STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF ENVIRONMENTAL PROTECTION,	)	
Petitioner,	)	
vs.	)	Case No. 08-4435EF
BR BALDWIN, INC.,	)	
Respondent.	)	

FINAL ORDER

The final hearing in this case was held on January 5, 2009, by video teleconference, at sites in Tallahassee and Tampa, Florida, before Bram D. E. Canter, an Administrative Law Judge of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner Department of Environmental Protection:

Peter James Caldwell, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard, Mail Station 35
Tallahassee, Florida 32399-3000

For Respondent BR Baldwin, Inc.:

Bobby Baldwin, pro se
BR Baldwin, Inc.
310 Bay Arbor Boulevard
Oldsmar, Florida 34677

PRELIMINARY STATEMENT

On or about August 21, 2008, Petitioner Department of Environmental Protection (Department) issued a three-count Notice of Violation, Orders for Corrective Action and Administrative Penalty Assessment (NOV) against Respondent BR Baldwin, Inc. (Baldwin). Baldwin timely requested an administrative hearing and the Department referred the matter to DOAH on September 10, 2008, to conduct the hearing.

At the hearing, the Department presented the testimony of Alison Meetze. The Department's Exhibits 1 through 9 were admitted into evidence. Baldwin presented the testimony of its President, Bobby Baldwin. Baldwin's Exhibits A and B were admitted into evidence. At the close of the hearing, the record was kept open to receive additional exhibits that had been referred to during the hearing. The Department's post-hearing Exhibit 9 was admitted into evidence. Baldwin's post-hearing Exhibits C through F were admitted into evidence.

A court reporter recorded the hearing, but a transcript was not prepared nor filed with DOAH. The parties submitted post-hearing writings which were considered in the preparation of this Final Order.

STATEMENT OF THE ISSUE

The issue to be determined in this case is whether Respondent Baldwin is liable for the violations of state

statutes and rules that are alleged in the NOV and, if so, whether Respondent should be ordered to pay the civil penalties proposed by the Department.

FINDINGS OF FACT

1. The Department is the state agency charged with the power and duty to administer and enforce the provisions of Chapters 376 and 405, Florida Statutes, and the rules promulgated in Florida Administrative Code Title 62.

2. Respondent BR Baldwin, Inc., is a Florida corporation. Beginning in July 31, 2006, Baldwin owned and operated an automotive service station at 2000 Drew Street in Clearwater, Florida ("the property").

3. Located at the property are three underground fuel storage tanks, along with their associated piping and dispensers. There is also an underground storage tank for waste oil.

4. Baldwin ceased using the underground storage tanks in May 2007 and had them taken out of service in July 2007.

5. Count I of the NOV charges Baldwin with a violation of Florida Administrative Code Rule 62-761.400(3)(a) which requires owners and operators of petroleum storage tank facilities to carry liability insurance or to otherwise demonstrate to the Department that they are financially able to pay for corrective actions and third party liability.

6. Baldwin admits that from July 31, 2006, until June 25, 2007, it did not have liability insurance coverage for the facility and did not otherwise demonstrate to the Department that it was able to pay for potential liability.

7. Bobby Baldwin, the president of Baldwin, contends that he tried to obtain insurance coverage but was unable to do so until June 2007. The more persuasive evidence shows that he did not at first make reasonable efforts to obtain insurance. His efforts to obtain insurance only became reasonable after the corporation was cited for failing to obtain insurance. Baldwin alleged, but did not prove, that the violation was caused by circumstances beyond his reasonable control and could not have been prevented by his due diligence.

8. Bobby Baldwin contends that his receipt of a storage tank registration placard from the Department misled him to believe that he did not have to get insurance. The issuance of a placard is not tied to the requirement for insurance coverage. Bobby Baldwin admitted that he was unfamiliar with the regulations that are applicable to petroleum storage facilities when he purchased the facility. His failure to inform himself about the applicable regulations was unreasonable and does not provide a basis for mitigating the penalties assessed for violating the regulations.

9. In the NOV, the Department seeks a penalty of $5,000 for the violation addressed in Count I.

10. Count II of the NOV charges Baldwin with violating Florida Administrative Code Rule 62-761.610(3)(c), which requires that manual tank gauging be performed for tanks of 550 gallons or less nominal capacity. The tank gauging is required so that a leak can be discovered. Baldwin admits that it did not perform manual gauging for its waste oil tank during the approximate year that it operated the service station.

11. Bobby Baldwin testified that he would have performed the manual gauging, but he was unaware that it was required. He also testified that he never used the waste oil tank.

12. In the NOV, the Department seeks a penalty of $4,000 for the violation addressed in Count II, which represents two days of violation. At the hearing, the Department modified the penalty demand to seek only a single day violation, or $2,000.

