IN RE DIC AMERICAS, INC.

TSCA Appeal No. 94-2

FINAL DECISION AND ORDER

Decided September 27, 1995

Syllabus

DIC Americas, Inc. ("DICA") has appealed an Initial Decision assessing a total civil penalty against it of $85,000 for five violations of regulatory reporting requirements imposed by EPA pursuant to TSCA § 8, 15 U.S.C. § 2607. DICA contends that the penalty amount is excessive. It argues that the Presiding Officer adhered too rigidly to Agency guidance for calculating civil penalties and failed to exercise an independent judgment as to the appropriateness of the penalty amount.

Held: The penalty assessment is affirmed. The Presiding Officer did not abdicate her decisionmaking responsibility merely because she elected to refer to Agency guidance as a basis for calculating a civil penalty. The Presiding Officer stated that she had exercised an independent judgment and DICA has pointed to no evidence to the contrary nor has it demonstrated that the assessed penalty is inconsistent with the penalty factors set forth in TSCA § 16(a)(2)(B), 15 U.S.C. § 2615(a)(2)(B).

Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich.

Opinion of the Board by Judge McCallum:

DIC Americas, Inc. ("DICA") has appealed an Initial Decision of the presiding officer assessing a total civil penalty against it of $85,000 for five violations of regulatory reporting requirements imposed by EPA pursuant to Section 8 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2607. DICA does not deny that it violated TSCA as alleged. Its sole argument on appeal is that the penalty is excessive. For the reasons stated below, the penalty assessment is upheld.

I. *BACKGROUND*

Section 8(b)(1) of TSCA, 15 U.S.C. § 2607(b)(1), requires EPA to "compile, keep current, and publish a list of each chemical substance which is manufactured or processed in the United States." To further that purpose, TSCA § 8(a)(1)(A), 15 U.S.C. § 2607(a)(1)(A), authorizes the Administrator to promulgate rules under which:

> [E]ach person * * * who manufactures or processes or proposes to manufacture or process a chemical substance * * * shall maintain such records, and shall submit to the Administrator such reports, as the Administrator may reasonably require * * *.

TSCA § 15, 15 U.S.C. § 2614, makes it unlawful for any person to fail or refuse to submit reports required by the Agency pursuant to TSCA § 8(a).

In 1977, EPA created the Chemical Substances Inventory, which is a compilation of production data relating to chemical substances that were manufactured or imported for commercial purposes after January 1, 1975. *See* 42 Fed. Reg. 64572 (Dec. 23, 1977). In 1985, the Agency determined that it needed updated information about the chemicals for which it had obtained data in 1977. *See* 50 Fed. Reg. 9944 (March 12, 1985). Therefore, on June 12, 1986, EPA issued regulations for the Partial Updating of the Inventory Data Base at 40 C.F.R. Part 710, Subpart B. The regulations required persons who had manufactured, imported or processed listed chemical substances in amounts that exceeded a specified regulatory threshold to submit "Form U" reports containing current information about the substances to EPA between August 25, 1986, and December 23, 1986. 40 C.F.R. §§ 710.28(a), 710.33(a), and 710.39. The Agency stated that it required the updated production data:

> [T]o set priorities for further investigation, to perform first-level screening of chemical substances for testing under TSCA section 4, to estimate, along with other data, the potential for human and environmental exposure to specific substances, to support the implementation of various TSCA regulations, and to perform economic impact analyses for potential TSCA regulations.

50 Fed. Reg. 9944 (March 12, 1985).[1]

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[1] As the Agency explained in its Federal Register notice proposing these regulations:

> [T]he lack of readily available current production data on these substances has * * * complicated the Agency's investigations of chemical substances [and] compelled the Agency to obtain current information in a resource-intensive and inefficient manner.

Proposed Rule, 50 Fed. Reg. 9944 (March 12, 1985). *See also* Final Rule, 51 Fed. Reg. 21438 (June 12, 1986).

DICA owns and operates a facility in Fort Lee, New Jersey, which imports and exports chemicals for commercial purposes. DICA submitted Form U reports for eighteen chemical substances on or about December 22, 1986. Stipulations, Para. 9. On May 31, 1989, EPA Region II conducted a TSCA compliance inspection at DICA's facility. During the inspection, DICA was asked to send EPA a list of the names and quantities of chemicals that DICA had imported in 1985. Stipulations, Para. 6. DICA submitted the requested information on September 27, 1989. When Region II compared the list of chemicals that DICA had imported in 1985 with the list of chemicals for which DICA had filed Form U reports on December 22, 1986, it determined that DICA had failed to file Form U reports for five chemicals for which such reports were required. Region II filed a complaint against DICA on September 28, 1990, charging DICA with five violations of TSCA § 8(a). It sought a total civil penalty of $85,000 ($17,000 per violation).

