IN RE RONALD H. HUNT, ET AL.

TSCA Appeal No. 05-01

FINAL DECISION AND ORDER

Decided August 17, 2006

Syllabus

Appellants, owners of rental property and a rental agent in Richmond, Virginia, contest an Initial Decision assessing an $84,224.80 penalty against them for violating the Toxic Substances Control Act ("TSCA"). The Administrative Law Judge ("ALJ") assessed the penalty based on Appellants' admitted failure to comply with regulations implementing section 1018 of the Residential Lead-Based Paint Hazard Reduction Act ("RLBPHRA") in connection with their rental of four single-family housing units in Richmond. These regulations, codified at 40 C.F.R. part 745, and entitled "Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property" (the "Disclosure Rule"), mandate that sellers and lessors of pre-1978 housing disclose to prospective purchasers and tenants information about the presence of lead-based paint hazards in such housing.

The specific violations that formed the basis of the Initial Decision involve the following Disclosure Rule requirements: (1) the obligation of lessors to include in the lease contract a statement disclosing the known presence of lead-based paint or lead-based paint hazards (40 C.F.R. § 745.113(b)(2)); (2) the obligation of lessors to provide lessees any available records or reports regarding the presence of lead-based paint or lead-based paint hazards (40 C.F.R. § 745.107(a)(4)); (3) the obligation of lessors to provide lessees a list of records or reports regarding lead-based paint or lead-based paint hazards (40 C.F.R. § 745.113(b)(3)); and (4) the obligation of leasing agents to ensure compliance with the Disclosure Rule (40 C.F.R. § 745.115).

The Initial Decision arose from a 47-count administrative complaint in which the U.S. EPA Region III ("Region") alleged that Appellants had violated several Disclosure Rule requirements, including those above, in connection with the four subject properties. The Region subsequently reduced the number of alleged violations to 32 counts, and Appellants stipulated to liability for these violations. The Region sought a $120,088 penalty against Appellants based on these admitted violations.

In her Initial Decision, the ALJ reduced the penalty from the amount proposed by the Region to $84,224.80. The ALJ took into account Appellants' mitigation work in her evaluation of the TSCA statutory penalty factors of "extent, circumstances, and gravity" of the violations and "other matters as justice may require." The ALJ reduced the proposed penalty by 30% for three of the properties where she determined that Appellants had carried out lead-based paint remediation using a "Lead Block" product to encapsulate the lead. However, the ALJ did not reduce the penalty for the remaining property (the "Barton Avenue property") where she determined that Appellants had not provided sufficient evidence

of remediation. In addition, the ALJ, following the applicable penalty policy for violations of section 1018 of the RLBPHRA ("penalty policy"), granted Appellants a 10% deduction to reflect their "cooperation" and a 10% deduction in recognition of their "immediate good-faith efforts to comply" with the Disclosure Rule under the penalty policy's category of "attitude."

In their appeal, Appellants challenge what they consider to be the unreasonable size of the penalty imposed by the ALJ. In support of their appeal, Appellants assert that the ALJ committed the following errors in her penalty assessment:

(1) The ALJ refused to consider published case precedents for calculating a penalty in allegedly comparable lead-based paint violation cases.

(2) The ALJ ratified the Region's "unwarranted" multiplication of penalty charges against Appellants by assessing penalties on a lease-by-lease rather than property-by-property basis and separately charging Appellants for both failure to include a statement in the lease regarding the known presence of lead-based paint and associated hazards and failure to provide tenants with related available documentation.

(3) The ALJ failed to grant a substantial penalty reduction based on Appellants' alleged remediation work at the subject properties. In particular, Appellants contest the ALJ's decision not to grant a penalty reduction for Appellants' alleged remediation of the "Barton Avenue" property. As to this property, Appellants argue that in not requiring the Region to demonstrate that Appellants had not conducted mitigation at the Barton Avenue property, the Region failed to adhere to the Board's decision in *In re New Waterbury, Ltd.*, 5 E.A.D. 529 (EAB 1994), which, Appellants state, imposes on the Agency the burden of demonstrating the reasonableness of its penalty proposals.

(4) The ALJ did not grant Appellants more than a 20% penalty reduction under the penalty policy's category of "attitude."

(5) The ALJ did not reduce the penalty to reflect Appellants' lack of culpability.

Held: Appellants' appeal is denied in all respects, as explained below:

(1) The Board rejects as a matter of law Appellants' contention that the Board is bound by penalty assessments in previous TSCA cases in determining a penalty in the instant case. The Board's established jurisprudence runs strongly counter to this position.

(2) The Board affirms the ALJ's decision to impose a TSCA penalty on a lease-by-lease rather than property-by-property basis. The RLBPHRA and the Disclosure Rule impose disclosure obligations lease-by-lease and require disclosure through the independent vehicles of a statement and documentation. This reading of relevant requirements comports with the Disclosure Rule's purpose, which is to protect tenants, not property, and to provide information, including documentation, sufficient to allow prospective tenants to make an informed choice regarding whether to inhabit housing containing lead-based paint and to allow occupants of target housing to prevent exposure to lead hazards.

(3) The Board upholds the 30% downward penalty adjustment to reflect Appellants' remediation work at three of the subject properties, which the Region has not challenged. To the extent that Appellants argue for a larger deduction at these properties, the Board rejects that argument, finding that the ALJ took a measured approach in adjusting the penalty downward by 30% for these properties, taking into consideration evidence bearing on

the effectiveness and limitations of lead encapsulation as remediation technique, as well as the lack of evidence that Appellants carried out recommended follow-up activities after encapsulation. With regard to the alleged remediation at the Barton Avenue property, Appellants' burden of proof argument is not supported by the Board's analysis in *New Waterbury*. Under *New Waterbury*, which applied the same TSCA penalty factors as the ones at issue in the present case, the Region's burden of proof is limited to showing that it considered the relevant statutory penalty factors and that its proposed penalty assessment is appropriate in light of those factors; however, the Region does not bear a specific burden as to any of these factors. Rather, where a respondent challenges the appropriateness of a proposed penalty by reference to a specific special circumstance that in the respondent's view warrants penalty mitigation under one of the generalized statutory penalty factors, respondent bears the burden of proving that the special circumstance in fact exists.

(4) The Board affirms the ALJ's penalty adjustment under the penalty policy's category of "attitude." The Board finds no abuse of discretion or clear error in the ALJ's decision not to grant further adjustments under this category. The Board has previously stated that when an ALJ assesses a penalty that falls within the range of penalties provided in the penalty guidelines, the Board will defer to an ALJ's judgment absent a showing that the ALJ has committed an abuse of discretion or a clear error in assessing the penalty — circumstances absent here. Indeed, Appellants do not merit an attitude-based penalty reduction for their lead remediation work since Appellants conducted their work not voluntarily, but under the orders of a separate authority, the Richmond Department of Public Health.

(5) The Board upholds the ALJ's decision not to grant Appellants a penalty reduction based on their alleged lack of culpability. The record indicates that Appellants received actual notice of lead-based paint contamination at the four properties prior to leasing them. As such, the Board agrees with the ALJ that Appellants' failure to make the proper disclosures of known lead-based paint contamination evinces a disregard for their Disclosure Rule obligations.

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Anna L. Wolgast.

Opinion of the Board by Judge Wolgast:

I. *INTRODUCTION*

In this administrative penalty action, five Appellants, who are owners of rental property and a rental agent in Richmond, Virginia, contest an Initial Decision by Administrative Law Judge Susan Biro (the "ALJ") assessing an $84,224.80 penalty against them for violations of the Toxic Substances Control Act ("TSCA" or "Act") section 409, 15 U.S.C. § 2689. In the prior proceedings, Appellants conceded that they had violated TSCA by failing to comply with the regulatory requirements of 40 C.F.R. part 745, subpart F, "Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards Upon Sale or Lease of Residential Property" (the "Disclosure Rule" or the "Rule"), with respect to four single-family housing units in Richmond. These regulations require that sellers and lessors of pre-1978 housing disclose to prospective purchasers and tenants information about the presence of lead-based paint hazards in such housing.

This action arises from an administrative complaint filed on July 22, 2003, by United States Environmental Protection Agency ("EPA") Region III ("Region") against Appellants alleging violations of TSCA and the Disclosure Rule. In the proceeding below, the Region had proposed a penalty of $120,088.80 against Appellants. In her Initial Decision, the ALJ reduced the penalty to $84,224.80. In their appeal, Appellants challenge what they characterize as the penalty's unreasonable size. For the reasons discussed below, we reject Appellants' penalty arguments and uphold the ALJ's assessment of an $84,224.80 penalty against Appellants.

II. *BACKGROUND*

A. *Legislative and Regulatory Background*

The legislation that forms the basis of the Region's administrative action is known as the Residential Lead Based Paint Hazard Reduction Act ("RLBPHRA") of 1992.[1] One of the stated purposes of the RLBPHRA is "to develop a national strategy to build the infrastructure necessary to eliminate lead-based paint hazards in all housing as expeditiously as possible." The thrust of the legislation is to facilitate access to lead information by purchasers and renters of housing, enabling them to take measures to avoid or abate lead hazards.

In support of this goal, section 1018 of the RLBPHRA requires the Secretary of the Department of Housing and Urban Development ("HUD") and the Administrator of the EPA to promulgate regulations for the disclosure of "lead-based paint hazards in target housing which is offered for sale or lease." *See* 42 U.S.C. § 4852d. This statutory provision mandates that sellers or lessors of target housing provide to purchasers or lessees information about lead hazards, including any known lead-based paint or lead based-paint hazards in the property being sold or leased. *Id*. § 4852d(a)(1).

In 1996, HUD and EPA jointly issued final regulations implementing the RLBPHRA. See requirements for known lead-based paint and/or lead-based paint hazards in housing, 61 Fed. Reg. 9,064 (Mar. 6, 1996). Known as the "Disclosure

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[1] The RLBPHRA is the common name for Title X of the Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (1992) (codified in part in chapters 15 and 42 of the United States Code). In addition to requiring notification to home purchasers and lessees of lead-based paint hazards, the RLBPHRA mandates the following: standards and programs for training and certifying contractors engaged in lead-based paint activities, standards and programs for lead evaluation and abatement, education and outreach activities regarding lead hazards, and research to identify and abate lead exposure hazards. *See* TSCA §§ 402, 403, 405, 406, 15 U.S.C. §§ 2682, 2683, 2685, 2686; *see also* Requirements for Known Lead-Based Paint and/or Lead-Based Paint Hazards in Housing, 61 Fed. Reg. 9,064, 9,064-65 (Mar. 6, 1996).

Rule," these implementing regulations are codified at 40 C.F.R. part 745, subpart F (EPA regulations) and 24 C.F.R. part 35, subpart H (HUD regulations). As explained in the preamble to the final rule, the thrust of the legislation is to facilitate access to lead information by prospective purchasers and renters, enabling them to take measures to avoid, abate, or remedy lead hazards.

