IN RE DESSIE L. BRUMFIELD
d/b/a BRUMFIELD PROPERTIES, LLC

TSCA Appeal No. 13-04

FINAL DECISION AND ORDER

Decided September 25, 2014

Syllabus

U.S. Environmental Protection Agency Region 5 appeals from an Administrative Law Judge's initial decision in an enforcement matter arising under EPA's residential lead-based paint disclosure rule ("Disclosure Rule"), promulgated under the authority of section 1018 of the Residential Lead-Based Paint Hazard Reduction Act, 42 U.S.C. § 4852d, and sections 16(a) and 409 of the Toxic Substances Control Act, 15 U.S.C. §§ 2615(a), 2689. In that decision, the Administrative Law Judge ("ALJ") dismissed ten violations of the Disclosure Rule, codified at 40 C.F.R. part 745, in connection with two leases of residential housing owned by Ms. Dessie Brumfield, the respondent. The ALJ found Ms. Brumfield liable for twenty other violations (in connection with five other leases), but dismissed the ten violations based on her legal conclusion that a "contract to lease" within the meaning of the Disclosure Rule must be in writing and her finding that the Region had failed to produce sufficient evidence of a written contract to lease those two properties. The Region contends that the ALJ erred in limiting the Disclosure Rule to written leases and appeals to the Environmental Appeals Board ("Board") to correct that error of law and to find Ms. Brumfield liable for the ten dismissed violations.

Held: The residential lead-based paint disclosure rule is not limited to written lease contracts, but instead applies to all contracts to lease, whether informal or formal, oral or written. The ALJ erred in concluding otherwise and in dismissing the ten violations based on that erroneous conclusion.

Additionally, based on the Board's review of the administrative record, the Region established by a preponderance of the evidence that Ms. Brumfield entered into an agreement to lease the two properties associated with the ten dismissed violations, and failed to meet the requirements of the Disclosure Rule as alleged. Accordingly, the Board finds Ms. Brumfield liable for the ten violations that the ALJ dismissed.

Finally, the Board concludes that the Region derived the proposed penalty in accordance with the appropriate penalty policy. As such, the Board orders Ms. Brumfield to pay for a total civil penalty of $52,364, which includes the Region's proposed penalty of $6,460 for the ten violations at issue, in addition to the $45,904 imposed by the ALJ in connection with the twenty other violations that were not challenged on appeal.

Before Environmental Appeals Judges Leslye M. Fraser, Randolph L. Hill, and Catherine R. McCabe.

Opinion of the Board by Judge Hill:

I. *INTRODUCTION*

U.S. Environmental Protection Agency ("EPA") Region 5 ("Region") appeals from the Initial Decision that Administrative Law Judge M. Lisa Buschmann ("ALJ") issued on December 4, 2013, pursuant to section 1018 of the Residential Lead-Based Paint Hazard Reduction Act, 42 U.S.C. § 4852d, and sections 16(a) and 409 of the Toxic Substances Control Act, 15 U.S.C. §§ 2615(a), 2689. In that decision, the ALJ found Ms. Dessie L. Brumfield, d/b/a Brumfield Properties, LLC ("Ms. Brumfield") liable for twenty violations of the residential lead-based paint disclosure rule ("Disclosure Rule"), 40 C.F.R. part 745, in connection with five leases of residential housing that Ms. Brumfield owned. The ALJ also dismissed ten other violations (in connection with two other leases) based on her legal conclusion that a "contract to lease" within the meaning of the Disclosure Rule must be in writing and her finding that the Region failed to produce sufficient evidence of a written contract to lease the two other properties.[1] The Region contends that the ALJ erred in limiting the Disclosure Rule to written leases and appeals to the Environmental Appeals Board ("Board") to correct that error. For the reasons that follow, the Board agrees that the ALJ erred as a matter of law, finds Ms. Brumfield liable for the ten dismissed counts, and imposes a total penalty of $6,460 for those violations.

