Del Val mailed its application on July 15, 1993, which was 45 days after a responsive pleading was due (allowing five additional days for mailing).

Complainant's argument is that although it originally moved for voluntary dismissal, which was denied, and in response to an order to show cause why the case should not be dismissed with prejudice, started off with four pages of argument why it believed the case should not be dismissed with prejudice, it, nevertheless, concluded by not opposing dismissal with prejudice. The exact words of Complainant in not opposing dismissal were as follows:

The equities and the law support complainant's position that this matter should be dismissed without prejudice. However, since Complainant has decided further investigation of the underlying subject matter of this case is not a beneficial use of limited resources, Complainant has no objection to this matter being dismissed with prejudice.⁷

⁶ 40 C.F.R. 22.30(b).

⁷ Complainant's reply to order of April 29, 1993 at 4. Complainant also pointed out that there may be a problem with the Paperwork Reduction Act. Id.

It is true that the order entered here would not fall squarely within the type of consent order considered under the rules, which deal with negotiated consent settlements.⁸ At the same time, neither does the order fit within the framework of the usual initial decision disposing of contested issues of fact or law.⁹

If the EAB undertook to review the dismissal order entered here, it would presumably be for the purpose of determining whether Complainant erred in not opposing the order. The rules, however, make no provision for sua sponte review by the EAB of consent orders, and Complainant's position, although expressed in the negative, was essentially the same as consenting to the order.

When carefully examined, the order entered here resembles much more an order on consent than a contested dismissal. The finality of such an order is not stayed to allow for consideration by the EAB.¹⁰ Certainly, the fact that dismissal was not opposed should

⁸ See 40 C.F.R. 22.18.

⁹ In addition to decisions entered after a hearing (or on accelerated decision where there is no factual dispute), the rules also include as initial decisions, orders entered on default and dismissals of the complaint. see 40 C.F.R. 22.17(b), 22.20(b). The instant order, of course, is not a default order. While it is an order to dismiss, it is clear from the wording of the rule, that dismissal orders referred to there are contested dismissals.

¹⁰ 40 C.F.R. 17.14(b), the text of which is set out supra at 4. It could be argued that the language indicates that settlements and voluntary dismissals are subject to petitions for rehearing or reconsideration which would delay their finality. The rule, however, does not explain how such petitions affect the finality of a settlement or voluntary dismissal, as it does with respect to initial decisions. Nor do the rules of practice specify either a procedure for filing such petitions in the case of a settlement or voluntary dismissal or the time frame within which to do it. Accordingly, I do not find such a construction to be reasonable.

have put Del Val on notice that there was a difference between this order and an order of dismissal which was contested, and, therefore, involving questions likely to be appealed by the losing party or the resolution of which could still be reviewed by the EAB.

Del Val points to the fact that it prevailed on opposing voluntary dismissal, and filed a brief supporting dismissal with prejudice. This is undoubtedly the kind of work that is compensable when an EAJA application is considered on its merits. It should also be made clear that this is not a case where Del Val is being deprived of its right to fees and expenses because of some contrived strategy by Complainant. Del Val's application is denied, because it did not comply with the jurisdictional limitation that it file its application within 30 days, but, instead, relying on an erroneous interpretation of the rules, elected to wait 45 days.

Order

For the reasons stated, the Application of Respondent, Del Val Ink & Color, Inc., under the EAJA, 5 U.S.C. 504, for fees and expenses is denied.



Gerald Harwood
Senior Administrative Law Judge

Dated: February 14 1994

In the Matter of Del Val Ink & Color, Inc., Respondent
Docket No. II-RCRA-91-0104

Certificate of Service

I certify that the foregoing **Order On Application for Attorney's Fees and Other Expenses Under the Equal Access to Justice Act**, dated February 14, 1994, was sent this day in the following manner to the addressees listed below.

Original by Regular Mail to:

Karen Maples
Regional Hearing Clerk
U.S. EPA
26 Federal Plaza
New York, NY 10278


Copy by Regular Mail to:

Attorney For Complainant:

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Maria Whiting
Legal Staff Assistant

Dated: February 14, 1994