

EAB Overturns ALJ's Decision to Depart From EPA Penalty Policy

The United States Environmental Protection Agency (EPA) Environmental Appeals Board (EAB) has overturned an Administrative Law Judge's (ALJ) civil penalty determination in which the ALJ had determined that the EPA Penalty Policy was inappropriate under the circumstances. In so doing, the EAB noted that the Penalty Policy is not mandatory, but also determined that the ALJ's reasons for departing from the Penalty Policy were not compelling, and, thus, the EAB applied the Penalty Policy and replaced the ALJ's penalty assessment with its own.

M.A. Bruder and Sons, Inc. (Bruder) owned and operated a paint manufacturing facility, which utilized solvents such as xylene, ethylbenzene, toluene, mineral spirits and naphtha. The used solvents, which were classified as hazardous wastes, were stored on-site in an accumulation tank. Such storage usually requires a permit or interim status under the federal Resource Conservation and Recovery Act (RCRA); however, an exemption allows such storage for up to 90 days, provided that the owner or operator of the facility installs air emission control equipment on the storage container. Bruder was presumably storing the waste under the aegis of this exemption, but failed to install a pressure relief valve on the storage tank, which rendered Bruder ineligible for the exemption. Thus, Bruder was operating its facility in violation of RCRA.

After discovering Bruder's violation during an inspection, the EPA notified Bruder that it was in violation of RCRA, after which Bruder installed the valve, which had been previously purchased but not installed. EPA nevertheless brought an administrative enforcement action against Bruder, seeking a civil penalty of \$64,900 under the guidelines of the EPA Penalty Policy. The Penalty Policy provides a matrix-based format by which a violation's "potential for

harm” and “extent of deviation” from legal requirements are each classified as “major,” “moderate,” or “minor,” and a penalty range is assigned to each combination, with more violations corresponding to higher penalties. For example, a violation that has a minor potential for harm but involved a major deviation, or “minor-major,” would give rise to a lower penalty than one that is “major-major,” (i.e., major in both respects). EPA characterized Bruder’s violation as that of a hazardous waste treatment, storage, or disposal facility (TSDF) operating without a permit. On this basis, EPA determined that the violation was “minor-major,” and derived its proposed \$64,900 total by requesting a \$350 penalty for each of the 179 days of violation, with a 10% increase for inflation, and a 10% reduction for “good faith.”

The administrative law judge (ALJ) in charge of the case observed that EPA’s application of the Penalty Policy was “technically accurate,” but thought that EPA’s penalty proposal overstated the true gravity of the violation. The ALJ noted that, given the exemption, Bruder’s actual violation was merely that of a hazardous waste generator failing to install a pressure relief valve, rather than a TSDF operating without a permit, as EPA had characterized it. In the ALJ’s opinion, this mischaracterization resulted in a penalty that was “myopic” and “grossly disproportionate” to the actual violation, and, therefore, the ALJ decided that he would not use the Penalty Policy to determine Bruder’s penalty. To determine the penalty, the ALJ instead turned to the statutory criteria of “seriousness” and “good faith,” and determined that the violation’s seriousness was “manifestly minimal” and that Bruder’s cooperation with EPA showed good faith. Under these criteria, the ALJ imposed a total penalty of \$8,950 against Bruder, representing a penalty of \$50 per day of violation.

EPA appealed the ALJ’s decision to the Environmental Appeals Board (EAB), arguing that the ALJ erred both by departing from the Penalty Policy and in his application of the

statutory criteria. Bruder argued in support of the ALJ's determination, claiming that the ALJ had properly followed the statutory criteria. Bruder also alleged that the departure from the Penalty Policy was not grounds for reversal, based on the "well-established principle that a penalty policy lacks the force of law and is, therefore, not binding." Additionally, Bruder argued that ALJ decisions are entitled to deference when being reviewed by the EAB.

DEPARTURE FROM THE PENALTY POLICY

The EAB began its review of the ALJ's decision by noting the regulation governing civil penalties, which provides that an ALJ must: (1) follow the statutory penalty criteria; (2) "consider" any other penalty guidelines that have been issued; (3) explain, in detail, the application of the statutory penalty criteria; and (4) if the penalty assessed is different from the one proposed by EPA, explain why he or she departed from EPA's proposal. The EAB observed that it had interpreted this regulation in past decisions to mean that an ALJ must consider penalty policies issued by EPA, but "is nonetheless free not to apply them to the case at hand."

