UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

Docket No. 11-0333
AMS-DA-11-0067; DA-11-04

In re:
Milk in the Mideast Marketing Area

ORDER GRANTING MOTION BY SUPERIOR DAIRY, INC. FOR DISCLOSURE OF CERTAIN COMMUNICATIONS

Introduction

On October 4, 2011 and October 5, 2011, a hearing was held in Cincinnati, Ohio, regarding proposed amendments to a tentative marketing agreement and order ("proposed amendments"), pursuant to notice issued September 8, 2011. On September 29, 2011, Superior Dairy, Inc. ("Superior") filed a motion for an Order directing the United States Department of Agriculture's ("USDA") Agricultural Marketing Services ("AMS") Dairy Programs "to disclose and incorporate in the public record all communications between interested parties and AMS employees from the date any employee had knowledge that a hearing notice would be issued." (Motion) On September 30, 2011, AMS, through its attorney, filed an opposition to the motion. Due to the temporal proximity of its filing to the hearing, I deferred ruling on the motion until after the hearing. I concluded that no prejudice attached to deferring ruling on the motion, as the record remained open pending submission of proposed corrections to the transcript and briefs by interested parties.

At the hearing, testimony was given by Clifford Carman, Assistant to the Deputy Administrator, Dairy Programs, AMS, regarding the agency's efforts to respond to Superior's requests for disclosure of information. Mr. Carman offered no testimony about whether AMS employees communicated with interested parties about the substantive issues involved in the

proposed amendments at any time in the pre-hearing process. Superior offered no evidence on the issue.

Superior's Position

Superior seeks disclosure of all *ex parte* communications made between AMS employees and interested parties before the issuance of the notice of hearing in the proposed amendments. Superior contends that the prohibition on such communications begins when an employee has knowledge that a hearing notice shall be issued, and requested that AMS disclose and incorporate in the public record all pre-notice communications between AMS employees and interested parties. In support of its motion, Superior asserts that such disclosure is mandated by the Administrative Procedures Act ("APA"), 5 U.S.C. §557(d)(1)(E), and The Government in the Sunshine Act ("the Sunshine Act"), Pub. L. 94-409, 90 Stat. 1241 (Sept. 13, 1976); 5 U.S.C. §552b.

AMS' Position

AMS maintains that the Rules of Practice and Procedure Governing Proceedings to Formulate Marketing Agreements and Marketing Orders ("Rules of Practice") set forth at 7 C.F.R. subpart 900 clearly establish the issuance of the notice of hearing as the date prohibiting employees of USDA who may be involved in the decision making process from engaging in *ex parte* discussions. 7 C.F.R. §900.16(a). AMS spurns Superior's argument that employees would be required to divulge communications with interested parties that occurred at any time after the employees had knowledge that the AMS Administrator would issue a notice of hearing. AMS argues that the issuance of the hearing notice triggers the formal rulemaking proceedings, and clearly establishes the time frame for prohibition of *ex parte* communications.

Statement of the Facts

On June 17, 2011, a petition for a hearing on proposed amendments to the Mideast Milk Marketing Order was filed by counsel for Dairy Farmers of America, Inc., Foremost Farms USA Cooperative, Inc., NFO Inc., and other dairy Cooperatives ("the Cooperatives"). Exhibit F to Motion. On July 15, 2011, AMS issued an "Action Plan on Proposed Amendments to Mideast Milk Marketing Order", and on that date Dana Coale, Deputy Administrator, AMS, Dairy Programs issued an "Invitation to Submit Proposals for Consideration at a Public Hearing that May Be Held to Discuss Amending the Pooling Standards with the Definition of a Pool Distributing Plant in the Mideast Marketing Order" ("Invitation"). Exhibits D and E to Motion. The Invitation specifically states, in pertinent part:

> Once a notice of hearing is issued and until the issuance of a Final Decision, USDA employees involved in the decisional process may not discuss the merits of a proceeding on an "ex parte" basis. Accordingly, it is suggested that any discussion you may wish to have with USDA personnel, including Market Administrator employees, be initiated as soon as possible.

