2/16/94

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
DEETER FOUNDRY, INC.,	)	**[RCRA] Docket No. VII-92-H-0009**
	)	
Respondent	)	

ORDERS

I

In an order issued November 24, 1993,[1] complainant was granted leave to serve a motion to file an amended complaint. Respondent was directed in the aforementioned order to file an answer to the amended complaint no later than November 26. The amended complaint, among others, reduced the total proposed penalty to $693,396 from $1,270,676. Respondent served its amended answer on November 29. This pleading restated respondent's affirmative defenses and iterated its request for a hearing. Significantly, respondent's submission did not come forward with any substantial reasons why the first amended complaint should be rejected. For the reasons stated in the memorandum in support of complainant's motion to amend its complaint, and the reduction of the proposed penalty, the undersigned Administrative Law Judge (ALJ) concludes that there exists no prejudice to respondent by granting complainant's motion to amend its complaint.

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[1] Unless indicated otherwise, all dates are for the year 1993.

II

On November 8, complainant filed a motion in limine and a memorandum of law in support thereof, to prevent the introduction of testimony or exhibits regarding penalties assessed in, what it asserts to be, unrelated administrative cases. Complainant has in mind exhibit numbers 35 and 36 of respondent's proposed list and any related testimony. For the reasons expressed in its response served November 23, respondent opposes precluding the introduction of the evidence in issue. It is of a view that it should "be permitted to present its evidence, to be given such weight as the Presiding Officer deems appropriate." (Opp'n at 10.)

The respondent's exhibits in contention are analogous to documents obtained through discovery. The documents set out in a prehearing exchange are not in evidence until offered and admitted at the hearing. However, considering the issue presented, the ALJ does not concur in respondent's thinking that "relevancy objections are best left for time of trial." (Opp'n at 1.) This merely defers the resolution of the issue to the time of the hearing. The ALJ is unable to perceive that the legal issue presented will be any different then from now. In the ALJ's view, the question is sufficiently ripe for resolution at this time.

Complainant's reliance upon Chautauqua Hardware Corporation (Chautauqua), EPCRA, Appeal No. 91-1, (June 24, 1991) is well taken. Respondent observes, however, that in Chautauqua, it was alleged that the penalty policy was defective, while here the challenge is to the purported "inconsistent application of the 1990

Penalty Policy." Assuming arguendo that such a distinction exists, it does not follow that the alleged inconsistent application of a penalty policy favors respondent's position. The language in Chautauqua, at 17, is broad enough to support complainant's position. The Chief Judicial Officer (CJO) of the Environmental Protection Agency held that a discovery request for the following information should be denied:

> [a]ny settlement agreements, final orders, and accompanying opinions or other documents that explain the terms and rationale of the resolution of the administrative litigation under EPCRA Section 313 in the following EPA cases: [the discovery request then lists 21 EPCRA cases].

The CJO reasoned as follows:

> In its opposition brief, Chautauqua explains that the purpose of all . . . [its] discovery requests, including the request quoted above, is to elicit information bearing on the appropriateness of the proposed penalty.[13/] The materials requested above, however, cannot be used to prove a fact bearing on that issue.[14/] What has happened in other cases can have no bearing on any factual issues in this case. Thus, the information about other EPCRA cases does not have "significant probative value," within the meaning of Section 22.19(f)(1)(iii). (Emphasis supplied.)

[13/] See, Respondent's Opposition to Motion for Interlocutory Review, at 11 ("Respondent's discovery requests go directly to the issue of culpability and the basis for the ERP and, therefore, directly to the fairness of the proposed penalty.")

[14/] Nor can other EPCRA cases be used to show that the penalty is inappropriate because it is more severe than penalties imposed in similar EPCRA cases. See Briggs & Stratton Corp., TSCA Appeal No. 81-1, at 20-22 (CJO,

(continuation of quoted footnote 14)

> February 4, 1981) penalties imposed in separate PCB actions cannot be compared, particularly as between settled cases and adjudicated cases); Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 187, rehearing denied, 412 U.S. 93 (1973) ("The employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases.") (Emphasis supplied.)