II. *STANDARD OF REVIEW*

The Board generally reviews appeals from an ALJ's initial decision *de novo*. *See* 40 C.F.R. § 22.30(f) (providing that, in an enforcement proceeding, "[the Board]" shall adopt, modify, or set aside the findings of fact and conclusions of law * * * contained in the decision or order being reviewed"); *see also* Administrative Procedure Act, 5 U.S.C. § 557(b) ("On appeal from or review of

[1] The ALJ also dismissed two additional counts for unrelated reasons, Initial Decision ("Init. Dec.") at 26-27, 29, which the Region does not appeal.

[an] initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.").

III. *PRINCIPAL FACTS*

In March 2009, the Region identified Ms. Brumfield as a target for inspection to ensure compliance with the Disclosure Rule. Init. Dec. at 5-6. Prior to inspection, the Region advised Ms. Brumfield that she would need to provide all lease documents for the past three years, as well as a list of properties she owned. *Id.* at 6. The Region conducted an inspection of Ms. Brumfield's documents in May 2009, and confirmed with her at that time that she had provided all the documents relating to the leases for buildings she owned that were built prior to 1978. *Id.* at 7-8. In July 2010, the Region filed a civil administrative complaint against Ms. Brumfield, alleging that she had entered into seven separate contracts to lease without providing the required certifications and disclosures in what amounted to thirty-two violations of the Disclosure Rule. Compl. (Enforcement Docket No. 1); Init. Dec. at 1. In responding to the Complaint, Ms. Brumfield supplied several additional documents that she apparently had located after the inspection. Answer (Enforcement Docket No. 3); Init. Dec. at 14 (Findings of Fact ("FOF") No. 60); Transcript of ALJ Hearing ("ALJ Tr.") at 262.

Although initially represented by counsel, Ms. Brumfield represented herself at an adjudicatory hearing before the ALJ in August 2012. As stated above, the ALJ found Ms. Brumfield liable for most of the alleged violations but dismissed ten violations that are now the subject of this appeal.

The ten dismissed violations arose from Ms. Brumfield's alleged failure to comply with five separate disclosure requirements for each of two leases. The first lease involved the rental of 2230 N. Teutonia Avenue, Milwaukee, Wisconsin, for the period of time including March 1, 2007, through sometime prior to May 15, 2008 ("Teutonia lease"),[2] and the second lease involved the rental of 4908 N. 40th Street, Milwaukee, Wisconsin, for the period of time including January 2007 through December 2008 ("40th Street lease").[3]

[2] The ALJ found Ms. Brumfield liable for a separate lease of the Teutonia property from May 15, 2008, to May 15, 2009.

[3] For reasons that are not clear, the Region identified the lease as being from January 1, 2008, through December 31, 2008, in the Complaint and subsequent documents, but submitted evidence that the 40th Street lease actually was in place as of

For each of these leases, the Region alleged that Ms. Brumfield failed to:

1) provide a Lead Warning Statement as required by 40 C.F.R. § 745.113(b)(1) (Counts 3 and 5);

2) provide an appropriate disclosure regarding the presence of lead in the property as specified in 40 C.F.R. § 745.113(b)(2) (Counts 10 and 12);

3) provide a list of available reports or statement that there are none, as required by 40 C.F.R. § 745.113(b)(4) (Counts 16 and 18);

4) provide the lessee's acknowledgment of receipt of the required information as required by 40 C.F.R. § 745.113(b)(3) (Counts 22 and 24); and

5) obtain certifications by lessor and lessee that requirements of the rule were met as required by 40 C.F.R. § 745.113(b)(6) (Counts 29 and 31).

The Region appeals from the dismissal of these ten violations. Ms. Brumfield has not entered an appearance in this appeal.