Exhibit E to Motion.

On September 8, 2011, a notice of the proposed rulemaking hearing was issued and a hearing was held on October 4 and October 5, 2011.

Discussion

The instant matter involves proposed amendments to an existing rule, and therefore falls under the purview of formal Rulemaking as defined by the APA, 5 U.S.C. §§556 and 557. The Sunshine Act[1] amended the APA by placing additional restrictions on *ex parte* communications

[1] As an agency headed by a single official, USDA does not squarely fall within those entities that must adhere to the Sunshine Act (an agency of the United States that is headed by a collegial body composed of two or more individual members, a majority of whom are appointed to their positions by the President of the United States with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of that agency). See, 10 S. Rep. No. 1178, 94th Cong., 2d Sess. 10-11 (1976). However, the APA was amended to prohibit *ex parte* communications and USDA has adopted the provisions of the Sunshine Act that relate to open meetings and *ex parte* communications by providing instruction and guidelines for a number of USDA agencies, including AMS.

during rulemaking procedures. The Sunshine Act requires covered agencies to provide notice and invitation to attend governmental meetings, and has been codified under 5 U.S.C.§ 552b.. A meeting is defined as "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business". 5 U.S.C.§ 552b(a)(2). A "meeting" under the Sunshine Act does not include a meeting at which only the scheduling of a future meeting is discussed. 85 *Wash. Ass'n for Television & Children v. Federal Commc'ns Comm'n*, 665 F.2d 1264, 1272 (D.C. Cir. 1981). The Sunshine Act provides for exemption from notice and disclosure in ten circumstances defined at 5 U.S.C. §552b(c)(1) through (10).

Pursuant to the amendments to the APA consistent with the Sunshine Act, interested parties outside of the agency are prohibited from making *ex parte* communications relevant to the merits of the proceeding "to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding. . .". 5 U.S.C. §557(d)(1)(A). In addition, "no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an *ex parte* communication relevant to the merits of the proceeding." 5 U.S.C. §557(d)(1)(B). The APA requires that any party who engages in a prohibited *ex parte* communication "shall place on the public record of the proceeding (i) all written communications; (ii) memoranda stating the substance of all such oral communications; and all written responses, (iii) and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph." 5 U.S.C. §557(d)(1)(C)(i) –(iii).

The prohibitions on *ex parte* communications begin "at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing **unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.**" (Emphasis added) 5 U.S.C. §557 (d)(1)(D). USDA has determined that the prohibition on *ex parte* communications relating to rule making hearings begins when the notice of hearing is issued. 7 C.F.R. §900.16(a) provides:

> At no stage of the proceeding following the issuance of a notice of hearing and prior to the issuance of the Secretary's decision therein shall an employee of the department who is or may reasonably be expected to be involved in the decisional process of the proceeding discuss ex pare the merits of the proceeding with any person having an interest in the proceeding or with any representative of such person: Provided, That procedural matters and status reports shall not be included within this limitation" and Provided further, That an employee of the Department who is or may reasonably be expected to be involved in the decisional process of the proceeding may discuss the merits of the proceeding with such a person if all parties known to be interested in the proceeding have been given notice and an opportunity to participate. A memorandum of any such discussion shall be included in the record of the proceeding.

7 C.F.R. §900.16(a).

The regulations define an *ex parte* communication as "an oral or written communication not on the public record with respect to which reasonable prior notice to all interested parties is not given, but which shall not include requests for status reports (including requests on procedural matters) on any proceeding." 7 C.F.R. §900.16(c). If an employee of the department who is or may reasonably be expected to be involved in the decisional process of the proceeding engages in *ex parte* communications, USDA is required to place the communication in the record[2]. 7 C.F.R. §900.16(c).

[2] If the communication was oral, a memorandum summarizing its substance shall be placed in the record. 7 C.F.R. §900.16(c)(2).