The phrase "significant probative value" within the meaning of discovery under 40 C.F.R. 22.19(b)(1)(iii) is akin to "relevancy" and therefore the complainant's argument comes within the holding of Chautauqua.

There are some very practical reasons for not deciding relevancy of the exhibits at the hearing. Argument then concerning admissibility will consume valuable time, which should be devoted to more substantive matters; it would also burden the record and contribute to confusion. Respondent, understandably, is concerned about the proposed penalty sought in this matter. It is reminded that the amount of civil penalty assessed, if any, is within the discretion of the ALJ. The latter is merely enjoined to "consider any civil penalty guidelines." 40 C.F.R. § 22.27(b). Additionally, in the event of liability and the assessment of a penalty, it would appear that respondent on appeal may request the Environmental Appeals Board revisit the question of the relevancy of contested exhibits. It is concluded that respondent's exhibits 35 and 36 do not have sufficient relevancy for admission into evidence at the forthcoming hearing.

III

In its motion served November 8, complainant seeks to strike respondent's affirmative defenses numbers 15, 16 and 17 from the answer. Respondent served its response in opposition to the motion on November 23.

Some preliminary observations are appropriate here. An "affirmative defense" is "matter asserted by defendant which, assuming the complaint to be true, constitutes a defense to it." Black's Law Dictionary (5th Ed. 1979). Although administrative agencies are generally unrestricted by technical and formal procedure which govern trials before a court, the Federal Rules of Civil Procedure (Fed. R. Civ. P.) often act as guides. A motion to strike under the Fed. R. Civ. P. 12(f) (hereinafter Rule) is the principle vehicle for objecting to an insufficient defense.[2] The Rule states:

> **(f) Motion to Strike.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

In that striking a portion of a pleading is a drastic remedy and because it is often considered simply a dilatory tactic of the movant, motions under the Rule are received with disfavor and, according to commentators granted infrequently. A motion to strike

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[2] Wright & Miller, Federal Practice and Procedure: Civil § 1380 at 782 (1969).

must state with particularity the ground thereof, and set forth the nature of the relief or type of order sought. Well-pleaded facts shall be taken as admitted, but conclusions of law or fact need not be treated in that fashion.[3] A motion to strike a defense will be denied if the defense is sufficient as a matter of law or if it fairly presents a question of law or fact which the court ought to hear.[4]

Must an affirmative defense be confined solely to issues involving liability? Many defenses arise in this context, and for this reason, in a technical sense, the answer to the aforementioned question would appear to be in the affirmative. Traditionally, administrative agencies possess wide latitude in fashioning their own rules of procedure.[5] Common garden intelligence dictates that defenses relating to the penalty question should not, solely for this reason, be amenable to a motion to strike. The pertinent section of the Consolidated Rules of Practice, 40 C.F.R. § 22.24, lend support to this. They provide that complainant, in addition to that of establishing liability, has the burden of going forward and proving that the proposed civil penalty is appropriate. Complainant has cited no persuasive legal authority which would

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[3] Id. at 787.

[4] 2A Moore's Federal Practice ¶ 12.21[3] at 12-179 (2d ed. 1987).

[5] See, In the Matter of Katzson Brothers, Inc., FIFRA Appeal No. 85-2 (Final Decision, November 13, 1985); Oak Tree Farm Dairy, Inc. v. Block, 544 F. Supp. 1351, 1356 n. 3 (E.D. N.Y. 1982); and Silverman v. Commodities Futures Trading Commission, 549 F.2d 28, 33 (7th Cir. 1977).

preclude the asserting of affirmative defenses concerning the penalty question. A respondent is entitled to its full, not a half, day in court concerning either liability or penalty, or where, as sometimes occurs, the evidence will involve both questions. To limit defenses solely to the issue of liability, as complainant appears to advocate with some defenses, would tend to bifurcate the hearing. It would be less costly and contribute to judicial economy to try all the issues in one proceeding. In the Matter of Shetland Properties, Docket No. TSCA-I-87-1082, Order Denying Complainant's Motion to Strike Affirmative Defense, September 30, 1987. However, an affirmative defense should be stricken if, among others, it is obviously frivolous or insubstantial in legal or factual significance, or presents a question which the ALJ does not have jurisdiction to rule upon. With this backdrop, the ALJ turns to the specific affirmative defenses.

