

12-24-02

FILED

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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

FLORIDA DEPARTMENT
OF ENVIRONMENTAL
PROTECTION,

DIVISION OF
ADMINISTRATIVE
HEARINGS

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF, IF FILED.

Appellant,

CASE NO. 1D03-1125

v.

02-2278F

HOLMES DIRT SERVICE, INC.,
and WILLIAM H. HOLMES,

CAS-CWS

Appellees.

Opinion filed January 8, 2004.

An appeal from an order of the Division of Administrative Hearings.

Lisa G. London, Senior Assistant General Counsel, Department of Environmental Protection, Tallahassee, Attorney for Appellant.

Frank T. Gaylord, Eustis, Attorney for Appellee.

PER CURIAM.

The Florida Department of Environmental Protection has appealed a Final Order of the Division of Administrative Hearings, which reduced penalties assessed against Holmes Dirt Service, Inc. and William J. Holmes by more than fifty percent of the statutory schedule. We affirm.

Section 403.121(10), Florida Statutes (2002), allows an ALJ to reduce up to fifty percent for mitigating circumstances and upon an affirmative finding that the “violation was caused by circumstances beyond the reasonable control of the respondent and could not have been prevented by respondent’s due diligence, the administrative law judge may further reduce the penalty.”

The ALJ had before it competent, substantial evidence that the violations were beyond Appellees’ control; accordingly, we affirm the ALJ’s decision to mitigate damages. See § 120.68(10), Fla. Stat. (2002).

AFFIRMED.

BOOTH and LEWIS, JJ., CONCUR; BENTON, J. DISSENTS WITH WRITTEN OPINION.

BENTON, J., dissenting.

Circumstances beyond appellees' reasonable control which they could not have prevented by due diligence were not proven here, in my opinion. The final order finds, inter alia, that appellees, who are the "owners and operators of the Holmes Fill Dirt Landfill Facility," failed to control objectionable odors, failed to control access to the facility, and did not provide required groundwater monitoring reports, all in violation of departmental rules.

Particularly in light of the additional finding that appellees failed to comply with other rules that required them to update their bond, or otherwise to give adequate financial assurance that they would comply with departmental rules, section 403.121(10), Florida Statutes (2002), should not be read to authorize reducing administrative fines more than fifty percent (from \$9,000 to \$3,000) for the sole stated reason that appellees "apparently do not have" enough money to comply.

Concluding that "the reasons given by the trial court to support a downward departure are insufficient," State v. Hinson, 855 So. 2d 119, 122 (Fla. 1st DCA 2003), inasmuch as financial responsibility is itself a requirement for operating a facility of this kind, I respectfully dissent.