IN RE BOLLMAN HAT COMPANY

EPCRA Appeal No. 98–4

FINAL DECISION

Decided February 11, 1999

Syllabus

This is an appeal by the Director, Air Protection Division, Region III, U.S. EPA (the "Region") from a Presiding Officer's Initial Decision. The Initial Decision arose out of an administrative enforcement action by the Region against the Bollman Hat Company ("Bollman") for seven alleged violations of the requirement to file toxic chemical reporting forms, known as "Form Rs," pursuant to section 313 of the Emergency Planning and Community Right-To-Know Act ("EPCRA"), 42 U.S.C. § 11023. Prior to the evidentiary hearing in this matter, Bollman stipulated to liability for the seven alleged violations, leaving only issues regarding the proper amount of the penalty. The Presiding Officer assessed a civil penalty for the seven violations in the aggregate of $8,166, substantially less than the penalty requested by the Region of $39,716.

The central issue arises out of the Region's use of a settlement policy in calculating penalty reductions for Bollman's self-disclosure of the violations alleged in certain counts of the complaint. *See* Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706 (the "Self-Disclosure Policy"). The Region, however, did not disclose in the complaint or in any pre-hearing exchange the fact that it used the Self-Disclosure Policy. The Region first disclosed its use of the Self-Disclosure Policy during the Region's testimony at the hearing.

In the post-hearing briefing, Bollman argued that the Region's failure to disclose its use of the Self-Disclosure Policy constituted a denial of due process entitling Bollman to dismissal of the complaint. The Region argued that there was no prejudice to Bollman because the Self-Disclosure Policy is not intended for use in litigation. The Region, nevertheless, stated that its use of the Self-Disclosure Policy in a contested proceeding fell within its prosecutorial discretion.

The Presiding Officer applied the Self-Disclosure Policy to determine the extent of the penalty reductions to be granted on account of Bollman's self-disclosure. The Presiding Officer, however, based on her evaluation of the facts, determined that Bollman should be granted a 100% penalty reduction for five of the seven violations, rather than the 75% reduction proposed by the Region (or the 50% allowable under applicable guidance). The Presiding Officer also granted a 25% reduction of the penalties for the remaining two counts under the rubric of "other factors as justice may require," stating that the Region's failure to disclose the use of the Self-Disclosure Policy was an injustice.

Held: The Region is correct that Board precedent states that the Self-Disclosure Policy is a settlement policy that should not be applied in litigated penalty assessments. However, to sustain the Region's appeal, the Board would be required to find that it was clear error for the Presiding Officer to have relied upon the Region's own misreading, misapplication, and misrepresentation of the Self-Disclosure Policy. Such a finding of clear error would not be justified. However, the Presiding Officer's penalty rationale, which relied upon the Region's improper application of the Self-Disclosure Policy, is not adopted because the Board is reluctant to perpetuate the Region's error, even though the Presiding Officer's reliance on the Region's own testimony and representations was not unreasonable. Nevertheless, based on general notions of fairness, the amount of penalty assessed by the Presiding Officer of $8,166 is sustained in an exercise of discretion under the rubric of "other factors as justice may require."

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge McCallum:

This is an appeal by the Director, Air Protection Division, Region III, U.S. EPA (the "Region") from an Initial Decision dated March 17, 1998, by Chief Administrative Law Judge Susan L. Biro (the "Presiding Officer"). The Initial Decision arose out of an administrative enforcement action by the Region against the Bollman Hat Company ("Bollman") for seven alleged violations of section 313 of the Emergency Planning and Community Right-To-Know Act ("EPCRA"), 42 U.S.C. § 11023. Bollman did not file an appeal from the Initial Decision; it does, however, oppose the Region's appeal.

As described in greater detail below, prior to the evidentiary hearing in this matter, Bollman stipulated to liability for the seven alleged violations, leaving only issues regarding the proper amount of the penalty. By the Initial Decision, the Presiding Officer determined to assess a civil penalty for the seven violations in the aggregate of only $8,166, substantially less than the penalty requested by the Region of $39,716. For the following reasons, we sustain the penalty assessed by the Presiding Officer, although based on a different rationale.