IV. *ANALYSIS*

The lead-based paint disclosure rule ("Disclosure Rule"), 40 C.F.R. part 745, subpart F, implements the Residential Lead-Based Paint Hazard Reduction Act of 1992, 42 U.S.C. §§ 4851-4856, and section 403 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2683. EPA, together with the U.S. Department of Housing and Urban Development ("HUD"), jointly promulgated the Disclosure Rule as part of a national strategy to address the widespread hazards of lead-based paint poisoning, particularly with respect to the exposure of children in their own homes. *See* 42 U.S.C. §§ 4851-51a, 4852d. The Disclosure Rule generally requires any person who leases housing constructed prior to 1978 ("target housing") to provide potential tenants with a lead hazard information pamphlet as well as a list of any reports of known lead-based paint hazards, and to make certain specified disclosure statements and certifications. *See* 40 C.F.R. §§ 745.100, .103, .113.

January 1, 2007, and continued through at least December 31, 2008. In any case, Ms. Brumfield has provided no evidence that she made the required disclosures.

In the discussion that follows, the Board first considers the primary issue raised on appeal – whether the Disclosure Rule is limited to written lease contracts. Because the Board concludes that the Disclosure Rule is not limited to written leases, the Board proceeds to evaluate Ms. Brumfield's liability for the violations that the ALJ dismissed, and then assesses an appropriate penalty.

A. *The Lead-Based Paint Disclosure Rule is Not Limited to Written Lease Contracts*

At the outset, the Board observes that no party raised or argued before the ALJ the legal question raised on appeal. Rather, the ALJ reached her conclusion on her own in one sentence in her Initial Decision, presumably based on her plain reading of the Disclosure Rule. *See* Init. Dec. at 21 (quoting the rule which provides that "[e]ach contract to lease target housing shall include, as an attachment or within the contract" the required statements and certifications); *see also* 40 C.F.R. § 745.113(b). The ALJ determined that, because the required disclosure statements cannot be included as "an attachment" or "within" an oral contract, the rule applies only to written contracts to lease. Init. Dec. at 21. On appeal, the Region argues that the Disclosure Rule is not limited to written leases, citing the statute, the implementing regulations, and the preamble to the final rule. Appeal Br. at 1, 5-18. The Board concludes that the Disclosure Rule is not limited to written lease contracts, but instead applies to all contracts to lease, whether informal or formal, oral or written.

The statute authorizing the Disclosure Rule establishes that lessors must comply with the disclosure requirements "before the * * * lessee is obligated under *any* contract to purchase or lease [target] housing." 42 U.S.C. § 4852d(a)(1) (emphasis added). The statute does not limit the applicability of the Disclosure Rule to written contracts to lease. Consistent with the statute, the implementing regulation applies to "[*e*]*ach* contract to lease target housing." 40 C.F.R. § 745.113(b) (emphasis added). Other provisions in the rule similarly do not restrict applicability to written contracts to lease, and instead clearly state that the rule applies to "all transactions." *See id.* § 745.100 (referring to "the sale or lease of target housing" and requiring disclosure before a lessee is obligated under "*a* contract.") (emphasis added); *id.* § 745.101 (providing that the rule "[*a*]*pplies to all transactions* to sell or lease target housing," and specifying four exceptions, none of which are oral contracts) (emphasis added). Thus, nothing in the plain language of the rule clearly limits the disclosure requirement to written contracts alone.

The Disclosure Rule, however, also provides that the contract "shall include, as an attachment or within the contract," the required disclosures and

certifications. *Id.* § 745.113(b). That language alone, with its use of the term "attachment" and the phrase "within the contract" arguably could be read to require a written contract. The preamble to the rule, however, clarifies that the rule applies to both written and oral leases.

