UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
Geron Furniture, Inc.,	)	Docket No. EPCRA-09-94-0009
	)	
Respondent	)	

ORDER CONCERNING THE USE OF ALTERNATIVE DISPUTE RESOLUTION IN ENFORCEMENT CASES

By pleading dated August 8, 1994, the Respondent in this proceeding, Geron Furniture Inc., advised that while bilateral discussions with the Complainant were not fruitful, "Respondent believes that a settlement consistent with the provisions and objectives of the Act is possible and consonant with both parties objectives." Respondent requested the appointment of a "settlement conference commissioner" to oversee a settlement conference with the parties.

On August 10 the undersigned issued an order soliciting the views of the Complainant on the Respondent's request for the appointment of a neutral (settlement commissioner).

In its response dated August 10, the Complainant did not express a positive reaction to the proposal. Its response, as a whole, may be characterized as rather negative. However, Complainant did not specifically decline to engage in further settlement discussions with the Respondent under the auspices of a neutral. In these circumstances, the undersigned believed that the Complainant had intended to leave the door open for the appointment of a neutral.

By order issued August 17, 1994, a dispute resolution process was initiated. The order recognized the consensual nature of the process, allowing either party to terminate the process upon request. Judge Hoya was appointed to serve as a neutral. The action was taken pursuant to the provisions of the Administrative Dispute Resolution Act, 5 U.S.C.A. §§ 571-579 (1990). That law encourages agencies to employ a variety of techniques for resolving disputes as opposed to relying on formal adjudication exclusively.

On August 22, 1994, the Complainant filed a document styled "Complainant's Continuing Objection To The Appointment Of A Settlement Judge". In this pleading the Complainant makes clear what was unclear before--it opposes the initiation of the dispute resolution process and the appointment of a neutral to facilitate

settlement discussions. The Respondent filed a reply on August 25 stating its conviction that the undersigned possessed the requisite authority to institute the dispute resolution process citing as authority 40 C.F.R. § 22.04 (c).

Of course, no purpose is served by the initiation or continuation of third-party neutral services if one of the parties believes that the matter is not amenable to resolution other than through formal hearing procedures. Accordingly, the dispute resolution process initiated by my August 17 order is terminated.

Complainant also questions the authority of the Chief Administrative Law Judge to issue the August 17 order on grounds that the Administrator has never published a policy implementing the statute.

Several points are in order. The EPA has been one of the lead agencies pioneering the movement in alternative dispute resolution (ADR). Indeed, prior to passage of the Administrative Dispute Resolution Act, the EPA had engaged the services of neutrals to facilitate negotiated rulemakings for the agency. (See e.g., 51 Fed. Reg. 38904, 38936 (Oct. 27, 1986) and 55 Fed. Reg. 30798, 307-- (July 27, 1990)). This practice continues today. (See e.g., 59 Fed. Reg. 21042, 21135 (Apr. 25, 1994) and 59 Fed. Reg. 38668, 38676 (July 29, 1994)). The EPA's appointment of David Batson as Dispute Resolution Liaison for the agency predates the statute and is further evidence of the EPA's policy in favor of ADR techniques. Charged with the responsibility of training and educating EPA staff in the use of ADR, Mr. Batson has conducted training sessions for offices within EPA including the Office of Enforcement.

The EPA has made no secret of its policy in favor of ADR. As early as 1987 the EPA released a guidance document signed by the Administrator on the use of ADR in enforcement proceedings. The existence of this policy and of the EPA's long standing position on the subject has been acknowledged by the outside press.

> The United States Environmental Protection Agency (EPA) was one of the first federal agencies to show an interest in ADR, with the issuance of its 1987 guidance on the "Use of Alternative Dispute Resolution Techniques in Enforcement Actions." Other agencies have followed EPA's lead since the passage of the Administrative Dispute Resolution Act in 1990 and the issuance of an Executive Order in the fall of 1991 encouraging the use of ADR by all federal agencies.

John Fischer, Local Governments and Alternative Dispute Resolution, 75 Public Management, August 1993, at 16.