The RLBPHRA's disclosure requirements for lead-based paint and hazards apply to "target" housing, which the Disclosure Rule defines as:

> [A]ny housing constructed prior to 1978, except housing for the elderly or persons with disabilities (unless any child who is less than 6 years of age resides or is expected to reside in such housing) or any 0-bedroom dwelling.

40 C.F.R. § 745.103. The Disclosure Rule defines "lead-based paint" as "paint or other surface coatings that contain lead equal to or in excess of 1.0 milligram per square centimeter [mg/cm^2] or 0.5 percent by weight." *Id.* The Disclosure Rule covers, under certain limited exceptions not relevant here,[2] all transactions to sell or lease target housing, including subleases. *Id.*

The RLBPHRA, along with its implementing regulations, require those who lease target housing to provide or disclose to lessees the following prior to the purchaser or lessee being obligated under the contract:

> (1) lead hazard information pamphlet;[3]
>
> (2) the presence of any lead-based paint and/or lead-based paint hazard known to the lessor or seller; and
>
> (3) records or reports available to seller or lessor pertaining to lead-based paint or lead-based paint hazards in the target property being sold or leased.

See 42 U.S.C. § 4852d(a)(1)(A)-(B); *see also* 40 C.F.R. § 745.107(a).

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[2] These limited exceptions to the Disclosure Rule's applicability to target housing are described at 40 C.F.R. § 745.101.

[3] TSCA mandates that EPA, in consultation with HUD, publish a lead hazard information pamphlet in connection with the RLBPHRA. TSCA requires that the pamphlet contain, among other things, information on the following: health risks associated with lead exposure; risks of lead exposure for children under six years of age, pregnant women, and women of childbearing age; approved methods for evaluating and reducing lead-based paint hazards; and how to obtain a list of contractors certified in lead-based paint hazard evaluation and reduction. *See* TSCA § 406(a); 15 U.S.C. § 2686(a).

In furtherance of the above disclosure requirements, the Disclosure Rule, in relevant part, prescribes inclusion in a lease contract, either as an attachment or within the contract, the following items of information:

> (1) lead warning statement;
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> (2) a statement disclosing the presence of known lead-based paint and/or lead-based paint hazards or lack of such knowledge in the housing being leased;
>
> (3) a list of any records or reports available to the lessor pertaining to lead-based paint or lead-based paint hazards in the housing being leased;
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> (4) lessee statement indicating receipt of the statement and list described in (2) and (3) as well as a lead hazard information pamphlet; and
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> (5) signatures by the lessor and lessee attesting to the accuracy of their statements.

See 40 C.F.R. § 745.113(b).

The Disclosure Rule also contains language applicable to agents who lease property on behalf of lessors. In this regard, the regulations require a lessor to inform agents of any known lead-based paint or lead-based paint hazards in any leased target property and any records pertaining thereto. *See id.* § 745.107(a)(3). Conversely, the regulations impose on an agent the duty to ensure compliance with the RLBPHRA.[4] For example, the implementing regulations impose upon an agent the duty to inform the lessor "of his/her obligations" under §§ 745.107 and 745.113, as well as to "ensure" that a lessor has complied with all activities required by these provisions, or to "personally ensure" that these provisions are complied with. *Id.* § 745.115.

With regard to penalties, the governing statute provides that "[it] shall be a prohibited act under section 409 of the Toxic Substances Control Act [15 U.S.C. § 2689], for not complying with a provision of this section or rule or order issued under it." 42 U.S.C. § 4852d(b)(5). The governing statute also provides that under section 409 of TSCA, penalties for violations of RLBPHRA, 42 U.S.C. § 4852d,

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[4] The RLBPHRA provides that "[w]henever a seller or lessor has entered into a contract with an agent for the purpose of selling or leasing a unit of target housing, the regulations promulgated under this section shall require the agent, on behalf of the seller or lessor, to ensure compliance with the requirements of this section." 42 U.S.C. § 4852d(a)(4).

"shall not be more than $10,000."[5] *Id.*

B. *Factual and Procedural Background*

Appellant Ronald H. Hunt is a real estate investor, developer, and the manager of properties in the Richmond, Virginia area. He, close family members, and friends own over 100 properties in the Richmond area. Complainant's Hearing Exhibit ("C's Ex") 28. In addition, Mr. Hunt manages approximately 250 dwellings and six apartment complexes, involving 1,000 leases. Hearing Transcript ("Tr.") at 28, 203-04. In his testimony, Ronald Hunt characterized himself as holding "100% control" over management of the four properties that are the subject of this proceeding. Tr. at 205. David E. Hunt, Ronald Hunt's brother, is a certified public accountant and, by himself and together with Ronald or Patricia Hunt and others, is a co-owner of various properties. Respondents' Hearing Exhibit ("Rs' Ex.") 6; C's Ex. 42; Tr. at 205. Appellant J. Edward Dunivan is Ronald Hunt's friend and business partner and a real estate investor who owns one property at issue. Rs' Ex. 5; C's Ex. 43; Tr. at 204.

Appellant Genesis Properties, Inc. ("GPI") is a Virginia corporation, co-owned by Ronald and Patricia Hunt, which manages all the real estate property owned by Ronald Hunt and his co-Appellants, as well as for other property owners. Tr. at 205-06; 228; C's Exs. 45-48. Although Patricia Hunt is President of GPI, Ronald Hunt testified that he is in charge of GPI's business activities and makes most of its decisions. Tr. at 205-06; C's Ex. 32. Michael Hunt, Ronald and Patricia's son and a licensed real estate broker, has over the past several years carried out GPI's day-to-day operations and is listed as GPI's manager. Tr. at 205-06, 214, 216-17. In his testimony, Michael Hunt described these operations as including leasing and managing apartments, and collecting rents. *Id.* at 216. He also testified that his duties include executing "lead disclosure." *Id.* at 217.

Beginning in 1996, the City of Richmond conducted a series of inspections at four properties owned by Appellants, which gave rise to the instant administrative action. Below is a summary of the four Richmond properties that are the subject of this administrative action. These properties include: (1) 1124 North

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[5] After July 28, 1997, maximum penalties for violations of section 1018 of the RLBPHRA were increased from $10,000 to $11,000, in accordance with EPA regulations promulgated pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (1990) (codified at 28 U.S.C. § 2461 note), amended by Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, § 31001(s), 110 Stat. 1321, 1321-373 (1996). *See* Civil Penalty Inflation Adjustment Rule ("CPIAR"), 69 Fed. Reg. 7121 (Feb. 13, 2004); Civil Monetary Penalty Inflation Adjustment Rule, 62 Fed. Reg. 35,038 (Jun. 27, 1997) (codified at 40 C.F.R. part 19). The most recent 2004 CPIAR provided no inflation-adjusted increase for maximum penalties imposed under RLBPHRA section 1018. *See* 69 Fed. Reg. at 7126. Consequently, section 1018 penalties remain capped at the $11,000 amount established in the 1997 CPIAR.

28th Street; (2) 1813 North 29th Street; (3) 3015 Barton Avenue; and (4) 2405 Third Avenue. These properties were leased during the years 1999 through 2002. The leases were executed by Michael Hunt, GPI's manager.[6]

- **Property 1: 1124 North 28th Street (Leases 1 and 2)**

In the fall of 1997, the City of Richmond's Department of Public Health ("RDPH") conducted an inspection of the property, owned by Ronald and Patricia Hunt since 1995. C's Exs. 11, 30, 32; Joint Exhibit ("Jt. Ex.") 1-Stipulations ("Stips.") 1, 46, 51. The inspectors sampled paint from several locations in the exterior and interior of the premises. Testing revealed that lead levels significantly exceeded the regulatory standard of 1.0 milligrams per square centimeter (mg/cm^2) (or 0.5% lead by weight) in 41 out of 57 samples. C's Exs. 21, 29, 30; Tr. at 95-97. The highest lead levels were from the exterior porch samples and registered 20.7 mg/cm^2. Tr. at 96; C's Ex. 21.

The inspection results prompted the RDPH, on October 21, 1997, to issue an Official Notice of Violation ("NOV") to the Hunts requiring them to commence lead abatement activities by November 20, 1997. C's Ex. 21; Jt. Ex. 1-Stip. 25. The RDPH warned the Hunts that failure to comply with the NOV by a final abatement compliance date (through removal or covering of all surface coatings containing lead over the regulatory level) could result in the Hunts paying a criminal fine of up to $1,000.

Soon after the NOV was issued, Ronald Hunt hired a contractor to encapsulate the lead paint at this property.[7] Approximately a year later, on November 17, 1998, the RDPH reinspected this property, stating afterwards that the violations had been satisfactorily corrected. Rs' Ex. 17. At about the same time that RDPH conducted its reinspection, the RDPH sent a letter to Ronald and Patricia Hunt, notifying them of the need to disclose the existence of lead-based paint hazards in connection with lease transactions involving the property. The RDPH enclosed with the letter the results of the lead-based paint testing that the RDPH had performed during their initial inspection, informing the Hunts that the results "should be used in accordance with all lead based paint disclosure requirements." C's Ex. 22; *see also* Jt. Ex. 1-Stip. 26.

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[6] Each of these leases included a lead warning statement required by the Disclosure Rule indicating the potential presence of lead in pre-1978 housing, potential health threats posed by lead, and the obligation of lessors to disclose the presence of known lead-based paint and/or lead-based paint hazards in pre-1978 housing. *See* C's Exs. 1-10.

[7] The Region's witness, Mr. Gallo, testified that Appellants used a "Lead Block" substance to encapsulate the lead detected in the properties involved. As described by Daniel Gallo, the encapsulant is "a rubberized substance that's applied instead of a paint over the previously lead-painted surface to encapsulate that surface." Tr. at 142.

Ronald and Patricia Hunt, using GPI as their agent, entered into the following leases for this property.

Lease 1: On January 28, 2000, GPI leased the 1124 North 28th Street property for the period February 1, 2000, to February 28, 2001 ("Lease #1"). C's Exs. 1, 29, 30, 32. During this period, three children, ages 4, 6, and 8, were among the property's occupants. C's Exs. 29, 30; Jt. Ex. 1-Stip. 15. Accompanying the lease was a form entitled "DISCLOSURE OF INFORMATION Lead Based Paint AND/OR Lead-based PAINT HAZARDS." C's Exs. 1, 29, 30, 32. The form bore the February 1, 2000 signatures of the "Lessor" and "Agent" certifying that the form was accurate. *Id.*

Handwritten checkmarks and initials on the disclosure form represented that the "Lessor has no knowledge of lead based paint and/or lead based paint hazards in the housing," and that the "Lessor has no reports or records pertaining to lead based paint and/or lead based paint hazards in the housing." *Id.*; Jt. Ex. 1-Stip. 5.

Lease 2: Following Lease 1, GPI entered into another lease of the same property. This lease covered the term from February 22, 2001, through February 28, 2002. During the period of this lease, two children, ages 7 and 12, lived in the property. Jt. Ex. 1-Stip. 16; C's Exs. 2, 29, 30, 32.

A lead disclosure form accompanied this lease. C's Ex. 32. As indicated by hearing testimony and exhibits, this disclosure form was ambiguous as to the presence of lead-based paint or lead-based paint hazards since both the affirmative and negative boxes were checked. *Id.*; Tr. at 29-31.