When EPA and HUD originally proposed the rule, they limited the disclosure requirements to written contracts. *See* Lead; Requirements for Disclosure of Known Lead-Based Paint and/or Lead-Based Paint Hazards in Housing, 61 Fed. Reg. 9064, 9068 (Mar. 6, 1996); *see also* 59 Fed. Reg. 54,984 (proposed Nov. 2, 1994). In the final rule, however, after taking into account public comments, the agencies specifically rejected limiting the rule to written contracts. *See* 61 Fed. Reg. at 9,068. EPA and HUD explained that, despite the inherent difficulty in administering and enforcing the disclosure requirements where leases are oral or informal, "*EPA and HUD have removed any implied exclusion for oral leases*." *Id.* (emphasis added). The preamble explained that "although the absence of a written lease provides challenges for certain Federal enforcement and compliance monitoring approaches, EPA and HUD * * * believe that * * * other evidence may exist, for example, to demonstrate that a leasing agreement exists between two parties." *Id.* The preamble further explains that "an explicit exclusion for oral leasing transactions could create incentives for lessors to avoid written leases," which could have the unintended consequence of depriving lessees of information on lead-based paint poisoning prevention, as well as many other protections afforded by written leases. *Id.* Thus, the preamble to the final rule makes it clear that the agencies did not intend the final Disclosure Rule to apply only to written leases.

Given the language of the statute, the implementing regulations, and the stated intent in the preamble to the rule, the Board concludes that a "contract to lease," as meant by the Disclosure Rule, is not limited to a written instrument. Rather, the Board concludes that the Disclosure Rule applies to all contracts to lease, whether informal or formal, oral or written. The ALJ erred in concluding otherwise and in subsequently dismissing the ten violations based on that erroneous conclusion.

B. *Liability*

Having concluded that the dismissal of the ten counts was in error, the Board now reviews the record before the ALJ and evaluates Ms. Brumfield's

liability for these ten violations.[4] In order to prove a violation of the Disclosure Rule, the Region must establish the following elements of the violation: (1) the respondent must be a "lessor," as defined in 40 C.F.R. § 745.103, who (2) entered into a "contract to lease" (3) "target housing," as defined in 40 C.F.R. § 745.103, and (4) failed to make one of the required disclosures, statements, or certifications. *See* 40 C.F.R. §§ 745.113(b).

The record clearly establishes several of these elements of liability with respect to both properties. Ms. Brumfield was indisputably the owner of the two properties in question and offered them for rent. *See* Init. Dec. at 8-9, 20 (FOF Nos. 20-24); Complainant's Exhibit ("EPA Ex.") 11, att. 2; 40 C.F.R. § 745.103 (defining "lessor"). Additionally, the two relevant properties were built prior to 1978, were not otherwise excepted from the regulations and, thus, fall into the category of "target housing" under the rule. *See* Init. Dec. at 8-9, 20 (FOF Nos. 19, 23-25); EPA Ex. 11, att. 2; 40 C.F.R. § 745.103 (defining "target housing").

When asked at inspection, Ms. Brumfield did not provide a written lease to the Region for either of these properties. Instead, Ms. Brumfield provided "Department of Revenue Rent Certificates," for each property. EPA Ex. No. 7 at 61-66, 89-90; ALJ Tr. at 174-176. These rent certificates are form documents for the State of Wisconsin, and document, presumably for tax purposes, the rent that Ms. Brumfield received. The certificates were not completed for the purpose of complying with the Disclosure Rule and they are not contracts to lease. However, the certificates establish that Ms. Brumfield accepted rental income from a tenant for the lease of the Teutonia property from March 1, 2007 through at least December 31, 2008, and that Ms. Brumfield accepted rental income from a tenant for the lease of the 40th Street property from at least January 1, 2007 through at least December 31, 2008. *See* EPA Ex. at 65-66, 89-90. Ms. Brumfield provided these rent certificates to the EPA in response to an inspection and request for all leases.[5] ALJ Tr. at 174-76. From this evidence, the Board concludes that it is more likely than not that Ms. Brumfield "entered into a lease

[4] Because the record was complete and the case had already been submitted for decision when the ALJ erroneously dismissed the violations, further proceedings are unnecessary and the Board will exercise its discretion to review the record *de novo.*

