UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

WOODCREST MANUFACTURING, INC. DOCKET NO. 5-EPCRA-96-007

Respondent

ORDER DENYING MOTION FOR DISQUALIFICATION

Under consideration is the motion to disqualify presiding officer by respondent, dated June 3, 1997. Respondent moves to disqualify the presiding officer because of remarks he allegedly made at an off-the-record conference held on May 27, 1997. It is respondent's position that when the presiding officer stated that respondent had not undertaken settlement discussions as it was directed to do on May 22, 1997, that the presiding officer exhibited bias by poisoning the settlement environment. Respondent also appears to argue that the presiding officer's determination that respondent would have until June 10, 1997 to continue settlement discussions before a ruling on complainant's motion for accelerated decision is arbitrary and capricious. The respondent attaches the affidavit of its counsel, Richard S. VanReenen, where he recounts his recollection of the statements that provide the basis for respondent's legal assertions. 1/

The conference was conducted by telephone and included the presiding officer, counsel for respondent and counsel for complainant.

Pursuant § 22.04 (d) (1) disqualification is required if the presiding officer has a financial interest or if he has any relationship with a party or with the subject matter which would make it inappropriate for him to act. Respondent has not claimed that the presiding officer has a financial interest in the outcome of the case or that he has a relationship with a party or with the subject matter. Until this case was assigned to the presiding officer he had no knowledge of the allegations in the complaint and has never met or had appear before him counsel for the respondent, the complainant or respondent's representatives. Thus, the request does not come within the prohibitions of §

22.04 (d) (1) and respondent does not assert that § 22.04 (d) (1) is applicable to its request.

Aside from the prohibitions in § 22.04, administrative law judges are bound to act without bias. An impartial decisionmaker is essential. Manual for Administrative Law Judges, (Admin. Conf. of the U.S. 3rd ed. 1993) at 97. But it does not mean that the presiding officer does not form judgments of the actors in a proceeding or he could never render a decision. See In the Matter of Central Paint and Body Shop, 2 EAD 309, 310-11 (CJO 1987).

At the same time, "clear and noncontroversial law" holds that a "personal bias or personal prejudice, that is an attitude toward a person, as distinguished from an attitude about an issue, is a disqualification when it is strong enough and when the bias has an unofficial source; such partiality may be either animosity or favoritism." The Federal Administrative Judiciary, (Admin. Conf. of the U.S., 1992) at Vol. II, p. 968. 2/ Presumably, it is respondent's view that the presiding officer has a personal bias or prejudice not about the facts, law, policy or discretion to be applied or exercised in the case but a bias or prejudice about the respondent as an entity. Such bias would be impermissible if it was based on a prior hostile unofficial relationship with the individual, the individual's personal characteristics (e.g. race, religion, or ethnic origin), or a prior unofficial positive relationship with the individual. Id. at 971. Disqualifying personal bias must have a prior unofficial source. If a decisionmaker develops strong feelings for or against a party based on official dealings with the party or on official exposure to the evidence concerning the party's behavior, it is not prohibited because it inevitable and it assumed that the decisionmaker can overcome feelings toward a party that are formed in the course of performing official duties. See Withrow v. Larkin, 421 U.S. 35, 53-55 (1975).

It is evident from the factual setting of this case that no prohibited bias existed. The remarks attributed to the presiding officer, if true, are not views formed from a prior unofficial source. Moreover, as the following account demonstrates they arose in the context of urging the respondent to realistically assess its options. They were formed in consideration of respondent's expressed interest in settling the case instead of having the presiding officer issue a decision that respondent was liable for the violations alleged in the complaint. Respondent often expressed its desire to settle as the following history indicates but seldom did anything to effectuate a settlement. Any remarks about the need for the respondent to aggressively pursue settlement did not poison the settlement environment, but instead

permitted respondent to have one more chance to effectuate an acceptable settlement. That this was the case is amply demonstrated by the facts of the case.

Respondent filed an answer on February 7, 1996. In its answer respondent admitted all allegations made in the complaint except it denied the amount of toluene that was used during the calendar year 1990 was 137,097 pounds; it conceded that it used 55,496 pounds if computation of the toluene was viewed as the average per cent of composition stated on the Material Safety Data Sheet. Ultimately, respondent stipulated that it "otherwise used" 136, 491 pounds of toluene, slightly less than the alleged amount. Respondent did not request a hearing in its answer but did contest the amount of the penalty. At the date of the answer respondent represented that it had filed the Form R for 1990 for each of the chemicals cited in the complaint.

The complaint and answer were forwarded to this office on June 3, 1996. On September 23, 1996, the undersigned was designated as the presiding officer. On September 30, 1996, an Order Establishing Procedures was issued and the prehearing exchange for complainant was due on January 6, 1997 and for the respondent on February 3, 1997. On November 25, 1997, complainant indicated in a status report that respondent and complainant had begun discussing settlement on February 7, 1996, that they had exchanged seven letters, that complainant had provided respondent with all documents that served as a basis for the complaint, and that complainant on November 21, 1996 sent respondent its settlement policy. On December 13, 1996, respondent reported to the presiding officer about the steps taken to settle the complaint. The report provided the exact dates when settlement efforts earlier reported by the complainant were made. The respondent's filing indicated that no discussions had been held between November 21 and December 13, 1996.

On January 6, 1997, complainant filed its prehearing exchange, on January 30, 1997, respondent filed its prehearing exchange, and on February 24, 1997, complainant replied to respondent's prehearing exchange. The parties indicated, on March 5, 1997, that any hearing should be held in Indianapolis, Indiana.