- **Property 2: 1813 North 29th Street (Leases 3, 4, 5)**

Ronald and Patricia Hunt also owned another property at 1813 North 29th Street in Richmond. On April 16, 1996, RDPH carried out an inspection of the property. In this case, the inspectors inspected only the outside of this property. Tr. at 106. The inspectors reported that the paint was "peeling" and in "poor" condition. Test result showed that some samples contained lead levels as high as 32.4 mg/cm^2. C's Ex. 23. In response to these results, on April 29, 1996, RDPH issued an NOV to abate the lead contamination. C's Ex. 23; Jt. Ex. 1-Stip. 27.

In response to the NOV, Ronald Hunt hired a licensed lead abatement contractor to encapsulate the lead paint on the premises. Tr. at 209. On May 11, 1998, over two years after the initial inspection, RDPH reinspected the property and reported, in a written Compliance Letter issued to the Hunts the same day, that the "previously cited lead hazards on the **exterior**, were found to be satisfactorily corrected." C's Ex. 52 (emphasis in original).

GPI, the leasing agent, then entered into the following three leases for 1813 North 29th Street. During the leases, the property was occupied by children, whose number and ages are noted.

Lease 3: January 8, 1999, to January 31, 2000. Jt. Ex. 1-Stip.17; C's Exs. 29, 30, 32.

Number and Age of Children: Two children, 10 and 18.

Lease 4: April 11, 2000, to April 30, 2001. C's Exs. 4, 29, 30; Rs' Ex. 10.

Number and Age of Children: Two children, 5 and 14

Lease 5: July 16, 2001, to July 31, 2002. C's Exs. 5, 29, 30, 32; Rs' Ex. 11.

Number and Age of Children: Three children, 7, 12, and 16

The lead disclosure statement attached to the above leases represented that "Lessor has no knowledge of lead based paint and/or lead based paint hazards in the housing" and that "Lessor has no reports or records pertaining to lead based paint and/or lead based paint hazards in the housing." C's Exs. 3, 4, 29, 30; Rs' Exs. 9, 10.

- **Property 3: 3015 Barton Avenue (Leases 6, 7, 8)**

David E. Hunt and Patricial L. Hunt hold joint legal title to premises at 3015 Barton Avenue. C's Exs. 13, 30, 32, Jt. Ex. 1-Stip. 58. RDPH conducted an inspection of the property on June 26, 1997, Tr. at 127, 162, 163, finding that paint exceeded lead standards in 66 out of 115 samples, Tr. at 163-65; C's Ex. 24, 29, 30. One sample measured as high as 23.225 mg/cm^2. C's Ex. 24 (Reports of Preliminary XRF test results, Action # 3423); Tr. 167-68. On June 30, 1997, the inspector issued an NOV to Appellants David Hunt and Patricia Hunt requiring commencement of lead abatement activities.

Ronald Hunt testified to undertaking abatement activities (encapsulation) in response to the NOV, but he provided no documentary evidence of this during the evidentiary hearing. Tr. at 20. On September 30, 1998, EPA issued a TSCA Subpoena (No. 358) directing Patricia and David Hunt, among other things, to provide to EPA information regarding leasing activity at 3015 Barton Avenue. Ronald Hunt, on behalf of Patricia Hunt and David Hunt, on October 8, 1998, filed a response that included two leases. C's Exs. 27, 28. The first lease was signed before the above inspection, the second, afterwards. Lead disclosure forms accompanied the leases, neither of which disclosed Lessors' knowledge of lead-based paint or lead-based paint hazards and none of which contained lead inspection reports. *Id*. 28.

Afterwards, GPI entered into a series of leases for this property, which was occupied by children, whose number and ages are noted below. These leases are as follows:

Lease 6: October 1, 1999, to August 31, 2000. C's Exs. 8, 29, 30; Rs' Ex. 14; Jt. Ex. 1

Number and Age of Children: Two children, 7 and 15.

Lease 7: Dec. 11, 2000, to December 31, 2001. C's Exs. 7, 29, 30; R. Ex. 13.

Number and Age of Children: One child, 15.

Lease 8: July 1, 2001, to July 31, 2002. C's Exs. 6, 29, 30, 32; Rs' Ex. 12; Jt. Ex. 1-Stip. 20.

Number and Age of Children: Three children, 1, 10, and 12.

The lead disclosure forms that accompanied these leases represented that "Lessor has no knowledge of lead-based paint and/or lead based paint hazards in the housing," and that "Lessor has no reports or records pertaining to lead based paint and/or lead based hazards in the housing." C's Exs. 29, 30; Rs' Ex. 14.

- **Property 4: 2405 Third Ave. (Leases 9, 10)**

This Richmond property was owned by J. Edward Dunivan. C's Exs. 14, 32, 30; Jt. Ex. 1-Stip. 71. On April 3, 1997, RDPH conducted an inspection of the **exterior** of the property only, taking paint samples, of which 8 of 11 samples exceeded standards. C's Ex. 25; Tr. at 130. On April 8, 1997, RDPH issued an NOV. In response to the NOV, Ronald Hunt encapsulated the property, after which RDPH reinspected the premises on June 12, 1997, finding it to be in compliance, which it confirmed via a compliance letter dated August 4, 1997. C's Ex. 57. The compliance letter stated that the lead hazards on the outside were found to be "satisfactorily corrected." On August 13, 1998, the RDPH reinspected the property and issued to Mr. Dunivan a "Notice of Non-Hazardous Lead based Paint" which stated that the property tested positive for lead but that the lead was in a non-hazardous condition. C's Exs. 26, 29, 30, 32; Jt. Ex. 1-Stip. 30.

Subsequently, Mr. Dunivan leased his property on two occasions using GPI as his agent. As noted, during these leases, the property was occupied by children.

Lease 9: December 8, 1999, through December 31, 2000. Jt. Ex. 1-Stip. 23.

Number and Age of Children: Four children, 5, 6, 8, and 17.

Lease 10: March 1, 2001, through February 28, 2002. Jt. Ex. 1-Stip. 24.

Number and Age of Children: Four children, 2, 5, 9, and 10.

The lead disclosure forms attached to these leases stated that the lessor "has no knowledge of lead-based paint and/or lead-based paint hazards in the housing," and that the "[l]essor has no reports or records pertaining to lead-based paint and/or lead-based paint hazards in the housing." C's Exs. 9, 10, 29, 30, 32; Rs' Exs. 15, 16.

In response to these inspection findings, the Region, on July 22, 2003, filed a 47-count administrative complaint against Appellants pursuant to TSCA section 16(e), 15 U.S.C. §§ 2615(a), for Appellants' violation of the RLBPHRA, 42 U.S.C. §§ 4851-4856,[8] and the Disclosure Rule. The Region filed its complaint against four sets of Appellants, which included: (1) Ronald Hunt and Patricia Hunt as co-owners of 1124 N. 28th Street and 1813 N. 29th Street; (2) David Hunt and Patricia Hunt, as co-owners of 3015 Barton Avenue; (3) J. Edward Dunivan, as owner of 2405 Third Avenue; and (4) GPI, as agent for each of the owner-Appellants.

The complaint alleged that Appellants, in connection with the leases at the four subject properties, (1) failed to disclose to the lessees the presence of any known lead-based paint and/or lead-based paint hazards before the lessees entered into their leases, in violation of § 745.107(a)(2); (2) failed to include in the lease contract a statement disclosing the known presence of lead-based paint or paint-based hazards, in violation of 40 C.F.R. § 745.113(b)(2); (3) failed to include any records or reports regarding the presence of lead-based paint or lead-based paint hazards in violation of § 745.107(a)(4); and (4) failed to provide a list of records or reports regarding lead-based paint or lead-based paint hazards in violation of § 745.113(b)(3). In addition, the Region charged agent GPI with violating § 745.115(a)(2) for failure to ensure the lessors' compliance with the above disclosure requirements for all the leases in question except for those leases (3-5) associated with 1813 N. 29th Street.[9]

On October 1, 2003, Appellants collectively filed an answer. Attempts at settlement negotiations followed, but proved unsuccessful. On February 11, 2004, ALJ Susan L. Biro was designated to preside over this proceeding.

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[8] Section 409 of TSCA, provides that "[i]t shall be unlawful for any person to fail or refuse to comply with a provision of this subchapter or with any rule or order issued under this subchapter." 15 U.S.C. § 2689

[9] The Region explained that it did not charge GPI with violating § 745.115(a)(2) in connection with these leases due to a lack of documentary evidence that GPI had received notice of the presence of lead or lead-based hazards at the 1813 N. 29th Street property. *See* Tr. at 68.

In response to the ALJ's prehearing order, the Region proposed to withdraw 15 counts of its 47-count complaint, and to amend its proposed penalty to $120,088, based on the remaining 32 counts. The Region proposed a penalty to be assessed in the following manner: $44,204 against Ronald Hunt and Patricia Hunt, jointly and severally; $17,820 against David Hunt and Patricia Hunt, jointly and severally; $15,840 against J. Edward Dunivan; and $42,224 against GPI. *See* Region's Prehearing Exchange at 32; C's Ex. 15.

On May 24, 2004, the Region filed a Motion for Accelerated Decision as to Liability with respect to the 32 counts that the Region had not proposed to withdraw. The Motion addressed the liability of Ronald Hunt and Patricia Hunt on counts 5-13; the liability of David Hunt and Patricia Hunt on counts 17-22; the liability of J. Edward Dunivanon counts 25-28; and the liability of GPI on counts 35-47 of the complaint. *See* Brief in Support of Complainant's Motion for Accelerated Decision as to Liability.

On June 7, 2004, Appellants submitted a response to the Region's Motion for Accelerated Decision in which they conceded their liability on these counts, and withdrew their claim of inability to pay. Respondents' Response to EPA's Motion for Accelerated Decision as to Liability. In their response, Appellants also requested that the ALJ "proceed directly to arguments related to the amount of the fine sought to be imposed." *Id.*

On June 9, 2004, the Region submitted an unopposed Motion to Withdraw the remaining 15 counts concerning failure to disclose on which it did not seek an accelerated decision on liability. On July 2, 2004, the ALJ granted the Region's Motion for Accelerated Decision as to the 32 counts and Motion to Withdraw the remaining 15 counts.

On September 14, 2004, a hearing was held in this proceeding to resolve the matter of the penalty amount proposed by the Region. The parties submitted post-hearing briefs.

On March 8, 2005, the ALJ issued her Initial Decision on the penalty, assessing a penalty of $84,224.80. In lowering the penalty from what had been proposed by the Region, the ALJ opted to reduce the proposed penalty by 30% for the three properties where the administrative record indicated Appellants had carried out lead-based paint remediation. Following the recommendations of the Agency's penalty policy for Disclosure Rule violations, *see infra*, she also granted Appellants a 10% reduction of the penalty for Appellants' cooperation and a 10% reduction in recognition of Appellants' "immediate good faith efforts to comply" with the Disclosure Rule. Initial Decision ("Init. Dec.") at 34.

