

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GLEN'S SUPER SERVICE)
STATIONS, INC., d/b/a)
SUPER PUMP STATION,)
)
Petitioner,)
)
vs.) CASE NO. 90-8028
)
DEPARTMENT OF AGRICULTURE)
AND CONSUMER SERVICES,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, this matter came on for hearing in Tallahassee, Florida, before the Division of Administrative Hearings by its duly designated Hearing Officer, Diane Cleavinger, on March 7, 1991.

APPEARANCES

For Petitioner: Glen Jernigan
P. O. Box 2498
Panama City, Florida 32402

For Respondent: Clinton H. Coulter, Jr., Esquire
Department of Agriculture and
Consumer Services
Mayo Building
Tallahassee, Florida 32399-0800

STATEMENT OF THE ISSUES

The issue addressed in this proceeding is whether Petitioner is entitled to a refund of the \$1,000 bond it posted in lieu of confiscation pursuant to Section 525.06, Florida Statutes.

PRELIMINARY STATEMENT

At the hearing, Respondent called one witness to testify and offered into evidence four exhibits. Petitioner called one witness to testify, but did not offer any exhibits into evidence.

FINDINGS OF FACT

1. Super Pump Station is a service station in the business of selling regular unleaded, regular unleaded plus, and unleaded premium gasoline to the public. Super Pump Station's place of business is located at 201 Northeast Street, Pensacola, Florida. Super Pump Station is owned by Petitioner, Glen's Super Service Stations, Inc.

2. On October 30, 1990, Steve Hadder, the Department's inspector, visited the station to conduct an inspection of the gasoline Petitioner was offering for sale to the consuming public from its tanks and related gasoline pumps.

3. Mr. Hadder took samples of all three types of gasoline offered for sale by Petitioner. The samples were forwarded to the Department's laboratory in Tallahassee and were tested to determine whether they met departmental standards for each type of gasoline.

4. The Departmental testing revealed that the regular-unleaded plus gasoline showed an end point of 500 degrees Fahrenheit which exceeded the maximum end point allowed by the Department under its rules governing petroleum products. Rule 5F-2.001(c)(4), Florida Administrative Code.

5. In light of the above facts, the Department elected to allow Petitioner, to post a \$1,000 bond in lieu of confiscation of the gasoline. The bond was posted on November 5, 1990.

6. The high end point was caused by the gasoline stored in the tank being mixed with or contaminated by diesel oil at the port terminal where Petitioner purchases its fuel. The contamination was not the result of any actions on Petitioner's part. However, the evidence demonstrated that an inexpensive test kit was available to Petitioner to test the fuel after it leaves the port terminal but before it is offered for sale to the public. Petitioner did not avail itself of this test kit. Therefore, Petitioner did not present any mitigating factors which would reduce the amount of assessment levied against it.

7. The store had sold 1,398 gallons of the contaminated product at \$1.379 per gallon.

8. The Department assessed Petitioner, the retail value of the product sold, which value exceeds the posted bond. The assessment is reasonable and conforms to the amount of assessments imposed by the Department in similar cases.

CONCLUSIONS OF LAW

9. 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).

10. Section 525.06(1), Florida Statutes, states:
All oils . . . that shall fall below the standard fixed by the Department of Agriculture and Consumer Services, are declared illegal and shall be subject to confiscation and sale by order of the Department. Instead of confiscation, 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. If any of the product has been sold to retail customers, the department is authorized to make an assessment equal to the retail value of the product sold, not to exceed \$1,000.

11. The burden is on the Petitioner, Glen's Super Service Stations, Inc., to prove that it is entitled to a refund of the bond it posted. Conversely, the burden is on the Department to prove that the assessment or penalty which it seeks to impose is appropriate. In this case, the Department is seeking to retain the bond as the assessment.

12. In attempting to apply the law to the facts, it is clear that Petitioner violated Section 525.06, Florida Statutes, by selling gasoline which did not meet Departmental standards and that the Department has entered an assessment which is authorized by that section. Rule 5F-2.001(c)(4), Florida Administrative Code. The Petitioner has not proven that it is entitled to a refund of any portion the bond. See DACS v. Clay Oil Corp, d/b/a Cowarts 66, DOAH Case Number 88-0181.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law it is accordingly,

RECOMMENDED:

That the request of Glen's Super Service Stations, Inc. d/b/a Super Pump Station for refund of the bond posted be DENIED and that the assessment by the Department of Agriculture and Consumer Services in the amount of \$1,000 be sustained.

DONE and ORDERED this 4th day of June, 1991, in Tallahassee, Florida.

DIANE CLEAVINGER
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, FL 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of June, 1991.

COPIES FURNISHED TO:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS:

ALL PARTIES HAVE THE RIGHT TO SUBMIT WRITTEN EXCEPTIONS TO THIS RECOMMENDED ORDER. ALL AGENCIES ALLOW EACH PARTY AT LEAST 10 DAYS IN WHICH TO SUBMIT WRITTEN EXCEPTIONS. SOME AGENCIES ALLOW A LARGER PERIOD WITHIN WHICH TO SUBMIT WRITTEN EXCEPTIONS. YOU SHOULD CONTACT THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE CONCERNING AGENCY RULES ON THE DEADLINE FOR FILING EXCEPTIONS TO THIS RECOMMENDED ORDER. ANY EXCEPTIONS TO THIS RECOMMENDED ORDER SHOULD BE FILED WITH THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE.