



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
JULIE'S LIMOUSINE &) DOCKET NO. CAA-04-2002-1508
COACHWORKS, INC.,)
)
RESPONDENT)

DECISION ON REMAND

In an Order on Respondent's Motion to Dismiss and Initial Decision ("Initial Decision") entered November 14, 2003, the undersigned dismissed the U.S. Environmental Protection Agency's ("EPA's") Complaint against Julie's Limousine & Coachworks, Inc., ("Respondent") for lack of subject matter jurisdiction. In a Remand Order issued July 23, 2004, the Environmental Appeals Board ("EAB") remanded this matter to the undersigned for a ruling on the admissibility of the evidence that the EPA proffered after the evidentiary hearing, and for further proceedings, as necessary.

As noted in the Initial Decision and Remand Order, Respondent contested the EPA's jurisdiction over the instant matter in its Answer filed in response to the Complaint issued against Julie's Limousine.^{1/} Subsequently, in its multiple motions for dismissal prior to and during the evidentiary hearing, Respondent challenged the EPA's jurisdiction on various grounds, including the lack of proof that the Regional Administrator for Region IV and/or Mr. Bruce B. Buckheit, the Director of the EPA's Air Enforcement Division ("AED"), Office of Regulatory Enforcement ("ORE"), Office of Enforcement and Compliance Assurance ("OECA"), had made a valid waiver determination. See Motions to Dismiss I, II, and III, and Motion to Reconsider. In response to Respondent's initial motion for dismissal, the EPA submitted a February 15, 2002 memorandum

^{1/} Respondent's initial challenge to EPA's jurisdiction was based on the assertion that the administrative enforcement action was barred by the twelve-month limitation on such actions set forth in Section 113(d)(1) of the Clean Air Act.

from Phyllis P. Harris, Regional Counsel and Director of Region IV's Environmental Accountability Division to Bruce B. Buckheit, Director of AED, ORE, OECA, "request[ing] a waiver of the twelve-month statutory limitation on EPA's authority to initiate an administrative complaint for penalties" against Respondent because "the case represents an appropriate use of this waiver authority ("Harris Memorandum"); a March 5, 2002 letter from Bruce Buckheit, to the DOJ, stating that AED "concur[s] and joins with Region 4 in requesting that a waiver of the 12-month limitation...is appropriate...." ("Buckheit Letter"); and an April 8, 2002, letter from the DOJ to Ms. Harris, concurring with the EPA's request for a waiver ("DOJ Letter").

During the evidentiary hearing in May 2003, Respondent moved for dismissal on the ground that the EPA had failed to show that the case involved a nationally managed program and, thus, Mr. Buckheit did not have delegated authority to make the waiver determination. See Motion to Dismiss III; Transcript at 578-90. Respondent's Motion to Dismiss III was held in abeyance until after the hearing and both parties had the opportunity to again address the jurisdictional issue in their post-hearing briefs. Transcript at 590.

In the EPA's reply to Respondent's Motion to Dismiss III, the EPA for the first time asserted that Mr. Buckheit, in fact, had concurred in Region IV's waiver determination and identified Mr. Smith as the Regional official who made the waiver determination.^{2/}

^{2/} In its pre-hearing pleadings, the EPA stated that Mr. Buckheit had properly made the waiver determination and cited paragraph 3.b of EPA Delegation 7-6-A for Mr. Buckheit's authority to make such determination in cases involving nationally managed programs, except in its Response II when the EPA stated that EPA Region IV obtained the statutory waiver and cited paragraph 3.e of EPA Delegation 7-6-A as authority for Mr. Buckheit to "sign, on behalf of EPA, Section 113(d)(1) waivers." The EAB found that "in Response II, Region IV specifically argued that Mr. Buckheit had exercised his concurrence authority under EPA Delegation 7-6-A ¶ 3.e (and not that he had acted solely under OECA's general grant of authority under EPA Delegation 7-6-A ¶ 2." Remand Order at 9-10, n. 12. I note that the EPA in Response II, citing Section 113(d)(1)'s requirement that the EPA "concur, along with the Attorney General, on any administrative enforcement," stated only that Mr. Buckheit has delegated authority to "concur in any determination regarding the authority delegated under paragraph 1.b," which "specifically refers to waiver authority" [to determine
(continued...)]

