3/17/92

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

IN RE: John Travassos AAD No. 91-020/FWA
Application No. 90-0746F

DECISION AND ORDER

This matter is before the hearing officer on the objection of the Division of Freshwater Wetlands ("Division") to Applicant's calling Messrs. Brian Tefft and Charles Horbert as witnesses in their direct case and interrogating them by leading questions. Oral argument was requested by the Division and heard on March 6, 1992 at the Offices of the Administrative Adjudication Division for Environmental Matters, One Capitol Hill, Providence, Rhode Island.

In the course of oral argument, Applicant's counsel indicated that Messrs. Horbert and Tefft will be called to elicit factual testimony and not expert testimony. Accordingly, this decision will address the witnesses in that capacity. The issue before the hearing officer is two-pronged. First is the threshold question of whether the Applicant may call Messrs. Tefft and Horbert as its own witnesses and second, once called, may the Applicant interrogate them by leading questions.

As a general rule, R.I.G.L. § 42-35-10 provides that the Rules of Evidence as applied in civil cases in the Superior Court shall be followed in administrative hearings. Sup.R.Civ.P. 43(b) addresses the issue of who may be called as an adverse or hostile witness. It provides in pertinent part:

> 43. Evidence.--
>
> (b) Scope of Examination and Cross-Examination. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him or her by leading questions and contradict and impeach him or her in all respects as if he or she had been called by the adverse party, except by evidence of bad character, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his or her examination in chief.

Sup.R.Civ.P. 43(b) follows the Federal rule. In a decision of the Sixth Circuit Court of Appeals in Boulter v. Chesapeake and Ohio Railroad Company, 442 F.2d 335 (1971), the Court considered the application of Fed.R.Civ.P. 43(b). In Boulter the Circuit Court held that it is error to preclude " . . . a party from offering relevant and competent testimonial evidence of an employee of the adverse party unless the adverse party first calls his employee in the presentation of his case." Id. at 336. The Court reasoned that while the trial court possesses great discretion under Rule 43, the Rule favors the reception of

relevant evidence. Id. It is clear under the relevant rules and case law that the Applicant may call a Division employee as a witness in its direct case.

I turn next to the question of whether Messrs. Tefft and Horbert may be interrogated by leading questions.

The Rhode Island Rules of Evidence, Rule 611 provides:

> **Rule 611. Mode and order of interrogation and presentation.**--(a) Control by Court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
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> (b) Scope of Cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.
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> (c) Leading Questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Section (c) of Rule 611 gives the court discretion to allow leading questions on direct examination when a party calls a hostile witness, an adverse party or a witness identified with an adverse party. A determination of adversity or hostility must be made on a case by case basis. Puccio v. Diamond Hill

Ski Area, Inc., 122 R.I. 28, 385 A.2d 650 (1978) Although the Division acceded to Mr. Tefft's adversity in its memorandum, I will address the characterization of each witness. With regard to Mr. Tefft, a review of his resume, including consideration of his title, his authority over other employees within the Division, and the extent of his daily functions, and his responsibilities in the day-to-day operations of the Division clearly evidence that he is analogous to a "managing agent" and accordingly the Applicant may interrogate him by leading questions.

Charles Horbert is employed within the Division as a Senior Natural Resources Specialist. Mr. Horbert conducted a review and evaluation of the site, assessed potential impacts and reported his findings to Brian Tefft. After careful review of the same factors regarding supervisory authority as were applied to Mr. Tefft, I find that Mr. Horbert is not an "adverse" party for purposes of Sup.R.Civ.P. 43(b).

Applicant urges the hearing officer to follow the reasoning of the Sixth Circuit Court of Appeals in the case of U.S. v. Bryant, 461 F.2d 912 (1972). In Bryant the Court held that where the defendant is allowed to ask leading questions of a Government agent or of another witness closely identified with the interest of the Government

> . . . It is realistic to assume, in such a case, that the witness will not be predisposed to accept suggestions offered by defense counsel's questions. Such a witness, like the "adverse party" to which Fed. R.Civ.P. 43(b) refers, is not likely to be tractable on direct examination by defense counsel. Accordingly, defense counsel should be permitted to lead such a witness unless the Government establishes that the witness is not hostile or biased against the defense. (Citations omitted) Id. at 919.

Our Rhode Island Supreme Court addressed this very issue in the case of State v. Richard Ashness and Christopher Cole, 461 A.2d 659 (R.I. 1983). In Ashness the trial court refused to declare the primary investigating officer in the investigation as hostile even after questioning from defense counsel. On appeal Ashness argued that the trial justice's ruling was error since he failed to recognize the rule concerning hostility adopted by inter alia, the Sixth Circuit Court in U.S. v. Bryant, supra.

The Rhode Island Supreme Court noted that some jurisdictions recognize the rule that witnesses closely associated with an adverse party may be declared hostile regardless of whether or not his answers are evasive but the Court noted that reliance upon such a rule in this jurisdiction is misplaced. State v. Ashness, 461 A.2d at 664-665.

Based on the law of this jurisdiction, I am not satisfied at this juncture that Mr. Charles Horbert is a hostile witness. Once called as a witness at the hearing, the Applicant may seek

to establish that Mr. Horbert is, indeed, hostile. I will then issue a ruling as to whether the Applicant may examine Mr. Horbert by way of leading questions.

Entered as an Administrative Order this 17th day of March, 1992.

Kathleen M. Lanphear
Chief Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, 4th floor
Providence, RI 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within Decision and Order to be forwarded via regular mail, postage prepaid to Dennis Esposito, Esq., Adler Pollock & Sheehan, Inc., 2300 Hospital Trust Tower, Providence, RI 02903 and to Michael K. Marran, Esq., Two Charles Street, Providence, RI 02904-2269 on this 19th day of March, 1992.

Bessie L Stewart

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