IN RE RAY BIRNBAUM SCRAP YARD

TSCA Appeal No. 92-5

FINAL DECISION AND ORDER

Decided March 7, 1994

Syllabus

U.S. EPA Region VIII appeals an order assessing a civil penalty of $1700 against Ray Birnbaum Scrap Yard for alleged violations of § 15 of the Toxic Substances Control Act (TSCA), 15 U.S.C. § 2614. Birnbaum admitted liability for certain TSCA violations alleged by Region VIII, but claimed that its strained financial condition rendered it unable to pay a gravity based penalty calculated under the TSCA Civil Penalty Guidelines. Region VIII proposed that the Presiding Officer assess a penalty of $16,236 based on the "inability to pay" alternative penalty formula suggested in the Guidelines.

On the basis of the financial documents stipulated to by the parties, the Presiding Officer concluded that the limit of Birnbaum's ability to pay a civil penalty was only $2000. The Presiding Officer allowed Birnbaum an additional fifteen percent downward adjustment because Birnbaum had remedied all violations alleged in the complaint, and assessed a penalty of $1700 against Birnbaum. On appeal, Region VIII contends that the Presiding Officer erred in reducing the penalty to $1700.

Held: The factual record, taken as a whole, supports a conclusion that the $16,236 penalty proposed by Region VIII was excessively harsh, and that a $1700 penalty is appropriate. The Presiding Officer did not err in his analysis of Birnbaum's financial documents and affidavits, nor in his application of case law to the facts presented. Accordingly, the Board assesses a civil penalty against Birnbaum in the amount of $1700.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge McCallum:

U.S. EPA Region VIII appeals an order of the Presiding Officer assessing a civil penalty of $1700 against Ray Birnbaum Scrap Yard ("Birnbaum") for alleged violations of § 15 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2614, and the rules implementing TSCA relating to the use, storage, marking, and disposal of polychlorinated biphenyls ("PCBs"), 40 C.F.R. Part 761. In December 1990 Region VIII filed a nine-count complaint against Birnbaum alleging various violations of the PCB regulations, and proposing civil penalties

totalling $111,000. Region VIII later proposed a revised penalty of $16,236 in light of Birnbaum's strained financial condition. The Presiding Officer concluded that Birnbaum was unable to pay even the revised penalty, and reduced the penalty further to $2,000. The Presiding Officer also allowed Birnbaum a fifteen percent penalty reduction for "attitude," resulting in a final penalty of $1,700. Region VIII contends that the Presiding Officer erred in assessing a $1,700 penalty, because the record does not demonstrate that Birnbaum is so financially distressed that it is unable to pay a penalty of $16,236. The amount of the penalty is the sole issue on appeal. For the reasons set forth below, we affirm the Presiding Officer's decision, and assess a civil penalty against Birnbaum in the amount of $1700.

I. *BACKGROUND*

The facts underlying Region VIII's complaint are not in dispute, and need only be stated briefly. Birnbaum is a sole proprietorship owned and operated by Raymond J. Birnbaum in a rural area of North Dakota. Birnbaum's only business is the purchase and resale of salvageable metal. Mr. Birnbaum engages in no other business enterprises, and the scrap yard is his sole source of income.

In June 1990 Region VIII conducted an inspection of the scrap yard that revealed alleged violations of PCB regulations governing the management of PCB items, including the presence of an unmarked, inadequately protected, and leaking aboveground storage tank containing PCB fluids; the presence of numerous PCB-contaminated transformers and a capacitor that were not managed in accordance with regulations; and failure to maintain records on the disposition of PCBs and PCB items. Region VIII issued a complaint citing Birnbaum for the alleged violations in December 1990, and proposing a total civil penalty of $111,000. Birnbaum filed an answer admitting some of the allegations of the complaint, and denying others.

In May 1992 Birnbaum and Region VIII jointly moved for a stipulated decision on the issue of liability, leaving only the amount of penalty in dispute. Region VIII conceded that Birnbaum had remedied all of the alleged violations. Further, Region VIII stipulated to the admission of financial documentation submitted by Birnbaum in support of its claim of inability to pay the proposed penalty, including affidavits and federal income tax returns of Ray and Marilyn Birnbaum, a financial statement for Ray Birnbaum, and medical records relating to an injury sustained by Mr. Birnbaum in a traffic accident in 1989. Region VIII and Birnbaum stipulated that the decision on the appro-

priate penalty was to be made on the basis of the documents and affidavit testimony submitted by the parties.

