BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Hall Signs, Inc.	)	EPCRA Appeal No. 97-6
Docket No. 5-EPCRA-96-026	)	

FINAL ORDER

On January 8, 1998, the Chief of the Pesticides and Toxics Branch, Region V, United States Environmental Protection Agency ("Region") filed an appeal with the Board from an Initial Decision issued by Administrative Law Judge Andrew S. Pearlstein ("Presiding Officer"). In that decision, the Presiding Officer assessed a civil penalty of $18,886 against Hall Signs, Inc. ("Hall Signs") for four violations of the requirement to timely file annual toxic chemical release forms pursuant to section 313(a) of the Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. § 11023(a).[1] The violations stemmed from

[1]At the time of the violations at issue in this case, EPCRA section 325(c) authorized the assessment of civil penalties in an amount not to exceed $25,000 for each violation of section 313. Subsequently, the Debt Collection Improvement Act of 1996 was enacted directing the EPA to make periodic adjustments of maximum civil penalties to take into account inflation. *See* 31 U.S.C. § 3701. The EPA has published inflation adjusted maximum penalties, *see* 40 C.F.R. §§ 19.1 *et seq.*, which apply to violations occurring after January 30, 1997.

Hall Signs' failure to timely file the toxic chemical release forms, known as "Form R," for phosphoric acid and for certain glycol ethers used by Hall Signs at its Bloomington, Indiana manufacturing facility in 1990 and 1991.

After a hearing was scheduled, the parties submitted stipulations in which Hall Signs admitted the violations at issue in this case. Thus, the only remaining issue was the amount of the penalty to be assessed, which issue the parties agreed to submit to the Presiding Officer on briefs. Initial Decision at 2. The Region requested an aggregate penalty of $57,800 for the four violations and it demonstrated that its proposed penalty was calculated in accordance with the Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act (the "ERP").[2] The Region's proposed penalty was calculated based on $17,000 for each of the four violations (totaling $68,000) with a 15% reduction for Hall Signs' cooperative attitude. Hall Signs argued that application of the ERP in this case would result in an unusually large penalty for

[2]The applicable regulations governing the administrative assessment of civil penalties specify that the presiding officer must consider any civil penalty guidelines or policies issued by the EPA. 40 C.F.R. § 22.27(b). The ERP was prepared by the EPA as a penalty policy to guide the administrative assessment of civil penalties for violations of EPCRA § 313. The general applicability of the ERP has not been disputed in this case. We have considered the guidance of the ERP in prior cases. *See In re Woodcrest Mfg., Inc.,* EPCRA Appeal No. 97-2, slip op. at 22-31 (EAB, July 23,1998), 8 E.A.D. __; *In re Spang & Co.,* 6 E.A.D. 226, 242 n.19 (EAB 1995); *see also In re Pacific Ref. Co.,* 5 E.A.D. 607, 608 and n.2 (EAB 1994).

the relatively small amounts of each of the toxic chemicals involved in the violations. In arguing for a lesser penalty, Hall Signs noted that the size of its business barely exceeded the ERP's threshold that separates penalties of $5,000 per violation from those of $17,000 per violation for the amount of each chemical at issue in this case.

As noted, the Presiding Officer assessed a penalty of only $18,886 for the four violations. In determining the amount of the penalty, the Presiding Officer considered "the nature, circumstances, extent and gravity of the violation or violations and, with respect to the violator, ability to pay, any prior history or such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." Initial Decision at 4 and n.1.[3]

Additionally, as required by the regulations,[4] the Presiding Officer considered the guidelines set forth in the ERP. However,

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[3]Although EPCRA § 325(c) does not set forth a list of factors to be considered in assessing penalties, the Presiding Officer's use of this list of factors, which was derived from EPCRA § 325(b)(1)(C) and § 325(b)(2), was appropriate. In the case of *In re Woodcrest Mfg., Inc.*, EPCRA Appeal No. 97-2, slip op at 21 n.11 (EAB, July 23, 1998), 8 E.A.D. __, we held that "[w]hile the absence of 'statutory' factors provides the Administrator greater discretion under § 325(c) than under § 325(b)(1)(C) or (2), the Administrator or her delegate may exercise this discretion by looking to the factors listed in such other sections as guidance in specific cases * * *."

[4]*See supra* note 2.

the Presiding Officer determined that the circumstances of Hall Signs' violations warranted deviating from those guidelines. Instead of following the ERP's guideline for an "extent" level of $17,000 for each violation based on both the amount of chemical involved and the size of respondent's business, the Presiding Officer derived his own mathematical formula based primarily on the amount of chemical involved. *Id.* at 8. The Presiding Officer explained that:

> There is nothing in EPCRA that indicates that the size of the business of the violator should be a significant penalty factor. If the factors cited under EPCRA §325(b)(1)(C) or §325(b)(2), for violations of the emergency notification requirements are to be considered as guidance, the most closely related factors are the violator's ability to pay, ability to continue in business, and any economic benefit. * * * I find the ERP's automatic consideration of the size of a violator's business as a major factor in determining the violation's extent level and gravity-based penalty, *as applied in this case*, arbitrary and unauthorized by the statute, EPCRA.