On March 7, 1997, a Notice of Hearing was issued scheduling the hearing for May 28 and 29 in Indianapolis, Indiana. On March 28, 1997, complainant filed a status report indicating that an unstated number of settlement discussions had been held following its last report on November 22, 1996 and that respondent had indicated it was interested in settling the case, possibly through the performance of a supplemental environmental project. Respondent reportedly told

complainant that it would send "in the near future" a proposed supplemental environmental project. On April 17, 1997, complainant filed a status report in which it indicated that the parties had continued to discuss a SEP and that complainant had sent respondent proposed joint stipulations of fact.

On April 30, 1997, complainant filed signed joint stipulations of fact. On May 8, 1997, complainant filed a motion and memorandum in support of an accelerated decision, attaching the joint stipulations of fact. On May 9, 1997, complainant filed a motion in limine to bar the testimony of Howard Holdsclaw on the grounds that his proposed testimony was beyond the issues raised by the complaint. On May 21, 1997, respondent responded to the motion in limine and the motion for accelerated decision by indicating that it still hoped to settle the case and perform a supplemental environmental project. Respondent made no substantive arguments in its filing. An off-the-record conference was held on May 22, 1997 with the parties to discuss the hearing scheduled to begin on May 28, 1997. Respondent indicated its desire to continue to attempt to settle the case and the presiding officer requested that the parties attempt to complete their negotiations before Monday, May 27. Also participating in the conference was respondent's environmental consultant, Howard Holdsclaw.

On May 23, 1997, respondent's counsel, Richard S. VanRheenen, filed a notice of appearance, and a motion to continue the hearing without indicating when counsel believed the hearing should be held. Complainant indicated that it would oppose continuing the hearing on May 23, 1997. On May 27, 1997, respondent moved to disqualify counsel for the complainant. Another off-the-record conference was held with the parties. On May 27, 1997, the hearing was postponed in order that the motion for accelerated decision could be considered. The parties were given until June 10, 1997 to complete any settlement discussions, otherwise the motion for accelerated decision would be ruled on.

When the first off-the-record conference was held on May 22, 1997, respondent was aware that it had conceded that it was liable for all the counts alleged in the complaint. Respondent had stipulated every fact alleged in the complaint with some non-material differences in the amounts of the toxic chemicals "otherwise used." Complainant told respondent during the May 22, 1997 conference that the stipulated facts formed a prima facie case and it would present no witnesses if an oral hearing were held. Respondent also knew that its only proposed witness, Howard Holdsclaw, intended to present evidence that the presiding officer believed was not relevant to deciding the case. Respondent was unable to point to any evidence that it would introduce that

would be relevant to the outcome of the case. In an effort to provide respondent an additional chance to settle before a decision on the merits was issued, it was given until May 27, 1997 to settle. The onus was on the respondent; the complainant had already filed stipulations that proved its case. There was no requirement to provide the additional time; the complaint was already a year and half old. From the outset, respondent did not contest the merits of complainant's case.

The presiding officer's attention to settlement was not unreasonable and was totally consistent with the rules. Section 22.04 (c) (8) provides that the presiding officer "shall have the authority to ... (8) Require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings." Section 22.18 provides "(a) Settlement policy. The Agency encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulation." Section 22.19 (a) (1) and (7) permits requiring the parties to attend a conference to consider settlement of the case. Requiring respondent to work at settling the case, before a ruling on the merits of the case, was well within the rules of the agency. Respondent's view that this exhibited bias toward respondent because complainant was not urged to settle is inaccurate. Respondent is the proponent of a SEP. Complainant has made various offers of settlement which respondent's counsel said were unacceptable. At no time has respondent ever articulated why it could not arrive at an appropriate settlement. If the answer is any indication, respondent believes that there should be no penalty at all. That is, of course, an unreasonable expectancy in light of the stipulations.

At the conference, which is the subject of respondent's motion, respondent was permitted to again attempt to settle the proceeding. The deadline of June 10, 1997, was more than generous under the circumstances. There is no evidence that respondent took advantage of the opportunity. Instead, respondent moved to disqualify counsel for the complainant and then the presiding officer. In light of the history of the case, respondent's actions appear a tactic to delay the inevitable.

ACCORDINGLY, IT IS ORDERED that the motion to disqualify the presiding officer IS DENIED.

Edward J. Kuhlmann

Administrative Law Judge

June 13, 1997

Washington, D. C.

1/ The statements provided in the affidavit and the motion appear to be drawn from the memory of counsel who was away from his office and participated on a cellular telephone according to his office. Rule of practice § 22.19 (d) provides that "no transcript of any prehearing conferences shall be made unless ordered by the Presiding Officer upon motion of a party or sua sponte." Respondent and complainant made no request and the presiding officer did not decide to provide for such a transcript sua sponte. The procedural matters decided during the conference were put into an order and issued on the day of the conference pursuant to § 22.19 (c). For a party to have made a transcript of a conference without permission of the presiding officer would, of course, violate the rules and undermine the purpose of having an off-the-record conference.

2/ Some forms of bias are permissible, even desirable, in a decision maker. Other identifiable forms of bias, which have not been alleged here, include: " 1. A prejudgment or point of view about a question of law or policy is not, without more, a disqualification. 2. Similarly, a prejudgement about legislative facts that help answer a question of law or policy is not, without more, a disqualification. 3. Advance knowledge of adjudicative facts that are in issue is not alone a disqualification for finding those facts, but a prior commitment may be." Id. at 968.

CERTIFICATE OF SERVICE

I hereby certify that the original of this Order, was filed with the Regional Hearing Clerk and copies were sent to the counsel for the complainant and counsel for the respondent on June 13,1997.

Shirley Smith

Legal Staff Assistant

For Judge Edward J. Kuhlmann

NAME OF RESPONDENT: Woodcrest Manufacturing, Inc.

DOCKET NUMBER: S-EPCRA-96-007

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