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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:)
))
LCL Management LLC,) Docket No. CAA-III-110
))
Respondent)

ORDER GRANTING MOTION TO COMPEL INFORMANT'S IDENTIFICATION AND DENYING MOTION FOR DEPOSITION UPON ORAL QUESTIONS

LCL Management LLC's ("Respondent") Motion to Compel Informant's Identification and Deposition Upon Oral Questions is granted in part for the reasons set forth below.

BACKGROUND

The Complaint in the instant case was filed on August 31, 1998. Complainant alleges that the Respondent, LCL Management, has violated the Clean Air Act in its operation of Village Knoll Apartments in Harrisburg, Pennsylvania. Three main violations of the regulations are alleged in the Complaint: Respondent knowingly vented refrigerants at least once in May or June 1996 in violation of 40 C.F.R. § 82.154(a); used two uncertified technicians in its service, maintenance and repair of appliances containing refrigerants in violation of 40 C.F.R. § 82.161(a) and failed to certify its recovery and recycling equipment as required by 40 C.F.R. § 82.162(a). Complaint at 4-6. Complainant proposes a penalty of \$57,600. Respondent filed its Answer on September 30, 1998, and denies any violation of the Clean Air Act. Respondent then filed a Motion to Compel Informant's Identification and Deposition Upon Oral Questions ("Motion to Compel") on January 25, 1999, and Complainant responded with a Motion in Opposition to Motion to Compel ("Opposition to Motion to Compel") on February 4, 1999.

DISCUSSION

The Respondent asserts in its Motion to Compel that the allegations in the Complaint regarding "improper air emissions" are based primarily on a written statement obtained from an unidentified informant. Motion to Compel at 2. Respondent argues that this informant's statement is vague and conclusory and fails to identify the informant or provide sufficient basis for this person's conclusion that improper venting had occurred. *Id.* at 3. Respondent asserts that it has investigated the claims set forth in the Complaint and it has failed to discover any evidence of the improper venting of refrigerants. *Id.* at 2. As a result, it seeks the identification and deposition of this unidentified witness. *Id.* Respondent argues that Complainant should identify this informant so that Respondent can "assess the basis and credibility of the informant's allegations" in furtherance of its defense in this case. *Id.* Respondent expects that the deposing of this witness will enable the discovery of the informant's identity and the observations which led him/her to conclude that an improper venting had transpired. *Id.* at 3. Respondent asserts that without the disclosure of the informant's identity or a deposition, LCL Management will be "deprived of any ability to prepare and evaluate its case, or to meaningfully consider the possibility of settlement." *Id.* Respondent also raises the potential for unfair surprise at hearing. *Id.* at 4.

Complainant acknowledges in its Opposition to Motion to Compel that the informant filled out a Stratospheric Ozone Protection Complaint Form ("Protection Complaint Form") which described the violations alleged in Count I of the Complaint and points out that this person requested confidentiality at the time of the filing of this form. Opposition to Motion to Compel at 1. However, Complainant states that it anticipates that this person's identity will become part of the public record at the hearing. *Id.* Complainant's opposition to Respondent's motion stems from its desire to "keep this person's identity out of the record for as long as possible." *Id.* Complainant asserts that Respondent should be able to identify this informant since Respondent's counsel had described this person as "a disgruntled employee who worked for Respondent briefly" and because of a reference in the Complaint to the events of May or June 1996, which should enable Respondent to identify the informant via a review of its employment records. *Id.* Furthermore, Complainant argues that the substance of this person's testimony can be gleaned from the Protection Complaint Form provided by Complainant with its Prehearing Exchange. *Id.* Complainant argues that since this person will be available for questioning at the hearing, the Respondent's Motion fails to satisfy the criteria for depositions under the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22, ("Rules of Practice"). Opposition to Motion to Compel at 3.

