

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

IN THE MATTER OF:)
)
John A. Biewer Company of Toledo, Inc.)
300 Oak Street)
St. Clair, Michigan 48079-0497)
(Perrysberg Facility))
)
U.S. EPA ID #: OHD 106 483 522; and)
)
John A. Biewer Company, Inc.)
812 South Riverside Street)
St. Clair, Michigan 48079; and)
)
Biewer Lumber LLC)
812 Riverside Street)
St. Clair, Michigan 48079)
)
Respondents)

DOCKET NO. RCRA-05-2008-0006

**ORDER ON COMPLAINANT’S MOTION TO STRIKE,
IN PART, RESPONDENT’S PREHEARING EXCHANGE**¹

In the Motion presently before the Court, titled “COMPLPAINANT’S [sic] MOTION TO STRIKE, IN PART, RESPONDENT’S PRE-HEARING EXCHANGE,” counsel for Complainant requests that the Court strike the portion of Respondent John A. Biewer Company of Toledo’s prehearing exchange in which Respondent “reserve[d] the right to cross-examine the author of the ‘Penalty Rational’ provided by Complainant dated August 15, 2008.” Motion at 1. Complainant contends that “Respondent has no such right.” Memorandum in Support of Complainant’s Motion at 1. On July 30, 2009, Respondent filed a Brief objecting to Complainant’s request, and Complainant subsequently filed a Response² to Respondent’s Brief

¹ This Order should be read in tandem with a related Order addressing Complainant’s Motion for Accelerated Decision on Liability and Penalty, which the Court is also issuing today.

² The Court notes that, although counsel for Complainant described its submission as a “Response,” the procedural rules governing this proceeding provide that, upon the filing of a motion, the non-moving party may file a “response” to the motion and the moving party may

on August 12, 2009.

Complainant filed a similar Motion to Strike, in Part, Respondent's Pre-hearing Exchange in the companion case of John A. Biewer Company of Ohio ("JAB Ohio"). Respondent JAB Ohio likewise filed a Brief objecting to the Motion, and Complainant subsequently filed a Response. By an Order dated December 23, 2009,³ the Court denied Complainant's Motion in the JAB Ohio matter, identifying two flaws in Complainant's position that JAB Ohio did not have a right to cross-examine the author of Complainant's Penalty Rationale in that proceeding. First, the Court stated that genuine issues of material fact existed as to the penalty proposed by Complainant,⁴ which entitled Respondent to an oral evidentiary hearing on the appropriate penalty under the procedural rules.⁵ Second, the Court held that cross-examination of the author of a penalty proposal is necessary to ensure that the individual properly applied the penalty policy to the facts underlying the penalty calculation and that, in accordance with the Administrative Procedure Act, a "full and true disclosure of [those] facts" occurs. 5 U.S.C. § 556(d).

In comparing the Motion and subsequent filings in the JAB Ohio matter to the Motion and subsequent filings in the present proceeding, the Court finds that no material differences exist between the two sets of submissions. Therefore, Complainant's contention that Respondent is not entitled to cross-examine the author of the Penalty Rationale in this proceeding suffers from the same defects as those stated above. Accordingly, the Court incorporates by reference the relevant portions of its Order on EPA's Motion to Strike, in part, Respondent's Prehearing Exchange issued on December 23 in the JAB Ohio matter and hereby DENIES Complainant's Motion to Strike, in Part, Respondent's Pre-hearing Exchange filed in the present proceeding.

subsequently file a "reply." 40 C.F.R. § 22.16. Therefore, Complainant's submission may more accurately be termed a "reply."

³ That Order is included as an Appendix to this Order.

⁴ The Court referred to its Order on EPA's Motion for Accelerated Decision on Liability and Penalty, also issued on December 23, 2009, as support for this statement.

⁵ As acknowledged by Complainant in its Memorandum in Support of Complainant's Motion, 40 C.F.R. § 22.20 authorizes Administrative Law Judges to render an accelerated decision in a proceeding, or find a respondent liable for an alleged violation and assess a penalty against the respondent without holding a hearing, only as long as no genuine issues of material fact exist as to the respondent's liability and the appropriateness of the penalty. Memorandum at 5. On the other hand, "if the proceeding presents genuine issues of material fact" on either of those issues, 40 C.F.R. § 22.21(b) provides that Administrative Law Judges "*shall* hold a hearing." (emphasis added).