Despite the clear regulatory language that sets the issuance of a notice of hearing as the event after which *ex parte* communications are prohibited, I find that this bright line commencement of the prohibition period does not fully consider the APA's trigger for a prohibition on such communications. Prohibited *ex parte* communications may occur prior to the issuance of the notice of hearing if the person responsible for the communication has knowledge that a hearing shall be noticed "in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge." 5 U.S.C. §557 (d)(1)(D).

USDA has acknowledged this alternative time line by adopting the Sunshine Act's amendments to the APA, as demonstrated by FGIS Directive 1521.1 ("the Directive"), found at http://www.aphis.usda.gov/library/gipsa/pdf/fgis1521_1.pdf (reproduced in its entirety as an attachment to this Order). The Directive recognizes that the prohibition against *ex parte* communications commences no later than at the time a hearing is announced, but also acknowledges that "*ex parte* restrictions may begin at an earlier date, such as when a hearing or adjudication is contemplated." Directive at ¶ IV A 2. The Directive provides that "[r]ecords of such prehearing actions may be made part of the formal hearing record[3]", and instructs employees to submit *ex parte* communications to the hearing clerk. Id.; Directive at¶ IVB. However, the Directive specifically provides that "[p]rior to the announcement of hearing, to gain information and perspective to determine the need for a formal hearing or adjudication, employees are free to discuss issues through correspondence, public meetings, special briefings, conferences, etc."

I conclude that the Directive demonstrates that USDA has embraced the application of the Sunshine Act's amendments to the APA to formal rule making hearings. I recognize[4] that

[3] The Directive's language mirrors that of 5 U.S.C. §557(d)(1)(C)
[4] My observation is guided by the Decision of USDA's Judicial Officer in *In re Jerome Schmidt*, Docket No. 05-0019 (March 26, 2007).

USDA directives and publications reflect rather than create policy. However, in this instance, the Directive reinforces the APA's mandate that *ex parte* communications between agency personnel and interested parties must be divulged if the agency personnel know that a hearing shall be noticed.. Accordingly, I find that any communication between AMS employees and interested parties that involved the merits of the rulemaking process constitute *ex parte* communications that must be made part of the record, once the communicator had knowledge that a hearing would be noticed. I reject AMS's argument that the prohibition on *ex parte* communication only commences at the time the notice of hearing is issued.

I note that AMS's Invitation (Exhibit E to the Motion) condones *ex parte* communications by encouraging individuals to initiate discussions with AMS personnel as soon as possible, or, as I infer, before the agency was certain that a hearing would be held. The Directive also permits early exchange of information between agencies and interested parties so that the agency can make a determination regarding the necessity for a hearing. It is clear from the Invitations' conditional language, that on the date it was issued, AMS had not determined that it would hold a hearing on the proposed amendment. Nothing in the Sunshine Act or APA prohibits all *ex parte* communications; only those exchanges regarding substantive issues that occur after it is known that a hearing shall be notice must be disclosed. Therefore, I find that the Invitation does not establish showing that prohibited communications occurred.

Although I accept that AMS employees may have had sufficient information that the proposed amendments would result in a hearing before the notice was issued, I find no overt evidence that agency personnel engaged in *ex parte* communications that must be included in the public record. To the contrary, the record establishes that AMS disclosed information that did not fall within an exemption under the Freedom of Information Act ("FOIA") in response to Superior's requests under that statute, in addition to requests made by the Cooperatives in an

attachment to their Request for a hearing. See, Exhibit F to Motion. Mr. Carman credibly testified regarding the number and content of requests for information processed by AMS before the commencement of the hearing. Transcript of the hearing, pp. 30 -112; 330-334. I accord substantial weight to his testimony. I also credit Mr. Carman's testimony that AMS provided requested information in intelligible and comprehensible formats, rather than only raw data. I further find that the agency's internal discussions regarding the potential of holding a rule making hearing do not constitute *ex parte* communications in violation of the Sunshine Act or the APA.