Initial Decision at 7-8 (emphasis added). The Presiding Officer derived his penalty determination for each violation by beginning with a gravity-based penalty of $5,000 (which amount was taken from the ERP's guidance for "circumstance level 1" violations) with upward adjustments reflecting the extent to which Hall Sign's use of each chemical exceeded the 10,000 pound reporting threshold. *Id.* at 9. Using this approach, the Presiding Officer determined that the total gravity-based penalty would be $22,219 for the four violations ($5,497 for Count I; $5,518 for Count II; $5,459 for Count III; and $5,745 for Count IV). *Id.* Next, the

Presiding Officer applied a 15% reduction for Hall Signs' cooperative attitude. *Id.* at 11. The resulting civil penalty of $18,886 was $38,914 less than the penalty proposed by the Region.

In its appeal, the Region argues that the Presiding Officer exceeded his authority by "finding the penalty policy to be 'arbitrary and unauthorized by statute.'" Region's Brief at 8. The Region, however, also has expressly stated that it is not appealing the amount of the penalty. Instead, the Region has filed its appeal solely to contest the Presiding Officer's determination that the ERP was "arbitrary and unauthorized by statute" when applied to the facts of this case. Specifically, the Region asserts that this determination, coupled with the Presiding Officer's subsequent creation of a new methodology for calculating a gravity-based penalty, improperly "struck down" Agency policy.

This Board has repeatedly held that the Presiding Officer has discretion to assess a penalty different in amount from the penalty requested in the complaint.[5] We also have held on numerous occasions that, although the Presiding Officer must "consider" any penalty guidelines, in any particular instance the Presiding Officer may depart from the penalty policy so long as

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[5] *In re Predex Corp.*, FIFRA Appeal No. 97-8, slip op. at 8, (EAB, May 8, 1998); *In re Johnson Pacific, Inc.*, 5 E.A.D. 696, 701 (EAB 1995); *In re James C. Lin and Lin Cubing*, Inc., 5 E.A.D. 595, 598 (EAB 1994).

the reasons for departure are adequately explained.[6] For instance, we have stated:

> If * * * the Presiding Officer does not agree with the Region's analysis of the statutory penalty factors or their application to the particular violations at issue, the Presiding Officer may specify the reasons for the disagreement and assess a penalty different from that recommended by the Region. *See* 40 C.F.R. §22.27(b).
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> * * * [T]he regulations do require the Presiding Officer to "consider any civil penalty guideline issued under the Act" (40 C.F.R. §22.27(b)) - that is, under the statute authorizing the institution of the enforcement action (*id*. §22.03(a)) - but they neither specifically require nor specifically preclude the Presiding Officer's consideration of any other materials. Moreover, this Board has repeatedly stated that a Presiding Officer, having considered any applicable civil penalty guidelines issued by the Agency, is nonetheless free not to apply them to the case at hand. [citations omitted]
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> Further, use of a written policy to assist in developing penalty proposals should not be presumed to eliminate the exercise of sound professional judgment from that process; nor should it be presumed to result in penalty proposals that do not fairly reflect the circumstances of a particular violation or a particular violator.

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[6] *In re A.Y. McDonald Indus*., Inc., 2 E.A.D. 402, 414 (CJO 1987) ("An ALJ's discretion in assessing a penalty is in no way curtailed by the [RCRA] Penalty Policy so long as he considers it and adequately explains his reasons for departing from it."); *see also In re DIC Americas, Inc*., 6 E.A.D. 184, 190 n.10 (EAB 1995) (same, quoting *A.Y. McDonald*); *In re Pacific Ref. Co.*, 5 E.A.D. 607, 612 (EAB 1994); *In re Great Lakes Div. of Nat'l Steel Corp*., 5 E.A.D. 355, 374 (EAB 1994); *In re Ray Birnbaum Scrap Yard*, 5 E.A.D. 120, 124 (EAB 1994); *In re Mobil Oil Corp*., 5 E.A.D. 490, 515 (EAB 1994); *In re ALM Corp*., 3 E.A.D. 688, 694 (CJO 1991).

In re Employer's Ins. of Wausau, 6 E.A.D. 735, 758, 761-762,(EAB 1997).

The Region's appeal in the present case would have us review the Presiding Officer's reasons for departing from the ERP in order to determine whether those reasons constituted an abuse of the Presiding Officer's discretion. It is significant, however, that the Region has not appealed the amount of the penalty assessed by the Presiding Officer. Thus, the Region does not dispute that the Presiding Officer had the discretion to reduce the amount of the penalty,[7] and the Region agrees that the amount assessed by the Presiding Officer was appropriate. Accordingly, because the parties agree as to the amount of the penalty,[8] no review by us of the Presiding Officer's decision would be necessary in most circumstances.

