STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,	)	
Petitioner,	)	
vs.	)	CASE NO. 88-0181
CLAY OIL CORPORATION, d/b/a COWARTS 66,	)	
Respondent.	)	

RECOMMENDED ORDER

This action came on for hearing before the Division of Administrative Hearings' duly designated Hearing Officer, Diane Cleavinger, on March 28, 1988, in Jacksonville, Florida. The parties were represented by counsel:

For Petitioner: Clinton Coulter, Esquire
Department of Agriculture and
Consumer Services
Mayo Building
Tallahassee, Florida 32399-0800

For Respondent: Paul S. Boone, Esquire
1221 King Street
Jacksonville, Florida 32204

The issue in this case is whether the $1,000.00 bond posted by Clay Oil Corporation in lieu of confiscation of contaminated fuel should be refunded by the Department of Agriculture and Consumer Services, either in whole or in part pursuant to Section 525.06, Florida Statutes.

At the hearing, the parties stipulated that all testing of the allegedly contaminated fuel involved in this case was done properly and that the test result showed a high end point of 455 degrees Fahrenheit for the tested fuel. Petitioner called Ben Bowen and William Ford as witnesses and introduced three (3) exhibits. Respondent called Peter Eyrick as a witness and introduced one (1) exhibit.

The parties filed proposed recommended orders on April 11, 1988, and April 9, 1988, respectively. Petitioner's and Respondent's proposed findings of fact have been considered and utilized in the preparation of this Recommended Order except where such proposals were not supported by the weight of the evidence or were immaterial, cumulative or subordinate. Specific rulings on the parties' proposed findings of fact are contained in the Appendix to this Recommended Order.

FINDINGS OF FACT

1. On November 5, 1987, a customer at Cowarts 66 service station complained of suspected water in the premium unleaded gasoline the customer had purchased at Cowarts 66 service station. Pursuant to the complaint, William Ford, an inspector for the Department, examined the premium unleaded gasoline storage facility at Cowarts 66 service station. The inspector obtained a sample of gasoline from the premium unleaded gasoline tank. The sample was examined by a Department of Agriculture chemist. There was no water found in the sample. However, the sample showed an end point of 455 degrees Fahrenheit which exceeded the maximum end point of 437 degrees Fahrenheit allowed by the Department under its rules governing petroleum products. Rule 5F-2.001(c)(4), F.A.C. The high end point was caused by the gasoline stored in the tank being mixed with or contaminated by another petroleum product with a high end point such as diesel fuel, thereby raising the end point of the premium unleaded. The contamination was caused by Clay Oil when their delivery driver accidentally mixed two fuels together and delivered the contaminated fuel to Cowarts 66.

2. On November 6, 1987, the inspector issued a stop sale notice. The Department then has the right to confiscate the contaminated gasoline. However, the Department may elect to allow the station to post a bond in lieu of confiscation. In this case, the Department allowed Cowarts 66 to post a $1,000.00 bond in return for replacing the contaminated gasoline with gasoline meeting the Department's standards. The bond was posted the same day as the stop sale notice. The gasoline was likewise replaced either the same day or the morning after by Clay Oil. Cowarts 66 was later reimbursed by Clay Oil for the $1,000.00 cash bond.

3. William Ford testified that he had been an inspector for Petitioner in the Jacksonville area for 16 years and had been familiar with Clay Oil Corporation and its operation for the past 10 or 15 years. He knew the corporation to be a reputable company. Prior to the instant case, he had never had any dealings with Clay Oil Corporation regarding dispensing of contaminated fuel. He had never had an occasion to require Clay Oil Corporation to post a bond.

4. Ford, also, testified that the violation was clearly inadvertent and not representative of the normal business practices of Clay Oil Corporation. Furthermore, Ford testified that Clay Oil Corporation had been totally cooperative with the Department and had made immediate efforts to correct the violation regarding the contaminated fuel.