A copy of the 1987 guidance (without attachments) is Appendix A hereto.

EPA's policy on the use of ADR in enforcement cases was later vigorously supported in June 1990 by the Deputy Administrator in a document that has been released to the public. The following passages taken from that document should remove any doubt that the agency has expressed its policy on the matter :

> III. Policy Statement
>
> The Administrator and I strongly support the use of ADR in EPA's enforcement program. As the Agency increases its enforcement effort, it is important that we use all the tools available to resolve enforcement actions effectively and obtain sound environmental results while retaining our strict adherence to the principle that the regulated community must comply with the environmental laws. I view ADR as an important tool to help us obtain this goal. Therefore, I believe that enforcement officials should consider the option of using ADR as a standard component of our enforcement program, and use ADR where appropriate.
>
> IV. Action and Followup
>
> I challenge each of you to apply ADR to the enforcement process. It is my belief, that ADR allows the Agency significant resource savings in appropriate cases, and that we cannot afford to turn our backs on this fact. To implement this policy, the Administrator is delegating to the Assistant Administrator of the Office of Enforcement responsibility for directing the Agency's efforts to integrate ADR into our enforcement program. I will be looking to the Office of Enforcement to keep me apprised of our progress.

The complete copy of this 1990 policy document is attached as Appendix B.

Although EPA's policy endorsing the use of ADR is clear, it should be emphasized that the statute does not preclude the use of ADR prior to the formal announcement of agency policy concerning their availability. Certainly, the statute cannot reasonably be construed as prohibiting ADR in the absence of a formally stated agency policy where the disputants seek the services of a third-party neutral.

The Administrative Law Judges' role in ADR, comes within the Judges' traditional role as case manager. The EPA's consolidated rules, specifically 40 C.F.R. § 22.04 (c), grants the power to

the presiding judge to, among other things, "(8) require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings" and "(10) do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules." Agency policy encouraging settlement is found in 40 C.F.R. § 22.18.

In a more specific manner, Administrative Law Judges have been delegated the responsibility to implement the requirements of Section 3 of Executive Order 12778, "Civil Justice Reform". (Appendix C hereto). Section 3 of that Executive Order (Appendix D hereto) provides for implementation of the recommendations of the Administrative Conference of the United States entitled "Case Management as a Tool for Improving Agency Adjudication". These recommendations include "routinely offer[ing] the services of trained mediators" and "channe[ling]" [parties] into a private dispute resolution mode such as mediation, negotiation or arbitration ... ." These recommendations are contained in 1 C.F.R. 305.86-7 (1991).

In furtherance of EPA policy and consistent with the authority that has been delegated to the Administrative Law Judges, I will continue to initiate dispute resolution procedures in future cases at the mutual request of the parties.

Jon G. Lotis
Administrative Law Judge

Dated: August 30, 1994
Washington, D.C.

IN THE MATTER OF GERON FURNITURE, INC., Respondent
Docket No. RCRA-09-94-0009

CERTIFICATE OF SERVICE

I certify that the foregoing Order Concerning the Use of Alternative Dispute Resolution in Enforcement Cases, dated August 30, 1994, was sent in the following manner to the addressees listed below:

Original by Regular Mail to:

Steven Armsey
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105-3901

Copies by Facsimile and by Certified Mail, Return Receipt Requested to:

Counsel for Complainant:

David M. Jones, Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105-3901
Fax: (415) 744-1041

Counsel for Respondent:

Carmen A. Trutanich, Esq.
Robert L. Gaumer, Esq.
Fred M. Blum, Esq.
JAFFE, TRUTANICH, SCATENA & BLUM
2500 Via Cabrillo Marina, Suite 204
San Pedro, CA 90731
Fax: (310) 832-3394

Stacy Hyde-Eason

Stacy Hyde-Eason
Legal Assistant, Office of Administrative Law Judges
U.S. Environmental Protection Agency, Headquarters
401 M Street, S.W.
Washington, D.C. 20460

Dated: August 30, 1994
Washington, D.C.