I. *BACKGROUND*

A. *Statutory, Regulatory, and Agency Guidance Background*

Before describing the specific factual and procedural background of this case, we provide here a brief description of the applicable statutes, regulations and general provisions of the Agency penalty policies used in this case as background to the issues raised on appeal.

EPCRA § 313 requires certain facilities to "submit annually, no later than July 1 of each year, a Toxic Chemical Release Inventory Reporting Form ("Form R") for each toxic chemical listed under 40 C.F.R. § 372.65 that was manufactured, imported, processed, or otherwise used during the preceding calendar year in quantities exceeding established chemical thresholds." *In re K.O. Mfg., Inc.,* 5 E.A.D. 798, 800 (EAB 1995). EPA has the authority to enforce the reporting requirements of section 313 and, at the time of the violations at issue in this case, was authorized to impose civil penalties of up to $25,000[1] for each failure to file a Form R for each day that the violation continued. EPCRA § 325(c), 42 U.S.C. § 11045(c).

Unlike the penalty provisions of many environmental statutes, EPCRA § 325(c) does not provide a list of factors to be taken into account in assessing civil penalties. *Compare* EPCRA § 325(c) *with* EPCRA § 325(b)(1)(C). Thus, beyond the limitation that the penalty shall not exceed $25,000 per violation, the statute does not provide much guidance on determining the proper amount of the penalty. *In re Woodcrest Mfg., Inc.,* 7 E.A.D. 757, 774 n.11 (EAB 1998). The EPA, however, has prepared a penalty policy to guide the administrative assessment of civil penalties for violations of EPCRA § 313. *See* Enforcement Response Policy for Section 313 of the Emergency Planning and Community-Right-to-Know Act and Section 6607 of the Pollution Prevention Act (Aug. 10, 1992) (the "ERP").[2] The ERP serves to assist the Agency's enforcement personnel in formulating an appropriate civil penalty amount for inclusion in an administrative complaint. Once the complaint is filed and the case is heard by a presiding officer, the 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).

Under the guidance of the ERP, administrative civil penalties are calculated in accordance with a two-step process. ERP at 7. First, a gravity-

---

[1] Subsequent to the violations at issue in this case, 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.

[2] Except as to the disputed applicability of the Self-Disclosure Policy (as defined below) to issues of voluntary disclosure of violations, 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 Woodcrest,* 7 E.A.D. at 774; *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, n.2 (EAB 1994). By its terms, the ERP became applicable to all administrative actions concerning EPCRA § 313 commenced after August 10, 1992, regardless of the date of the violation. ERP at 1.

based penalty reflecting characteristics of the violation is determined utilizing a penalty matrix. *Id.* at 8. Second, after a gravity-based penalty amount is determined, upward or downward adjustments may be made to take into account factors reflecting characteristics of the violator. *Id.* As described below, Bollman has not opposed the proposed calculation of the gravity-based penalty; instead its opposition relates to the adjustments to be applied.

The ERP guidelines provide that adjustments to the base gravity component of the penalty may be based upon consideration of the following "characteristics of the violator": (a) any voluntary disclosure of the violation by the violator; (b) the violator's history of prior violations; (c) whether the toxic chemical has been "delisted" subsequent to the violation; (d) the violator's attitude; (e) "other factors as justice may require;" and (f) ability to pay. ERP at 14–20.

The ERP provides guidance that a 25% reduction may be granted for violations that are voluntarily disclosed. ERP at 14–15. It further provides that an additional deduction of up to 25% may be obtained by certifying that the violation was immediately disclosed within 30 days of discovery, the facility has undertaken concrete actions to ensure that the facility will be in compliance in the future, and the facility does not have a history of violations. *Id.* at 15. Thus, the ERP provides for a maximum reduction for self-disclosure of up to 50% of the gravity-based penalty.