"There is no basic constitutional right to pretrial discovery in administrative hearings." *Silverman v. Commodity Futures Trading Commission* 549 F.2d 28, 32 (1977). However, procedural due process is applicable to administrative proceedings. *Standard Oil v. Federal Trade Commission*, 475 F. Supp 1261, 1272 (1979). Thus, administrative hearings must function so that the participants' due process rights are protected. As a result, "discovery must be granted if in a particular situation a refusal to do so would so prejudice a party as to deny him due process." *McClelland* at 1285. Discovery must, therefore, be granted to the Respondent if refusing to do so would result in a denial of due process. According to the Court in *Urbano v. U.S. Dept of Treasury*, the touchstone of due process in the administrative hearing context is "one of fundamental fairness in light of the total circumstances." *Urbano v. U.S. Dept of Treasury* 967 F. Supp 1322, 1333 (1997). Thus, in determining whether Respondent's Motion to Compel should be granted, there must be an underlying concern for the fairness of the process.

The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure do not govern administrative proceedings. *McClelland v. Andrus* 606 F.2d 1278, 1285 (1979). Additionally, the Administrative Procedure Act does not contain a provision regarding pretrial discovery. *Id.* As a result, the extent of discovery to which a party is entitled in an administrative hearing setting is determined by the

particular agency. *Id.* Consequently, the applicable standard for discovery in this case will be found in the Consolidated Rules of Practice. Discovery is permitted under the Rules of Practice if it "will not in any way unreasonably delay the proceeding; [if] the information to be obtained is not otherwise obtainable; and [if] such information has significant probative value." 40 C.F.R. § 22.19(f)(1).⁽¹⁾ Depositions can be ordered by the Presiding Officer only if there is a "showing of good cause and upon a finding that the information sought cannot be obtained by alternative methods or there is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing." 40 C.F.R. § 22.19(f)(2).

The information sought by the Respondent is already in Complainant's possession so its discovery will not result in an unreasonable delay of the proceedings because Complainant can simply turn over the information to the Respondent. The identity of the informant is probative evidence. Count I of Complainant's case hinges on this person's testimony and the discovery of this witness's identity will aid the Respondent in its defense. Complainant argues in its Opposition to Motion to Compel that the informant's identity is otherwise obtainable since, according to Complainant, the Respondent can discover this information in its employment records. Opposition to Motion to Compel at 1. In its Motion to Compel, Respondent has indicated that it has failed in its attempt to identify this witness. Thus, it is questionable whether this information is in fact otherwise obtainable to a reasonable degree of certainty. Since Complainant does not provide a rationale for its desire to keep the witness's name concealed during the prehearing process and given the fact that Complainant has this information in its possession and in light of the importance of this witness's testimony to this case, Complainant should turn over the informant's identity to the Respondent.

It should also be noted here that the Rules of Practice require the parties at a hearing to turn over the names of the witnesses they expect to call as well as a brief narrative summary of the expected testimony in their respective prehearing exchanges. 40 C.F.R. § 22.19(b). The November 24, 1998 Order Establishing Procedures for the instant hearing issued by the undersigned set dates for the submission for prehearing exchanges by the parties. Consequently, if Complainant expects to call this informant as a witness, his/her name should be turned over to the Respondent in accordance with this requirement.

It can be argued that Complainant is invoking the "informer's privilege" by attempting to continue the concealment of the informant's identity. Although primarily applied in criminal law, the idea of providing confidentiality to informants has been applied in the environmental law context. *See, e.g. In the Matter of Gallagher and Henry Countryside, Illinois* 1995 EPA ALJ LEXIS 10 (judge permitted the Complainant to protect a witness as a confidential source on the grounds that the testimony was not necessarily needed and Respondent offered no specific reason for needing the name of the witness). This privilege has been described as the "[g]overnment's privilege to withhold from disclosure the identity of persons who furnish information of violations of the law to officers charged with the enforcement of the law." *Roviaro v. United States* 353 U.S. 53, 59 (1957). The underlying purpose is to protect the public interest in effective law enforcement. *Id.* However, this privilege is limited at trial. If disclosure of the informant's identity or the information in his/her possession is relevant to the accused's defense or is needed to provide a fair outcome then this privilege can be ignored. *Id.* In fact, under *Roviaro*, if a court requires disclosure of an informant's identity or communication and the Government withholds the information, the court can dismiss the action. *Id.* The *Roviaro* Court found that a determination of whether disclosure is appropriate in a particular set of circumstances depends on the balancing of the public interest in protecting the flow of information against the accused's right to prepare his/her defense. *Id.* at 61.