5. Clay Oil Corporation's representative, Peter T. Eyrick, testified that upon being advised that contaminated fuel had been delivered to Cowarts' service station, he immediately instigated measures to replace the contaminated fuel with fuel that met Department standards. Furthermore, he testified that he had no knowledge that contaminated fuel had been delivered or that illegal sales had occurred until being informed by Cowarts' owner and the Department's inspector.

6. The evidence clearly establishes that this violation was inadvertant and isolated. The violation is not representative of the normal business practice of Respondent. The evidence, also, clearly demonstrated that Respondent had no intent to sell adulterated fuel.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of this proceeding. Section 120.57(1), Florida Statutes (1987).

8. This hearing is held pursuant to Section 120.57(1), Florida Statutes. The Department of Agriculture and Consumer Services is empowered to set minimum standards of quality with regard to gasoline and oil products. 5F-2.001(1)(a) F.A.C. provides, with regard to gasoline, to-wit:

> (1) GASOLINE.
> (c) Distillation Range - ASTM Method D86.
> 4. The End Point Shall not exceed 437 degrees Fahrenheit (225 degrees Celsius).

9. When Gasoline is found to have been below the above mentioned standard, the Department issues a "Stop Sale Notice" so as to prevent sale of such gasoline to the consuming public. Chapter 525, Florida Statutes.

10. A vendor who has received a Stop Sale Notice with regard to allegedly substandard gasoline can lift the Stop Sale Notice by posting a bond and replacing the allegedly substandard gasoline. Section 525.06, Florida Statutes, provides in part:

> . . . a refundable bond in cash or by certified check in the amount of the value of the product subject to confiscation may be accepted by the department, pending legal disposition. The amount of this bond shall be limited to $1,000.00. If any of the product has been sold to retail customers, the department is authorized to make an assessment equal to retail value of the product sold, not to exceed $1,000.00.

11. The Department of Agriculture and Consumer Services has had occasion to construe the various Florida Administrative Code provisions regulating gasoline and oil in connection with vendors' request for a refund of bonds posted.

12. In Department of Agriculture and Consumer Services vs. 7-Eleven Food Stores: 1411-23741 and 1406-10038 and The Southland Corporation, 6 F.A.L.R. 1657 (1983), the Department considered the issue concerning whether the Respondent, 7-Eleven Food Stores and The Southland Corporation sold ethanol enriched gasoline from two retail outlets in Tampa and Winter Haven from pumps that were not labeled so as to disclose the contents of the fuel in violation of Chapter 525, Florida Statutes and whether all or part of the $1,000.00 bond posted pending legal disposition of the matter should be refunded by the Department. 6 F.A.L.R. 1658.

13. It was undisputed that the fuel involved did not meet the standard concerning ethanol in gasoline. 6 F.A.L.R. 1659.

14. In determining how much, if any, refund the Respondent would be entitled to receive, the Department found significant the following facts, to-wit:

> The evidence in the record also establishes that these two violations were isolated ones, were of a technical nature and not related at all to any effort by the Respondent to sell adulterated or substandard fuel. The violations were clearly inadvertent and are not representative of the normal business practices of the Respondent and indeed no such other violations have been shown to have occurred in the past. The parties stipulated that in excess of $1,000.00 worth of the ethanol gasoline was sold to the motoring public. Inasmuch as the parties agreed that this violation was unintentional, that the Respondent had been totally cooperative with the Petitioner and had made immediate efforts to correct the mislabeling of the fuel when it was brought to its attention, and in view of the fact that the Respondent had no knowledge that illegal sales had occurred until informed by the Petitioner's representative, these factors obviate the necessity for the maximum forfeiture to be extracted from the Respondent.
>
> 6 F.A.L.R. 1662

15. In light of the above facts, the Department refunded $750.00 of Respondent's $1,000.00 bond.

16. Another case of significance to the instant case is Department of Agriculture and Consumer Services vs. Cherokee Oil Co., d/b/a Patterson Garage, 6 F.A.L.R. 2249 (1984). The issue involved in this case was whether the gas-alcohol mix violated the Department's 50 percent evaporated temperature standard and what disposition to make of the bond posted by Respondent.