DEFERENCE TO ALJ DECISIONS

The EAB explained that while it can review an ALJ's penalty determination *de novo*, or, without any deference to that decision, and has the authority to change the penalty to be assessed, it "will generally not substitute [its] judgment for that of an ALJ absent a showing that the ALJ committed clear error or abused his or her discretion in assessing a penalty." The EAB noted, however, that "when a penalty deviates substantially from the [EPA's] penalty guidelines, closer scrutiny of the [ALJ's] rationale may be warranted." In such circumstances, the EAB will defer to the ALJ's decision only if his or her reasons for departing from the penalty policy are "compelling;" otherwise, the EAB will review the decision *de novo*.

The EAB observed that the ALJ's rationale for departure from the Penalty Policy was that EPA's application of the policy was technically correct, but unfair under the circumstances. As explained above, EPA's penalty determination was based on the characterization of the violation as operating a TSDF without a permit. The EAB agreed with the ALJ that EPA's characterization of Bruder's violation was "flawed" because it did "not take into account the particular circumstances of the case." More specifically, "but for the failure of the [timely] installation of the valve,...[Bruder] would have continued to be exempt from the permit requirements entirely." The EAB also noted that EPA itself had conceded that Bruder was not "really" operating a TSDF, but instead, was "a generator that failed to comply in only one limited respect with the requirements necessary to qualify for the generator exemption." Because the violation alleged by EPA was incorrect, the EAB concluded that EPA's application of the Policy was *not* technically correct. And because the ALJ was wrong on this point, his reasons for departing from the Penalty Policy were not "compelling." Therefore, the EAB would review the penalty amount *de novo* and make its own penalty determination.

THE EAB'S PENALTY DETERMINATION

While the EAB agreed with the ALJ that EPA's proposed penalty was inappropriate, it nonetheless determined that "the Penalty Policy can be applied in a way that would ensure an appropriate penalty," and, thus, it would apply the Policy. It also noted that the Policy was intended to reflect the statutory penalty criteria set forth in RCRA.

The EAB agreed with EPA and the ALJ that the "potential for harm," the first factor under the Penalty Policy, was "minor," and noted that the second factor, the extent of deviation from RCRA's requirements, "depends on how the violation is characterized." The Board reiterated that it considered the violation to be that of a generator who failed to comply with one

of several requirements for an exemption, rather than that of a TSDF operating without a permit. On the basis of this violation, the EAB determined that the extent of Bruder's deviation was also "minor," resulting in a classification of "minor/minor," with a corresponding range of a \$100-\$499 single penalty. The EAB decided to select the mid-point in the range, \$300.

Next, the EAB considered the Penalty Policy's option of including a multi-day component, which adds a penalty amount for each day of violation. Depending on the classification of the violation, multi-day penalties are mandatory, presumed, or discretionary. For a minor/minor violation such as Bruder's, they are discretionary. The Board determined that it would apply a \$100 per day penalty, resulting in a total base penalty of \$18,200. The Penalty Policy also allows for additional penalties reflecting the violator's economic benefit from noncompliance. However, EPA had declined to include such penalties in its proposal because it had determined that Bruder's economic benefit was minimal. The EAB agreed, and determined that it would not assess such penalties. As required by statute, the EAB then adjusted the penalty for inflation, arriving at a total of \$19,455.80.

Lastly, the EAB turned to the Penalty Policy's "adjustment factors," which include: good faith efforts to comply; degree of willfulness; history of noncompliance; ability to pay; environmental projects; and other "unique" factors. The EAB agreed with EPA that Bruder's situation warranted a 10% decrease for good faith. Thus, the EAB assessed a final penalty of \$17,510.22 against Bruder.

M.A. Bruder & Sons, Inc., RCRA (3008) Appeal No. 01-04 (Env. Appeals Bd. July 10, 2002).

H. Kirk Meadows