[5] With respect to the Teutonia lease, the Region also provided a partial lead disclosure statement form. This document further supports the finding that a contract to lease existed for the Teutonia property as of March 1, 2007. As discussed below, however, this document is insufficient to establish that Ms. Brumfield made the required disclosure.

agreement" as meant by the Disclosure Rule for each of these properties in connection with the rents Ms. Brumfield certified to the State of Wisconsin that she received. Although certain types of leases are excluded from the Disclosure Rule (e.g., short term leases of less than 100 days, leases of housing certified to be lead free, and lease renewals where the lessor previously provided proper disclosures), the evidence in the record does not establish that any of these exclusions apply to the leases in this appeal. *See* 40 C.F.R. § 745.101. Thus, the Region established the first three elements of liability as to each of the two leases at issue in this appeal – namely, that Ms. Brumfield, a lessor, entered into an agreement to lease target housing as alleged.

The final element of liability for each of the ten violations is the failure to make the required disclosures and certifications. Specifically, the Disclosure Rule required Ms. Brumfield to provide the following for every lease:

> (1) A Lead Warning Statement with the following language:
>
> Housing built before 1978 may contain lead based paint. Lead from paint, paint chips, and dust can pose health hazards if not managed properly. Lead exposure is especially harmful to young children and pregnant women. Before renting pre-1978 housing, lessors must disclose the presence of lead-based paint and/or lead-based paint hazards in the dwelling. Lessees must also receive a federally approved pamphlet on lead poisoning prevention.
>
> (2) A statement by the lessor disclosing the presence of known lead-based paint and/or lead-based paint hazards in the target housing being leased or indicating no knowledge of the presence of lead-based paint and/or lead-based paint hazards. The lessor shall also disclose any additional information available concerning the known lead-based paint and/or lead-based paint hazards, such as the basis for the determination that lead-based paint and/or lead-based paint hazards exist, the location of the lead-based paint and/or lead-based paint hazards, and the condition of the painted surfaces.
>
> (3) A list of any records or reports available to the lessor pertaining to lead-based paint and/or lead-based paint hazards in the housing that have been provided to the lessee. If no such records or reports are available, the lessor shall so indicate.
>
> (4) A statement by the lessee affirming receipt of the information set out in paragraphs (b)(2) and (b)(3) of this section and the lead hazard information pamphlet required under 15 U.S.C. 2696.

* * * *

> (6) The signatures of the lessors, agents, and lessees, certifying to the accuracy of their statements, to the best of their knowledge, along with the dates of signature.

Id. § 745.113(b).[6] The ten counts that the ALJ dismissed allege that Ms. Brumfield failed to meet each of the above five requirements with respect to each of the two leases.

First, with respect to the 40th Street lease, Ms. Brumfield did not produce any record or documentation to demonstrate that she provided the lead warning statement or made any of the above disclosures, statements or certifications. Despite the requirement to maintain records, Ms. Brumfield was unable to provide any proof that she had complied with the rule. The only documentation Ms. Brumfield provided with respect to this lease was the rent certificate discussed above; she did not provide a Lead Disclosure Form or otherwise demonstrate compliance with the Disclosure Rule. EPA Ex. 7, at 90; ALJ Tr. at 174. Based on the evidence in the record, the Board concludes that it is more likely than not that Ms. Brumfield failed to meet the requirements of 40 C.F.R. §§ 745.113(b)(1), (2), (3), (4), and (6), with respect to the 40th Street lease. As such, the Board concludes that Ms. Brumfield is liable for Counts 5, 12, 18, 24, and 31 of the Complaint.