If the informer privilege is applied to the instant facts, it is apparent that Complainant should reveal the informant's identity. Complainant does not put forth any strong arguments against the revelation of this person's identity. It does not

argue any privacy or public interest reasons for the continued concealment and, other than asserting that Complainant has not justified its request under the Rules of Practice, the only argument set forth by Complainant is "EPA would like to keep this person's identity out of the record for as long as possible." Opposition to Motion to Compel at 1. The Respondent, on the other hand, has a strong interest in discovering the informant's identity before hearing since this person is a witness to one of the alleged violations of the Clean Air Act. On balance, it is apparent that under these circumstances, Respondent's interest in preparing its defense should take precedence over Complainant's attempt to protect the informant's identity.

Since the unidentified witness in this case, according to Complainant, will testify at the hearing, the argument that this information should remain concealed from the Respondent cannot stand in light of the fact that parties in administrative proceedings "are entitled to appropriate discovery in time to reasonably and adequately prepare themselves, and their defenses before facing the charges in the administrative trial." *Standard Oil* at 1275. If Complainant is permitted to continue the concealment of the informant's identity, the ability of the Respondent to adequately prepare for the hearing will be impinged because this informant is a potential witness who is alleged to have information which is at the crux of this case. As a result, the informant's name should be turned over to the Respondent.

The question now arises as to whether Respondent should be permitted to depose the informant. A party who seeks discovery must submit a motion to the Court setting forth the "circumstances warranting the taking of the discovery, the nature of the information expected to be discovered; and the proposed time and place where it will be taken..." 40 C.F.R. § 22.19(f)(3). Respondent in the instant case has set out in its motion arguments in support of the taking of the discovery deposition. However, in light of the fact that Respondent does not know the informant's identity, it cannot be shown that the requirements for further discovery can be met. Further discovery can only be obtained if the Presiding Officer finds "that such discovery will not in any way unreasonably delay the proceeding; that the information to be obtained is not otherwise obtainable; and that such information has significant probative value." 40 C.F.R. § 22.19(f)(1). In addition, Respondent must also satisfy section 22.19 (f)(2) of the Rules of Practice which only permits depositions upon oral questions if it can be shown that "the information sought cannot be obtained by alternative methods" or that "there is substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at hearing." 40 C.F.R. § 22.19(f)(2). Thus, the question of whether a deposition is warranted cannot be answered until the informant's identity is determined and it can be ascertained whether further discovery is permissible under the Rules of Practice.

CONCLUSION

Given the requirements of the Rules of Practice and the due process concern for fundamental fairness, the identity of the informant in this case shall be made available to Respondent on or before **April 16, 1999**. The question of whether this person should be deposed can only be determined after his/her identity is revealed and it can be ascertained whether a deposition can be permitted as required under the Rules of Practice. Thus, Respondent's Motion to Compel Informant's Identification is granted and its Motion for Deposition Upon Oral Questions is denied without prejudice.

Any motions by the parties for further discovery, accelerated decision, or other matters shall be filed on or before **April 30, 1999**. Following resolution of these motions (if any), this matter will be set for hearing.

Charles E. Bullock
Administrative Law Judge

Dated: April 6, 1999
Washington, D.C.

1. Probative evidence is evidence which affects the probability that a fact is as a party claims it to be. *In the Matter of Chataqua Hardware Corporation* 3 E.A.D. 616, 622 (1991).

IN THE MATTER OF LCL MANAGEMENT LLC, formerly known as LCL MANAGEMENT, Respondent

Docket No. CAA-III-110

CERTIFICATE OF SERVICE

I certify that the foregoing Order Granting Motion to Compel Informant's Identification and Denying Motion for Deposition Upon Oral Questions, dated April 6, 1999, was sent in the following manner to the addressees listed below:

Original by Regular Mail to: Ms. Lydia A. Guy
Regional Hearing Clerk
U. S. Environmental

Protection

Agency, Region III
1650 Arch Street
Philadelphia, PA 19103-

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Copies by Regular Mail to:

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Dated: April 6, 1999

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