The Region calculated the proposed penalty in accordance with the Agency's Guidelines for Assessment of Civil Penalties Under Section 16(a)(2)(B) of the Toxic Substances Control Act, 45 Fed. Reg. 59770 (Sept. 10, 1980) ("Guidelines") and the Agency's Recordkeeping and Reporting Rules TSCA Sections 8, 12 and 13 Enforcement Response Policy (May 15, 1987) ("ERP").[2] The Guidelines are generally applicable to all of TSCA whereas the ERP provides specific guidance for penalties covering TSCA Sections 8, 12 and 13. The two penalty policies implement Section 16(a)(2)(B) of TSCA, 15 U.S.C. § 2615(a) which 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 to do business, any history of prior such violations, the degree of culpability, and such other matters as justice may require.

Under both policies, the Region is instructed to follow a two-stage procedure for determining a TSCA civil penalty. During the first stage, the Region derives a "gravity-based penalty" that reflects the Agency's assessment of the "nature, circumstances, [and] extent" (which together constitute the "gravity") of the violation. *See* TSCA § 16(a)(2)(B), quoted above. The ERP contains a matrix that takes these factors into

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[2] *See* Region's Proposed Penalty Calculation (C Ex 14) and testimony of Daniel J. Kraft, Chief, Toxic Substances Section, Region II Environmental Services Division, Tr. 167 *et seq.*

account.[3] The vertical axis of the matrix lists six levels of "circumstances" which reflect "the *probability* that harm will result" from a particular type of violation. ERP at 8 (emphasis added). Failure to file a Form U is deemed a Circumstances Level 1 (High Range) violation. As explained in the ERP, failure to file a required report is considered "an extremely serious violation" because it impairs the ability of the Agency to carry out its statutory risk assessment responsibilities. ERP at 17. The horizontal axis of the matrix classifies violations by "extent." Failure to file a Form U is "significant" in extent because the information required on a Form U is "important to the overall decision making of the Agency in terms of setting its priorities and deciding what rulemaking to pursue." ERP at 22. The penalty amount specified on the matrix for a violation that is "Circumstances Level 1" and "Significant" in extent is $17,000.[4] Therefore, consistent with the ERP, the Region calculated a gravity-based penalty of $17,000 for each of DIC's five reporting violations. During the second stage of penalty calculation, the Region considers the remaining five statutory factors which pertain to the specific conduct and circumstances of the violator. *See* TSCA § 16(a)(2)(B), quoted above. In this case, the Region concluded that none of the five factors warranted either an upward or downward adjustment of the gravity-based penalty.

DICA filed an Answer on October 1, 1990, in which it denied the allegations in the Complaint. Shortly afterwards, on December 17, 1990, DICA submitted Form U reports for the five chemicals without admitting or denying liability. The Region filed a Motion for a Partial Accelerated Decision as to Liability for the five violations on February 8, 1991, which DICA did not oppose, and which the presiding officer granted on December 24, 1991. The Region then filed a Motion for Partial Accelerated Decision as to Penalty on January 30, 1992, which the presiding officer denied on March 16, 1992. Following a penalty hearing on March 30 and 31, 1992, the presiding officer issued a Decision and Order on December 30, 1993, holding DICA liable for a total civil penalty of $85,000, the amount proposed by the Region. She concluded that the penalty amount "conforms to EPA guidance documents, is fair and reasonable in the circumstances here, and is properly based upon the probability of harm at the time of the issuance of the complaint * * *." Decision at 6. The presiding officer characterized

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[3] Since the Agency considers the "nature" of all reporting and recordkeeping violations as "hazard assessment," the "nature" of the violation is not a variable on the matrix.

[4] Although TSCA allows a civil penalty for each day of noncompliance with a statutory duty, the ERP specifically states that, for nonreporting for the Inventory Update, only a "one day" penalty should be assessed rather than a penalty for each day of violation.

the harm inherent in the violations as the "absence of complete information from respondent's facility in the inventory data base." *Id.* She emphasized that failure to file a Form U report is a serious violation in light of the importance to the Agency of "maintaining as complete a data base as possible." *Id.* at 5. She concluded that no adjustments to the gravity-based penalty were warranted.

