

BEFORE THE STATE TAX APPEAL BOARD  
OF THE STATE OF MONTANA

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PETER NIELSEN,	)	
	)	DOCKET NO.: MFT-2011-1
Appellant,	)	
	)	
-vs-	)	
	)	
THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MONTANA,	)	ORDER and OPPORTUNITY FOR JUDICIAL REVIEW
	)	
Respondent.	)	

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**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). Peter Nielsen (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 Collin’s decision, and correspondence submitted to the Board by the Appellant.

On March 5, 2010, the Appellant was operating a Wyoming registered dump truck with a flat bed trailer on Main Street in Billings, Montana, when he was stopped by MDOT Motor Carrier Officer Ken Adkins. Such trucks require temporary trip permits to operate in Montana.

A sample of fuel taken from each supply tank on the Appellant's vehicle was analyzed at the Montana Department of Transportation Chemistry laboratory and indicated a dyed fuel concentration of 5.0 parts per million (ppm) in one supply tank and 5.8 ppm in the other. 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.

The Appellant received Dyed Fuel Use Citation #14332492 on March 5, 2010, 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 MDOT imposed the civil penalty of \$5,000 for a second offense pursuant to §15-70-372(2), MCA.

The Appellant received an informal telephone review by Robert A. Turner, Chief, Fuel Tax Management & Analysis Bureau. On May 14, 2010, Mr. Turner determined the dyed fuel violation of \$5,000 was due and owing.

The Appellant requested a formal review which was conducted by Pamela P. Collins, Hearing Examiner, Agency Legal Services Bureau, Montana Department of Justice, on February 22, 2011. The Hearing Examiner concluded "The evidence presented at the hearing supports the Department's conclusion that Mr. Nielson knowingly operated his truck with dyed special fuel in the supply tanks, thereby violating Mont. Code Ann. § 15-70-330(3)(a). He is subject to the civil penalty required by Mont. Code Ann. § 15-70-372(2)."

The Hearing Examiner's proposed Findings of Fact, Conclusions of Law and Proposed Order were adopted as the final decision of the MDOT on May 9, 2011.

### **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.

The Appellant claims he did not intentionally use dyed fuel on Montana public roads and highways. Even though he admits to having dyed fuel in the truck, he argues he did everything in his power to remove it by diluting with clear fuel and produced receipts showing the purchase of clear fuel. He requested a smaller fine of \$1,000 to \$2,000 instead of the \$5,000 penalty imposed for a second offense using dyed fuel in violation of §15-70-330(3).

The Hearing Examiner set forth well-reasoned Findings of Fact and Conclusions of Law. The Hearing Examiner determined the evidence presented at the hearing supports the department's conclusion that Mr. Nielsen knowingly operated his truck with dyed special fuel in the supply tanks, thereby violating §15-7-330(3)(a) MCA, and is subject to the civil penalty required by §15-70-372(2) MCA. We see no indication that we should substitute our discretion for that of the Hearing Examiner in setting the fine in this matter.

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 7th day of September, 2011.

BY ORDER OF THE  
STATE TAX APPEAL BOARD

( S E A L )

/s/ \_\_\_\_\_  
KAREN E. POWELL, Chairwoman

/s/ \_\_\_\_\_  
DOUGLAS A. KAERCHER, Member

/s/ \_\_\_\_\_  
SAMANTHA SANCHEZ, 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 8th day of September, 2011, the foregoing Order of the Board was served on the parties hereto by the method indicated below and addressed as follows:

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/s/ \_\_\_\_\_  
DONNA EUBANK  
Paralegal