With respect to the Teutonia lease, Ms. Brumfield did not produce any documentation of disclosure when EPA inspectors requested the documentation. ALJ Tr. at 174-76; EPA Ex. 7 (inspection report & attachments). When Ms. Brumfield responded to the Complaint, however, she did include a partial lead-based paint disclosure form that appears to be related to the Teutonia lease during the relevant time-frame. *See* Answer (Enforcement Docket #3) at 27; Init. Dec. at 14 (FOF No. 60). The partial document begins with an incomplete sentence regarding "lead-based paint hazards in the housing," has the initials "DL" written beside two statements acknowledging receipt of "information listed above." Answer at 27. The "information listed above," however, is absent. *Id.* A signature on the bottom of the page appears to be the name of the same tenant listed on the Rent Certificate for the Teutonia lease and is dated March 1, 2007. *Id.* The document does not, however, identify the property to which it is

[6] Ms. Brumfield was also required to retain, for no less than three years from the commencement of the leasing period, a record demonstrating that the proper disclosures were made. *See* 40 C.F.R. § 745.113(c). The Region could have but did not allege that Ms. Brumfield violated this record-keeping requirement.

associated, contain the required lead-warning statement, the required statement regarding the presence of lead or the availability of any reports, and does not contain Ms. Brumfield's signature as required. *Id.* The Board previously has held that compliance with the Disclosure Rule requires a "verbatim recitation of the precise words" of the Lead Warning Statement set forth in the regulation. *See In re Vidiksis*, 14 E.A.D. 333, 342 (EAB 2009). In so holding, the Board rejected the idea that substantial compliance with the rule was sufficient. *Id.* At most, the partial document submitted by Ms. Brumfield contains a possible acknowledgment of the receipt of information, but there is no indication of whether the information received met the requirements of the rule. Based on the evidence in the record, the Board concludes that Ms. Brumfield more likely than not failed to meet the requirements of 40 C.F.R. §§ 745.113(b) (1),(2), (3), (4), and (6), with respect to the Teutonia lease. As such, the Board concludes Ms. Brumfield is liable for Counts 3, 10, 16, 22, and 29 of the Complaint.

C. *Penalty*

Civil penalties for violations of the lead-based paint Disclosure Rule are authorized under section 1018 of the Residential Lead-Based Paint Hazard Reduction Act, 42 U.S.C. § 4852d, and sections 16 and 409 of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2615, 2689, and 40 C.F.R. § 745.118(f). In assessing a penalty, the statute requires the enforcing agency to take into account the following factors: "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 doing business, any history of prior such violations, the degree of culpability, and such other matters as justice may require." TSCA § 16, 15 U.S.C. § 2615(a)(2)(B). Under the Consolidated Rules of Practice, 40 C.F.R. part 22, the Board must "determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act." 40 C.F.R. § 22.27(b). The Board often looks to the EPA's penalty policies for guidance on assessing the statutory factors. *See In re Smith Farm Enters., LLC*, 15 E.A.D. 222, 282 (EAB 2011), *see also In re Ram, Inc.*, 14 E.A.D. 357, 367 n.10 (EAB 2009) (explaining that EPA's penalty policies provide guidance in determining an appropriate penalty assessment by providing a framework for translating statutory factors into numerical terms in a uniform manner).[7]

[7] The Board recognizes, of course, that EPA's penalty policies do not bind the Board. Such guidance has not been subjected to the rulemaking procedures of the Administrative Procedure Act and, thus, lacks the force of law. *See Ram*, 14 E.A.D. at 368 n.10 (citing *In re Allegheny Power Serv. Corp.*, 9 E.A.D. 636, 658-59 (EAB 2001),

The relevant penalty guidance document in this matter is the Section 1018 – Disclosure Rule Enforcement Response Policy ("Penalty Policy") issued by EPA's Office of Civil Enforcement in December 2007. The Region relied on this policy in proposing the penalty for the Ms. Brumfield.[8] *See* Compl. Post-Hearing Br. (Enforcement Docket No. 37) at 38. Under the Penalty Policy, a penalty is calculated based on a gravity component and a set of adjustment factors. Penalty Policy at 11. Importantly, the penalty policy provides that "each requirement of the Disclosure Rule is a separate and distinct requirement." *Id.* at 12. Thus, a separate penalty amount is calculated for each violation of the rule, and for each lease transaction that occurs.