In addition, Region VIII presented to the Presiding Officer its proposed revised penalty calculation of $16,236, based on the "ability to pay" guidelines contained in the *Guidelines for Assessment of Civil Penalties Under Section 16 of the Toxic Substances Control Act; PCB Penalty Policy*, 45 Fed. Reg. 59,770, 59,775 (Sept. 10, 1980) (1980 Guidelines), and in the Agency's 1990 revised PCB Penalty Policy (1990 Penalty Policy). The 1980 Guidelines suggest that when a business demonstrates inability to pay a penalty calculated in accordance with the usual guidelines,[1] the Agency should utilize a "model" formula setting the penalty at four percent of the average gross sales for the penalty year and prior three years. *Id.* The Region applied this formula to Birnbaum's average gross annual sales for 1987-1990 ($405,910) to arrive at a revised penalty of $16,236 (four percent of $405,910).

The Presiding Officer rejected the Region's calculation of a revised penalty of $16,236, because that figure "greatly exceeds Respondent's ability to pay and is simply arbitrary." Initial Decision at 12. The Presiding Officer premised his conclusion on factual findings drawn from the documents and affidavit testimony stipulated for admission by the parties. According to the Presiding Officer's findings of fact, while Mr. Birnbaum's annual gross sales from the scrap yard business averaged just over $451,300 from 1987-1991, his gross costs for the purchase of salvageable metal were also very high, averaging over $339,300. *Id.* at 6 (citing Affidavit of Raymond Birnbaum). When other average annual business costs were deducted, Mr. Birnbaum's

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[1] TSCA provides that in assessing a civil penalty, the Presiding Officer shall take into account:

> [T]he nature, circumstances, extent and gravity of the violation or violations and with respect to the violator, ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

TSCA § 16(a)(2)(B). TSCA penalties are usually determined in two stages in accordance with the 1980 Guidelines and the 1990 PCB Revised Penalty Policy. First, a "gravity based penalty" is calculated from a matrix which takes into account both the probability of harm caused by the violation and the extent of potential damage from the violation. Second, upward or downward adjustments may be made to the penalty based on the other statutory factors: ability to pay and effect on ability to continue in business (which are considered as one factor); prior violations; culpability; and "such other matters as justice may require." 45 Fed. Reg. 59,770.

net annual profit averaged just over $39,000.[2] From this sum, Mr. Birnbaum paid federal and state taxes, and provided support for his wife and four children. *Id.* Mr. Birnbaum received no other income from the business. Moreover, the Presiding Officer observed that Mr. Birnbaum was 52 years old, and had sustained a broken neck in a 1989 truck accident that limited his ability to drive his own delivery truck and forced him to engage part-time help. *Id.* at 12. Mr. Birnbaum had a personal net worth of less than $20,000, including his one-half share of the residence jointly owned with his wife. *Id.*

On the basis of the foregoing, the Presiding Officer agreed with Mr. Birnbaum that the upper limit of his ability to pay was $2,000. The Presiding Officer cited *Kay Dee Veterinary, Division of Kay Dee Feed Co.*, FIFRA Appeal No. 86-1 (CJO, Oct. 27, 1988), for the proposition that when the Agency has not rebutted a showing of severe financial distress, a substantial reduction in a proposed penalty is appropriate. The Presiding Officer then determined that a further reduction of fifteen percent was warranted for "attitude of the violator" because Mr. Birnbaum had remedied all alleged violations. Initial Decision at 13. The Presiding Officer set the penalty amount at $1,700 ($2,000 less fifteen percent).

The Region's appeal identifies two issues concerning the appropriateness of the penalty imposed by the Presiding Officer:

> (1) Whether the assessment by Complainant of a civil penalty derived from calculations based on four percent of the Respondent's gross income over a four year period was arbitrary and did not include consideration of Respondent's ability to pay and the remedial action by Respondent for removal of PCB contamination.
>
> (2) Whether [the Presiding Officer] erred, as a matter of law, in his application of case law in the issue of Respondent's ability to pay and his conclusion that Respondent was in severe financial stress.

Brief in Support of Complainant's Notice of Appeal at 2. We interpret the Region's statement of the issues as simply challenging the Presid-

[2] Although the Guidelines suggest using the penalty year and prior three years (here, 1987-1990) in calculating the reduced penalty, 1991 financial data were included in the record and the Presiding Officer relied on the additional data in evaluating Birnbaum's financial status. The Region has not objected to the Presiding Officer's use of 1991 data, and the Region has itself used the 1991 data in opposing the penalty calculated by the Presiding Officer. Under these circumstances, we find no error in the Presiding Officer's use of the 1991 data.

ing Officer's exercise of discretion in arriving at a penalty lower than that proposed by the Region.