So ordered.

William B. Moran
United States Administrative Law Judge

Dated: _____
Washington, D.C.

APPENDIX

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

IN THE MATTER OF:)	
)	
John A. Biewer Company of Ohio, Inc.)	
300 Oak Street)	
St. Clair, Michigan 48079-0497)	
(Washington Courthouse Facility))	
)	
U.S. EPA ID #: OHD 081 281 412; and)	DOCKET NO. RCRA-05-2008-0007
)	
John A. Biewer Company, Inc.)	
812 South Riverside Street)	
St. Clair, Michigan 48079; and)	
)	
Biewer Lumber LLC)	
812 Riverside Street)	
St. Clair, Michigan 48079)	
)	
Respondents)	

**Order on EPA’s Motion to Strike, in part,
Respondent’s Prehearing Exchange**

Under consideration is “COMPLAINANT’S [sic] MOTION TO STRIKE, IN PART, RESPONDENT’S PRE-HEARING EXCHANGE.” EPA, through its Senior Counsel, seeks to strike the Respondent’s reservation of its “right to cross-examine the author of the ‘Penalty Rational’ provided by Complainant dated August 15, 2008.”¹ In a Memorandum in Support of its Motion, EPA contends that “Respondent has no such right.” EPA Memorandum at 1. A truncated, but accurate, synopsis of EPA’s argument proceeds as follows: Congress gave the EPA Administrator exclusive authority to assess a civil penalty under RCRA; such penalty assessment is to consider the seriousness and good faith associated with the violation; the Administrator employed that authority through the establishment of a penalty policy for the assessment of such penalties; a respondent is not entitled to cross-examination of the penalty assessment at hearing; and a respondent may only challenge such an assessment through paper

¹ This Order should be read in tandem with a related Order addressing EPA’s Motion for Accelerated Decision on Liability and Penalty, which Order is also being issued today. That Order is included as an Appendix to this Order.

submissions of its analysis of the penalty policy to the violation in issue.

Although EPA seems to acknowledge that the Administrative Procedure Act (“APA”) affords those faced with agency action, such as in this case, the right to a hearing and a decision on the matter, all in accordance with the APA provisions at 5 U.S.C. §§ 554, 556 and 557, its motion argues against that right, contending that administrative law judges are subject to the Administrator’s rules governing the assessment of a civil penalty, and that “on matters of law and policy, an ALJ is subordinate to the agency in which he serves.” EPA Memorandum at 2-3. ALJ’s, according to EPA’s Counsel, as “creature(s) of Congressional enactment” are “semi-independent subordinate hearing officers.” *Id.* at 4 (citations omitted). Accordingly, while EPA Counsel admits that the parties have a right to cross-examine witnesses, acknowledging that 40 C.F.R. § 22.22 (b) and (c) provide for such examination of witnesses, Counsel contradictorily takes the position that “[t]he Administrator has promulgated no rule requiring a complainant, or any party, in an action in his civil penalty process to make available any witness for cross-examination other than as is stated in [sections 22.22 (b) and (c)] and [the Administrator] certainly has invested ‘no right’ in a respondent to cross-examination as a witness anyone who calculates a penalty amount proposed in [sic] complaint.” *Id.* at 4-5. EPA Senior Counsel’s thinking is that it is only if EPA calls the author of the ‘Penalty Rationale’ as a witness or submits the penalty rationale document into evidence, that a Respondent has the right to cross-examine the document’s author. *Id.* at 5. EPA Counsel believes that, because one can file a motion for summary judgment² where there is no genuine issue of material fact, it means that the Administrator has allowed for the assessment of penalties “without providing any oral evidentiary hearing for the cross-examination of witnesses” and that this “support[s] [] the proposition that the Respondent has no right to cross-examine the author of the ‘Penalty Rationale’ provided in the Complainant’s Pre-Hearing Exchange.” *Id.* at 6.³