On April 12, 2005, Appellants filed an appeal of the Initial Decision, asserting that the penalty was "excessive." Appeal Brief ("App. Br.") at 19. In their Appeal Brief, Appellants contended that the ALJ erred by:

(1) refusing to consider published case precedents for calculating a penalty in comparable lead-based violation cases;

(2) unreasonably multiplying the fines by failing to calculate the penalty on a per-property basis;

(3) not reducing the penalty to reflect Appellants' lack of culpability;

(4) not allowing a further reduction of the penalty beyond the additional 10% for "cooperation" and 10% for "immediate good-faith efforts to comply with the Disclosure Rule"already granted by the ALJ in light of Appellants' lead remediation actions; and

(5) failing to grant a substantial penalty reduction based on reduced harm to reflect Appellants' alleged remediation work at the Barton Avenue property (in addition to the reductions the ALJ granted for Appellants' remediation work at the other three properties).

App. Br. at 3, 6-19. On May 4, 2005, the Region filed a response to Appellants' Appeal Brief. Appellee's Response Brief ("Region's Response"). The Board heard oral argument on this case on September 29, 2005.

On November 18, 2005, the Region disclosed to the Board "potential licensing issues" involving RDPH lead inspectors whose inspection reports the Region had introduced into evidence in this proceeding. *See* Complainant's Notice of Potential Witness Issues. In status reports dated December 9 and 21, 2005, the Region explained that upon consulting licensing records held by the Virginia Department of Professional and Occupational Regulation, the Region learned that three of the four inspectors in question had not been licensed to conduct lead inspections in accordance with Virginia law at the time of their inspections.[10] *See* Complainant's Status Report: Potential Witness Issues; Complainant's Final Status Report: Potential Witness Issues ("Final Status Report"). One of the unlicensed inspectors was Mr. Sims, who testified at the evidentiary hearing. *Id.* The Region noted, however, that the lead inspectors "had all received lead inspector training needed for lead inspector licenses * * * prior to the inspections at issue in this

[10] The Virginia law establishing lead inspection certification standards consistent with the RLBPHRA and implementing regulations provides that "it shall be unlawful for any person who does not hold a certificate issued by the Board as a certified lead contractor, professional, or worker to perform lead inspection, evaluation, or abatement activities." Va. Code Ann. § 54.1-503(B) (1995).

case * * * and all subsequently had passed the lead inspector exam needed to qualify for a full lead inspector/risk assessor license[]." Final Status Report at 2. On January 20, 2006, the EAB issued a remand order directing the ALJ to assess how the information disclosed by the Region regarding inspector licensing affected the ALJ's prior determinations on liability and penalties. *See* Remand Order (EAB, Jan. 20, 2006).

By order dated June 27, 2006, the ALJ concluded that the information brought to light by the Region would not alter her earlier determinations on liability and penalties. *See* Order on Remand (ALJ, June 27, 2006). The ALJ noted that the absence of a state license would not in fact affect the admissibility of the evidence, only its weight. With regard to liability, the ALJ stressed that the inspectors' training, knowledge, and work experience in lead inspection rendered their written reports and testimony admissible on the question of lead contamination at the subject properties despite the legal deficiencies in certain inspectors' licensing status. *Id.* at 13-14. In addition, she determined that these skill factors, together with corroborating evidence provided at the hearing, were sufficient for the Region to demonstrate lead contamination at the properties by a preponderance of the evidence and thus to establish Appellants' notice obligations under the RLBPHRA. *Id.* at 17. With regard to penalties, the ALJ found that the Region had exhibited no "bad faith" justifying a penalty reduction according to the EPA's TSCA penalty factors, *see infra*, noting that the Region had disclosed the information regarding the inspectors' licensing deficiencies promptly upon discovering it, and that this information was equally available to both parties from Virginia government records. *Id.* at 19. Moreover, the ALJ observed in this regard that the effective date of the Virginia regulations implementing the bar on unlicensed lead inspections was "fairly murky," creating possible confusion among the inspectors regarding the licensing requirements at the time of their inspections. *Id.* at 20. In her Order on Remand (ALJ, June 27, 2006), the ALJ noted that during the entire course of the proceedings in this matter, including remand proceedings, Appellants have not challenged the admissibility and accuracy of the inspectors' evidence on lead contamination. *Id.* at 12-14, 19.

Appellants have not filed a challenge to the ALJ's determinations in her Order on Remand (ALJ, June 27, 2006).

C. *The Region's Penalty Assessment*

1. *Applicable Statutory, Regulatory, and Agency Guidance for Disclosure Rule Penalty Assessments*

In proposing a penalty against Appellants, the Region applied the TSCA penalty factors found at section 16 of the Act. This section provides that:

> In determining the amount of a civil penalty, the Administrator shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, ability to pay, effect on ability to continue in business, any history of such prior violations, the degree of culpability, and such other matters as justice may require.

TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B).

The Section 1018 — Disclosure Rule Enforcement Response Policy ("ERP") was issued by the EPA's Office of Regulatory Enforcement in February 2000. The ERP is used to implement the TSCA section 16 penalty factors in cases of violations of the Disclosure Rule. In assessing a penalty, ALJs are required to consider any penalty policies issued under the Act. However, ALJs are not bound by such policies and may depart from them when they find a basis for doing so and provide an articulation of that basis. *See* 40 C.F.R. § 22.27(b); *see also In re William E. Comley, Inc.*, 11 E.A.D. 247, 262 (EAB 2004); *In re M.A. Bruder & Sons, Inc.*, 10 E.A.D. 598, 610 (EAB 2002); *In re Chem Lab Prods., Inc.*, 10 E.A.D. 711, 716 (EAB 2002).

The calculation of penalties under the ERP is based upon a gravity-based component and a set of adjustment factors. The gravity-based component of the penalty is determined by a matrix according to the "circumstances" and "extent" of the violation. *See* ERP at B-4. One calculates the recommended gravity-based penalty by finding the value at which these two variables intersect on the matrix. *Id.*

The "circumstances" gravity criterion measures the probability of harm resulting from a particular violation. Each violation is ranked from "Level 1" through "Level 6," with Level 1 representing the highest degree of probability that a lessee will be uninformed about lead-based paint hazards as a result of the violation and Level 6 representing the lowest such probability. The "extent" criterion measures the likelihood or potential for damage to human health or the environment. Under the ERP, the "extent" is predicated upon the age of the youngest child (if any) living in the house and whether there is a pregnant woman in the dwelling. *Id.* at 11. In particular, the ERP sets forth the following three extent designations based on these considerations:

> (1) **Major**: Occupants include a pregnant woman, a child under the age of six, or the age of occupant not provided.
>
> (2) **Significant**: A child is over six years of age but less than 18 years of age.

(3) **Minor**: Occupant is over 18 years of age.

Id. at 13, B-4.

The ERP provides that "each requirement of the Disclosure Rule is a separate and distinct requirement from the other requirements." *Id*. at 12. Accordingly, the ERP explains that "[i]n order to determine whether a violation of the Disclosure Rule has occurred" requires reviewing each such regulatory requirement to see if it has been violated. *See id.* As the ERP further explains using several examples, the number of real estate transactions[11] between lessor and lessee dictates the number of separate counts of a violation since each transaction must be examined independently for the purpose of computing a total gravity penalty amount. *See id.; id*. App. C. In one example, the ERP states that:

> [I]f a Lessor owns eight target housing units in an apartment building and fails to comply with the Disclosure Rule when leasing each of these units, the Lessor will be held liable for violating the Disclosure Rule in all eight transactions. Each transaction "stands alone" and thus the penalty will be assessed as individual counts in the Complaint. When the civil administrative Complaint is filed against the Lessor, all eight (8) transactions will be included in the same Complaint. The total gravity-based penalty will be the sum of the penalties for violation of all eight (8) transactions.

Id. at 13.

The gravity-based penalty can be modified by "adjustment factors" such as ability to pay/continue in business, history of prior violations, degree of culpability and "such other factors as justice may require." "Other factors as justice may require" includes, in relevant part, adjustments based on a violator's "attitude" and a demonstration that a target property is "lead free."[12] Under the rubric of "attitude," the ERP provides for a reduction of up to 10% for each of three components constituting proper "attitude" for a potential maximum "attitude" reduction

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[11] The ERP defines a "Real Estate Transaction" as "the business dealings that results [sic] in an agreement between either a lessor/agent and a lessee or a seller/agent and purchaser for target housing." ERP at 13.

[12] Within the ERP's heading of "other factors as justice may require" are such additional considerations as the performance of Supplemental Environmental Projects, compliance with the Agency's audit policy, a violator's business size, the economic benefit of noncompliance, and an adjustment for small independent owners and lessors. *See* ERP at 16-17. The Region determined that these considerations did not apply to this case. *See* Tr. at 61-65.

of 30%. These components consist of (1) a respondent's cooperation; (2) "a respondent's immediate good faith efforts to comply with the Disclosure Rule"; and (3) early settlement of the case. Id. at 16. The ERP also provides that EPA may adjust the penalty downward by 80% where the target housing is "certified to be lead-based paint free by the responsible party." *Id.*

2. *The Region's Proposed Penalty Calculation*

The counts of the administrative complaint consist of the following three Disclosure Rule violations: (1) failure to include a statement disclosing the presence of lead-based paint or lead-based paint hazards, 40 C.F.R. § 745.113(b)(2); (2) failure to provide lessees any available records or reports on lead-based paint or lead-based paint hazards, 40 C.F.R. § 745.107(a)(4); and (3) failure to include a list of available records or reports pertaining to lead-based hazards, 40 C.F.R. § 745.113(b)(3).

The Region ranked each of these violations along the "circumstance" axis in accordance with the ERP's recommendations. *See* ERP at B-1, B-2. Thus, the Region ranked the § 745.113(b)(2) violation (failure to include a statement) as Level 3; the § 745.107(a)(4) violation (failure to provide lessee records or reports) as Level 1; and § 745.113(b)(3) violation (failure to attach a list of records or reports) as Level 5. In accordance with the ERP, the Region ranked the extent of the corresponding violation(s) by the ages of the resident children. For leases numbers 1, 4, 8, 9, and 10, where young children under age six resided, the Region ranked the corresponding disclosure violations as "major." For the other leases, where children between ages six and eighteen resided, the Region ranked the remaining violations as "significant." For each of the 32 counts, the Region adjusted the penalty downward by ten percent to reflect Appellants' cooperation in coming into compliance. C's Ex. 15, at 12. For all the leases, except those involving 1813 N. 29th St., the Region divided the corresponding penalty amounts equally among the lessors and GPI to reflect GPI's obligation under the Disclosure Rule to ensure Appellants' compliance with the Disclosure Rule and GPI's role in executing those leases.[13]

Following this methodology, the Region proposed the following penalty amounts: $44,204, jointly and severally, against Appellants Ronald Hunt and Patricia Hunt (1124 N. 28th Street and 1813 N. 29th Street); $17,820, jointly and severally, against Appellants David Hunt and Patricia Hunt (3015 Barton Avenue); $15,840 against Appellant J. Edward Dunivan (2405 Third Avenue); and

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[13] The Region did not propose that GPI be assessed half of the penalty for violations involving the 1813 N. 29th Street property (leases 3 through 5) because of lack of documented evidence that GPI had received notice of the presence of lead or lead-based hazards at this property. *See* Tr. at 68; *supra* note 9.