The Region nonetheless urges the Board to vacate the portion of the Initial Decision setting forth the Presiding Officer's rationale. In this respect, we note that the power to review a presiding officer's decision may be exercised to vacate the rationale (even without vacating the result) of a presiding officer's decision "to assure that it does not establish an

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[7]The Region expressly acknowledges that the Presiding Officer had the authority to reduce the amount of the proposed penalty. Region's Brief at 14-16.

[8]Hall Signs did not file an appeal and has stated that it has no objection to those portions of the Region's proposed order that state the amount of the penalty to be assessed. Hall Signs Reply at 2.

erroneous precedent." *In re Martin Electronics, Inc.,* 2 E.A.D. 381, 385 (CJO 1987). Nevertheless, we "do[] not want to be drawn routinely into parsing the language of an initial decision assessing a penalty when neither party has appealed the amount of the penalty assessment." *In re Burlington Northern R.R.,* 5 E.A.D. 106, 108-109 (EAB 1994). Such cases may not present a particularly good vehicle for deciding the issues raised. *Id.* at 110 (the respondent "had no monetary stake in the outcome of the appeal and thus only a limited incentive to research and address the issue.").

Despite our general reluctance to be drawn into such cases, we think the issue raised by the Region's appeal may be dealt with in short order, and for that reason alone we have decided to address it. Stated succinctly, it is our conclusion that the rationale of the Presiding Officer need not be vacated because, as discussed below, the Region is in error in construing the Initial Decision as establishing a precedent that undermines the validity of the Agency's penalty policy.

The Region argues that the Presiding Officer exceeded his authority by improperly striking down Agency policy. While recognizing the Presiding Officer's discretion in establishing a penalty as set forth above in the text accompanying footnotes 5 and 6, the Region argues that the Presiding Officer "exceeded his obligation to ‹consider' the penalty policy by taking the additional step of finding the penalty policy to be "arbitrary

and unauthorized by statute." Region's Brief at 8. Further, the Region argues that "the freedom of an ALJ not to apply the penalty policy (after having considered it), set forth in 40 C.F.R. § 22.27(b), does not confer upon the ALJ the authority to strike down Agency policy * * *." *Id.* at 11.

The Presiding Officer's holding, however, was not as broad as argued by the Region; nor does the Initial Decision establish any binding precedent concerning a presiding officer's authority to set Agency policy generally. Although the methodology used by the Presiding Officer in calculating the penalty in this case represents a substantial departure from the ERP guidelines, his analysis establishes that he *considered* the ERP as required by the regulations, but did not find it appropriate as applied in this case. At each place in the Initial Decision where the Presiding Officer stated that the ERP is arbitrary, he also limited his holding "to the facts of this case," "on this record" and "as applied in this case." Initial Decision at 6, 8, 9. This is fully consistent with the Presiding Officer's authority previously articulated in *Wausau* to assess a penalty different from the one recommended if the Presiding Officer does not agree with the "application" of a penalty policy "to the particular violations at issue." *Wausau*, 6 E.A.D. at 760. Moreover, the statements as to arbitrariness and lack of authority[9] were only a

[9]Given that the statute authorizes penalties of up to $25,000 for each violation, it is difficult to understand how the

small part of a very detailed explanation of the Presiding Officer's reasons for departing from the ERP. In the context of the entire discussion, there is nothing suggesting that the Presiding Officer intended to, or indeed thought he had the authority to, "strike down" the Agency policy *per se.*

These limitations and the Presiding Officer's detailed analysis are sufficient to assure that the Presiding Officer's rationale will not establish an erroneous precedent applicable to the facts or record of other cases. We reiterate that a complainant in other cases may still rely upon the ERP as part of such complainant's *prima facie* penalty case, *see, e.g., Wausau,* 6 E.A.D. at 760, and the Presiding Officer's rationale in this case does not limit a complainant's ability to support the rationale of the ERP on the record in other cases if that rationale were specifically challenged by a respondent.

For the foregoing reasons, the Presiding Officer's assessment of a civil penalty of $18,886 for the four violations of the EPCRA toxic chemical reporting requirements is affirmed and assessed against Hall Signs. Hall Signs shall pay the full amount of the civil penalty within sixty (60) days after receipt of this final order, unless otherwise agreed to by the parties.

Presiding Officer may have viewed a lesser penalty of only $17,000 per violation as being "unauthorized" by statute. Initial Decision at 9.

Payment shall be made by forwarding a cashier's check or certified check in the amount of $18,886 payable to the Treasurer, United States of America at the following address:

EPA - Region 5
Regional Hearing Clerk
P.O. Box 70753
Chicago, IL 60673

A transmittal letter identifying the subject case and docket number, and Hall Sign's name and address, must accompany the check.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: 12/16/98

By: /s/
Ronald L. McCallum
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I certify that the foregoing Final Order in the matter of Hall Signs, Inc., EPCRA Appeal No. 97-6, was sent in the manner indicated to each of the following:

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Dated: 12/16/98

/s/
Annette Duncan
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