The upshot of EPA’s argument is its view that, even if there is a genuine issue of material fact, one does not have the right to cross-examine the author of the penalty rationale provided with EPA’s pre-hearing exchange unless EPA calls the author as a witness. *Id.* at 8-9, citing *In Re Newell Recycling Company, Inc.*, 8 E.A.D. 598, 625 (1999) for the proposition that the respondent did not raise “any material issue of fact relating to the amount of penalty appropriate for the violations.” *Id.* at 9. EPA also looks to the appeal of that decision, issued by the Fifth Circuit, for the rejection of Newell’s due process claim that an evidentiary hearing was required before a penalty could be assessed. *Id.*, citing *Newell Recycling Company, Inc. v. U.S. EPA.*⁴ Citing other decisions, EPA contends that it is not necessary to have a witness testify as to how

² Summary judgment is known in EPA’s parlance as a motion for accelerated decision.

³ EPA cites *Puerto Rico Aqueduct & Sewer Authority v. U.S. EPA*, 35 F.3d 600 (1st Cir. 1994), for the proposition that an agency need not conduct an evidentiary hearing “when it appears conclusively from the papers that, on the available evidence, the case only can be decided one way.” EPA Memorandum at 7, citation omitted.

⁴ EPA cites, but incorrectly, to the Federal Circuit Court’s affirmation of the *Newell Recycling Company* decision as 232 F. 2d 204 (5th Cir. 2000), when the correct citation is 231 F.3d 204. EPA Memorandum at 9.

the particular penalty was calculated. Instead, EPA asserts that the “analysis” produced by the author of the “Penalty Rationale” does not create evidence, but rather is a “thought process involving a consideration of evidence, and the language of a statute and the Administrator’s policy.” EPA’s Senior Counsel goes further, suggesting that the assessment of a penalty is not fact finding but rather is the exercise of a discretionary grant of power. This leads EPA’s Counsel to the view that once it determines there has been a violation, the sanction to be imposed is a matter of agency policy and discretion. Although EPA does not assert it foursquare, it is clearly suggesting with this argument that the penalty aspect is essentially unreviewable as the “penalty amount determination is not an issue of fact, it is not a determination to be established by witness testimony.” *Id.* at 11-12.

In its Brief in Opposition to EPA’s Motion, Respondents note, accurately, that the Court stated, during a conference call on January 9, 2009, that cross-examination of the author of the penalty computation would be allowed and consequently no accelerated decision was available on that issue. Respondents fairly characterize EPA’s stance on this issue as a claim that all the agency need do is inform the Court and the Respondent of its calculated penalty amount and perhaps add the penalty calculation worksheet, but that it is under no obligation to provide written or oral testimony on the issue. Respondents submit that without admitted evidence on the issue or a stipulation to use the penalty calculation without sworn testimony, the Court would not have a factual basis to make a decision regarding the penalty. Opposition at 2. The short answer to this quandary is that the Court takes EPA’s Motion as a claim that it need not present any evidence on the matter of the penalty as such information is beyond a respondent’s inquiry and outside the Court’s purview.

Yet, as Respondents point out, EPA’s position that it need not present anything on the penalty amount runs up against 40 C.F.R. § 22.24(a), which provides that the “Complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint *and that the relief sought is appropriate.*” Opposition at 2. Given that requirement and the agency’s burden of establishing by a preponderance of the evidence that the relief sought is appropriate, Respondents believe that oral or written testimony of the individual who calculated the penalty amount and the right to subject that person to cross-examination concerning the reasons and rationale for that calculation are fundamental. Respondents maintain that they should be afforded the right to cross-examine the individual who calculated the proposed penalty on issues such as the agency’s evaluation of Respondents’ good faith as well as other aspects of the penalty calculation. The Court agrees with the Respondent’s contentions.

