

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

JOHN L. NOVOTNY,)	DOCKET NO. MT-2008-1
)	
Appellant,)	
)	
-vs-)	
)	
THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF MONTANA,)	ORDER and OPPORTUNITY <u>FOR JUDICIAL REVIEW</u>
)	
Respondent.)	

STATEMENT OF CASE

This matter comes before the State Tax Appeal Board (Board) for administrative review of a Final Agency Decision and Order entered by the Montana Department of Transportation (MDOT). John L. Novotny (Appellant) appeared on his own behalf (*pro se*) to challenge the Final Agency Decision, and additionally alleges that the facts stated by the MDOT are disputable.

MDT and Novotny agree there is no question or argument as to whether the appellant knowingly used dyed fuel on public roads. Rather Appellant argues that the question is “did the MDOT violate the Appellant’ rights in collecting the sample of dyed fuel.”

Factual and Procedural History

1. On March 19, 2007, Montana Department of Transportation Motor Carrier Services Officer Myrlin Schatz initiated a stop of the Appellant’s vehicle and trailer. As part of Officer Schatz’ stop, a fuel sample was taken from the fuel

tank of Mr. Novotny's vehicle. An analysis of the sample fuel was performed at D.P.H.H.S. laboratory. A report from the Laboratory indicated a dyed fuel concentration of 19.0 mg/L.

2. Fuel samples in excess of 2.0mg/l of red dye are considered to be in violation of ARM 18.10.112 and §15-70-330, MCA. John L. Novotny was issued Citation #DFS 7049028 on March 19, 2007.
3. The Department of Transportation imposed a civil penalty of \$1,000 pursuant to § 15-70-372(2), MCA, on December 20, 2007.
4. At all times, Mr. Novotny has appeared on his own behalf (*pro se*). Mr. Novotny requested an Informal Review. On June 14, 2007, Robert Turner, Manager MDOT Fuel Tax Management and Assessment Bureau, issued a decision in favor of the Department.
5. Mr. Novotny timely appealed. MDOT appointed an administrative hearing officer. The MDOT filed a motion for summary judgment and an administrative hearing on the motion was held on November 16, 2007. At the hearing and in discovery, Mr. Novotny indicated he used dyed fuel on a public road. Mr. Novotny continuously stated that he did not understand the procedural aspects of the legal process, but argued that the stop was not proper.
6. At the hearing, Mr. Novotny requested any tapes from the stop, as well as the fuel sample. Because Mr. Novotny was appearing *pro se*, the hearing officer directed MDOT to provide the materials, and agreed to allow for time for Mr. Novotny to examine the materials and submit additional information for consideration before he ruled on the motion for summary judgment. The hearing examiner kept the record open to allow for post-hearing submission, with objection from MDOT.

7. MDOT provided the requested information to Mr. Novotny. Mr. Novotny subsequently submitted a DVD copy of the stop to be part of the record. The hearing examiner accepted the DVD as part of the record.
8. The Administrative Hearing Examiner issued his decision of Summary Judgment in favor of MDOT on December 20, 2007.
9. On January 9, 2008 the Appellant appealed the decision. Oral arguments were presented to the Director on February 1, 2008 and a Final Agency Decision was issued on February 14, 2008.
10. Mr. Novotny filed a timely appeal to this Board on March 17, 2008.

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 Tax Appeal Board's function is to review the record of a hearing and, from that review, to determine if the Board should affirm, modify or reverse the final agency decision of the Director of the Department of Transportation. See 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 contends the stop by Officer Schatz was illegal due to lack of probable cause, and thus, the hearing examiner cannot reach the question of whether he had dyed diesel in his tank. The MDOT contends the Hearing Examiner's authority does not extend to consider the legality of the stop.

The Hearing Examiner determined that resolution of this issue would require him to rule on whether the Appellant's constitutional rights have been violated. He subsequently ruled that constitutional issues should be decided by the courts and not by administrative agencies. We disagree. The issue at hand turns on applying facts in the record to a threshold statutory requirement for making the initial stop. This is within the purview of an administrative fact-finding body.

In this case, the appellant's substantial rights were prejudiced by the MDOT failure to comply with the "probable cause" requirement set forth in § 61-10-154(6)(c), MCA. The Montana Legislature directed, by statute, that a MDOT peace officer must have probable cause to stop and inspect a vehicle. Section 61-10-154(6)(c) MCA. In relevant part, the statute states:

(c) the authority, if probable cause exists, to stop and inspect a supply tank connected to the engine of any diesel-powered motor vehicle operating on the public highways of this state in order to determine compliance with Title 15, chapter 70, part 3. (emphasis added)

Whether this Board or a hearing examiner has authority to determine a Constitutional claim is not at issue in this matter. While we have reviewed related cases, (Larson v. State (1975), 166 Mont. 449, 534 P.2d 854; Taylor v. FWP, 205 Mont. 85; NY v. Berger, 482 U.S. 691), these cases are not applicable to a question of fact as applied to a statute. Instead, this Board must consider whether the evidence indicates a failure of the Department to comply with the statutory "probable cause" requirement.

The evidence on the record is uncontroverted. In the DVD of the stop, Officer Schatz does not provide probable cause for the stop itself. In fact, he indicates he stopped Mr. Novotny on the basis of direction of his supervisor. There is no evidence in the record the Supervisor had probable cause to direct the stop, nor

that Officer Schatz had independent probable cause to make the stop. No other evidence has been provided to demonstrate probable cause existed to stop Mr. Novotny. The evidence demonstrates MDOT failed to comply with §61-10-154(6)(c), MCA. The Hearing Examiner himself points out the Department failed to offer any evidence of probable cause.

Section 15-70-324(4) authorizes the DOT to establish vehicle inspection sites and stop and inspect vehicles without probable cause. There is no indication in the record that Mr. Novotny's stop was made at an inspection site.

In this instance, Mr. Novotny's substantial rights have been violated through the Department's failure to present evidence of probable cause for the stop. *See* 2-4-704, MCA.

Conclusion

The Final Agency Decision of the Department of Transportation is reversed.

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ORDER

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

DATED this 19th day of June 2008.

BY ORDER OF THE
STATE TAX APPEAL BOARD

/ss/ _____
KAREN E. POWELL, Chairwoman

/ss/ _____
SUE BARTLETT, Member

/ss/ _____
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 the 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 19th day of June, 2008 the foregoing Order of the Board was served on the parties hereto by depositing a copy thereof in the U.S. Mails, postage prepaid, addressed to the parties as follows:

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