The gravity-based component of the penalty reflects the overall seriousness of the violation and is determined by a matrix according to the "nature," "circumstances," and "extent" of the violation. *See* Penalty Policy at 11, 27-30 (Appendix B). Each specific violation is assigned a "circumstance level." *Id.* The "circumstance" criterion reflects the "probability of harm resulting from a particular type of violation," with level 1 representing a "high probability of impairing [a lessee's] ability to assess the information required to be disclosed," and level 6 representing "a low probability of impairing [a lessee's] ability to assess the information required to be disclosed." *Id.* at 12. So, for example, the failure to include a Lead Warning Statement as required by 40 C.F.R. § 745.113(b)(1) is a level 2 violation under the Penalty Policy. *Id.*

The "extent" criterion is used to consider the "degree, range, or scope of the violation's potential for harm," to human health and the environment. *Id.* Under the Penalty Policy, the extent factor is based on the age of any children living in the target housing and whether a pregnant woman lives in the target housing. *Id.* For example, in calculating the proposed penalty for each of the violations in this appeal, the Region used the extent of "minor" because the Region had no evidence that the residents were either pregnant women or children with respect to either lease at issue." *See* Compl. Post-Hearing Br. at 51-57.[9]

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aff'd, No. 6:01-cv-241 (S.D. W.Va. Apr. 5, 2002); *In re Emp'rs Ins. of Wausau*, 6 E.A.D. 735, 758 (EAB 1997)).

[8] Specifically, in calculating the proposed penalty, the Region relied on the penalty matrix contained within the 2007 Penalty Policy that applies to violations occurring after March 15, 2004. Penalty Policy at 30.

[9] According to the Penalty Policy, the Region may assign the mid-range, or "significant," level for the extent (rather than the "minor" level) where "the age of the

The gravity-based penalty amount for each violation is found where the "circumstance" and "extent" levels intersect on the matrix provided in the Penalty Policy. Penalty Policy at 30. The Region proposed the same penalty for each of the leases at issue. The proposed gravity-based portion of the penalty for each violation is summarized below:

Violation Description	Applicable Regulatory Provision	Circumstance Level for Provision Violated	Extent of Harm Factor Proposed	Penalty Policy Matrix Amount per Violation
Failure to include a Lead Warning Statement (Counts 3, 5)	40 C.F.R. § 745.113(b)(1)	Level 2	Minor	$1,550/count $3,100 total
Failure to include required statement regarding presence of lead (Counts 10, 12)	40 C.F.R. § 745.113(b)(2)	Level 3	Minor	$770/count $1540 total
Failure to include list of available reports or state that there are none (Counts 16, 18)	40 C.F.R. § 745.113(b)(3)	Level 5	Minor	$260/count $520 total
Failure to include an acknowledgment by Lessee of receipt of required information (Counts 22, 24)	40 C.F.R. § 745.113(b)(4)	Level 4	Minor	$520/count $1040 total

youngest individual is not known." Penalty Policy at 13. The Board does not, however, question the Region's proposal to apply a "minor" extent factor here. The ALJ also used the Region's proposed circumstances levels and extent of harm for similar violations for which she found Ms. Brumfield liable.

Failure to provide Lessor's and Lessee's dated signature certifying that requirements of rule were met (Counts 29, 31)	40 C.F.R. § 745.113(b)(6)	Level 6	Minor	$130/count $260 total
Total Penalty				**$3,230/lease $6,460 total**

The Board concludes that the Region derived the proposed gravity-based penalty amount in accordance with the Penalty Policy.

Under the Penalty Policy, the gravity-based penalty may be modified by "adjustment factors" such as ability to pay or continue in business, history of prior violations, degree of culpability, and "such other factors as justice may require." Penalty Policy at 17.