In EPA’s “Response,” that is, in what EPA Counsel meant to describe as its Reply,⁵ Complainant points to 40 C.F.R. § 22.20, “by which the Administrator specifically provides for the assessment of a civil penalty without any cross-examination of an agency witness, when there is no genuine issue of material fact.” EPA Response at 2. The problem with that assertion is that the provision does not so “*specifically provide[]*” any such thing. Rather, the Section provides that it is within the Presiding Officer’s discretion to render an accelerated decision as to any or all

⁵ Section 22.16, “Motions,” provides that a movant may file a “reply.”

parts of a proceeding if no genuine issue of material fact exists. EPA reasserts its view that “the determination of an appropriate amount of civil penalty for violations is an issue of law for argument, and not a factual issue requiring the credibility of a witness’ testimony.” *Id.* Further, EPA maintains that Sections 22.22(c) and 22.24(a) of the procedural rules only require that each matter is to be decided upon a preponderance of the evidence and that EPA has the burden of proving that the violation occurred and that “the burden of persuasion that the penalty amount sought is appropriate.” *Id.* at 3. EPA asserts that the proposition that a respondent has a right to an oral evidentiary hearing to cross-examine an agency penalty witness is unsupported by the procedural rules: “As a matter of law, there is simply no such right.” *Id.* at 3-4. Further, as EPA expresses it, “Complainant has presented a 27 page argument in which she has analyzed the facts of this case in consideration of the RCRA statutory criteria, as interpreted in the Administrator’s civil penalty policy, to support the penalty amount proposed in the Complainant and Compliance Order . . .” *Id.* at 4. Given that, EPA’s stance is that a respondent may only “argue against Complainant’s proposed penalty amount . . . asserting that Complainant’s analysis is defective and that a penalty amount other than that proposed by Complainant is more appropriate.” *Id.* Given its view that a Respondent may only argue its position as to the penalty, EPA rejects the Respondent’s view that the cross-examination process “[requires] the Complainant to present a witness to read - - or otherwise attempt to recite by memory - - Complainant’s penalty argument.” EPA contends this “is simply not necessary . . . nor has it ever been . . . to provide Respondents an opportunity to challenge the amount of penalty Complainant proposes for their alleged violation.” *Id.* at 5

Discussion:

As previously described, EPA contends that there is no right to cross-examine the individual who prepared the proposed penalty EPA is seeking to impose. According to EPA, at most, cross-examination of such an individual is available for a respondent only when the respondent can show that there is a genuine issue of material fact in dispute. The problem with this stance is twofold. First, the Court has determined that there are material facts in dispute. *See* the Court’s Order on EPA’s Motion for Accelerated Decision on Liability and Penalty, issued the same day as this Order. Second, a respondent may not know if the individual who prepared the proposal properly applied the penalty policy, in a given instance, unless afforded an opportunity to cross-examine that individual. In over a decade of experience in these matters the Court has observed instances when EPA’s facially-sound penalty rationale has unraveled during the process of pointed questions posed by respondent’s counsel during the process of cross-examination. Such weaknesses would have gone undetected, absent cross-examination because the flaws could not have been gleaned based on the mere exchange of papers supporting the rationale.

Given that EPA has flirted with the idea that when it comes to the proposed penalty cross-examination may be denied entirely, the value and purpose of cross-examination should be recalled. As Wigmore has stated, cross-examination is the “greatest legal engine ever invented for the discovery of truth.” This “vital” tool “can expose inconsistencies, incompleteness, and

inaccuracy in [] testimony.” *Perry v. Leeke*, 488 U.S. 272 (1989) at 283. As the court in *Perez-Perez v. Popular Leasing Rental, Inc.* 993 F.2d 281 (1st Cir. 1993), observed, “one purpose of cross-examination is to give counsel the opportunity to root out . . . inconsistencies, omissions, and exaggerations. 993 F.2d at 286. Cases such as *Mathews v. Eldridge*, 424 U.S. 319 (1976) (“Mathews”), involving the issue in the administrative law context, do not suggest that the right may be entirely denied. Instead, the cases have described any limitation upon the right as being impacted by considering the private interest affected by the official action, the risk of erroneous deprivation of that interest under the procedures being employed, the probable value of additional procedures, and the administrative burden created if additional procedures were added. Accordingly, in the administrative litigation context the Supreme Court has affirmed that “[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of . . . ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.” *Mathews* at 333. This “fundamental requirement of due process is the opportunity to be heard . . . in a meaningful manner.” *Id.* The Supreme Court noted that, as due process is flexible, the procedural protections required are those “the particular situation demands” and that this requires an “analysis of the governmental and private interests that are affected.” *Id.* at 334.