As explained below, the central issue in this case, however, arises out of the Region's application of another Agency policy in proposing penalty reductions for self-disclosure in this case. *See* Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 60 Fed. Reg. 66,706 (1995) (the "Self-Disclosure Policy"). The Federal Register notice states that the purpose of the Self-Disclosure Policy is to encourage regulated entities to conduct voluntary compliance evaluations and to disclose and correct violations. Self-Disclosure Policy, 60 Fed. Reg. at 66,706–07. It provides this encouragement by stating that EPA will waive the gravity-based penalties[3] (i.e., provide a 100% reduction) for companies that voluntarily identify, disclose and correct violations in accordance with nine enumerated criteria, and that it will reduce the gravity-based penalties by 75% for companies that meet all but one of the nine criteria. *Id.* at 66,711. The Self-Disclosure Policy also states that it is based on factors that are intended to guide the Agency in the exercise of its "prosecutorial discretion" and that it "does not create any rights,

[3] The Self-Disclosure Policy expressly states that EPA reserves the right to recover economic benefit that may have been realized as a result of the non-compliance. *Id.* at 66,706.

duties, obligations, or defenses, implied or otherwise, in any third parties." *Id.* at 66,712. It states further that it should be used in settlement negotiations and "is not intended for use in pleading, at hearing or at trial." *Id.* Nevertheless, the Region, in presenting its case in the context of this adjudication invoked the Self-Disclosure Policy in calculating the penalty advanced before the Presiding Officer.

B. *Factual and Procedural Background*

Bollman operates a manufacturing plant located at 110 East Main Street, in Adamstown, Pennsylvania (the "Facility"). Joint Set of Stipulated Facts, Exhibits and Testimony (the "Stipulations") ¶ 1. In July 1996, the Region filed a seven-count administrative complaint against Bollman alleging seven violations of the Form R filing requirement. The Region alleged that Bollman used at its Facility the following chemicals during the indicated years in amounts exceeding the applicable reporting threshold without timely filing the requisite Form Rs: Sulfuric Acid in 1992 and 1993; Methyl Isobutyl Ketone ("MIBK") in 1992, 1993, and 1994; and Toluene in 1993 and 1994. The Region proposed a penalty of $39,716 for the seven alleged violations. In deriving the proposed penalty, the Region credited Bollman with self-disclosure reductions of 75% of the gravity-based penalties for all violations other than the failure to file the two Form Rs for the 1994 reporting period. (The violations credited with self-disclosure reductions were alleged in counts I through V of the Complaint.)

Bollman filed its answer to the Complaint on July 22, 1996 (the "Answer"), in which Bollman admitted the material factual allegations of the Complaint pertaining to liability for the violations. Bollman, however, argued that the amount of the penalty should be reduced to take into account certain facts identified by Bollman. Bollman proposed that an appropriate penalty would be $10,718.

In December 1996, the Presiding Officer issued a Prehearing Order, which among other things required the parties to file prehearing exchanges in accordance with section 22.04 of the Consolidated Rules of Practice, 40 C.F.R. § 22.04. The order specifically directed that "[t]he Complainant shall set out how the proposed penalty was determined, and shall state in detail how the specific provisions of any EPA penalty or enforcement policies and/or guidelines were used in calculating the penalty." *See* Prehearing Order (Dec. 5, 1996) ¶ 2.

In its prehearing exchange submitted in December 1996, the Region provided a detailed, but incomplete, explanation of its proposed

penalty. The Region's explanation comprised four pages of the five-page text of its prehearing exchange, and the Region attached as an exhibit a calculation sheet describing how it arrived at the proposed penalty. *See* Complainant's Prehearing Exchange at 2–5, Ex. 21. The Region also stated that the proposed penalty "accords" with the ERP, a copy of which was attached as an exhibit to the prehearing exchange. *Id.* Ex. 23.

