

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

LAWRENCE J. MCKINLEY)	
)	DOCKET NO.: MT-2009-1
Appellant,)	
)	
-vs-)	
)	
THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MONTANA,)	ORDER and OPPORTUNITY FOR JUDICIAL REVIEW
)	
Respondent.)	

STATEMENT OF CASE

This matter comes before the State Tax Appeal Board (Board) for administrative review of the Final Agency Decision and Order entered by the Montana Department of Transportation (MDOT). Lawrence J. McKinley (Appellant) is asking for a reduction of the maximum allowed and imposed fine in this case.

FACTUAL HISTORY

The following history was derived from the MDOT’s answer to the Board, Hearing Examiner Buslee’s proposed decision and correspondence submitted to the Board by the Appellant. There were no facts submitted that were contested.

On November 6, 2008, the Appellant was operating a 1994 Dodge pickup on U.S. 93 when he was stopped by Department of Transportation Motor Carrier Officer Brad Marten. The 1994 Dodge pickup was specifically manufactured to consume diesel fuel and the Appellant admitted to Officer Marten that the vehicle contained dyed diesel. The Appellant

stated that he placed dyed diesel in the vehicle and admittedly was aware he was burning dyed diesel when he was pulled over by Officer Marten.

A sample of fuel taken from the Appellant's vehicle was analyzed at the Montana Department of Transportation Chemistry laboratory and indicated a dyed fuel concentration of 14.3 parts per million (ppm). The presence of red dye at a concentration of 2.0 ppm or greater is considered to be in violation of the laws of Montana.

Officer Marten issued Citation #DFS 8102142 to the Appellant on November 6, 2008, for violation of § 15-70-330(3)(a) MCA. This was the Appellant's second violation for the use of dyed fuel to operate a motor vehicle upon the public roads and highways of this state.

The Appellant received an informal telephone review by Robert A. Turner, Chief, Fuel Tax Management & Analysis Bureau, on January 8, 2009. He requested a reduction in the fine, which was denied.

The Appellant requested a formal review which was conducted by Christopher H. Buslee, Hearing Examiner, Agency Legal Services Bureau, Montana Department of Justice, on May 28, 2009. The Hearing Examiner concluded "Lawrence J. McKinley used special dyed fuel when operating a motor vehicle on a public road in the State of Montana contrary to § 17-30-330(3) (*sic*)¹, MCA, and subjects him to the penalty set forth in § 17-30-372(2) (*sic*)², MCA. The fine imposed by Officer Marten is authorized by law and no special circumstance warrants a reduction thereof."

The Hearing Examiner's proposed Findings of Fact, Conclusions of Law and Proposed Order was adopted as the final decision of the MDOT on June 24, 2009.

¹ Section of MCA quoted by Hearings Examiner's Proposed Order was incorrectly typed as § 17-30-330(3) and should be § 15-70-330(3).

² Section of MCA quoted by Hearings Examiner's Proposed Order was incorrectly typed as § 17-30-372(2) and should be § 15-70-372(2).

CONCLUSIONS OF LAW AND BOARD DISCUSSION

The State Tax Appeal Board has jurisdiction over this matter pursuant to § 15-70-111, MCA, and § 15-2-201(3), MCA. The Board's function is to review the record and, from that review, to determine if the Board should affirm, modify or reverse the final agency decision of the MDOT. Section 15-70-111, MCA.

In determining whether to affirm, modify or reverse the final agency action, we will not substitute our judgment for that of the Hearing Examiner as to the weight of the evidence. Although there are no statutes setting forth appellate standards of review for use by the tax appeal board, we look to the concepts used by the district court in its appellate capacity. *See, e.g.*, 2-4-704, MCA. In addition, we will only reverse or modify the decision when a substantial right of the Appellant has been prejudiced.

At no point in this appeal has the Appellant denied purposeful or knowing use of dyed fuel on Montana public roads and highways. See § 15-70-330(3)(a). He has requested a reduction of the \$5,000 penalty imposed for a second offense for using dyed fuel in violation of § 15-70-330(3).

The MDOT determined there are no facts which call for a decrease in the civil penalty. The MDOT also contends the penalty imposed by § 15-30-372(2), MCA, leaves no discretionary ability to adjust the penalty after a second offense.

Therefore, after review of the transcript, exhibits, pleadings, and all other materials relating to this matter, the Board concludes that the Hearing Examiner's Finding of Fact, Conclusions of Law, and Proposed Order are supported by evidence and are not clearly erroneous.

ORDER

Upon review of the administrative record and the arguments of the parties, the Final Agency Decision of the Department of Transportation is affirmed.

Dated this 28th day of October, 2009.

BY ORDER OF THE
STATE TAX APPEAL BOARD

(S E A L)

/s/ _____
KAREN E. POWELL, Chairwoman

/s/ _____
SUE BARTLETT, Member

/s/ _____
DOUGLAS A. KAERCHER, Member

NOTICE: You are entitled to judicial review of this Order in accordance with Section 15-70-111, MCA, and 15-2-303(2), MCA. Judicial review may be obtained by filing a petition in district court of Lewis and Clark County within 60 days following the service of this Order.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 28th day of October, 2009, the foregoing Order of the Board was served on the parties hereto by the method indicated below and addressed as follows:

Lawrence McKinley
Topcut Concrete Cutting & Destruction
P.O. Box 184
Arlee, MT 59821

U.S. Mail, Postage Prepaid
 Hand Delivered
 E-Mail
 Telecopy

Eli Z. Clarkston
Legal Services Unit
Department of Transportation
P.O. Box 201001
Helena, MT 59620-1001

U.S. Mail, Postage Prepaid
 Hand Delivered
 Deadhead
 E-Mail
 Telecopy

DONNA EUBANK
Paralegal