

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SHELL OIL COMPANY,)
)
 Petitioner,)
)
 vs.) CASE NO. 90-8030
)
 DEPARTMENT OF AGRICULTURE AND)
 CONSUMER SERVICES,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Upon due notice, this cause came on for formal hearing on March 22, 1991 in Gainesville, Florida, before Ella Jane P. Davis, a duly assigned Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

FOR PETITIONER: No appearance

FOR RESPONDENT: Clinton H. Coulter, Jr., Esquire
Department of Agriculture and
Consumer Services
510 Mayo Building
Tallahassee, FL 32399-0800

STATEMENT OF THE ISSUE

Whether or not the agency may, pursuant to Section 525.06 F.S., assess \$390.04 for sale of substandard product due to a violation of the petroleum inspection laws and also set off that amount against Petitioner's bond.

PRELIMINARY STATEMENT

Because the letter-petition herein challenged the agency's assessment, the Notice of Hearing issued January 25, 1991 placed the burden of proof and duty to go forward upon the agency. See, Sunshine-Jr. Food Stores, Inc., 214 v. Dept. of Agriculture and Consumer Services, DOAH Case No. 90-5316 (Recommended Order entered March 18, 1991) which established a converse burden of proof.

The Department of Agriculture and Consumer Services presented the oral testimony of John Whitton and had 4 exhibits admitted as business records.

Although the undersigned waited ten minutes before beginning the hearing and ten minutes after the agency rested, the party requesting hearing did not appear and presented no evidence.

No transcript was provided. No post-hearing submittals were filed.

FINDINGS OF FACT

1. Coleman Oil Co., Inc. d/b/a Shell Oil Co. at I-75 and SR 26 Gainesville, Florida, is in the business of selling kerosene, among other petroleum products.

2. On November 15, 1990, Randy Herring, an inspector employed with the Department of Agriculture and Consumer Services and who works under the direction of John Whitton, Chief of its Bureau of Petroleum, visited the seller to conduct an inspection of the petroleum products being offered for sale to the public.

3. Mr. Herring drew a sample of "1-K" kerosene being offered for sale, sealed it, and forwarded it to the agency laboratory in Tallahassee where Nancy Fisher, an agency chemist, tested it to determine whether it met agency standards.

4. The testing revealed that the sampled kerosene contained .22% by weight of sulfur. This is in excess of the percentage by weight permitted by Rule 5F-2.001(2) F.A.C. for this product.

5. A "Stop Sale Notice" was issued, and on the date of that notice (November 20, 1990) the inspector's comparison of the seller's delivery sheets and the kerosene physically remaining in his tanks resulted in the determination that 196 gallons of kerosene had been sold to the public. Based on a posted price of \$1.99 per gallon, the retail value of the product sold was determined, and the agency accordingly assessed a \$390.04 penalty. The agency also permitted the seller to post a bond for the \$390.04 on November 21, 1990. The assessment is reasonable and conforms to the amount of assessments imposed in similar cases.

CONCLUSIONS OF LAW

6. The Division of Administrative Hearings has jurisdiction of the parties and subject matter of this cause. See, Section 120.57(1) F.S.

7. Section 525.05 F.S. 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.

8. Rule 5F-2.001(2) F.A.C. sets the standard for sulfur in kerosene as .04% by weight. The seller here was clearly in violation of that standard, and the assessment and bond were reasonable. The agency has borne its initial burden to prove the legitimacy and amount of the assessment.

9. Therefore, the burden shifted to the seller to prove that it was entitled to a refund of the bond it had posted.

10. The agency has met its burden of proof. The seller, which did not appear, did not object to any exhibits, and did not present any evidence. Therefore, the seller has not met its burden to prove its entitlement to a refund of the bond. The Department is entitled to retain the bond posted.

RECOMMENDATION

Upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Agriculture and Consumer Services enter a final order approving the \$390.04 assessment and offsetting the bond against it.

DONE and ENTERED this 25th day of April, 1991, at Tallahassee, Florida.

ELLA JANE P. DAVIS, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
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Tallahassee, Florida 32399-1550
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Filed with the Clerk of the Division
of Administrative Hearings this 25th
day of April, 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 consult with 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.