$42,224 against Appellant agent GPI. These proposed penalty amounts against the co-Appellants totaled $120,088, as we summarize in the chart below.[14] The chart refers to co-Appellants by their initials, and the asterisk indicates those properties in which the penalty was split between the owner and property manager GPI.

Appellants	Property	Leases	Gravity Based Penalty (GBP)	Adjusted GBP GBP - (10% of GBP) for "attitude"	Proposed Penalty
RHH/PLH[15]	1124 N. 28th St.	1-2*	$19,030	(-$1,903) $17,127	$44,204
	1813 N. 29th St.	3-5	$39,600	(-$3,960) $35,640	
DEH/PLH	3015 Barton Ave.	6-8*	$39,600	(-$3,960) $35,640	$17,820
JED	2405 Third Ave.	9-10*	$35,200	(-$3,520) $31,680	$15,840

Lessor Total: $77,864

GPI was assessed a penalty for the three properties for which it had received notice of lead-based paint contamination. These three properties are identified by asterisks, above. GPI's proposed penalty was calculated by the Region as follows:

> GPI Total Proposed Penalty = 50% × Adjusted GBP
> except for leases 3-5:
> 50% × $84,427 = $42,223.5 =$42,224

Region's Total Proposed Penalty: $77,864 (Lessors' proposed penalty) + $ 42,224 (GPI's proposed penalty) = $**120,088.**

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[14] A more detailed overview of the Region's penalty calculation, count by count, is provided in the Initial Decision. *See* Init. Dec. at 14-26; *see also* C's Ex. 15 (Penalty Worksheet).

[15] These acronyms represent the owner-Appellants, as follows: RHH/PLH (Ronald H. Hunt and Patricia L. Hunt); DEH/PLH (David E. Hunt and Patricia L. Hunt); and JED (J. Edward Dunivan).

D. *The ALJ's Penalty Assessment*

As noted, the ALJ's Initial Decision reduced the Region's proposed penalty from $120,088.00 to $84,224.80. In her penalty assessment, the ALJ largely adopted the analysis articulated in the Region's proposed penalty assessment, which relied upon the ERP. While the ALJ endorsed the Region's proposed deductions from the penalty to reflect the cooperative attitude of Appellants, in the ALJ's view further deductions were warranted based on Appellants' attitude and the reduced risk of lead hazards stemming from their lead encapsulation work.

The ALJ detailed her rationale for departing from the Region's matrix-derived gravity-based penalty. First, she added a 30% downward adjustment to reflect the diminished harm resulting from Appellants' lead encapsulation work. In lowering the penalty, she stated that "although the ERP does not provide for it, I believe Respondents are entitled to a downward penalty reduction based upon their pre-violation lead paint hazard reduction activity in regard to the properties other than Barton Avenue." Init. Dec. at 32.[16] Referring to the TSCA section 16 statutory penalty factors, the ALJ explained that the adjustment, in her view, was justified based on the "extent, circumstances, and gravity of this violation not otherwise accounted for under the ERP and/or as an adjustment under the category of 'other factors as justice may require.'" Init. Dec. at 31-34; *see* TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B). Next, the ALJ applied, within the ERP's category of "attitude," another 10% reduction for Appellants' "immediate good faith effort to comply" and the "speed and completeness" with which they came into compliance, in addition to the Region's 10% discount for "cooperation." Init. Dec. at 34-35. This resulted in a total downward adjustment for "attitude" of 20% under the ERP. *Id.* As had the Region, the ALJ split the adjusted penalty amounts evenly between the lessor and GPI for all properties except the one at 1813 N.

[16] The ERP specifically provides for a lowered penalty associated with a reduced risk of lead exposure only in the situation where a "party provides EPA with appropriate documentation * * * that the target property is certified to be lead-based paint free by a certified inspector." ERP at 16. The Disclosure Rule defines "lead-based paint free" housing to be target housing "that has been found to be free of paint or other surface coatings that contain lead equal to or in excess of 1.0 milligram per square centimeter or 0.5 percent by weight." 40 C.F.R. § 745.103. In that situation, the ERP recommends an 80% downward adjustment of the penalty. *See id.*

29th Street (leases 3-5). These calculations resulted in a final penalty assessment of $84,224.80, as we indicate below:

Appellant	Property	ALJ's Final Penalty Assessment (**FPA**): GBP — (30% adjustment for reduced harm for all properties except 3015 Barton Avenue) - (20% adjustment for attitude) = Adjusted GBP **FPA**=Adjusted GBP/2 (except for 1813 N. 29th Street where **FPA**=Adjusted GBP)
RHH/PLH	1124 N. 28th St. (leases 1-2)	$19,030(GBP) - $5,709 (30% of $19,030) = $13,321 - $2,664.40 (20% of $13,32) = $10,656.80/2 = **$5,328.40**
	1813 N. 29th St. (leases 3-5)	$39,600(GBP) - $11,880 (30% of $39,600) = $27,720 - $5,544 (20% of $27,720) = **$22,176.00**
DEH/PLH	3015 Barton Ave. (leases 6-8)	$39,600(GBP) - $7,920 (20% of $39,600) = $31,680/2 = **$15,840.00**
JED	2405 Third Ave. (leases 9-10)	$35,200(GBP) - $10,560 (30% of $35,200) = $24,640 - $4,928 (20% of $24,640) = $19,712/2 = **$9,856.00**

Agent GPI's final penalty assessment represents an equal share of the penalty assessed for all leases except leases 3-5: ($5,328.40 + $15,840.00 + $9,856.00) = **$31,024.40.**The calculations indicated above resulted in the following penalty assessment by the ALJ:

- Ronald and Patricia Hunt ($5,328.40 +$22,176.00) **$27,504.40**
- David and Patricia Hunt **$15,840.00**
- J. Edward Dunivan **$ 9,856.00**
- GPI **$31,024.40**

ALJ's Final Penalty Assessment: **$84,224.80**

III. *DISCUSSION*

Below, we consider in turn each of the arguments Appellants have raised objecting to the ALJ's penalty assessment. As we explain, none of these arguments warrants modifying the ALJ's penalty assessment.

A. *Whether the ALJ Erred in Finding Past Penalty Cases Not Binding on this Proceeding*

Appellants argue that the penalty the ALJ imposed in this case is "totally out of proportion with the infractions" and with past penalty cases arising under the Disclosure Rule. App. Br. at 6. In support of this argument, they list ten previous decisions involving the Lead Disclosure Rule in which the Agency assessed fines ranging from $4,070 to $37,037. App. Br. at 7-11. Appellants aver that these "precedents carry the force of law and thus set the boundaries for what this Board should consider as the appropriate amount of fine to be assessed against them in this case." *Id.* at 7. Characterizing the instant case as one "boiling down to ten leases, four houses, and truly, four clerical mistakes at the least," *id.* at 11, the Respondents assert that the ALJ's penalty assessment is excessive for "minor infractions such as those involved here," *id*. Thus, Appellants urge the Board to "use its authority to follow established precedent and common sense in imposing a more reasonable fine than that suggested by the Presiding Officer." *Id.*

The question of whether penalties imposed in previous cases involving the same statute should demarcate the size of a penalty in a current proceeding is one which we have addressed on many occasions. Our jurisprudence on this question militates strongly against Appellants' position.

In its survey of jurisprudence in this area, *see* Region's Response at 21-25, the Region details the three principal considerations that have prompted us to reject a case-by-case-comparison as an appropriate basis for assessing penalties in almost all circumstances. First, we have emphasized that the penalty inquiry is inherently fact-specific such that abstract comparison of dollar figures between cases without considering the unique factual record of cases does not allow for meaningful conclusions about the fairness or proportionality of penalty assessments. *Id.* at 22. Second, requiring cross-case comparisons in penalty assessments would interfere with Agency procedural rules' goal of judicial economy by encouraging respondents to "present detailed re-examinations of other allegedly similar penalty cases," thereby burdening ALJs and the EAB with the task of examining the fine factual details of cases other than the one immediately before them. *Id.* Finally, established case law rejects alleged unequal treatment (i.e., that a party has suffered a larger penalty than other parties in a similar administrative proceeding) as a basis for challenging administrative penalty actions. *Id.* A recurring principal underlying this final consideration is the notion that administrative agencies are entitled to significant deference in fashioning remedies, such as penalties, as part of the regulatory responsibilities that Congress has entrusted to

them.[17]

We have indeed stated that "there may be circumstances so compelling as to justify, despite judicial economy concerns and Supreme Court precedent affirming agency penalty discretion, our review of other allegedly similar cases." *In re Chem Lab Prods. Inc.*, 10 E.A.D. 711, 732 (EAB 2002). To date, however, the Board has not found a circumstance in which separate cases were sufficiently identical to justify such an analysis, and we find nothing compelling in Appellants' reasons for reviewing other cases here. Accordingly, we will not depart from our well-established jurisprudence disfavoring the case-by-case comparison approach urged by Appellants, and we reject as a matter of law their argument that the Board must consider or be bound by penalty determinations in other TSCA lead disclosure cases in assessing a penalty in the instant case.

To be sure, consistency in enforcement is a goal of EPA's administrative penalty policy. For example, the Agency's general enforcement policy states that "[f]air and equitable treatment requires that the Agency's penalties must display both consistency and flexibility." *See* EPA General Enforcement Policy #GM-21, *Policy on Civil Penalties* 4 (Feb. 16, 1984). However, EPA policy advocating fair and equitable penalty assessment does not "suggest identical penalties in every case" because "[v]ariations in the amount of penalties assessed in other cases, even those involving violation of the same statutory provision or regulations, do not, without more, reflect an inconsistency" with EPA policy. *In re Titan Wheel Corp. of Iowa*, 10 E.A.D. 526, 533 n.14 (EAB 2002).

In fact, the ERP — which the ALJ largely followed — and other penalty policies serve the purpose of fairness and consistency by recognizing the fact-specific nature of penalty calculations and thus identifying the variety of considerations that arise in every case and that distinguish one case from another. In this regard, Appellants' comparison of cases based on final penalty assessments, while ignoring the underlying specifics of the cases, provides no compelling basis for overturning the ALJ's penalty assessment on the criteria of fairness and consistency.