In consideration of the foregoing, I conclude that any communications between an AMS employee who was aware that a hearing would take place, and any interested parties regarding the substantive merits of the proposed amendments constitute *ex parte* communications even if they occurred before the date that the notice of hearing was issued on September 8, 2011. Although there is no record evidence that any *ex parte* communication occurred by an employee of AMS who knew that a hearing would be noticed before the date of the hearing notice, I nevertheless find it appropriate to direct AMS to survey the personnel involved in the decision making process to determine whether any engaged in prohibited communications as described in U.S.C. §557(d)(1)(E). If any such communications are identified, the employee is directed to file with the Hearing Clerk any remedial information contemplated by the Directive and by 5 U.S.C. §557 (d)(1)(C) by not later than November 15, 2011.

Conclusion

I find that AMS employees who knew before September 8, 2011 that a hearing would be noticed were prohibited from engaging in *ex parte* communication with interested parties. I find that regardless of its temporal relationship to the issuance of the notice of hearing, any *ex parte* communication regarding the substantive merits of the proposed marketing order amendment

must be disclosed and made part of the record, if made by an employee who knew that a hearing would be held. The regulatory language regarding the commencement of the period for prohibited *ex parte* communications must be read in conjunction with the Sunshine Act amendments to the APA, which have been adopted by USDA.

I further find no evidence to demonstrate that AMS Dairy Program employees engaged in *ex parte* communications that must be made part of the record in the instant proceeding, pursuant to the APA and the Sunshine Act. The record reflects that AMS has furnished Superior with information sought under FOIA requests, and with the information requested by the Cooperatives. However, considering AMS' position that the date the hearing was noticed is the only date triggering the prohibition of *ex parte* communications, I find it appropriate to require AMS to identify whether such communications occurred, and if so, take corrective action as required by 5 U.S.C. §557 (d)(1)(C) and by USDA's internal Directive.

ORDER

Superior's Motion for Disclosure and Placement in the Hearing Record of *ex parte* Communications is GRANTED. AMS shall make inquiries of personnel to identify whether any such communication occurred, and to take appropriate remedial action consistent with this Order by not later than November 15, 2011.

Copies of this Order shall be sent to the parties by the Hearing Clerk.

So ORDERED this 28th day of October, 2011 in Washington D.C.

Janice K. Bullard

Janice K. Bullard
Administrative Law Judge

Attachment to Order Denying Motion for Disclosure

UNITED STATES DEPARTMENT OF AGRICULTURE
AMS INSTRUCTION
FEDERAL GRAIN INSPECTION SERVICE
FGIS DIRECTIVE 1521.1
ACTION BY: Office of the Administrator and Division Directors, AMS, FGIS, and P&SA
Prohibitions on Ex parte Communications
I PURPOSE
This Instruction, provides guidelines for the Agricultural Marketing Service (AMS), the Federal Grain Inspection Service (FGIS), and the Packers and Stockyards Administration (P&SA) for the handling of situations in which ex parte communications are prohibited.
II AUTHORITY
Public Law 94-409 (the "Government in the Sunshine Act") amended the Administrative Procedure Act by placing additional restrictions on ex parte communications. A copy of the Government in the Sunshine Act is attached as Exhibit A. AMS regulations concerning ex parte communications are attached as Exhibit B.
III DEFINITIONS
A An ex parte communication, as defined in the Act, is "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given."
1 The ex parte restrictions in the Government in the Sunshine Act apply to the merits of formal rulemaking processes (those in which formal hearings are required) and adjudicatory processes, conducted in accordance with the Administrative Procedure Act, in which a decision is based upon evidence from a public hearing record. Ex parte restrictions covered in this Instruction do not apply to informal rulemaking.
2 The prohibition against ex parte communications commences no later than at the time a hearing is announced and continues until a final decision is issued. Prior to the announcement of hearing, to gain information and perspective to determine the need for a formal hearing or adjudication, employees are free to discuss issues through correspondence, public meetings, special briefings, conferences, etc. Records of such prehearing actions may be made part of the formal hearing record.
3 A communication is not ex parte if:
a The person making it placed it on the public record at the time it was made; or
b All parties to the proceeding had adequate advance notice allowing them to be present and to respond when the communication is made.
B Reasonable advance notice implies a period of time adequate to permit other parties to be present and to respond when the communication is made.
C Public record of a proceeding means the public docket, transcript of proceedings, or equivalent file containing all materials relevant to the case and available to the parties and the public generally.
D Interested party means any individual or other person with an interest in the Agency proceeding that is greater than the general interest of the public as a whole. The term includes, but is not limited to, parties involved in the proceeding, competitors, public officials, and nonprofit or public interest organizations and associations with a special interest in the matter regulated. A member of the public at large who expresses a casual or general opinion about a pending proceeding would not necessarily be an "interested party."