See Response III. In this regard, the EPA stated that "after ... Winston Smith, made a determination that the case could proceed, his attorney, the Regional Counsel, requested concurrence from the designee of the Attorney General on his behalf." Response III at 7.

During a post-hearing telephonic conference with both parties on October 2, 2003, I directed the EPA to submit a written brief verifying the facts surrounding the waiver determination. This instruction merely sought clarification of the person(s) who made the waiver determination and concurred in that determination, if any, and such was not intended as an invitation for the submission of additional evidence.^{3/}

Nonetheless, the EPA on October 15, 2003 proffered an affidavit dated October 14, 2003 from Winston A. Smith, the former acting Director of Region IV's Air, Pesticides & Toxics Management Division ("APTMD") until September 2002 ("Smith Affidavit"), and an affidavit from Richard Biondi, the current Acting Division Director of AED, ORE, OECA ("Biondi Affidavit").^{4/} The Smith Affidavit was proffered by the EPA to support its position that Mr. Smith, in fact, had made the determination that a waiver of the twelve-month statutory limitation on the EPA's authority to initiate an

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jointly with the Attorney General]. Regardless, the EPA lastly argued in its Response II that "the proper waivers were obtained and signed by the authorized personnel...."

^{3/} During most of the post-hearing telephonic conference, the EPA stated that the waiver determination had been properly made by Mr. Buckheit even though I had indicated that the term "waiver determination" as used here did not include the decision by the AA for OECA or his designee to concur with the Region's waiver determination. Later in the telephonic conference, the EPA indicated that it misspoke and that the waiver determination was made by Mr. Smith.

^{4/} The Biondi Affidavit contains no pertinent information concerning the question of whether Mr. Smith made the waiver determination in the instant matter. Mr. Biondi states only that Mr. Buckheit received Region IV's request for a waiver and that Mr. Buckheit agreed with Region IV's determination. Although the EAB cites the Biondi Affidavit as evidence proffered by the EPA along with the Smith Affidavit, the Biondi Affidavit was not identified as potentially critical evidence by the EAB. For purposes of this Decision, the admissibility of the Biondi Affidavit is treated the same as the Smith Affidavit.

administrative penalty action under Section 113(d)(1) of the Clean Air Act was appropriate and that such required determination was made before the February 15, 2002 Harris Memorandum was issued, requesting a waiver and seeking the concurrence of Mr. Buckheit. Respondent objects to all evidence proffered by the EPA subsequent to the evidentiary hearing.^{5/}

In the Initial Decision, I found that the record before me did not demonstrate that the waiver determination was made by a Region IV official with delegated authority. I also found that the Harris Memorandum did not show that a Regional official with delegated authority to do so had made a waiver determination. Because I found that the Smith Affidavit did not adequately establish that Mr. Smith, in fact, had made the determination that a waiver was appropriate before the Harris Memorandum was issued on February 15, 2002, I did not reach the question of the admissibility of the Smith Affidavit. See Initial Decision at 15-16. However, in light of the Remand Order, I now must do so. In its Remand Order, the EAB directed the undersigned to rule on the admissibility of the Smith and Biondi affidavits.

The EAB in its Remand Order found that "the Harris Memorandum itself clearly does not establish that Mr. Smith made the waiver determination" and that "it [Harris Memorandum] also is not by itself dispositive, and without additional facts it is insufficient to prove that jurisdiction exists," and, therefore, determined that the Smith affidavit is a "potentially pivotal piece of evidence."^{6/}

^{5/} Respondent submitted Respondent's Surreply in Support of Third Motion to Dismiss for Lack of Subject Matter Jurisdiction and Motion to Exclude on October 23, 2003.

^{6/} Remand Order at 33-4. The EAB goes on to state that "[o]n its face, the Smith Affidavit appears to strongly support Region IV's position that Mr. Smith made the required determination prior to issuance of the Harris Memorandum." Remand Order at 34.