We note, in any case, that the cases cited by Appellants, if anything, support the legal conclusion on which we base our decision. In particular, Appellants' arguments illustrate the fallacy of making facile comparisons of penalty assessments among cases without considering the facts of each case — a consideration the Board has emphasized in rejecting the approach to penalty assessment advocated by Appellants here. *See Chem Lab*, 10 E.A.D. at 728. For example, Appel-

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[17] The reader is directed to our decision in *In re Chem Lab Prods., Inc.*, 10 E.A.D. 711 (EAB 2002) for a thorough analysis of the Board's rationale for rejecting case-by-case comparisons in assessing penalties. *See Chem Lab*, 10 E.A.D. at 728-34.

lants characterize the current $84,000 penalty assessed by the ALJ as "beyond the pale" because it is "more than twice as large as the most egregious previously reported case." App. Br. 11; Oral Argument at 10. The Region explains how Appellants' characterization is mistaken, noting that the ALJ's assessment must be understood in the context of the great number of leases and parties involved here. Region's Response at 21. As the Region aptly notes, this case involves four sets of penalties distributed among a total of five Appellants and ten leases,[18] and seven of the ten cases cited as "precedent" by Appellants involved violations for a *single lease*. *See id.* at 21, 25 n.53. In sum, Appellants' discussion of prior cases only confirms our previous observation that "penalty assessments are sufficiently fact- and circumstance-dependent that the resolution of one case cannot determine the fate of another." *In re Newell Recycling Co.*, 8 E.A.D. 598, 642 (EAB 1999) (finding that ALJ did not err in failing to consider penalties assessed in other cases when calculating penalty amount in instant case).[19]

For the foregoing reasons, we determine that Appellants have failed to assert supportable grounds for reducing the ALJ's penalty assessment based on the Agency's prior decisions in Disclosure Rule cases.

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[18] For example, the Region notes that when calculated on a per Appellant basis, the ALJ's penalty assessment falls within what Appellants consider the appropriate penalty range of $4,070 to $37,037.

[19] Appellants' discussion of other Disclosure Rule cases, *see* App. Br. at 7-11, clearly illustrates why the Board has consistently declined to accept the comparison to other cases that Appellants suggest here. The cases are almost invariably, in their facts, distinguishable.

For example, as the Board observed at oral argument, some of these previous cases that Appellants listed as models of "proportionality" exceed, on a per-lease basis, the penalty assessed here by the ALJ. Oral Argument at 12. This includes, for example, *In re Marc Brown*, a default case in which the ALJ assessed a penalty of $10,000 for a violation involving one lease, *see In Re Marc Brown*, Dkt. No. TSCA-7-2001-0001 (ALJ, Aug. 9, 2001) and *In re Billy Yee*, in which the Board upheld the ALJ's penalty assessment of $29,700 for a single lease, *see In re Billy Yee*, 10 E.A.D. 1 (EAB 2001). In the instant case, the ALJ's assessment for the 10 leases averages slightly above $8,000 per lease, and in no case exceeds $10,000 for a single lease. *See* Init. Dec.at 41. By comparison, in *In re CAS Equity, Inc.*, the ALJ assessed a penalty of $30,800 for a single lease. *See* Dkt. No. TSCA-7-2000-053 (ALJ, Nov. 26, 2001). Appellants' arguments regarding our recent decision in a Disclosure Rule case, *In re Harpoon Partnership*, are similarly distinguishable. Appellants argue that the penalty assessment is inconsistent with the assessment in *Harpoon*, which involved a greater number of violations (45 counts) than in the instant case (32 counts), and in which the Board upheld a lower penalty ($37,000) than the ALJ assessed here. *See* App. Br. at 10-11; Oral Argument at 13. As the Region's Counsel explained at oral argument, however, the lower penalty in *Harpoon* was explained by the significantly lower number of leases involving young children as compared to the instant case. Oral Argument at 14, 35; *see In re Harpoon Partnership*, 12 E.A.D. 182 (EAB 2005), *aff'd on other grounds*, *Harpoon v. EPA*, No. 05-2806 (7th Cir. Aug. 24, 2005).

B. *Whether the Penalty Assessments Resulted in Multiplication of Penalties*

Appellants contend that the ALJ, without "discretion or common sense," ratified the Region's "multiplication" of the penalty, resulting in excessive penalties against them. In support of this argument, Appellants assert that the Region erred by reviewing each of the counts "individually," even though given that Appellants' violations allegedly involved "four minor paperwork errors on four properties." App. Br. at 12, 15. Appellants further argue that the most "enlightened" approach would be to calculate the penalty on a property-by-property, rather than on a lease-by-lease, basis. App. Br. at 12; *see also* Tr. at 238-39.

We disagree with Appellants' suggestion here that the penalties should be calculated on a property-by-property basis. The ALJ's lease-by-lease penalty assessment is consistent with the Disclosure Rule's imposition of lease-by-lease disclosure requirements on lessors. For example, the Disclosure Rule provides, in relevant part, that "*[e]ach contract to lease* target housing shall include * * * a statement by the lessor disclosing the presence of known lead-based paint hazards in the target housing being leased or indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards." 40 C.F.R. § 113(b)(2) (emphasis added). It also requires the lessor to "provide the * * * *lessee* with any records or reports available to the seller or lessor pertaining to lead-based paint and/or lead-based paint hazards in the target housing being sold or leased." 40 C.F.R. § 107(a)(4) (emphasis added).[20] Such requirements to including specific information in leases and to convey this information to individual lessees accords with the Disclosure Rule's aim of protecting tenants and their families from lead hazards. Highlighting the Disclosure Rule's tenant focus, the preamble that introduced the issuance of the final Disclosure Rule observed that "using [disclosure information], consumers can make more informed decisions concerning home purchase, lease, and maintenance to protect their families from lead hazard exposure." 61 Fed. Reg. 9064 (Mar. 6, 1996). As the Region's counsel stated at oral argu-

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[20] The Disclosure Rule's governing statute, Title X of the RLBPHRA, clearly obligates a lessor to make disclosure to individual lessees:

> [T]he Disclosure Rule shall require that, before the purchaser or *lessee* is obligated under any contract to lease the housing, the seller or lessor shall
>
> * * *
>
> (B) disclose to the purchaser or *lessee* the presence of any known lead-based paint, or any known lead-based paint hazards, in such housing and provide to the purchaser or *lessee* any lead hazard evaluation report available to the * * * lessor * * * .

RLBPHRA § 1018(a)(1)(B), 42 U.S.C. § 4852d(a)(1)(B) (emphasis added).

ment, "[t]he reason why [the Disclosure Rule] is lease-based rather than property-based is to protect the tenants of the leases, not the properties of the owners." Oral Argument at 44.

Another facet of Appellants' "multiplication" argument is that the Region inappropriately inflated the penalty by "double fining" them for their failure to correctly include a statement in the lease disclosing their knowledge of lead hazards at the subject properties, and their failure to provide documentation regarding these hazards. App. Br. at 14. In other words, Appellants object to the Region's assessment of separate penalties for failure to comply with their § 745.113(b)(2) obligation to include a statement indicating their knowledge of known lead-based paint hazards, and their failure to meet their § 745.107(a)(4) obligation to provide related documents. In support of this argument, Appellants state that all these violations stemmed from a single "nucleus of fact," which in this case was four simple "paperwork" errors. As a result of this simple omission, contend Appellants, GPI lacked the requisite notice to "go and find the documents and present further information." Oral Argument at 6.[21]

Appellants' arguments disregard the Disclosure Rule's imposition of separate obligations to include a statement regarding the known presence of lead as well as to provide any documentation regarding such hazards. As the Region counters, "[o]ne can include a provision in the lease that lead-based paint is present in the target housing and fail to provide records of lead-based paint and vice versa." Region's Post Hearing Brief at 55. Most importantly, the preamble to the final Disclosure Rule stressed the importance of providing documentary information to tenants apart from simple notice. The preamble noted that documentary information on lead hazards "can help purchasers and occupants take exposure prevention precautions during later ownership or occupancy." 61 Fed. Reg. 9064, 9076. The preamble further explained that section 1018 of the RLBPHRA separately requires lessors and sellers to disclose the presence of lead hazards and to provide available written records and reports to the purchaser or lessee. *Id.* "By mandating that both actions occur," stated the preamble, "Congress recognized the distinction between the two actions and the fact that the seller or lessor might have actual knowledge of lead-based paint and/or lead-base paint hazards above and beyond that present in available reports." *Id.* Thus, this language stresses that carrying out these two obligations is necessary to provide the intended protection to tenants, thus indicating that one obligation cannot be subsumed within the other.

In our view, Appellants' arguments in this respect trivialize the nature of their disclosure violations. Rather than Appellants' documentary violations being

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[21] In Appellants' articulation, "due to [the owners] having checked the wrong box they also failed to give tenants related documentation." App. Br. at 13.

an innocent consequence of their prior failure to mark the disclosure form, these violations stem from Appellants' fundamental mismanagement of the records concerning lead-based paint hazards. As the ALJ explained, the owner-Appellants, before initiation of the subject leases, had access to substantial records regarding lead contamination at the properties, such as notices of violation and compliance letters. Despite access to these records, the owner-Appellants failed to provide this information to GPI in a way that would ensure that the ten relevant leaseholders and their families would be properly informed of lead hazards as intended by the Disclosure Rule before finalizing the leases in question.[22] Init. Dec. at 36-37; Tr. at 210-11; *see also* Region's Response at 17-19. Moreover, Appellants' poor management practices continued uncorrected over a period of ten leases, during which time families with children were uninformed of potential lead-based paint hazards. Region's Response at 28. In light of these facts, and the Disclosure Rule's aims, we regard as reasonable the ALJ's decision to sanction Appellants separately for their failure to disclose the presence of lead and failure to provide documentary evidence — and to do so on a lease-by-lease basis.[23]

We also disagree with Appellants' contention that in approving what Appellants argue is the Region's "multiplication" of penalties, the ALJ inappropriately failed to conduct an "independent analysis" of the Region's penalty calculation in contravention of our holding in *In re Harpoon*, 12 E.A.D. 182 (EAB 2005). As noted above, the ALJ was required to assess a penalty consistent with the statutory penalty factors at TSCA § 16(a)(2)(B) and to consider the applicable penalty guidelines in the ERP. *See* 40 C.F.R. § 22.27(b).

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[22] The record indicates that GPI had received oral notice of contamination at all of the subject properties except for 1813 N. 29th Street. *See* C's Ex. No. 32. However, in his testimony, Ronald Hunt indicated that contrary to usual practice, the documentation he received regarding lead-based contamination at the four properties was somehow not distributed to GPI for filing. *See* Tr. at 210-11. The result of this apparent clerical error, he explained, was that GPI did not have such documentation in its files at the time it executed the leases for the properties and so did not provide the required lead-based paint disclosure and documentation to tenants. *See id.; see also id.* at 218.

[23] As part of their "multiplication argument" Appellants appears to fault the Region for first "doubling" the penalties against GPI and the owner-Appellants in connection with their leasing of the three relevant properties (1124 N. 28th Street, 3015 Barton Avenue, and 2405 Third Avenue) prior to the Region using its "prosecutorial discretion" to "halve" the penalties against them. *See* App. Br. at 11-17. (Such "halving" appears to refer to the Region splitting the penalty amounts between GPI and the owner-Appellants in connection with the leases at the above properties.") We have some difficulty in understanding the purpose of Appellants' line of argument. First, this halving after an initial "doubling" nullifies any multiplication. Furthermore, this "halving" represented a concession to Appellants. As the Region noted, the Disclosure Rule imposes on both the lessor and agent the obligation to make proper disclosure to tenant. As such, the Region observed that it could have assessed upon both the owner-Appellants and GPI the full penalty amount recommended by the ERP for violation of these obligations. But as the Region's Counsel explained at Oral Argument, in those cases "where the agent was also assessed or addressed for similar violations as to the lessors in this case because it's a closely knit family operation, we exercised our prosecutorial discretion to only assess penalties of 50 percent of what they could have been under ERP for both the lessors and for the agent." Oral Argument at 47.