DICA filed the instant appeal on February 3, 1994, in which it argues that the presiding officer erred because she adopted the Region's "mechanical" approach to calculating a gravity-based penalty from the ERP instead of exercising her independent judgment as to an appropriate penalty for the violations under TSCA. DICA Appeal Brief at 8. Specifically, DICA contends that the presiding officer erred because she "conclusively presumed" that all Section 8 reporting violations create a "high probability" of adversely affecting EPA's ability to monitor chemical substances, and because she disregarded evidence DICA had submitted to show that Respondent's particular violations would not have had a significant impact on Agency regulatory programs. *Id.* at 14. DICA further contends that even if it is determined that the presiding officer did not err in these respects, she still erred because she did not reduce the gravity-based penalty based on the circumstances of the violations.[5] Specifically, DICA argues that a substantial downward adjustment in the penalty is warranted because (1) its violations were inadvertent; (2) its representatives were courteous and cooperative at the compliance inspection; (3) it submitted Form U reports after it was notified of the violations; and (4) it implemented a computer system to improve its recordkeeping and thereby prevent future violations.[6] DICA proposes that its penalty be reduced from $17,000 per violation to $500 per violation. Notice of Appeal at 17. It seeks the opportunity for an oral argument. *Id.* Region II filed a Reply Brief on February 16, 1994, in which it urged the Board to affirm the Initial Decision.

II. *DISCUSSION*

We affirm the presiding officer's penalty assessment and we adopt her Decision and Order as our own.[7] We reject DICA's argument

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[5] *See* n. 6, *infra.*

[6] DICA argues for penalty reductions based on the statutory penalty factors of culpability and "such other matters as justice may require." It does not contend that it lacked the ability to pay the assessed penalty or that the penalty would affect its ability to remain in business.

[7] Pursuant to 40 C.F.R. § 22.31(a), the Board may adopt, modify, or set aside the findings and conclusions of the presiding officer. DICA's request for an oral argument is denied.

that the presiding officer "abdicated" her decisionmaking responsibility because she calculated a gravity-based penalty from the ERP matrix. EPA has developed penalty policies to assure that Regional enforcement personnel calculate civil penalties that are not only appropriate for the violations committed but are assessed fairly and consistently. Agency regulations specifically provide that the presiding officer "*must consider* any civil penalty guidelines issued under the Act" and must set forth in the Initial Decision specific reasons for deviating from them (emphasis added). 40 C.F.R. § 22.27(b)(emphasis added). The clear implication of this language is that the presiding officer may either approve or reject a penalty suggested by the guidelines. In other words, a presiding officer has *the discretion either to* adopt the rationale of an applicable penalty policy where appropriate or to deviate from it where the circumstances warrant. Our past decisions confirm that a presiding officer may utilize a penalty policy in determining an appropriate civil penalty amount. As we stated in *In re Great Lakes Division of National Steel Corp.*, 5 E.A.D. 355, 374 (EAB 1994):

> The Agency has issued penalty policies to create a framework whereby the decisionmaker can apply his discretion to the statutorily-prescribed penalty factors, thus facilitating the uniform application of these factors. *In re Alm Corporation*, TSCA Appeal No. 90-4 (CJO, Oct. 11, 1991) [3 E.A.D. 688].[8] * * * [A] penalty policy "reasonably implements the statutory criteria, with a range of penalties to reflect differing circumstances." *In re Genicom Corporation*, EPCRA Appeal No. 92-2 (EAB, Dec. 15, 1992) [4 E.A.D. 426]. Therefore, a presiding officer may properly refer to such a policy as a means of explaining how he arrived at his penalty determination.[9]

See also In re Mobil Oil Corp., 5 E.A.D. 490 (EAB 1994). By referring to the penalty policy as a basis for assessing a particular penalty, the presiding officer is incorporating the underlying rationale of the policy into her decision. The reference to the policy becomes, in effect, a

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[8] *Aff'd, Alm Corp. v. EPA*, 974 F.2d 380 (3d Cir. 1992), *cert. denied* 113 S. Ct. 1412 (1993).

[9] Contrary to DICA's assertion, the penalty matrix does not "establish conclusive presumptions." *See* DICA Notice of Appeal and Appeal Brief at 15. DICA refutes its own claim that the matrix establishes conclusive presumptions by acknowledging that "the ERP and the penalty matrix are not authoritative but merely guidelines meant to carry out the mandates of TSCA Section 16(a)." *See* DICA Appeal Brief at 21.

form of "shorthand" for explaining the rationale underlying the penalty assessment. *In re Empire Ace Insulation Manufacturing Corp.*, 3 E.A.D. 226, n.1 (CJO 1990); *In re National Coatings, Inc.*, 2 E.A.D. 494, 498 (CJO 1988) ("By conforming to the guidelines, a presiding officer provides a clear, reviewable explanation of the rationale for his penalty assessment.").