II. *DISCUSSION*

The regulations governing this proceeding give the Presiding Officer the discretion "to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, [so long as he] set[s] forth in the initial decision the specific reasons for the increase or decrease." 40 C.F.R. § 22.27(b). Although the Presiding Officer must "consider" any penalty guidelines, he is not bound by them. *Id.* The regulations also give the Board the discretion to increase or decrease the penalty assessed in the initial decision. *Id.* § 22.31(a). When the penalty assessed by the Presiding Officer falls within the range of penalties provided in the penalty guidelines, the Board will generally not substitute its judgment for that of the Presiding Officer absent a showing that the Presiding Officer has committed an abuse of discretion or a clear error in assessing the penalty. *See Bell & Howell Co.*, TSCA Appeal No. TSCA-V-C-033, 034, 035 (JO, Dec. 2, 1983). However, when a penalty deviates substantially from the Agency's penalty guidelines, closer scrutiny of the Presiding Officer's rationale may be warranted. The Board finds that the decision of the Presiding Officer in this case readily withstands such scrutiny.

The 1980 Guidelines set forth a formula to be applied in cases where the respondent asserts "inability to pay" or "inability to continue in business" as a defense to imposition of a civil penalty.[3] The Guidelines make clear that Congress "for *most* cases did not intend that TSCA civil penalties present so great a burden as to pose the threat of destroying, or even severely impairing, a firm's business." 45 Fed. Reg. 59,770, 59,775. While observing that "[m]easuring a firm's ability to pay a cash penalty, without ceasing to be operable, can be extremely complex," the Guidelines nevertheless assert that "a year's net income, as determined by a fixed percentage of total sales, will generally yield an amount which the firm can afford to pay." *Id.* The Guidelines use four percent of gross sales as the formula (the average ratio of net income to sales for U.S. manufacturing (five percent), less one percent since small firms are generally less profitable than large ones). *Id.*

The Region concedes that the financial documents and affidavit testimony submitted by Birnbaum justify a penalty reduction due to

[3] As noted, for purposes of the TSCA penalty system these adjustment factors are considered as one. 45 Fed. Reg. 59,770, 59,775.

inability to pay the gravity based penalty. The Region only disputes the Presiding Officer's conclusion that Birnbaum's financial condition was so severe that deviation from the Guidelines' "inability to pay" formula was necessary.

The 1980 Guidelines include an important caveat to the "four percent of gross sales" formula:

> There may be some cases where a firm argues that it cannot afford to pay even though the penalty as adjusted does not exceed four percent of sales. A variety of factors, too complex to discuss here, might require such further adjustment to be made.

45 Fed. Reg. 59,770, 59,775. The Guidelines thus clearly contemplate that there will be extraordinary cases which do not fit neatly within the "inability to pay" formula. The Board agrees with the Presiding Officer that this is such a case. The "four percent of gross sales" formula does not necessarily take into account a case in which a business appears to generate reasonable gross sales, but has inordinately high costs of goods sold, as does the Ray Birnbaum Scrap Yard. Indeed, the formula is derived from the average ratio of net income to sales for U.S. *manufacturing*. To assume that the same ratio is appropriate for all other businesses would be speculative; the formula clearly yields a disproportionately large penalty when applied to the facts at hand. A penalty of $16,236 represents close to one-half of Mr. Birnbaum's net annual profit, from which he must pay taxes and meet living expenses for himself and his family. Blind adherence to the Guidelines in this case would be unjust and inconsistent with the statute's remedial, as opposed to punitive, purposes. *See Briggs & Stratton Corp.*, TSCA Appeal No. 81-1 (JO, Feb. 4, 1981) ("Civil penalties under TSCA are intended to deter through regulation, not reprimand through punishment.").