The Region's prehearing exchange set forth the following table showing how the proposed penalty had been derived:

Year	Chemical	Level	Extent	Penalty
1992	Sulfuric Acid	1	A	$6,250
1992	MIBK	1	B	4,250
1993	Sulfuric Acid	1	A	4,904
1993	MIBK	1	B	3,263
1993	Toluene	1	B	3,263
1994	MIBK	1	B	8,893
1994	Toluene	1	B	8,893
			TOTAL:	$39,716

Complainant's Prehearing Exchange at 3. The Region also described its calculation in relevant part as follows:

> According to EPA's EPCRA § 313 Enforcement Response Policy, failure to submit a Form R by the reporting deadline is a Circumstance Level 1 violation. For the counts involving Sulfuric Acid, * * * a 75% reduction was applied because the Respondent self-confessed its 1992 and 1993 failures to report and corrected them. For the counts involving MIBK and Toluene, * * * a 75% reduction was applied to the 1992 and 1993 counts, because the Respondent self-confessed its 1992 and 1993 failures to report and corrected them. No such reduction was applied to the 1994 counts inasmuch as notification by EPA occurred before the Respondent took action.

Complainant's Prehearing Exchange at 3–4. The Region did not disclose in its prehearing exchange why it used a 75% reduction for voluntary self-disclosure when the ERP only provides for a maximum of a 50% reduction for self-disclosure; the Region's Prehearing Exchange also did not make any reference to the Self-Disclosure Policy.

In February 1997, the Presiding Officer entered an order scheduling an evidentiary hearing to be held beginning on November 18, 1997. In

July 1997, the parties filed their Stipulations in which Bollman stipulated to liability as to all counts of the Complaint. Stipulations ¶ 21. Thus, the only remaining issues for the hearing related to the proper amount of the penalty for the violations. At the hearing, the Region called two witnesses, one of whom was Mr. Craig Yussen, the Region's EPCRA Section 313 Compliance Coordinator. Bollman called two witnesses.

The issues on appeal arise out of the testimony of Mr. Yussen, who testified that he had calculated the penalty proposed by the Region in its Complaint. Transcript of Nov. 18, 1997 Hearing ("Tr.") at 74. In the course of describing how he arrived at the proposed penalty, Mr. Yussen explained that he calculated the reduction for voluntary disclosure by using the Self-Disclosure Policy's guideline for a 75% reduction. *Id.* at 97. He also explained that in instances where the violation was self-disclosed, the Self-Disclosure Policy "supersedes" the ERP as guidance for calculating the reduction to be granted for self-disclosure. *Id.* at 199. Mr. Yussen also testified, however, that he did not determine whether Bollman satisfied all of the Self-Disclosure Policy's criteria for applicability of the 75% reduction. Mr. Yussen testified that in calculating the penalty, he made a "presumption" that most of the criteria were satisfied. *Id.* at 222–26. Mr. Yussen also explained that this case was the first one involving voluntary disclosure in his experience after the Self-Disclosure Policy had become effective. *Id.* at 154.

During Mr. Yussen's testimony, the Presiding Officer asked whether the Self-Disclosure Policy was included in the Region's exhibits and whether it was disclosed to Bollman prior to the hearing. *Id.* at 105. The Region's counsel explained that the Self-Disclosure Policy was not being used as an exhibit and had not been disclosed because, by it terms, it is to be used for settlement. *Id.* The Region explained further that "we were being particularly accommodating in using the full 75 percent reduction under the Self-[Disclosure] Policy going beyond the 50 percent reduction that's capped in the Enforcement Response Policy." *Id.* at 106.

In its post-hearing brief, the Region further stated as follows:

> In this instance, Complainant, in its discretion, admittedly without knowing all of the relevant background details of Respondent's voluntary disclosure at the time, and in its zeal to recognize and encourage voluntary disclosure, extended a technically unsupported penalty adjustment to Respondent in the Complaint.
>
> * * * * * * *