Affirmative Defense No. 15

Respondent maintains in this defense that: "[T]he Complaint should be dismissed for lack of meaningful notice to respondent." The ALJ has difficulty with this. The record shows that respondent did receive "meaningful notice" in the form of the complaint. The defense is irrelevant and immaterial to either the issues of liability or penalty. It borders on the frivolous. It is concluded that this defense should be stricken in its entirety.

Affirmative Defense No. 16

Respondent asserts that the complaint should be dismissed in

that the State of Nebraska has been delegated authority to administer the hazardous waste program, and "the State has primacy in this matter." This is in error. The issue was treated in some depth by this ALJ in an order issued In the Matter of Harmon Electronics, Inc. (Harmon), RCRA Docket No. VII-91-H-0037, at 1-7, (August 17, 1993). Complainant relates that it gave notice to the State prior to the issuance of the complaint. (Mot. at 4.) This is all that is required under section 3008(a)(2) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928. Respondent's defense is again irrelevant and immaterial or both on the issues of liability and penalty. It is concluded that this defense should be stricken in its entirety.

Affirmative Defense No. 17

Respondent is of a mind that the complaint should be dismissed because at the time of its filing it was, and is, working cooperatively with the State to address all matters mentioned in the complaint and compliance order issued by complainant. For the reasons mentioned in Harmon, this is not a defense to the question of respondent's liability, but it may be material and relevant on the penalty issue in that one of the factors to be weighed in assessing a penalty is "any good faith efforts" to comply with applicable requirements. Section 3008(a)(3). (Harmon at 23.) It is concluded that this defense should be stricken as it relates to liability but not to the extent it pertains to the penalty question.

IV

For the reasons stated in its motion of November 9, complainant seeks leave to file a supplemental prehearing exchange. On November 24, respondent served its response stating that it "has no objection to the motion" but not waiving objection to the admissibility into evidence of any of complainant's prehearing exchange, and reserving the right to supplement its own prehearing exchange.

In that there is no objection to complainant's motion, it is concluded that it should be granted.

V

For the reasons stated in its motion filed with the Regional Hearing Clerk on October 21, complainant, pursuant to 40 C.F.R. § 22.20(a), seeks a partial accelerated decision on the question of liability on all six counts in the complaint. Pursuant to the aforementioned section of the regulations, on November 12, respondent served a cross motion for a partial accelerated decision on the issue of the penalty proposed by complainant. On November 10, respondent served its response to complainant's motion for an accelerated decision on the issue of liability. Complainant served its response to respondent's motion for an accelerated decision concerning the penalty question on November 30. In addition to seeking denial of respondent's motion, complainant requests an order concerning three other issues which will be addressed below. On December 3, complainant filed a reply to respondent's response to complainant's motion for a partial

accelerated decision on the issue of liability. Respondent served a sur-response on December 13. The parties have presented their positions in excruciating detail. The arguments advanced in the flurry of pleadings have been examined and weighed; they will not be restated here except to the extent deemed necessary for the resolution of the issues.

To begin at the beginning, the pertinent section of the Consolidated Rules of Practice, 40 C.F.R. § 22.20(a), provides, in pertinent part, as follows:

> (a) General. The Presiding Officer, upon motion of any party . . . may . . . render an accelerated decision in favor of the complainant or respondent, as to all or any part of the proceeding, . . . if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law . . . . (emphasis added).