The Region makes much of the fact that the Presiding Officer cited *Kay Dee Veterinary* in support of the proposition that limited financial resources can provide grounds for a large reduction in a proposed penalty. The Region incorrectly states that "[the Presiding Officer] summarily dismissed EPA's calculation as arbitrary because he determined that Respondent was in `severe financial distress' according to the test set forth in [*Kay Dee Veterinary*]." Brief in Support of Complainant's Notice of Appeal at 4. The Presiding Officer did not apply any "test" set forth in *Kay Dee Veterinary*, a penalty proceeding under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). It appears that the Presiding Officer merely cited *Kay Dee Veterinary* by way of

an appropriate analogy.[4] Further, contrary to the Region's assertion, the Presiding Officer in this case did not use his "unbridled discretion to dismiss the EPA analysis [of inability to pay] and perform a *Kay Dee* analysis." Brief in Support of Complainant's Notice of Appeal at 5. The Presiding Officer first calculated a gravity based penalty of $41,000 on the basis of the admitted counts of the complaint, and then moved to the "adjustment" phase of the calculation. The Presiding Officer carefully considered the effect of application of the 1980 Guidelines' "inability to pay" formula, and concluded that in this case adherence to the Guidelines would work a harsh result. Having made that conclusion, it was entirely reasonable—indeed, essential—for the Presiding Officer to analyze the financial information furnished by Birnbaum in order to arrive at an appropriate penalty amount.[5]

The Region disputes certain findings made by the Presiding Officer on the basis of Birnbaum's financial documents because, in the Region's view, the documents appear to contain inconsistencies and the Presiding Officer only relied on the selected pieces of evidence that supported his findings. The Region's arguments are without merit. With respect to alleged inconsistencies, the Region had the opportunity to investigate the accuracy of Birnbaum's financial documents prior to stipulating that the Presiding Officer could assess a penalty on the basis of the documents. The 1990 Penalty Policy expressly states that "[t]he Agency reserves the right to request, obtain, and review all underlying and supporting financial documents that form the basis of these records to verify their accuracy." 1990 Penalty Policy at 17. The

[4] In *Kay Dee Veterinary*, the Agency sought penalties of $30,000 against the respondent for violations of FIFRA. The respondent argued that such a penalty would have a severe adverse effect upon its ability to continue in business, and requested a reduction to $1200. The Agency rejected that request, and Kay Dee appealed. On appeal, the Judicial Officer noted that under the FIFRA penalty guidelines, "adverse effect" must be determined on the basis of an analysis of certified financial records. The Judicial Officer found that Kay Dee's certified financial statements supported its claim that its financial situation was precarious, and that the Region "has not contradicted respondent's financial data, either by means of cross-examination or by furnishing data of its own." *Kay Dee Veterinary*, at 10-12. The Agency had thus not satisfied its burden of persuasion that the proposed penalty was "appropriate" under 40 C.F.R. § 22.24, and the Judicial Officer therefore reduced the penalty to the requested amount.

[5] The Region claims that the existence of *certified* financial statements in *Kay Dee Veterinary* somehow distinguishes it from this case. However, unlike the FIFRA penalty guidelines, the TSCA penalty guidelines do not require the use of certified financial statements in evaluating a business's financial status. Further, contrary to the Region's assertion, the fact that Kay Dee had been operating with large net losses, resulting in a negative net worth, is not relevant to our analysis in this case. Kay Dee had also expended nearly $800,000 per year in employee salaries, yet a penalty reduction was nevertheless deemed proper under the specific facts presented. *Kay Dee Veterinary* at 12. When application of the "inability to pay" guideline is excessively harsh, the calculation of an appropriate civil penalty must turn on the individual facts and circumstances of each case. *See* 45 Fed. Reg. 59,770 59,775.

Region was apparently sufficiently satisfied with the accuracy of the documents that it was willing to stipulate to their admission without extensive additional inquiry.

Further, the Board concludes that the Region's specific objections to certain findings of fact drawn from the documents cannot be sustained, and that the evidence, taken as a whole, supports the Presiding Officer's conclusions. The Region claims that the medical records proffered by Birnbaum do not support Birnbaum's claim that his 1989 neck injury was so severe as to adversely impact his ability to work at his business. The Region cites selected passages from the medical records, but ignores other passages that in our view easily support a conclusion that Mr. Birnbaum sustained a serious and debilitating neck injury. For example, Mr. Birnbaum's attending neurosurgeon concluded that Mr. Birnbaum "will have a lifelong trouble with stiffness and loss of range of motion of the cervical spine[.]" Aug. 3, 1989 Report of Dr. G.A. Hazen. Dr. Hazen noted that while Mr. Birnbaum "might" regain some movement in the neck, the loss of range of motion in the neck was "limited by about 60% in all directions." *Id.*

The Region suggests that Mr. Birnbaum's business has actually grown rather than declined since his accident, as evidenced by increases in gross income since 1989. The Region disregards the fact that Mr. Birnbaum's tax returns show that although his gross income has increased since 1989—the year of the accident—his gross income has never recovered to pre-accident levels. In 1987, the scrap yard's gross income was $145,500; it fell to $124,051 in 1988, then to $73,345 in 1989. In 1990, his gross income rose to $108,623, and rose slightly again in 1991, to $113,663.