> The purpose of invoking that settlement policy at all, in coming up with a proposed penalty for the Complaint, was simply to find some identifiable basis for according Respondent a voluntary disclosure reduction figure greater than that allowed under the ERP.
>
> * * * * * * *
>
> In its zeal to reward this, at the time, rare instance of self-disclosure, Complainant overstepped the normal boundaries of the ERP, merely to get the 75% figure. It did so only to extend to Respondent a more favorable reduction, one which, in hindsight, in strict compliance with the Self[-Disclosure] Policy, should have been reserved for the settlement process. Even in that process, applying the more technical aspects of the nine "conditions" of the Self[-Disclosure] Policy * * * would have been a hollow exercise. At best, in the settlement context, Complainant would have been determining whether Respondent satisfied the "spirit" of those requirements, and even then, given Respondent's much belated disclosure, and its indisputable failure to take adequate steps to prevent recurrence, it would not have qualified.
>
> In retrospect this decision to take a figure from a settlement policy, and with a series of favorable presumptions, insert it, into the complaint was ill-advised, but the use of that beneficial reduction did not fall outside of the legitimate boundaries of Agency discretion * * *.

Complainant's Post Hearing Brief at 7–8 (footnotes omitted). Nevertheless, in a footnote, the Region stated that it was prepared to "abide" by the reduction that had been "extended" in the Complaint. *Id.* at 8 n.5. In sum, the Region argued that, while the Self-Disclosure Policy is only applicable to settlement—and even under the terms of the Self-Disclosure Policy, Bollman did not satisfy the conditions for a reduction—the Region was nonetheless willing to "abide" by the reduction "extended" in the Complaint. In contrast, Bollman argued in its post-hearing brief both that its originally proposed penalty of $10,718 was reasonable and that dismissal of the Region's Complaint with prejudice would be appropriate based on lack of fair notice and due process violations caused by the Region's failure to disclose the full rationale of its proposed penalty.

In the Initial Decision, the Presiding Officer applied the Self-Disclosure Policy to determine the extent of the penalty reductions to be granted on account of Bollman's self-disclosure of the first five violations. The Presiding Officer observed that the Self-Disclosure Policy suggests that a 75% reduction should be granted if a respondent satisfies eight of the nine criteria set forth in the Self-Disclosure Policy, and that a 100% reduction is recommended if a respondent satisfies all nine of the criteria. The Presiding Officer determined to hold the Region to Mr. Yussen's "presumption" that Bollman "met eight of the nine criteria." Initial Decision at 14. In addition, the Presiding Officer held after reviewing the evidence that Bollman also met the ninth criterion. *Id.* at 9–13. Because the Region had used the Self-Disclosure Policy in calculating the proposed penalties for counts I through V of the Complaint and because the Presiding Officer found that all nine of the Self-Disclosure Policy's criteria had been satisfied, the Presiding Officer granted Bollman a 100% reduction in the penalties for these five counts.

The Presiding Officer did not grant Bollman a self-disclosure reduction for the failure to report the 1994 use of both MIBK and Toluene alleged in counts VI and VII of the Complaint. The Presiding Officer, however, did determine to grant a 25% reduction of the penalties for these two counts under the rubric of "other factors as justice may require"[4] because the Region "withheld from the Respondent, as well as from [the Presiding Officer], its use of the Self-[Disclosure] Policy in calculating the penalty until the hearing, and even then it was merely referenced verbally but not presented or marked for identification." Initial Decision at 22. The Presiding Officer determined that, by withholding this information, the Region failed to disclose the reasoning behind the penalty proposed in the Complaint. *Id.* The Presiding Officer also found that, "had the [Region] disclosed its use of the Self-[Disclosure] Policy in calculating the penalty, this case likely would have settled without the need for hearing." *Id.* at 23. The Presiding Officer concluded that "[s]uch an injustice to Respondent may be remedied under the provisions of 'other factors as justice may require.'" *Id.* The Initial Decision, therefore, reduced the penalty for counts VI and VII by 25% resulting in a total penalty of only $8,166.[5]

---

[4] *See* ERP at 18.

[5] The Presiding Officer also determined to grant an additional reduction of 30% on account of Bollman's attitude represented by its cooperation and compliance. The Region has not appealed this 30% reduction.