I respectfully disagree. Respondent argues that aside from the Smith Affidavit being inadmissible as untimely, there are many serious problems with the affidavit. First, I note that Mr. Smith states in his affidavit that "[d]uring my tenure as the Division Director for APTMD, I was briefed on the Julie's Limousine case in Spring, 2002, and my staff recommended that the case proceed to an administrative complaint in order to assess penalties for violations of Sections 609 and 114 of the Clean Air Act(CAA)," and that the Harris Memorandum seeking the waiver was issued February
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Thus, the EAB directed the undersigned to rule on the admissibility of this critical piece of evidence.

^{6/} (...continued)

15, 2002, which was prior to the commencement of Spring on March 20, 2002. Smith Affidavit at 2. Such inconsistency concerning the critical dates of the required determination at issue compels me to question the accuracy and reliability of the affidavit. Second, the Smith Affidavit, which related the specific facts of one of many cases reviewed by the Director for APTMD, was executed some twenty months after the actions at issue and the waiver request. Interestingly, Mr. Smith was not identified by the EPA as the Regional official who made the waiver determination until after the hearing when the EPA filed its response to Respondent's Motion to Dismiss III, but in its Response II the EPA stated that the "proper waivers were obtained and signed by the authorized personnel."

Third, I note that copies of the Harris Memorandum and Buckheit Letter were sent to Bruce Gelber of DOJ, Beverly Spagg, Region 4, APTMD, and Lucia C. Mendez, Region 4 EAD, but no copies were sent to Mr. Smith. Although Mr. Smith was sent a copy of the April 8, 2002, DOJ letter concurring with the EPA's Section 113(d)(1) waiver request, the letter was addressed to Ms. Harris. Further, during the proceeding below and at the post-hearing telephonic conference with both parties on October 2, 2003, the EPA materially changed its express and implied position of claiming that Mr. Buckheit had executed the Section 113(d)(1) waiver to asserting that Mr. Smith had made the waiver determination. Although the EPA's representations during the proceeding may not have been "materially inconsistent in the sense ordinarily necessary for the application of judicial estoppel," these representations can be considered in assessing the probative value accorded the Smith Affidavit. Finally, I note Respondent's contention that the Smith Affidavit does not state clearly that Mr. Smith made the determination that the waiver was appropriate and that such determination was made prior to the issuance of the Harris Memorandum.

In view of the foregoing reasons and after having considered the entire record of proceeding (see Tr. at 363-74), I had determined that the Smith Affidavit was not sufficiently probative to support the EPA's position that the waiver determination by Mr. Smith was made before the Harris Memorandum was issued. Thus, in the Initial Decision issued November 14, 2003, I found that the Smith Affidavit "does not adequately establish the EPA's position." See Initial Decision at 15.

On remand, after having fully considered the record in this case, the arguments of counsel, the administrative rules of practice, and relevant case law, I find that the Smith Affidavit is inadmissible. The Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Consolidated Rules of Practice"), 40 C.F.R. §§ 22.1-.32, provide that the parties must file any document or exhibit as part of the prehearing exchange unless the "non-exchanging party has good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so." 40 C.F.R. §§ 22.19(a)(1), 22.22(a). Where a party fails to provide information within its control without good cause, the Administrative Law Judge ("ALJ") may exclude the information from evidence. 40 C.F.R. § 22.19(g).

Although Respondent contested the EPA's jurisdiction based on the validity of the Region IV and/or alleged Buckheit waiver determination before the hearing and during the hearing, the Smith Affidavit was not proffered by the EPA until after the evidentiary hearing was concluded. Respondent now challenges as untimely the admissibility of the Smith Affidavit.

The EPA has offered no good cause for its failure to submit the Smith Affidavit as part of its prehearing exchange.^{7/} Indeed, the Smith Affidavit was not proffered until after the post-hearing briefs were filed. As such, the Smith Affidavit is found inadmissible as untimely filed. See 40 C.F.R. § 22.19(g). Although Respondent did not renew its pre-hearing assertion set forth in its Motion to Dismiss II that the EPA had failed to show that Region IV had made a valid waiver determination until after the conclusion of the hearing, it was incumbent upon the EPA in this case to provide the necessary proof of a valid waiver determination as part of its prehearing exchange.^{8/} See

^{7/} Additionally, the EPA did not submit the Smith Affidavit in response to Respondent's three Motions to Dismiss or Motion to Reconsider.