In the instant case, the presiding officer informed the parties at the beginning of the penalty hearing that she had considered the TSCA guidelines and that she had reached a tentative conclusion that "the penalty seems * * * to have been properly placed on the matrix," but that she was open to DICA's arguments why she should deviate from the penalty amount derived from the matrix based on the circumstances of the violations. Tr. 8. In stating that she was following the guidelines in this case, the presiding officer nevertheless made it plain that she did not consider herself constrained by the guidelines; rather, she expressed the view that she was free to deviate from them if warranted by the circumstances.

> [I]t is a good idea to have a penalty policy which starts off the calculations on the part of the Government so that there is some unanimity, at least at the outset. * * * However not every case comes out * * * just the way the Government asked when the matter is before me for decision. I am willing to listen to any reasonable assertions with respect to why, in the interests of justice particularly, the penalty ought to be reduced * * * which is why I denied the motion for Summary Judgment as to the penalty in this case.

Tr. 8 and 10. These views of the presiding officer belie DICA's claim that the presiding officer surrendered independent judgment when she assessed a penalty prescribed by the guidelines. Under the regulation previously cited, a presiding officer is obligated to "consider" any penalty policy guidelines issued by the Agency. But obviously that duty carries with it no obligation to adhere to the penalty policy in a particular instance.[10] Nor does it suggest that a presiding officer errs in the slightest respect if he or she decides not to deviate from

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[10] It has long been the position of the Agency that our regulations governing the assessment of civil penalties do not bind either the presiding officer or the final decision-maker (in this case, the Board) to the formulas set forth in the penalty guidelines. *See, e.g., In re Great Lakes Division of National Steel Corp.*, 5 E.A.D. 355, 374 (EAB 1994) (dicta); *In re General Electric Company*, 4 E.A.D. 884, 908 (EAB 1993) (accepting the Presiding Officer's penalty assessment

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the penalty policy. The fact that the presiding officer has a choice of either following or deviating from the Penalty Policy operates to preserve not restrict the presiding officer's independence.

It is clear that the presiding officer was cognizant of the discretion afforded the decisionmaker under the rules and that she exercised that discretion appropriately. After hearing the witness' testimony at the hearing, the presiding officer determined that a civil penalty derived from the ERP matrix *was* appropriate for DICA's violations. She emphasized that a "careful effort has been made to determine whether any showing which could form the basis of a reduction in penalty has been made. None appears on the facts of this case."[11] Decision at 6. That the presiding officer exercised independent judgment in arriving at an appropriate penalty is especially clear in this instance since the presiding officer affirmatively stated that she had exercised an independent judgment and since DICA has pointed to no evidence to show otherwise. To suggest otherwise would ignore the fact that the presiding officer could have chosen to deviate from the penalty policy but explicitly elected not to for the reasons stated.

For DICA to persuade us that the presiding officer's penalty assessment was in error and should be overturned, DICA must demonstrate that the assessed penalty is not consistent with the statutory penalty factors. DICA has not succeeded in that regard. First, it has presented no convincing arguments that the gravity-based penalty derived from the matrix overestimates the seriousness of its violations. As the Region persuasively argued, the value of any data base is substantially diminished if it is incomplete. The ERP states that:

> Section 8 information is used by the Agency to evaluate the potential risks associated with the manufacture and use of a chemical. This data gathering often occurs

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while noting that "the Presiding Officer disregarded the 1980 PCB Penalty Policy"); *In re 3M Company*, 3 E.A.D. 816, 822 (CJO 1992); *In re ALM Corp.*, 3 E.A.D. 688 (CJO 1991) (dicta); *In re Empire Ace Insulation Mfg. Corp.*, 3 E.A.D. 226 (CJO 1990) (dicta); *In re A.Y. McDonald Industries, Inc.*, 2 E.A.D. 402, 414 (CJO 1987) ("An ALJ's discretion in assessing a penalty is in no way curtailed by the Penalty Policy so long as he considers it and adequately explains his reasons for departing from it."); *In re Sandoz, Inc.*, 2 E.A.D. 324 (CJO 1987) (citing additional cases at note 13).

[11] She noted, as factors militating against a penalty reduction, that "no circumstances out of respondent's control have been shown, * * * [that] there was a three-month delay between issuance of the complaint and compliance by respondent, * * * [and that] lack of compliance in the first instance may fairly be attributed to insufficient vigilance on respondent's employees' part." Decision at 5.

> at the early stages of regulatory decision making. Therefore, complete and accurate information is essential. Incomplete and inaccurate information will have far-reaching effects on the Agency's risk assessment, regulatory priority setting, and regulation development processes.

ERP at 16. The gravity of such a violation is obviously substantial. Therefore, the presiding officer did not err when she concluded that the failure to file Form U reports was a serious violation. Second, we reject DICA's argument that the presiding officer abused her discretion because she did not utilize any of the statutory adjustment factors to reduce the gravity-based penalty.

> 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.

In re Pacific Refining Co., 5 E.A.D. 520, 524 (EAB 1994). *See also In re Johnson Pacific, Inc.*, 5 E.A.D. 696, 702 (EAB 1995); *In re Mobil Oil Corp.*, 5 E.A.D. 490, 515 (EAB 1994); *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994). The presiding officer found that the Region had properly applied the adjustment factors in the Agency's penalty policies and therefore she relied upon the Region's analysis as a basis for her conclusion that no downward adjustment to the gravity-based penalty was warranted. DICA has not shown that the presiding officer, by relying on the Region's analysis, either failed to consider one or more statutory factors or relied upon an analysis of these factors that was flawed.[12] Therefore, it has not demonstrated that the presiding officer's adoption of the Region's penalty analysis as a basis for determining an appropriate and reasonable penalty under TSCA was misplaced.

Finally, we find no basis whatsoever for DICA's contention that "[b]ecause DICA was * * * given no real opportunity to present a

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[12] As noted in n.6, *supra*, the particular statutory factors which, according to DICA warrant a penalty reduction are "degree of culpability" and "such other matters as justice may require." "The two principal criteria for assessing culpability are (a) the violator's knowledge of the particular TSCA requirement, and (b) the degree of the violator's control over the violative condition." 45 Fed. Reg. 59770, 59773. A downward adjustment in the gravity-based penalty is warranted only where both factors are present. The test of lack of knowledge is whether the violator knew or *should have known* either of the TSCA requirement or of the "general hazardousness

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defense to EPA's penalty assessment, the hearing it was afforded was in reality only a charade." DICA Appeal Brief at 22. The presiding officer heard two days of testimony on the issue of an appropriate penalty for these violations. She had the benefit of extensive post-hearing briefs. Moreover, as noted *supra*, the presiding officer emphasized both at the beginning of the hearing and in her Final Decision that DICA had the opportunity to influence her penalty assessment.

III. *CONCLUSION*

For the reasons stated above, we hereby affirm the Initial Decision assessing a total civil penalty of $85,000 against DICA for its failure to file five Form U reports. Payment shall be made within sixty (60) days after receipt of this Order, unless otherwise agreed by the parties, by sending a certified or cashier's check, payable to the Treasurer, United States of America, to:

Regional Hearing Clerk
U.S. EPA - Region II
P.O. Box 360188M
Pittsburgh, PA 15251

So ordered.

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of his actions." *Id. See, e.g., In re SED, Inc., et al.*, 3 E.A.D. 150 (CJO 1990). The Region maintains that DICA is not entitled to a penalty reduction based on nonculpability because it knew of the regulatory requirement and/or had the ability to prevent the violation. *See* Region's Reply Brief at 7. DICA has not refuted the Region's factual assertions. (In instances where a penalty adjustment based on the two principal criteria for assessing culpability is not warranted, the Guidelines provide for an adjustment of the gravity-based penalty to reflect the violator's "attitude." 45 Fed. Reg. 59770, 59773. The Region does not dispute that DICA has been cooperative and courteous but explains that it is not entitled to a penalty reduction based on its "attitude" because such a reduction is warranted only where the violator has taken prompt corrective actions. The Region argues that DICA cannot be considered to have complied promptly because it failed to submit the Form U reports until three months after the complaint was filed. *Id.*)

With regard to "such other matters as justice may require," DICA not only claims that both the Region and the Presiding Officer failed to consider the factor, but that "EPA's penalty policy does not contemplate the application of the statutory element of 'such other matters as justice may require' in the context of a non-reporting violation." DICA Appeal Brief at 25. The record does not support any of these assertions. Both the Guidelines and the ERP expressly direct the Region to consider "such other matters as justice may require" as a penalty factor. *See* Guidelines, 45 Fed. Reg. 59770, 59775 and ERP at 6. The Region maintains that it took the penalty factor into account and concluded that there were no extenuating circumstances warranting a reduction in the gravity-based penalty. In particular, the Region asserts that DICA's computerization of its records was merely a prudent business decision and did not merit a penalty reduction as an "environmentally beneficial expenditure" because computerization was implemented prior to the EPA inspection of DICA's facility. *Id.* at 10. The Presiding Officer agreed with the Region's conclusion that DICA had not demonstrated any basis for a reduction of the gravity-based penalty.