

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

BRAD MYERS,)	
)	DOCKET NO. MT-2007-74
)	
-v-)	
)	
THE DEPARTMENT OF TRANSPORTATION)	ORDER AND OPPORTUNITY
OF THE STATE OF MONTANA,)	FOR JUDICIAL REVIEW
)	
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). The Appellant alleges that the Hearing Examiner's Findings of Fact, Conclusions of Law and Order are clearly erroneous and not supported by the evidence that was presented in this case. Specifically, the Appellant raises the following four issues.

1. The Hearing Examiner used the wrong burden of proof.
2. This case should have been dismissed due to destruction of key evidence.
3. This case should have been dismissed due to the introduction of improper hearsay.
4. The procedure in § 15-70-330 and § 15-70-372, MCA, is unconstitutional.
5. The "arbitrator" failed to make proper Findings of Fact.

Factual History

On April 9, 2006, Department of Transportation Motor Carrier Services Officer Frydenlund observed Mr. Myers driving a pick-up truck with a substantial load that appeared it might be overweight. Officer Frydenlund initiated a stop of the vehicle. As part of the stop, the Officer received permission to take samples of fuel from Mr. Myers' vehicle to inspect for untaxed dyed diesel fuel. Office Frydenlund collected three samples.

At the time the samples were collected, Mr. Myers indicated he had recently put clear fuel into the tank to drive it legally and he previously put dyed fuel in it on the farm. He did not measure or determine what volume of either fuel was in the vehicle at the time.

Because sufficient red color existed upon visual inspection, the Officer submitted the samples for testing. The testing was completed at the DPHHS Environmental Laboratory. A report from the Laboratory dated April 20, 2006, indicated a dye concentration of 4.49 mg/l (ppm). Fuel samples in excess of 2.0mg/l of red dye are considered to be in violation of §15-70-330, MCA. As a routine procedure, the remaining samples were destroyed approximately six months after initial testing because no request was made to preserve the samples.

The Department of Transportation determined Mr. Myers violated §15-70-330, MCA, and imposed a civil penalty of \$1000 pursuant to § 15-70-372(2), MCA. Mr. Myers timely appealed, and an administrative hearing was held on March 16, 2007. At the hearing, Mr. Myers again indicated he was aware the pick-up truck had dyed fuel in the fuel tank. He attempted to mitigate the use of the dyed fuel by filling the truck with clear diesel fuel. Mr. Myers' counsel requested the case be dismissed for failure to preserve the evidence. A Final Agency Decision was issued on May 22, 2007, and was timely appealed to this Board.

Other factual issues may be brought forth below as needed.

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 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. Section 15-70-111, MCA.

Burden of Proof

The Appellant asserts the Hearing Examiner used the wrong burden of proof in reaching his Findings of Fact and Conclusions of Law. The Hearing Examiner placed the burden of proof on the appellant as the party who brought the action. Appellant argues the Department should bear the burden of proof when assessing a fine and penalty, as in a criminal matter. We disagree. This matter is an administrative action. For any administrative action, the general rule is that the party seeking to change the status quo has the burden of proof. Implementation of a fine or penalty does not alter the burden of proof.

"A party has the burden of persuasion as to each fact the existence or nonexistence of which is essential to the claim for relief or defense he is asserting." Sections 26-1-401 and -402, MCA. Thus, the party asserting a claim for relief bears the burden of producing evidence in support of that claim. *Montana Environmental Defense Fund v. Department of Environmental Quality and Bull Mountain Development Co.No.LLC*, 2005 MT 96, 326 Mont. 502, 112 P.3d 964; citing *Wright Oil & Tire Co. v. Goodrich* (1997), 284 Mont. 6, 11, 942 P.2d 128, 131. *See also, In re License Revocation of Gildersleeve*, 283 Mont. 479, 483 (Mont. 1997) (the burden of proof falls upon the appellant to prove the invalidity of the State's action, rather than require the State to justify its act of revocation).

In this instance, it is the Appellant who is challenging the Department's determination that he is subject to an administrative penalty of \$1000. In this case, the Appellant had the burden of proof and the Hearing Examiner correctly applied the burden of proof.

Evidence

At the hearing, the Appellant asked the Hearing Examiner to dismiss his case because the fuel samples that were originally tested were subsequently destroyed by the Department of Transportation. The Appellant makes no argument that the samples were improperly destroyed or that the evidence was somehow mishandled by the Department.

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. In addition, we will only reverse or modify the decision when a substantial right of the Appellant has been prejudiced. In this instance, the weight of the evidence was clear that the fuel sample contained dyed fuel. In fact, the Appellant himself testified to that fact. Further, we see no error on the part of the Hearing Examiner that demonstrates a substantial right of the appellant has been prejudiced. *See* § 2-4-704(2)(a), MCA. The evidence also demonstrates that the Appellant had ample opportunity to request that the samples be retained or re-tested. The Appellant failed to do so in a timely manner. Thus, there is no prejudice to the Appellant by destroying the fuel sample. The decision of the Hearing Examiner is upheld.

Hearsay

The Appellant argues exhibits "B", "C", "G" and "H" were improperly admitted. The Hearing Examiner determined that the evidence was both relevant and admissible as set forth in the decision. After considering all evidence and testimony, the Board concludes that the rulings

set forth by the Hearing Examiner conform to the evidence presented and should not be overruled.

Constitutionality of Statutes

The Appellant argues that the procedures set forth in § 15-70-330, MCA and § 15-70-372, MCA, are unconstitutional as applied by the Department. The Appellant argues that the Department's policy to implement the maximum fine for all persons found to be purposefully or knowingly using dyed fuel on the highway is unconstitutional. Counsel argued at the hearing that the Department should utilize some discretion in implementing the fine. The testimony indicated, however, that the Department has used discretion in assessing the \$1000 fine in past circumstances, such as Hurricane Katrina. (Turner, p 34). Counsel provided no additional arguments to buttress his claim of unconstitutionality as applied. We conclude that the statute as applied is constitutional.

Arbitrator

Finally, the Appellant argues Findings of Fact essential to the decision were not made by the arbitrator. The Appellant fails to inform this Board which alleged facts are not set forth in the Hearing Examiner's Order. Upon review of the transcript, exhibits, pleadings, and all other materials relating to this matter, the Hearing Examiner's Findings of Fact, Conclusions of Law, and Order are supported by the evidence and are not clearly erroneous.

CONCLUSION

We uphold the final agency decision of the Department of Transportation.

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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 affirmed.

DATED this 13th day of September 2007.

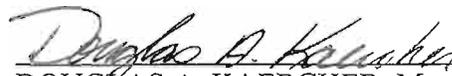
BY ORDER OF THE
STATE TAX APPEAL BOARD



KAREN E. POWELL, Chairwoman



SUE BARTLETT, Member



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 13th day of September, 2007, 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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