An accelerated decision is equivalent to a summary judgment under Fed. R. Civ. P. 56. It permits a final decision to be rendered without the time or expense of an evidentiary hearing provided there are no genuine issues of material fact in controversy. Material facts are those which establish or refute an essential defense asserted by a party.[6] Although reasonable inferences may be drawn from the evidence, they must be viewed in a light most favorable to the non-moving party in determining whether any material fact exists.[7] Further, not only must genuine issues of

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[6] Words and Phrases, "Material Fact."

[7] United States v. Diebold, 369 U.S. 654, 655 (1962); Adickes v. Kress & Co., 398 U.S. 144, 159 (1970); Prinizi v. Keydril Co., 738 F.2d 707, 709 (5th Cir. 1984). See also, 6 Moore's Federal Practice, ¶ 56.15 [1-00].

material fact not exist, but it must be determined that the moving party is entitled to a judgment as a matter of law. Once it is determined that an issue of material fact exists, the inquiry ends.[8] The ALJ is not empowered to resolve the issue or to weigh the evidence supporting each argument.[9] Further, in considering a motion for summary judgment, the forum must accept any competent evidence presented by the non-moving party as true.[10]

The ALJ is not obliged to engage in the unnecessary and titanic task of anatomizing each and every assertion raised in the cross motions for an accelerated decision. It is apparent that the parties are examining the questions of fact and law under different microscopes and have entangled themselves in disagreement. Be it complainant's motion for an accelerated decision concerning liability, or the like pleading by respondent regarding the penalty, it is as clear as a day in June that there exists many genuine issues of material fact.

Assuming arguendo that persuasive arguments are made by each party in support of its motion for an accelerated decision, they still may be denied. The granting of a motion for an accelerated decision is a harsh remedy; it should be approached with circumspection. A forum may exercise its discretionary power to deny such a motion, although movant has made a case for same in the

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[8] Homan Mfg. Co. v. Long, 242 F.2d 645, 656 (7th Cir. 1957).

[9] Cox v. American Fidelity and Casualty Co., 249 F.2d 616, 618 (9th Cir. 1957).

[10] Leonard v. Dixie Well Serv. & Supply, Inc., 828 F.2d 291 (5th Cir. 1987).

record. Perma Research Development Company v. Singer Company, 308 F. Supp. 743, 750 (S.D. N.Y. 1970); John Blair Company v. Walton, 47 F.R.D. 196, 197 (D. Del. 1969); Roberts v. Browning, 610 F.2d 528, 536 (8th Cir. 1979); Moore's, supra, at 4, ¶ 56-15[6], at 56-323. The wrenching questions posed in the motions for accelerated decisions should be resolved in an evidentiary hearing.

In its response of November 30, complainant also requests the ALJ to issue an order which "declares that the 1990 Civil Penalty Policy applies to this case," (at 3, 18-28). In pertinent part, the 1990 Penalty Policy provides:

> The 1990 RCRA Civil Penalty Policy is immediately applicable and should be used to calculate penalties in all RCRA administrative complaints . . . brought under the statute after the date of the policy, regardless of the date of violation . . . . (at 54, emphasis supplied.)

The original complaint in this matter was issued on February 3, 1992. Based upon the clear and quoted language above, it is concluded that the 1990 Penalty Policy is applicable to the subject proceeding. It is not necessary for the ALJ to reach and decide here the manner or degree that the 1990 Penalty Policy is applicable to the proceeding. This will require thorough ventilation of the appropriate evidence at the hearing.