The RLBPHRA and the Disclosure Rule impose disclosure obligations lease-by-lease and require disclosure through the independent vehicles of a simple statement and attached documentation. Accordingly, the failure to heed these obligations warranted separate sanctions as reflected in the ALJ's penalty calculation. Appellants have offered no evidence to support their contention that the ALJ failed to conduct an "independent" analysis applying the applicable statutory provisions and Agency guidance.

C. *Whether the ALJ Should Have Granted a Larger Discount to Reflect the Remediation Appellants Performed at Their Property and Lack of Harm to the Tenants.*

Appellants challenge as insufficient the ALJ's downward adjustment to the penalty to reflect the reduced harm stemming from Appellants' lead encapsulation work at their properties, and specifically the ALJ's determination not to grant a reduction based on alleged encapsulation of the Barton Avenue property. According to Appellants, the reduction does not reflect the greatly diminished risk of lead contamination to tenants — which they describe as "approaching zero" — that resulted from their encapsulation. *See* App. Br. at 15-16; Init. Dec. at 42.[24] As noted earlier, the ALJ reduced the penalty by 30% from gravity-based penalty amounts proposed by the Region for three of the properties, a reduction not specifically contemplated by the ERP, but determined that Appellants had not provided enough evidence of lead encapsulation at the Barton Avenue property to justify a corresponding penalty reduction for this property. *See* Init. Dec. at 31. Referring to the section 16 penalty factors, the ALJ explained that her penalty determination with respect to Appellants' encapsulation activities took into account the "extent, circumstances, and gravity" of the violations and "other factors as justice may require." *Id.* at 34; *see* TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B). For the reasons detailed below, we agree with the ALJ's penalty adjustments for remedial work.

1. *The ALJ's Penalty Adjustments Are Reasonable*

In our view, the ALJ took a measured approach in reducing the penalty by 30% to reflect Appellants' remediation work at the 1124 N. 28th St., 1813 N. 29th St., and 2405 Third Ave. properties. In her adjustment, she accorded proper weight and consideration to the testimony indicating that the encapsulant Lead Block could provide a very effective barrier against the dispersal of lead in homes. For example, in their testimonies, the lead paint inspector for RDPH and the Region's lead enforcement coordinator concurred that under proper supervision and maintenance, Lead Block could be a highly effective technique for mini-

[24] Appellants appear to misstate the discount the ALJ granted them. The actual discount she granted them was 30%, not 10% as Appellants seem to say. *See* App. Br. at 16.

mizing the risk of exposure to lead. *See* Tr. at 42-47, 177-79.[25] On the other hand, the ALJ gave weight to undisputed information in the record on the limitations of lead encapsulation as a hazard reduction technique and lack of evidence that Appellants carried out the recommended follow-up activities upon encapsulation. First, she noted that application of Lead Block did not constitute a lead removal technique, meaning that all the properties continued to harbor lead; second, that there was a dearth of information regarding how Appellants carried out the encapsulation and how the risk of exposure was reduced in "friction areas" where "mere encapsulation" is not effective; and third, that there was a lack of information on "monitoring and maintenance" following the encapsulation in order to ensure the technique's success. Init. Dec. at 34 (citing Tr. at 62); *see also* Oral Argument at 55-56.

Further, we disagree with Appellants' assertion that because the Region did not demonstrate actual harm to those who rented the subject properties, this is a case of "harmless error" that merits "the lower end of the range of penalties imposed in lead disclosure cases." App. Br. at 17. Appellants' arguments in this respect misapprehend the overriding *preventive* purpose of the Disclosure Rule as explained in the Disclosure Rule's preamble. *See supra* Part III.B. This preventive purpose is clearly articulated in the ERP:

> The Disclosure Rule requirements are designed to provide potential Purchaser and Lessees with information that will permit them to weigh and assess the risks presented by the actual or possible presence of lead-based paint or lead-based hazards in the target housing they might purchase or lease.

ERP at 9. By not disclosing this type of information to the tenants, Appellants deprived the tenants of information that they could use to better protect their families. This deprivation of information produced the very harm that the Disclosure Rule intends to avoid — uninformed occupation of lead-contaminated housing. As such, Appellants' disclosure violations did not amount to "harmless error" and warrant the assessed penalty.

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[25] In this regard, the ALJ also observed that Samuel Rotenberg, the Regional Toxicologist for Region III, recognized in his written testimony that lead encapsulation could be a very effective technique for reducing lead hazards. Init. Dec. at 29. Mr. Rotenberg stated in his written testimony that "encapsulation * * * can dramatically reduce the exposure from lead-based paint" if surfaces are properly prepared, the encapsulant properly is applied, and encapsulated areas are reasonably maintained. C's Ex. 94, at 7.

2. *The ALJ's Determination Not to Reduce the Penalty Based Upon Alleged Remediation at Barton Avenue Is Reasonable and Supported By the Record*

Appellants devote the bulk of their appeal to contesting the ALJ's determination not to grant a penalty reduction for Barton Avenue and her predicate finding that Appellants had not conducted lead-based paint remediation at this property. Appellants assert that the ALJ erred by failing to adhere to our decision in *In re New Waterbury, Ltd.*, which, they state, imposes on EPA the "burden of demonstrating that the penalty it proposed was reasonable." App. Br. at 6 (citing *In re New Waterbury, Ltd.*, 5 E.A.D. 529 (1994)). Instead, argue Appellants, the ALJ's analysis of the Barton Avenue property "flies in the face of the EPA's clear burden to prove its case against the respondents." App. Br. at 17. Appellants suggest that the Region bears the burden of showing lack of remediation at the Barton Avenue property and that "the Presiding Officer has essentially allowed the EPA to prove a lack of remediation through the absence of evidence." *Id.* at 17.

We disagree with Appellants' argument that the ALJ's analysis of the Barton Avenue penalty assessment is at odds with our analysis in *New Waterbury*, where we applied the same TSCA section 16 penalty factors involved in the instant case. First, Appellants' "burden of proof" argument is not supported by our analysis in *New Waterbury.* In addition, as discussed below, when an appellant seeks consideration of specific mitigating evidence under a general penalty rubric such as "other matters as justice may require," the burden lies with the appellant to come forward with such evidence and to convince the ALJ that such evidence has veracity.

At the outset, Appellants' argument fails to apprehend, as we explained in *New Waterbury*, that "although the Region bears the burden as to the appropriateness of the penalty, it does not bear a separate burden on each of the TSCA § 16 penalty factors." *New Waterbury*, 5 E.A.D. at 538. We explained this distinction in *New Waterbury* in the following manner:

> [T]he Region has the burden of proof * * * with regard to the *appropriateness* of a penalty and thus, it must show that it has taken into account each of the factors identified in TSCA § 16 in assessing a proposed penalty and that its proposed penalty is supported by its analysis. * * * [T]his does not mean that there is any specific burden of proof with respect to any individual factor; rather the burden of proof goes to the Region's consideration of all the factors.

New Waterbury, 5 E.A.D. at 538-39.

Applying this precedent to the case at hand, *New Waterbury* does not impose upon the Region a specific burden of proof with respect to the TSCA Section 16 penalty factors of "extent, circumstances, and gravity" and "other matters as justice may require," which the ALJ considered in her decision not to reduce the penalty based on the alleged remediation of the Barton Avenue property. *See* Init. Dec. at 34. *New Waterbury* only requires the Region to consider these penalty factors, among other factors, in supporting its overall penalty proposal. Similarly, the ALJ must consider, as she did here, all the TSCA section 16 penalty factors in reaching her initial decision, but there is no specific burden as to any of these factors. Thus, our precedent in *New Waterbury* does not impose upon the Region any specific burden to demonstrate lack of remediation at Barton Avenue in consideration of the two penalty factors discussed above.

In short, the Region's burden is limited to showing that it considered the relevant statutory factors and that its proposed penalty assessment is appropriate in light of those factors. When a respondent challenges the appropriateness of a proposed penalty by reference to specific special circumstance that, in respondent's view, warrants penalty mitigation under one of the generalized statutory penalty factors, respondent necessarily bears the burden of proving that the special circumstance in fact existed.

This is particularly true in a circumstance in which the evidence of the alleged special circumstance is within the respondents' possession and control. Here, Appellants put forward evidence of the remediation work undertaken at their properties. Appellants argued to the ALJ successfully that remediation of the rental properties should be taken into account in assessing an appropriate penalty, and the Region has chosen not to contest this determination. This does not mean, however, that the Region had a burden to disprove that remediation occurred in order to support the overall appropriateness of its proposed penalty, because Appellants, not the Region, possessed the evidence as to whether remediation occurred. It is appropriate to impose the burden of going forward with evidence and of persuasion upon the party with the most access to or knowledge of the facts involved. *See Helena Chem.* 3 E.A.D. 26, 37-38 (CJO 1989) (citing *Envtl. Def. Fund, Inc. v. EPA*, 548 F.2d 998, 1004 (D.C. Cir. 1976) for the proposition that "the burden of going forward with evidence falls on the 'party having knowledge of the facts involved.'"); *accord Standard Scrap Metal Co.*, 3 E.A.D. 267, 272 (CJO 1990). Thus, information concerning the use of lead encapsulation at Appellants' properties is likely to be in the possession of Appellants, since encapsulation work and related documentation arose from interactions between Appellants and the City of Richmond, and it is therefore appropriate to impose upon Appellants the burden of producing evidence and of persuasion on this point.

To conclude otherwise would require the Region to anticipate and effectively disprove as part of its case in chief any number of special, case-specific circumstances that a respondent might allege as a basis for penalty mitigation,

which obviously can extend well beyond the evidence relevant to proving a violation or addressing one of the more specific penalty factors (*e.g.*, history of violations).[26] The statute does not require such prescience, and neither would justice be served by requiring the Region to attempt to disprove that which is peculiarly within the respondent's means to adduce.

Moreover, imposing these evidentiary burdens upon Appellants is consistent with the ERP's approach to remediation-related penalty reduction, which provides for a downward adjustment for lead-based paint removal. In particular, the ERP states that "EPA will adjust the proposed penalty downward 80% if the *responsible party provides EPA with appropriate documentation (e.g.*, reports for lead inspection conducted in accordance with HUD guidelines) that the target housing is certified to be lead-based paint free by a certified inspector." ERP at 16 (emphasis provided). Thus, the ERP clearly contemplates that sellers or lessors of target housing bear the burden of demonstrating that they have removed the lead-based paint contamination. By analogy, the burden of proof for a downward penalty reduction based upon lead-based paint remediation resides with Appellants.