II. *DISCUSSION*

The Region argues on appeal that the Presiding Officer clearly erred by applying the Self-Disclosure Policy "to reduce to $0 the civil penalty for the violations alleged in Counts I–V of the Administrative Complaint." Complainant's Appellate Brief ("Region's Brief") at 2. The Region also argues in the alternative that "even assuming *arguendo* that the Self-Disclosure Policy could be applied here, the facts in the record do not support any reduction for self-disclosure beyond that already given in the Complaint." Region's Brief at 17.[6] In addition, the Region argues that the Presiding Officer clearly erred by "sanctioning Complainant through a penalty reduction of 25% for Counts VI and VII * * * on the ground that Complainant had denied Respondent a due process right to litigate the Self-Disclosure Policy." *Id.* at 2. Bollman opposes these grounds of appeal.

In support of the Region's argument that the Self-Disclosure Policy, by its terms, is only applicable to calculating penalties in the context of settlements and that it should not have been used by the Presiding Officer to guide the penalty determination in this litigated case, the Region cites several of our prior decisions, including *In re Harmon Elecs., Inc.,* 7 E.A.D. 1, 55 (EAB 1997), *rev'd on other grounds sub nom Harmon Electronics, Inc. v. Browner,* 19 F. Supp. 2d 988 (W.D. Mo. 1998)(finding substantial evidence supporting the penalty assessed). Specifically, the Region states as follows:

> The Initial Decision's application of the Self-Disclosure Policy to eliminate the proposed penalty for Counts I–V is inconsistent with the face of the plain language of the Policy itself and the Board's clear holding in [*Harmon*] that the Self-Disclosure Policy should not be applied in contested hearings.

Region's Brief at 11.

In *Harmon,* the respondent appealed a penalty assessment under the Resource Conservation and Recovery Act, arguing that it met the spirit of the Self-Disclosure Policy and should be granted a penalty reduction on account of its voluntary disclosure of the violations at issue. The complainant objected that the respondent did not meet the criteria of the Self-Disclosure Policy. The Board rejected the respondent's request for a reduction in the amount of the penalty, explaining as follows:

---

[6] As discussed below, because we decline to apply the Self-Disclosure Policy, we do not reach this alternative argument.

> Harmon [the respondent] downplays one critically important aspect of the "spirit," as well as the terms, of the policy, which is to encourage settlements rather than allow a case to run its full course through expensive and time-consuming litigation. This important aspect of the policy would be undermined if the penalty reduction provisions of the policy were applied in full here. We have previously held that the settlement should not be undermined by an adjudication that would allow full credit for mitigating conduct properly considered only within the context of a settlement. *In re Spang & Company,* [6 E.A.D. 226, 248 (EAB 1995)] (a respondent's agreeing to perform supplemental environmental projects "represent[s] an essential part of the *quid pro quo* the Agency expects to receive for settling a case with a reduced penalty. This *quid pro quo* is obviously missing in this [case].").

Harmon, 7 E.A.D. at 46–47. Thus, the Region is correct in arguing that we have held that the Self-Disclosure Policy should not be applied in litigated penalty assessments.

More specifically, the Region is also correct in its argument on appeal that use of the Self-Disclosure Policy in this litigated case is inconsistent with the express terms of the Self-Disclosure Policy. As noted above, the Self-Disclosure Policy clearly states that it "does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties" and that it "is not intended for use in pleading, at hearing or at trial." Self-Disclosure Policy, 60 Fed. Reg. at 66,712. Thus, the Region's use of the Self-Disclosure Policy in drafting its complaint and as part of its evidence at trial was clearly improper and contrary to the policy's expressly stated intent.

This improper application of Agency policy necessarily undercuts the policy's effectiveness. We have noted that the proper use of an applicable penalty policy serves to promote the general policies of consistency and fairness in penalty assessments. *See,* e.g., *In re Employers Ins. of Wausau,* 6 E.A.D. 735, 760 (EAB 1997)("proof of adherence to the policy is some evidence of consistency and fairness in enforcement suggesting that, in that sense at least, the proposed penalty is an 'appropriate' one."). It is self-evident that an erroneous application of a policy in a context where it expressly was not intended to apply does not promote, but instead undercuts, the general policy favoring consistency. In addition, as noted in *Harmon* (and *Spang*), incentives for settlement are undermined

when a settlement policy is used in a contested litigation. *Harmon,* 7 E.A.D. at 47; *In re Spang & Co.,* 6 E.A.D. 226, 248 (EAB 1995).[7]