Certainly it is true that where necessary to ensure that the evidence presented is trustworthy, cross-examination is required. Section 556(d) of the Administrative Procedure Act provides for this: “A party is entitled to . . . such cross-examination as may be required for a full and true disclosure of the facts.” Accordingly, the provision recognizes that “one of the fundamentals of a fair hearing [includes] a reasonable opportunity to test and controvert adverse evidence whether or not such evidence is a statement of opinion, observation, or consideration of a witness.” McCormick on Evidence (1972 ed. at 857).

The Court recognizes that the APA mandates only “such cross-examination as may be needed for a full and true disclosure of the facts.” 5 U.S.C. § 556(d). Thus, while there is not an absolute right to cross-examination, the key question to be posed is whether the procedure to be employed will be sufficient to develop the truth.⁶ Therefore it must be asked whether the procedures being contemplated will adequately protect a respondent’s interests. Another aspect to be considered is the reasonableness of the cross-examination.⁷ Thus the extent of cross-

⁶ McCormick notes that the legislative history for the APA rejects any claim for an unlimited right of unnecessary cross-examination. McCormick on Evidence 1972 edition at 857. Neither limitation applies here.

⁷ The APA provision, Section 556(d) provides a party is entitled to such cross-examination as may be required for a full and true disclosure of the facts. The procedures an Agency employs may not prejudice a party from that right. *Richardson v. Perales*, 402 U.S. 389 at 409. The right to confrontation exists “in all types of cases where administrative and regulatory actions [are] under scrutiny.” *Greene v. McElroy*, 360 U.S. 474 (1959) at 497. The Court in *Perales* also cited to Professor Wigmore’s explanation that “confrontation and cross-examination are basic ingredients in a fair trial . . . [and that] cross-examination [is] a vital feature of the law.” Thus the Court noted that “no safeguard for testing the value of human

examination should be determined by the administrative law judge according to the particular circumstance of the case being litigated.⁸ The uses of cross-examination, as applicable here, include a respondent's opportunity "to bring out matters left untouched by direct examination . . . to question [the witness'] . . . narration; and to *expose the basis of any opinions he has expressed.*" McCormick on Evidence (1972 ed. at 857) (emphasis added).

If the Board's statements that there may be a departure from a penalty policy are to have substance, a respondent must have meaningful opportunity to test the application of such a policy in each case. Merely presenting the Agency's rationale and the attendant mathematical calculation may well leave a respondent without a real opportunity to test the Agency's fealty to the policy's requirements.

Accordingly, it is this Court's view that a respondent has a right to cross-examine the author who applied the penalty policy to a particular alleged violation. In a real sense, if the Court were to adopt EPA's stance, the description of the penalty EPA seeks as its "*proposed* penalty" would be an enormous misnomer, because there would be no *proposed* aspect to it, and it would be akin to a penalty imposed by fiat. Alternatively, if it is subsequently determined upon an appeal that the right to cross-examine only exists where material facts in dispute have been demonstrated, a respondent should be able to look behind the EPA rationale and calculations through discovery. The point is that, through discovery or through cross-examination, a respondent should have the opportunity to inquire about the proposed penalty rationale. Absent this opportunity, a respondent may not learn of potential flaws in the agency's application of the policy in a given instance. Without it, the Court may also remain in the dark about potential errors in the penalty calculation process and consequently lack the Board-required rationale basis to explain any departure from a penalty policy.

Based on the foregoing, the Court concludes that EPA's Motion is properly DENIED.

William B. Moran
United States Administrative Law Judge

December 23, 2009
Washington, D.C.

statements is comparable to that furnished by cross-examination, and the conviction that no statement . . . should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience." *Id.* quoting Wigmore on Evidence (3d ed. 1940).

⁸ On that basis the administrative law judge in *Central Freight Lines v. United States*, 669 F. 2d 1063 (5th Cir. 1982) upheld the ALJ's procedure to limit the *amount* of cross-examination to 127 of some 1,600 witnesses.