The Region argues that Mr. Birnbaum's sworn statement that he has been forced to hire part-time help since his accident is inconsistent with his income tax returns, because certain business expense items shown on the returns (*e.g.* "contract labor") have decreased since his accident. The Region's argument presupposes that it understands how Mr. Birnbaum's tax preparer allocated and accounted for such expenses for federal income tax purposes. Since the Region did not engage in such an inquiry, its argument is merely speculative. The Region also contends that Birnbaum's tax returns reflect the purchase of a truck for $46,447 in 1989, and that such a purchase is inconsistent with financial distress. We believe that the Region overstates the importance of this expense item—the purchase of a truck for a salvage yard does not appear to be frivolous on its face, and may have been necessitated by the 1989 accident in which Mr. Birnbaum's truck overturned. In any event, regardless of fluctuations in specific business

expense items, the fact remains that this sole proprietorship generates very modest income for Mr. Birnbaum, and therein lies the harshness of the proposed $16,236 penalty.[6]

Based on the foregoing, the Board agrees that the Region's proposed penalty of $16,236 is excessively harsh, and that the base penalty of $2,000 suggested by Birnbaum is appropriate in this case.[7] The remaining issue is whether the Presiding Officer erred in allowing an additional fifteen percent reduction for "attitude" because Birnbaum took action to remedy all of the violations alleged by Region VIII.[8] The Region contends that this reduction is an inappropriate "credit" which may only be given when penalty and cleanup costs are excessive. The Region misinterprets the nature of the Presiding Officer's penalty adjustment, which is concerned more with Birnbaum's cooperative attitude than with specific costs incurred by Birnbaum. The 1990 Penalty Policy expressly provides that "[a] company would generally qualify for a downward adjustment of a maximum of 15% [for 'attitude'] if it immediately halts the violative activity and takes steps to rectify the situation." 1990 Penalty Policy at 17. The Region stipulated that all alleged violations had been remedied prior to submission of the case to the Presiding Officer for assessment of a penalty. Accordingly, we find that the Region's objection to the fifteen percent downward adjustment in the penalty is not well founded.[9]

For the foregoing reasons, the initial decision of the Presiding Officer assessing a penalty of $1,700 against Ray Birnbaum Scrap Yard is affirmed.

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[6] The Region takes issue with Mr. Birnbaum's statement that he provides full or partial support for his four children, when only two children were claimed as dependents on Mr. Birnbaum's tax returns from 1989 through 1991. It does not necessarily follow that Mr. Birnbaum cannot provide support for children for whom a federal income tax dependency exemption can no longer be claimed. The Region also points out minor differences between property valuations on Mr. Birnbaum's tax returns and his financial statement. We do not believe that these differences are material to our analysis.

[7] The Presiding Officer incorrectly noted that the $16,236 penalty proposed by the Region was based on an assumption that all of the violations in the complaint were established. Initial Decision at 6. The reduced penalty was calculated on the basis of Birnbaum's inability to pay the gravity based penalty for the admitted allegations, calculated in accordance with the Guidelines. The parties agree that this sentence should be stricken from the Initial Decision.

[8] This penalty adjustment falls under the rubric "other factors as justice may require." 1990 Penalty Policy at 17.

[9] The propriety of making any additional downward penalty adjustment for "attitude" following a penalty reduction based on ability to pay was not raised as an issue by the Region and thus will not be discussed in this decision; the Region's challenge goes only to the reason for the adjustment.

III. *CONCLUSION*

A civil penalty of $1700 is assessed against Ray Birnbaum Scrap Yard in accordance with § 16(a) of the Toxic Substances Control Act. Payment of the entire amount of the civil penalty shall be made within sixty (60) days of service of this final order (unless otherwise agreed to by the parties), by cashier's check or certified check payable to the Treasurer, United States of America, and forwarded to:

EPA—RegionVIII
(Regional Hearing Clerk)
P.O. Box 360859M
Pittsburgh, PA 15251

So ordered.