17. The evidence was uncontroverted that the Respondent was in violation of the above mentioned standard concerning its gasoline. The Respondent had no knowledge of any problem or any reason to believe that there was any deviation from State standards. 6 F.A.L.R. 2251.

18. In determining what disposition was to be made of the bond posted by Respondent, the Department stated, to-wit:

> Although the statute might be interpreted to authorize Petitioner to retain the whole sum, a long line of cases reflects Petitioner's consistent interpretation of the statute to allow

the return of part of the bond to the owner of the non-standard gasoline. E.g., Department of Agriculture and Consumer Services v. Mocar Oil Co., No. 82-21446, (Final Order entered Feb. 11, 1983). Department of Agriculture and Consumer Services v. Big "S" Oil Co., No. 81-3217, 4 F.A.L.R. 1319-A (Final Order entered May 10, 1982); State of Florida Department of Agriculture and Consumer Services v. One Stop Oil Co., No. 82-342, 4 F.A.L.R. 1320-A (Final Order entered April 30, 1982); Department of Agriculture and Consumer Services v. Romaco, Inc. d/b/a Majik Market, No. 82-3102, 4 F.A.L.R. 818-A (Final Order entered February 24, 1982); State of Florida, Department of Agriculture and Consumer Services v. Emmet C. Wever d/b/a Ormand Mall 66 Services, No. 81-2831, 4 F.A.L.R. 823-A (Final Ordered entered February 2, 1982). In construing the statute, deference should be given to the agency's consistent interpretation.

6 F.A.L.R. 2254-2255

19. In light of the above, the Department refunded $950.00 of the Respondent's $1,000.00 bond.

20. Likewise, in Department of Agriculture and Consumer Services vs. Zippy Mart #145, 6 F.A.L.R. 5931 (Fla. Dept. of Agriculture and Consumer Services 1984), it was undisputed that the Respondent was in violation of Department standards in that it had inadvertently mingled diesel fuel with its unleaded gasoline. The Respondent was allowed to post a bond in the amount of $1,000.00, remove the product from the premises and place new product in the tank. 6 F.A.L.R. 5933.

21. Without expressing a detailed factual basis, the Department refunded $500.00 of Respondent's $1,000.00 bond.

22. In the instant case as with the above-cited cases, the evidence is undisputed that the violation was inadvertent and not calculated to defraud the consuming public. The past operation of Clay Oil Corporation is exemplary and upon being advised that there was contaminated gasoline at Cowarts 66, it moved immediately to remove said gasoline from sale and replace it with gasoline which met the Department's standards. Moreover, Clay Oil Corporation cooperated completely in assisting the Department with its investigation.

23. Having considered the facts and the applicable law, it is clear that Clay Oil Corporation is entitled to a refund of a portion of the $1,000.00 bond.

RECOMMENDATION

Based upon the foregoing findings of fact and Conclusions of Law, it is

RECOMMENDED that the Department refund to Clay Oil Corporation $750.00 of the $1,000.00 bond.

DONE and ORDERED this 11th day of May, 1988, in Tallahassee, Florida.

DIANE CLEAVINGER
Hearing Officer
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of May, 1988.

APPENDIX
CASE NO. 88-0181

Petitioner, Clay Oil Corporation, did not number its paragraphs in its recommended order. I, therefore, have numbered the paragraphs in its recommended order sequentially and utilize those numbers in this appendix.

Petitioner's proposed findings of fact contained in paragraphs 1, 2, 3, 4 and 5, have been adopted, in substance, in so far as material.

Respondent's proposed findings of fact contained in paragraphs 1, 2 and 3, have been adopted, in substance, in so far as material.

Respondent's proposed findings of fact contained in paragraph 4 has been adopted, in substance, in so far as material, except for the finding regarding the number of gallons sold. The number of gallons sold was not shown by the evidence.

Respondent's proposed findings of fact contained in paragraph 5 was not shown by the evidence.

COPIES FURNISHED:

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