

UNITED STATES DEPARTMENT OF JUSTICE
Drug Enforcement Administration

In the Matter of

Lyle E. Craker, Ph.D.

Docket No. 05-16

MEMORANDUM TO COUNSEL AND RULING

On November 7, 2005,¹ counsel for Respondent filed Respondent's Fourth Supplemental Prehearing Statement and Motion for Leave to File. On November 15 counsel for the Government filed a response to Respondent's motion and Government's Motion to Sustain the Government's Objection to Scope and Relevancy of the Cross-Examination of Matthew Strait.

Respondent seeks to present the testimony and curriculum vitae of Dr. Frederic M. Scherer, professor emeritus at the John F. Kennedy School of Government, to rebut Mr. Strait's testimony in this proceeding. Mr. Strait coordinated the Drug Enforcement Administration's (DEA) response to Respondent's application; during his cross-examination, the following exchange occurred.

Q [by counsel for Respondent]: Okay; and given that you did see this letter at the time, was it a concern of you in particular or DEA in general to determine whether there were adequately competitive conditions in manufacturers of bulk marijuana as you decided whether or not to –

Ms. Paredes: Objection, outside the scope of direct and lack of foundation. Calls for speculation as to what DEA as an organization was going to do.

Ms. Carpenter: Again, I think he was coordinating the response. I think he's rather uniquely able to say what it is that he heard other people talking about at the time.

Ms. Paredes: He's certainly not an expert on competition.

.....
Judge Bittner: Overruled.

The Witness: Actually, I can't speak for the Agency, but I will speak for myself to what extent that is helpful to you. And I actually never saw competition as an issue [in this process], in that the marijuana that is provided is on a cost reimbursable basis. This is a not for profit situation for the University of Mississippi . . . ?

¹ All dates herein are 2005.

² Transcript p. 945.

Respondent asserts that the issue did not arise until Mr. Strait's testimony, and that therefore Respondent could not have submitted this evidence earlier.

In the alternative, Respondent asks to reopen the record to offer the evidence at issue, asserting that he had intended to offer evidence about the consequences of registering an additional manufacturer through Dr. Doblin or Responcent, but that I sustained objections to their testimony on this point because neither witness had expertise on the costs and prices associated with supplying marijuana to researchers.³ Respondent further asserts that the evidence he seeks to present is not voluminous and that inasmuch as the hearing will not resume until December 2005, the Government will not be prejudiced by this additional evidence.

The Government emphasizes that it objected to questioning Mr. Strait about whether the DEA was concerned about adequately competitive conditions in the manufacture of bulk marijuana on grounds that the question was outside the scope of direct examination and that there was no foundation for it, and because Mr. Strait is not an expert in this area. The Government further emphasizes that Mr. Strait did not decide how the DEA would respond to the application and asserts that inasmuch as Mr. Strait is not an expert, it is improper for Respondent to offer expert testimony to rebut him. The Government further asserts that the evidence Respondent seeks to adduce goes beyond rebuttal.

With respect to Respondent's alternative request to reopen the record, the Government contends that the problem is of Respondent's own creation, and that Respondent could have listed an expert in a prehearing statement prior to the commencement of the hearing. The Government contends that it would indeed be prejudiced by the proffered evidence because it would have to arrange for its own expert, and that the length of time between hearing sessions should not be a significant factor.

The Government further asks that I reconsider my overruling of the Government's objection to the question of Mr. Strait noted above.

Discussion

At the outset, I have reviewed the question posed to Mr. Strait and decline to

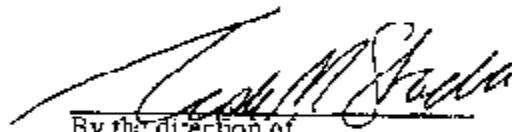
³ I assume counsel's reference is to transcript pages 63 and 611.

reconsider my overruling of the objection. Mr. Strait was asked whether he or the DEA was concerned about whether there were adequately competitive conditions in the manufacture of marijuana. Inasmuch as he was coordinating the agency's response to Respondent's application, it was appropriate for him to testify about the various issues he considered.

I conclude that the evidence that Respondent now seeks to offer does not rebut Mr. Strait's testimony: inasmuch as he testified that he did not consider competition an issue, rebuttal evidence would be information to the effect that he did indeed consider the adequacy of competition something that the agency should investigate. That is not what Respondent seeks to show. Instead, Respondent wishes to offer evidence on the underlying question of whether the market in the manufacture of marijuana is adequately competitive. I conclude that this evidence is properly part of Respondent's case-in-chief because Respondent bears the burden of proof on the issue, and that Respondent has not timely proffered it.

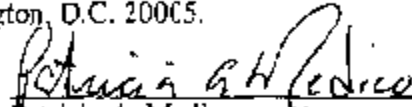
Accordingly, Respondent's motion to supplement its prehearing statement is denied.

Dated: November 16, 2005


By the direction of
Mary Ellen Bittner
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the undersigned on November 16, 2005, caused a copy of the foregoing to be faxed and delivered via interoffice mail to counsel for the Government, Brian Bayly, Esq., Office of Chief Counsel, Drug Enforcement Administration, Washington, D.C. 20537, and a copy to be faxed and mailed, postage paid, to counsel for Respondent, Julie M. Carpenter, Esq., Jenner & Block, 601 Thirteenth Street, N.W., Suite 1200 South, Washington, D.C. 20005.


Patricia A. Medico
Secretary to Mary Ellen Bittner
Administrative Law Judge