Complainant also requests an order which "excludes from the record all references to settlement negotiations in this case and prevents the future introduction of evidence relating to settlement negotiations, including discussions relating to supplemental environmental practices." (Resp. at 3, 28-29.) Complainant's

request has merit. The pertinent section of the Consolidated Rules of Practice, 40 C.F.R. § 22.22(a), provides for the exclusion of evidence relating to settlements which would be excluded under Rule 408 of the Federal Rules of Evidence. The reason for this prohibition is obvious and known to members of the bar. The ALJ also concurs in complainant's request to exclude references to settlement negotiations "from the record" which would embrace prehearing and post hearing submissions. On the facts presented in the pleadings to date, information pertaining to settlement is by its very nature tainted. In an effort to achieve the maximum objectivity in reaching an initial decision, the ALJ should be shielded and insulated from information concerning settlement negotiations, with particular reference to monetary amounts. The parties have been admonished previously concerning this transgression and respondent's attention is invited to paragraph "6" on page "3" of the Notice and Order issued July 1, 1992.

Complainant also requests an order which "excludes from the record all existing references to settlement and penalty amounts in other cases and prevents the future introduction of any evidence relating to settlements and penalties in other cases." (Resp. at 3, 23-25). This was treated to some degree above concerning complainant's motion in limine. The ALJ again concurs in complainant's thinking. Any settlement amount reached in other cases is flatout irrelevant to the pending matter. The same conclusion applies to those matters that have been litigated and a penalty assessed. To permit the introduction into evidence, or any

other part of the record, of penalty amounts assessed in purportedly similar cases is to be avoided. This should also apply to those matters where the complaint was dismissed or no penalty assessed. There exists a variety of considerations, and the weight to be accorded same, between cases; the relevancy and probative value of such tendered evidence varies from minimal to nil. To permit the introduction of such evidence anywhere in the record is also time consuming and distracting. The ALJ declines to be waylaid into such an arid exercise.

IT IS ORDERED that:

1. Complainant's motion to amend its complaint be **GRANTED**.

2. Complainant's motion in limine to prevent the introduction into evidence of testimony or exhibits regarding penalties assessed in unrelated administrative cases be **GRANTED**.

3. Complainant's motion to strike respondent's affirmative defenses numbers 15, 16 and 17 from respondent's answer is **GRANTED** in part, and **DENIED** in part. Complainant's motion to strike affirmative defenses numbers 15 and 16 is **GRANTED** in entirety. Complainant's motion to strike affirmative defense number 17 is **GRANTED** insofar as it relates to the question of liability and **DENIED** to the extent it pertains to the penalty issue.

4. Complainant's motion to supplement its prehearing exchange be **GRANTED**.

5. Complainant's motion for an accelerated decision on the issue of liability be **DENIED**.

6. Respondent's motion for an accelerated decision concerning the penalty question be **DENIED**.

7. Complainant's request for an order that the 1990 Civil Penalty Policy applies to the instant proceeding be **GRANTED**.

8. Complainant's request to exclude from the record all existing references to settlement negotiations in this case and prevent the future introduction of any evidence relating to settlement negotiations, including discussions relating to supplemental environmental projects, be **GRANTED**.

9. Complainant's request to exclude from the record all existing references to settlement and penalty amounts in other cases and prevent the future introduction of any evidence relating to settlement amounts in other cases be **GRANTED**. In the interest of clarity, and sua sponte, this order also extends to litigated matters where a complaint may have been dismissed, or where no penalty was assessed.

Frank W. Vanderheyden
Administrative Law Judge

Dated: February 15, 1994

IN THE MATTER OF DEETER FOUNDRY, INC., Respondent,
[RCRA] Docket No. VII-92-H-0009

Certificate of Service

I certify that the foregoing Orders, dated 2/15/94, was sent this day in the following manner to the below addressees:

Original by Regular Mail to:

Ms. Venessa R. Cobbs
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region VII
726 Minnesota Avenue
Kansas City, KS 66101

Copy by Regular Mail to:

Attorney for Complainant:

Denise L. Roberts, Esquire
Office of Regional Counsel
U.S. EPA, Region VII
726 Minnesota Avenue
Kansas City, KS 66101

Attorney for Respondent:

Stephen J. Owens, Esquire
STINSON, MAG & FIZZELL
1201 Walnut Street, Suite 2800
Kansas City, MO 64106-2150

Marion Walzel
Legal Staff Assistant

Date: Feb. 16, 1994