Bollman, however, argues that *Harmon* is distinguishable from the present case. Bollman argues as follows:

> Unlike the Respondent in *Harmon,* Bollman [] did not invoke the [Self-Disclosure] Policy in this litigation, EPA did. * * * Bollman [] did not spurn the potential advantages of using the [Self-Disclosure] Policy in settlement discussions, only to later invoke its "spirit" in expensive and time-consuming litigation. That's what *Harmon* did. In contrast, this case involves the opposite situation – EPA never offered to use the [Self-Disclosure] Policy in any pre-hearing context, but then pulled it out of its hat at the Hearing and injected it into the middle of this (unfortunately) adjudicated matter.
>
> Because of this unique context, this case is the exception that solidifies the rule. The Board should affirm the Initial Decision below, while simultaneously issuing a ringing affirmation of the wise principles stated in the *Harmon* opinion. Bollman [] has no quarrel with those principles. Companies responding to penalty assessments should not be encouraged to sit back in settlement discussions and ignore the potential benefits of the [Self-Disclosure] Policy in the hope that they can later raise the same policy in a hearing before an ALJ and capture a more favorable application than offered by EPA. However, in the rare (and one would hope, unique) case where EPA itself "opens the door" by using and relying upon the [Self-Disclosure] Policy in a litigated hearing, it makes no sense at all to penalize the respondent by overturning any resulting use of the policy by the ALJ.

---

[7] Bollman's arguments to the effect that the benefits of the Self-Disclosure Policy were not offered to it during settlement discussions do not serve as a basis for an exception to the principle stated in *Harmon* and *Spang*. The specific decision to enter into settlement discussions is properly a matter of prosecutorial discretion. It is not appropriate for the manner in which the Region exercises that discretion to become a subject of litigation. The Region has filed a motion seeking to strike a portion of Bollman's argument to the extent that it alleges what was, or was not, said during settlement discussions. *See* Complainant's Motion to Strike (July 29, 1998). As we have rejected Bollman's argument on other grounds, we need not address the Region's motion.

Bollman's Brief at 8–9.[8] Thus, simply stated, Bollman argues that because the Region used the Self-Disclosure Policy at the hearing, the Presiding Officer did not err by applying the Self-Disclosure Policy to guide her penalty assessment.

Although the express terms of the Self-Disclosure Policy state that it is not intended to be used in litigation, there nevertheless is considerable merit to Bollman's argument. Certainly, a presiding officer normally would be justified in relying upon unrebutted testimony proffered by a Region concerning application of Agency policy to the facts of the particular case, particularly where, as here, Mr. Yussen was introduced as the Region's EPCRA enforcement coordinator with considerable experience at developing proposed penalties for violations of EPCRA § 313, *see* Tr. at 76, and Mr. Yussen testified that the Self-Disclosure Policy "supersedes" the ERP as to adjustments for self-disclosure in this case. *Id.* at 199. Moreover, the Region's attorney also represented in the post-hearing brief that the Region's use of the Self-Disclosure Policy in pleading its case "did not fall outside of the legitimate boundaries of Agency discretion * * *." Complainant's Post-Hearing Brief at 8. We take this to mean that the Region believes that the Agency enjoys more discretion than the ERP on its face might suggest and that in exercising that discretion, even in the context of litigation, a Region may incorporate by reference the Self-Disclosure Policy. This strikes us as a dubious proposition. In any case, to sustain the Region's appeal, we would be required to find that it was clear error for the Presiding Officer to have relied upon the Region's own misreading, misapplication, and misrepresentation of the Self-Disclosure Policy. We do not believe that this finding would be justified, particularly where the Region was unwilling to admit in its post-hearing brief that its use of the Self-Disclosure Policy in this litigation was clear error.

