

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

In re:)
))
Hagerstown Aircraft Services, Inc.)
))
Docket No.: RCRA-03-2011-0112)
_____))

RCRA (3008) Appeal No. 01

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SUPPLEMENTAL BRIEF OF
HAGERSTOWN AIRCRAFT SERVICES, INC.

Comes now, Hagerstown Aircraft Services, Inc., by and through its attorneys Andrew F. Wilkinson, Esq. and DIVELBISS & WILKINSON and files this supplemental brief pursuant to the Order Directing Supplemental Briefing dated July 24, 2014. In that Order, the Environmental Appeals Judge directed the parties to address two (2) issues indicated in the Order.

FACTS

1. Hagerstown Aircraft Services, Inc. (*Hagerstown*) is a Maryland corporation previously engaged in the repair and maintenance of private aircraft at the Washington County Regional Airport in Washington County, Maryland.
2. On March 5, 2013, Tracey Potter, the majority and primary shareholder, president, and managing operator of the company died as a result of a heart attack.
3. As a result of his death, Kimberly Potter, his wife, was left to attempt to run the company. Previously, Mrs. Potter had little or no involvement in the operation of the

company. Though she had previously worked in the insurance industry, she and Mr. Potter had three (3) children as a result of the marriage and Mrs. Potter had become, for many years, a stay-at-home mom.

4. After Mr. Potter's death, Mrs. Potter learned that Mr. Potter had been having an extra-marital affair during the marriage. In addition, she learned that the company had significant debt issues including, but not limited to, significant sums owed on federal, state, and local taxes as well as rent to the County government. It is believed that much of the debt problems that the company faced was a result of Mr. Potter's inappropriate use of company money to fund his affair.

5. Though not exhaustive, the following debts are indicated on the books of the company:

Overdue Federal Payroll Tax	292,250
IRS Penalty	15,200
IRS Interest	10,000
Maryland Withholding Tax	18,600
Pennsylvania Withholding Tax	13,600
West Virginia Withholding Tax	1,500
401K Withholding	3,300
Current Sales Tax	52,900
Overdue Sales Tax	52,300
Rent due to County	40,000
Outstanding Loans	479,000
Loan to Kim Potter	80,000
Other Accounts Payable	150,000
Credit Cards	41,500
Total	1,250,150

6. The primary asset of the company is land and a building for which the company is contracting to sell based on appraised value. After payment of capital gains tax, the balance from the sale will be approximately \$444,600, less closing costs.

7. In addition, the company expects to sell remaining assets (tools, lifts, painting equipment) in the near future with proceeds amounting to approximately \$50,000.

8. Cash on hand is less than \$30,000.

9. As a result of the debt against the company and given that Mrs. Potter is not interested in attempting to resurrect a company that her late husband used to fund an extra-marital affair, the company is now not operating, employees have been terminated, and sale of all assets is pending.

A. In re Willie P. Burrell and the totality of the circumstances.

In the Order dated July 24, 2014, the Appeals Judge asked how the totality of the circumstances should be considered when the primary witness is deceased. As indicated in *In re Willie P. Burrell*, TSCA Appeal No. 11-05 (EAM Aug. 21, 2012), the test for the Board involves:

[W]hether the party challenging the default order violated procedural requirements; whether the particular procedural violation constitutes proper grounds for a default order; and whether the party challenging the default order has demonstrated a valid excuse or justification for noncompliance with a procedural requirement.

In re Willie P. Burrell, at 11. Importantly, inability to pay is not a valid excuse or defense against initial liability. *Id.* at 20. Inability to pay is only a mitigating factor in the consideration of the amount of the penalty. *Id.*

As a threshold matter, Hagerstown cannot claim that a procedural requirement was not violated. In addition, that Tracey Potter is dead does not seem to offer Hagerstown any safe harbor in the storm. From *In re Willie P. Burrell*, it is clear that the burden is on

Hagerstown to prove justification for noncompliance. Without the primary witness, Hagerstown admits that it cannot meet its burden.

And yet, the presentation of Hagerstown's case to date, through other counsel, has not been about whether there was or was not a procedural violation. Rather, the presentation has been a request for the Appeals Board to recognize that since Mr. Potter's death, the company, through Mrs. Potter's efforts, has acted responsibly in fixing any EPA concerns, the penalty notwithstanding. To the degree that the Appeals Board has the ability to take into consideration the history that got Mrs. Potter to this point, Hagerstown requests that the Board do so and consider a penalty less than \$64,000.

B. Evidence that Hagerstown cannot pay the penalty.

In the Order, the Appeals Judge asked two (2) related questions:

1. Why did Hagerstown fail to present evidence to the RJO of inability to pay?
2. What evidence does Hagerstown have to show an inability to pay?

On the first question, the undersigned counsel must answer honestly that he does not know why Hagerstown would have failed to present evidence to the RJO of an inability to pay at the RJO stage of the proceedings. It may be that Hagerstown's counsel at the time recognized that inability to pay was not a valid defense to the procedural violation and decided not to raise the issue before the RJO. From the pleadings, it appears that Hagerstown was, at that time, seeking to have a separate discussion with EPA counsel concerning a resolution at a penalty figure less than \$64,000 that would have had a realistic opportunity to be paid. It is believed that Hagerstown was trying to stay in business and that a lesser penalty could have assisted in Hagerstown remaining a going concern. Hagerstown