^{8/} The record indicates that Respondent may not have renewed its argument concerning whether the appropriate Regional official had made the waiver determination because the EPA argued that this was a case involving a nationally managed program and that Mr. Buckheit had made properly the waiver determination. Regardless of whether the EPA's arguments are deemed "materially inconsistent" or
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Respondent's Reply in Support of Third Motion to Dismiss at 11. Moreover, inasmuch as the validity of the waiver determination was challenged by Respondent, and the EPA ultimately relied on its argument that Mr. Smith made the waiver determination with the concurrence of Mr. Buckheit, the EPA needed to provide sufficient proof of these actions in order to carry its burden of proof.^{9/} Allowing the EPA to file the Smith Affidavit at this very late date would be unfair and highly prejudicial to Respondent.^{10/}

Inasmuch as I agree with the EAB's findings that "the Harris Memorandum itself clearly does not establish that Mr. Smith made the waiver determination" and that "it [the Harris Memorandum] also is not by itself dispositive, and without additional facts it is insufficient to prove that jurisdiction exists," I find that the record without the Smith Affidavit is not sufficient to show that the Regional official(s) with delegated authority to do so had made the required waiver determination. As such, the EPA has not adequately established that it had validly obtained a waiver of the

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"fundamentally irreconcilable," these arguments were sufficiently confusing as to the alleged jurisdictional facts so as possibly to have cut off further argument by Respondent.

^{2/} The burden of proving jurisdiction lies with the EPA. Section 22.24 of the Consolidated Rules of Practice, 40 C.F.R. § 22.24; *In re Lyon County Landfill*, CAA Appeal No. 98-6, 8 E.A.D. 559, 568 (EAB, Aug. 26, 1999). The EAB, in discussing the EPA's burden of establishing jurisdiction over this matter, ruled that "in order to demonstrate that there has been a valid determination by EPA, Region IV must show that the appropriate person, or persons, within EPA made the requisite statutory determination." Remand Order at 14. The EAB further ruled that "[w]hether the Regional official with delegated authority made the necessary waiver determination or not is a question that Region IV bears the burden of proving" because its assertion of jurisdiction had been challenged. Remand Order at 29.

^{10/} In its Remand Order, the EAB pointed out that an ALJ has broad discretion in determining what evidence is properly admissible and her rulings on such matters are entitled to substantial deference. *In re Titan Wheel Corp.*, 10 E.A.D. 526, 541 (EAB 2002); *In re J.V. Peters*, 7 E.A.D. 77, 99 (EAB 1997), *aff'd sub nom. Shillman v. United States*, No. I:97-CV-1355 (N.D. Ohio Jan. 14, 1999), *aff'd in part*, 221 F.3d 1336 (6th Cir. 2000), *cert. denied*, 531 U.S. 1071 (2001). See Remand Order at 35-6.

twelve-month statute of limitations on administrative penalty actions pursuant to Section 113(d)(1) of the Clean Air Act prior to issuing the Complaint against Respondent. Accordingly, the EPA does not have administrative jurisdiction over this matter and the Complaint against Respondent must be dismissed.^{11/}

Order

The Complaint is dismissed for lack of jurisdiction.

Appeal Rights

This Order constitutes an Initial Decision as provided in Section 22.17(c) of the Consolidated Rules of Practice, 40 C.F.R. § 22.17(c). Pursuant to Sections 22.27(c) and 22.30 of the Consolidated Rules of Practice, 40 C.F.R. §§ 22.27(c) and 22.30, this Initial Decision shall become the Final Order of the Agency unless an appeal is filed with the Environmental Appeals Board within thirty (30) days of service of this Order, or the Environmental Appeals Board elects, *sua sponte*, to review this decision.

Barbara A. Gunning
Administrative Law Judge

Dated: August 26, 2004
Washington, DC

^{11/} Respondent's Fourth Motion to Dismiss for Lack of Subject Matter Jurisdiction filed August 24, 2004, is now moot. In its Motion to Dismiss IV, Respondent moves to dismiss the Complaint on the additional ground that this tribunal lacks subject matter jurisdiction because a required waiver determination also was not made by the Attorney General or a properly authorized delegatee of the Attorney General.

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