We are, however, reluctant to perpetuate the Region's improper application of the Self-Disclosure Policy by adopting the Presiding Officer's penalty rationale, even though the Presiding Officer's reliance on the Region's own testimony and representations was not unreasonable. We

[8] We reject Bollman's characterization of our holding in *Harmon* to the extent that Bollman argues that "the Board agreed with Harmon that substantial penalty reductions were appropriate, and affirmed all of the ALJ's reductions." Bollman's Brief at 8. In *Harmon,* the complainant did not appeal the penalty reductions granted by the presiding officer and, therefore, the Board was not asked to affirm, or reverse, such reductions.

therefore decline to adopt the Presiding Officer's penalty rationale because the express terms of the Self-Disclosure Policy state that it should not be used in litigation.[9]

Nevertheless, we believe that the penalty of $0 assessed by the Presiding Officer for counts I through V is appropriate in the context of this case. We have been granted broad discretion to increase or decrease the amount of the penalty assessed by a presiding officer. 40 C.F.R. § 22.31(a). Here, general notions of fairness lead us in exercising our discretion to both sustain the Presiding Officer's assessment of a penalty of $0 for the violations alleged in counts I through V of the Complaint and to sustain the Presiding Officer's reduction of the penalty for counts VI and VII by 25% under the rubric of "other factors as justice may require." Although we do not believe that Bollman was denied due process as was found by the Presiding Officer,[10] nevertheless the Region's failure to disclose its use of the Self-Disclosure Policy and its misleading representations to the Presiding Officer were unfair and inappropriate, which if left unremedied may undermine public faith in the Agency's administrative process. Moreover, with respect to counts I through V, fairness dictates that, where, as here, a Region misapplies a penalty policy and perpetuates that misapplication throughout the proceeding below, and where a Presiding Officer understandably likewise misapplies the policy, the Region should not on appeal be permitted to undo an outcome of its own making.[11]

---

[9] Neither the Region's misrepresentation nor the Presiding Officer's penalty recommendation preclude us from increasing the amount of the penalty or applying a different methodology in the exercise of our reasonable discretion. *See Rapp v. U.S. Dept. of Treasury,* 52 F.3d 1510, 1516–17 (10th Cir. 1995) (upholding the determination by the Director of the Office of Thrift Supervision that OTS was not equitably estopped from enlarging the amount of penalties assessed against respondent).

[10] In order to show a violation of due process, the aggrieved party must show both inadequate notice and prejudice caused by the lack of notice. *See Rapp,* F2 F.3d at 1519–20 (holding that a change in theory of liability for an administrative penalty did not violate due process because the aggrieved party was not prejudiced as a result of the insufficient notice). Here, it is doubtful that Bollman suffered prejudice as a result of the Region's undisclosed, arbitrary use of an inapplicable policy to recommend a penalty in an amount lower than the Agency's applicable penalty policy would have recommended. Nevertheless, the Region's rationale for the proposed penalty reduction was central to this case and, therefore, the failure to disclose that rationale was unfair, even if there was no actual prejudice.

[11] We reject the Region's argument that the "justice" factor is reserved only "for instances where application of other factors yields a disproportionately high penalty or where the respondent is unfairly prejudiced." Region's Brief at 24. The justice factor grants

Continued

III. *CONCLUSION*

For the foregoing reasons, we hereby assess a penalty against Bollman for its seven admitted violations of EPCRA § 313 in the aggregate amount of $8,166. Bollman shall pay the full amount of the civil penalty within sixty (60) days of receipt of this final order, unless otherwise agreed by the parties. Payment shall be made by forwarding a cashier's check or certified check in the full amount payable to the Treasurer, United States of America at the following address:

EPA-Region III
P.O. Box 360515
Pittsburgh, PA 15251

So ordered.

"broad discretion to reduce the penalty *when the other adjustment factors prove insufficient or inappropriate to achieve justice* * * *." *Spang,* 6 E.A.D. at 249. We believe the unique circumstances of this case properly bring it within the scope of the "justice" factor, even though our primary concern here is harm to the administrative process rather than to the Respondent. A failure to make an adjustment to the penalty to account for that harm would be manifestly unjust.