Appellants did put forward testimony to the effect that lead remediation occurred at Barton Avenue; however, the ALJ found this evidence not to be credible. As the ALJ found in her Initial Decision, evidence presented regarding lead encapsulation at Barton Avenue was conspicuously sparse. Init. Dec. at 31-32. The ALJ notes that in contrast to the other properties, for which Appellants received compliance letters from the RDPH attesting to their remediation work, Appellants never received a compliance letter for the Barton Avenue property. *Id.* (citing Tr. at 208). Further, Appellants provided no documentary evidence to support Ronald Hunt's testimony that he had hired a contractor to conduct lead encapsulation at this property — such as the name of the contractor and dates the work was performed. *Id.* (citing Tr. at 208). In his testimony, Mr. Sims, RDPH's lead inspector, corroborated this lack of documentary evidence, recounting that in searching the RDPH's computer records, he did not turn up any records of compliance letters issued by the RDPH concerning the Barton Avenue property.[27]

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[26] In fact, in this case, the question of remediation is clearly collateral to the Disclosure Rule violation. The Disclosure Rule provisions state that "[n]othing in this section implies a positive obligation on the seller or lessor to conduct any [lead] evaluation or reduction activities." 40 C.F.R. § 745.107(a).

[27] Mr. Sims also related in his testimony that no one in the RDPH or Lead-Safe Richmond received communication from property owners David Hunt or Patricia Hunt, GPI, or any other person regarding the NOV issued for the Barton Avenue property. Tr. at 169. Mr. Sims explained that it is usual practice for a property owner, following receipt of an NOV, to contact the RDPH on how to address the violation. *Id.*

The lack of documentary evidence of remediation at the Barton Avenue property is particularly glaring given the eyewitness evidence offered by the Region, which strongly indicated that Appellants did not conduct encapsulation at Barton Avenue. As the ALJ notes, RDPH's lead inspector, Mr. Sims, testified that he conducted several drive-by inspections of this property, including one in July 1997 following the issuance of the NOV, and three times in 2004, but never saw evidence of lead encapsulation. Init. Dec. at 31 (citing Tr. at 171-73). As Mr. Sims explained, he was able to determine that Appellants had not applied Lead Block encapsulant because application of this product makes wall surfaces look glossy, whereas he noticed "flaking and chipping" on the Barton Avenue property's exterior. *Id.* (citing Tr. at 174-75). Consequently, the record amply supports the ALJ's conclusion that "what evidence there is in the record suggests to me that, contrary to Ronald Hunt's testimony, he did not promptly and privately undertake lead abatement activities in regard to the Barton property in the same manner as was conducted on the other properties and that, consistent with [the Region's] testimony, such abatement activities might never actually have occurred at all." *Id*. at 32.

As we have stated on many occasions, the Board typically defers to an ALJ's determination regarding witness credibility and the judge's factual finding based on such credibility determinations. *See In re Chippewa Hazardous Waste Remediation & Energy, Inc.*, 12 E.A.D. 346 (EAB 2005); *In re Morton L. Friedman*, 11 E.A.D. 302, 314 n.15 (EAB 2004). Here, the ALJ had the opportunity to observe at hearing the conflicting testimony of Mr. Ronald Hunt and Mr. Sims on the Barton Avenue property's putative remediation and determined that Mr. Hunt's testimony was not persuasive. Init. Dec. at 32. Accordingly, we defer to the ALJ's credibility determination and agree with her consequent decision not to grant Appellants a mitigation-based penalty reduction for the Barton Avenue property.

For the foregoing reasons, we uphold the ALJ's penalty assessment as it reflects her consideration of the reduced harm resulting from Appellants' lead remediation work at three of the subject properties. Furthermore, we determine that the ALJ's decision not to reduce the penalty to reflect Appellants' ostensible remediation at the Barton Avenue property is supported by the record. In particular, the ALJ's decision in this regard is appropriate in light of the undisputed evidence of lead contamination at the Barton Avenue property, Appellants' failure to produce sufficient evidence that they carried out lead remediation at the property, and our deference to the ALJ's credibility determinations.

D. *Whether Appellants are Entitled To Additional Penalty Reduction Based on Their Cooperation*

Appellants contend that the ALJ gave them "too small a discount * * * for their cooperation." App. Br. at 18. As noted earlier, the ALJ, following the ERP,

adopted the Region's initial proposed 10% reduction based on the Appellant's cooperative attitude and supplemented it with a 10% reduction to reflect Appellants' "immediate good faith efforts to come into compliance." App. Br. at 18; Init. Dec. at 35. These deductions amounted to a 20% downward adjustment under the ERP's category of "attitude." *See supra* Part II.D.

In support of their argument, Appellants aver that such further discounts are justified due to the ALJ's recognition that Appellants were "exceptionally honest, direct, and cooperative" in their actions relating to the investigation. App. Br. at 18. They further assert that the penalty should be reduced in light of the "voluntary remedial actions" Appellants conducted at their properties. In this regard, they highlight Mr. Sims' testimony that such encapsulation work was "rarely" done. *Id.*

We disagree with Appellants that their actions in the wake of the Region's enforcement action merit further reductions for good attitude beyond those adjustments assessed by the ALJ. As the Board has stated on many occasions, when the ALJ assesses a penalty that falls within the range of penalties provided in the penalty guidelines, the Board will defer to an ALJ's judgment absent a showing that the ALJ has committed an abuse of discretion or a clear error in assessing the penalty. *Chippewa* 12 E.A.D. at 356; *Morton L. Friedman*, 11 E.A.D. at 341; *In re Chempace Corp.*, 9 E.A.D. 119, 131 (EAB 2000). We find no such abuse of discretion or clear error in the matter at hand.

We further disagree with Appellants' argument that its lead remediation work merits an attitude-based reduction. *See* App. Br. at 18. As the Region counters in its brief, Appellants conducted their lead remediation not voluntarily, but rather under the orders of a separate authority, the RDPH.[28] As the Region notes,"the [Appellants'] partial compliance with the Richmond lead-based paint NOV is relevant to [their] cooperation with the Richmond authorities — not to [Appellants'] cooperation with EPA on an entirely different enforcement action." *Id.* at 41 n.110. The Region's statement is consistent with previous decisions in which we have held that respondents are not entitled to "good faith" penalty deductions via compliance with legal obligations separate from those underlying the violation that is the subject of a current administrative action. *See, e.g., In re B&R Oil Co.*, 8 E.A.D. 39, 56-57 (EAB 1998) (in a proceeding under the Resource Conservation and Recovery Act, holding that the respondent's compliance with mandates separate from those involved in instant proceeding did not merit penalty reduction on the ground of "good faith" compliance); *accord In re*

[28] As stated in the Region's response, the NOVs the RDPH issued for the subject properties alerted the owner-Appellants that failure to conduct lead-based paint remediation work would result in issuance of a summons and imposition of a $1,000 fine if the owners did not conduct remediation. Region's Response at 40 n.107 (citing C's Exs. 21, 23-25 (RDPH Notices of Violation)).

Everwood Treatment Co., 6 E.A.D. 589, 608 (EAB 1996).[29]

For the foregoing reasons, we uphold the ALJ's decision granting Appellants a 20% penalty reduction based on their "attitude" in accordance with the ERP and therefore reject Appellants' arguments in favor of further reductions on this basis.

E. *Whether Appellants are Entitled to Additional Discounts on the Ground of Diminished Culpability.*

Appellants contend that the ALJ erred in her Initial Decision by not granting them a significant penalty reduction based on their lack of culpability. App. Br. at 19. In support of this position, they claim that the "uncontradicted testimony" at trial is that their Disclosure Rule violations were the product of "unintentional paperwork snafus." *See id.*

In her Initial Decision, the ALJ considered the oral and documentary evidence presented by the parties and determined that Appellants did not merit a penalty reduction on the grounds of diminished culpability because, pursuant to documentation received from RDPH or EPA, Appellants were placed on notice of the presence of lead-based paint and hazards at the subject properties before leasing them. *See* Init. Dec. at 35-37.

We agree with the ALJ's determination, which is amply supported by the relevant evidence. For example, Ronald Hunt testified that he received notice of the contamination of the subject properties through the NOVs he received from the RDPH prior to the execution of the leases at issue. *See* Tr. at 210-12. Furthermore, in a subpoena response to the EPA, GPI declared that, prior to the execution of the leases at issue, it had received copies of the NOVs for all the properties involved here except for 1813 N. 29th Street. *See* C's Ex. 32. What emerges from this record is that Appellants received actual notice of lead-based paint contamination at the four properties prior to leasing them. We note that Appellants do not challenge the facts indicating such notice. Therefore, we agree with the ALJ that Appellants' failure to make the proper disclosures of known lead-based paint contamination evinces a "negligent, if not willful disregard" of TSCA requirements. *See* Init. Dec. at 37.

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[29] We also agree with the Region's argument that Appellants should not be granted further penalty reductions based on their lead remediation work since the ALJ has already taken this issue into account in determining that the reduction in harm associated with these efforts warranted a 30% penalty reduction under the "circumstances, extent, and gravity" and "other factors as justice may require" prongs of the penalty analysis. Region's Response at 42.

We also note that the ALJ's penalty assessment is consistent with the ERP's recommendations regarding penalty adjustments based on culpability. The ERP does not contemplate penalty reductions for diminished culpability. Rather, it only specifically provides for up to a 25% *increase* of a penalty when a violator "intentionally commits an act which he knew would be a violation of the Disclosure Rule" or has previously been issued a notice of noncompliance with the Disclosure Rule. ERP at 15. Thus, the ERP does not contemplate any adjustments for what Appellants assert is the unintentional nature of their violations.

For the foregoing reasons, we find that the ALJ's decision not to decrease the penalty further on this basis is consistent with the record and with the ERP, and we reject Appellants' request for a reduced penalty on the ground of lack of culpability.[30]

IV. *CONCLUSION*

In accordance with the above discussion and pursuant to TSCA section 16(a), 15 U.S.C. § 2615(a), and RLBPHRA section 1018, 42 U.S.C. § 4852d, Appellants are hereby assessed civil penalties totaling $84,224.80 for their violations of the Disclosure Rule. The penalties shall be assessed in the following manner:

- $27,504.40, jointly and severally, against Ronald H. Hunt and Patricia L. Hunt
- $15,840.00, jointly and severally, against Patricia L. Hunt and David E. Hunt
- $9,856.00 against J. Edward Dunivan
- $31,024.40 against Genesis Properties, Inc.

Appellants shall pay the full amount of their penalty within 30 days of receipt of this final order. Payment shall be made by forwarding a cashier's or certi-

[30] In upholding the Initial Decision in this matter, we agree with the ALJ's determination in her Order on Remand, which concluded that the fact that certain RDPH inspectors lacked proper lead inspection licenses pursuant to Virginia law at the time they inspected the subject properties did not justify altering her previous determinations on liability and penalties. *See supra* Part II.B. In our view, the ALJ's Order on Remand was soundly reasoned, and we note that Appellants have not challenged before the Board the ALJ's conclusions regarding licensing issues.

fied check payable to the Treasurer, United States of America, to the following address:

EPA-Region III
Regional Hearing Clerk
P.O. Box 360515
Pittsburgh, PA 15251-6515

So ordered.