In considering the adjustment factors in this case, the Board notes that the Region proposed no adjustment (either up or down) to the gravity-based penalty for any of the violations alleged in the Complaint. *See* Compl. Post-Hearing Br. at 87-90. In her decision, the ALJ generally did not adjust the gravity-based penalty for any of the violations for which she found Ms. Brumfield liable.[10] In weighing the adjustment factors, the ALJ found no history of prior violations and also concluded that Ms. Brumfield had the "ability to pay the penalty and continue her business of leasing residential properties." Init. Dec. at 44-46.

With respect to culpability, the ALJ found that Ms. Brumfield's actions were "best characterized as negligent." *Id.* at 46. The ALJ then went on to discuss the specific factors of culpability outlined in the Penalty Policy, including Ms. Brumfield's degree of control over the events constituting the violations, her actual knowledge of the presence of lead-based paint or its hazards in the leased

[10] The ALJ did reduce the gravity-based penalty assessed with respect to the violations associated with one of the leases for a specific property that the ALJ determined had a reduced risk of exposure to lead. Init. Dec. at 12 (FOF No. 50), 41-42 (addressing counts related to the property on 2428 W. Brown St.); *see also* Penalty Policy at 21. That basis for reducing the gravity-based penalty is not relevant to the properties at issue in this appeal, however.

housing, her level of sophistication in dealing with the compliance issue, and her knowledge of the legal requirements. *Id.* The ALJ ultimately concluded that, even though "there [were] sound reasons for increasing the penalty" based on Ms. Brumfield's culpability, "on balance" the facts did not warrant an increase in the gravity-based penalty. *Id.* The ALJ's determination of culpability turned, in part, on the ALJ's evaluation of Ms. Brumfield's testimony at the hearing and her consideration of the entire record below.[11] The Board sees no reason to disturb the ALJ's assessment of Ms. Brumfield's culpability, particularly given that the Region has not sought an upward adjustment for culpability.

Having thoroughly reviewed the record and the Penalty Policy, the Board concludes that it will not adjust the gravity-based penalty either up or down for any of the violations in this appeal. The Board concludes the Region's proposed penalty of $6,460 is appropriate for the violations alleged.

V. *CONCLUSION AND ORDER*

For all of the reasons above, the Board concludes that the ALJ erred as a matter of law when she dismissed ten counts of violations based her determination that a "contract to lease" within the meaning of the Disclosure Rule is required to be in writing. Pursuant to TSCA section 16(A), 15 U.S.C. § 2615(a), and the Residential Lead-Based Paint Hazard Reduction Act section 1018, 42 U.S.C. § 4852d, the Board finds Ms. Brumfield liable for the ten violations, as described above, and imposes a penalty of $6,460 for these violations. This penalty is imposed *in addition* to the $45,904 penalty that the ALJ imposed in the Initial Decision, which was not challenged on appeal.

Accordingly, Ms. Brumfield must pay a total civil penalty of $52,364. Payment of the entire civil penalty amount is due within thirty days of service of this Final Decision and Order, unless otherwise agreed to by the Region. Payment may be by certified or cashier's check payable to the Treasurer, United States of America, and forwarded to:

[11] Although the Board reviews findings of fact *de novo*, the Board "generally defers to an ALJ's factual findings when those findings rely on witness testimony and when the credibility of the witnesses is a factor in the ALJ's decisionmaking." *Smith Farm*, 15 E.A.D. at 229, 269; *cf. In re Stevenson*, 16 E.A.D. 151, 158-59 (EAB 2013) (recognizing the role of witness demeanor in evaluating culpability).

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A transmittal letter identifying the case name and the EPA docket number, plus Ms. Brumfield's full name and address, must accompany payment. 40 C.F.R. § 22.31(c). Ms. Brumfield shall serve copies of the check or other instrument of payment on the Regional Hearing Clerk and on the Region. If appropriate, the Region may modify the above-described payment instructions to allow for alternative methods of payment, including electronic payment options. Failure to pay the penalty within the prescribed time may result in assessment of interest on the civil penalty. *See* 31 U.S.C. § 3717; 40 C.F.R. § 22.31(c).

So ordered.