E Decisional line means the Agency employees or other individuals who are, or who may reasonably be expected to be, involved in the Agency's deliberations. If the Agency Administrator or a Division Director is the decision maker, the decisional line normally would be the Agency employees involved in the deliberations preceding the decision. If an administrative law judge is the decision maker, the Agency employees involved in the proceeding would be "interested parties." The more extended a decisional line becomes, the more difficult it will be to avoid ex parte communications.

F Merits of a case, broadly construed, means any discussion or communication concerning the substance of a proceeding which could affect an Agency's decision.

1 Individuals initiating communication with Agency employees in the decisional line concerning the merits of a case should be advised of the prohibition on ex parte communications (see Exhibit C, attached).

2 Inquiries about procedure or requests for status reports are not considered discussions of merit or substance. A general background discussion about an entire industry, not directly related to a specific agency proceeding involving a member of that industry, would not necessarily constitute an ex parte discussion of merit. However, because such a discussion could be a subtle attempt to influence a decision, a Judgment will have to be made whether a particular communication could affect the decision. In doubtful cases, it should be treated as an ex parte communication.

IV RESPONSIBILITIES

A Division Directors, AMS and FGIS, and the Executive Assistant to the Administrator, P&SA, shall:

1 Identify all hearing and adjudicatory processes subject to ex parte communication restrictions.

2 Determine when to apply ex parte restrictions. Restrictions on ex parte communications must begin no later than the time the notice of hearing or adjudication is announced. However, ex parte restrictions may begin at an earlier date, such as when a hearing or adjudication is contemplated.

3 Specify decisional lines and, when the notice of hearing is published in the Federal Register, also publish the list of Agency, Division, and other Departmental officials or organizational units in the decisional line. If the decisional line changes, announce the changes in an amendment to the notice of hearing, to be published in the Federal Register.

4 Prepare for timely distribution to identifiable interested parties a statement of the Agency's position which respect to ex parte communications. (See example of such a statement in Exhibit C, attached.)

5 Train all decisional line employees in the recognition of ex parte communications and appropriate remedial action.

B Employees in the decisional line shall:

1 Avoid participating in any ex parte communications.

2 Advise any interested party attempting to initiate an ex parte communication of the prohibitions against such communications.

3 Place ex parte communications on the public record by submitting to the hearing clerk:

a. A copy of any written ex parte communication.
b. A memorandum stating the substance of any oral ex parte communication.
c. Copies of oral or written statements made in response to such communications.

V PENALTIES AND SANCTIONS

Knowingly engaging in ex parte communication is, to the extent consistent with the interests of justice, sufficient grounds for a decision on the merits adverse to the party who committed the violation. Other sanctions are:

A Censure of an offending party or dismissal from the proceedings.
B Barring an attorney from practicing before the Agency.
VI COORDINATION WITH OFFICE OF THE GENERAL COUNSEL
Close coordination must be maintained with the Office of the General Counsel in all matters and questions concerning prohibitions on ex parte communications. Interpretation of the Government in the Sunshine Act is not yet well developed; ex parte restrictions will continue to be clarified by court actions and precedent.
/s/Irving W. Thomas
Deputy Administrator
Attachments
PLEASE CONTACT THE ISSUANCE STAFF ON 301-734-5359 FOR COPIES OF THE ATTACHMENTS