13. Count III of the NOV is the Department's claim for investigative costs of $1,000. The Department apparently determined not to seek costs and presented no evidence in support of its costs claim at the final hearing.

14. At the hearing, the Department stated its willingness to have the (modified) penalties of $7,000 reduced by 50 percent, to $3,500, and to allow Baldwin to pay the penalties in twelve equal monthly installments.

15. Bobby Baldwin testified that he is financially unable to pay even the revised penalties of $3,500. There are exhibits in the record that relate to Bobby Baldwin's personal finances. However, Bobby Baldwin is not named in the NOV. BR Baldwin, Inc., alone, is responsible for any penalties.

16. The Department contends that a respondent's inability to pay or difficulty in paying a penalty is not a mitigating factor that can be applied to reduce penalties. The statute does not identify inability to pay as a mitigating factor, but neither does it exclude its consideration. See § 403.121(10), Fla. Stat. The issue is moot in this case, however, because the Department has already stipulated to the reduction of the penalties by 50 percent.

CONCLUSIONS OF LAW

17. DOAH has jurisdiction over the parties and the subject matter in this case under Sections 120.569, 120.57(1), and 403.121(2), Florida Statutes (2008).[1]

18. Section 403.161(1)(b), Florida Statutes, makes it a violation to fail to comply with any Department rule.

19. If the Department has reason to believe a violation of the laws that it administers has occurred, it may institute an administrative proceeding to establish liability, to recover damages, and to order the prevention, abatement, or control of

the conditions creating the violation. See § 403.121(2)(a)-(b), Fla. Stat.

20. However, the Department may proceed administratively only in cases where it seeks administrative penalties that do not exceed $10,000, as calculated in accordance with Section 403.121, Florida Statutes. § 403.121(2)(b), Fla. Stat.

21. The Department has the burden to prove by a preponderance of the evidence that Baldwin violated the law as alleged in the NOV. See § 403.121(2)(d), Fla. Stat.

22. In an administrative enforcement case, the Administrative Law Judge is to issue a final order on all matters, including the imposition of administrative penalties. See § 403.121(2)(d), Fla. Stat.

23. Section 403.121(3), Florida Statutes, provides a range of penalties that “must be calculated” for certain types of violations. Section 403.121(4), Florida Statutes, provides a range of penalties that the Department “must assess” for other identified types of violations. Section 403.121(5), Florida Statutes, provides that the Department “may assess” a penalty of $500 for failure to comply with any Department statute or rule not specifically identified in Section 403.121, Florida Statutes.

24. A penalty “may be assessed” for each additional day in which a violation occurs. See § 403.121(6), Fla. Stat.

25. For the violation addressed in Count I of the NOV, Section 403.121(4), Florida Statutes, requires a penalty of $5,000.

26. For the violation addressed in Count II of the NOV, Section 403.121(3)(g), Florida Statutes, requires a penalty of $2,000.

27. Evidence may be received in mitigation and the Administrative Law Judge may reduce a penalty up to 50 percent for mitigating factors. See § 403.121(10), Fla. Stat. The Administrative Law Judge may further reduce the penalties upon an affirmative finding that the violation was caused by circumstances beyond the reasonable control of a respondent and could not have been prevented by the respondent's due diligence. Id.

28. The Department's revised penalty demand of $3,500, to be paid in 12 monthly installments, is fair and reasonable under the circumstances.

DISPOSITION

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

1. Respondent shall pay $3,500 to the Department for the administrative penalties assessed above.

2. The penalties shall be paid in 12 monthly installments, consisting of eleven payments of $291.67 and a final payment of

$291.63. The first installment shall be paid within 30 days of the effective date of this Order. Each subsequent monthly payment shall be due no later than the 5th day of the ensuing month.

3. Payments shall be made by cashier's check or money order payable to the "State of Florida Department of Environmental Protection" and shall include thereon the notation "OGC Case No. 08-0305, Ecosystem Management and Restoration Trust Fund." The payment shall be sent to the Department of Environmental Protection, Southwest District Office, 13051 North Telecom Parkway, Temple Terrace, Florida 33637.

DONE AND ORDERED this 3rd day of February, 2009, in Tallahassee, Leon County, Florida.

BRAM D. E. CANTER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of February, 2009.

ENDNOTE

[1] All references hereafter to the Florida Statutes are to the 2008 codification.

COPIES FURNISHED:

Michael W. Sole, Secretary
Department of Environmental Protection
Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Tom Beason, General Council.
Department of Environmental Protection
Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Lea Crandall, Agency Clerk
Department of Environmental Protection
Douglas Building, Mail Station 35
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Bobby Baldwin
BR Baldwin, Inc.
310 Bay Arbor Boulevard
Oldsmar, Florida 34677

Peter James Caldwell, Esquire
Department of Environmental Protection
3900 Commonwealth Boulevard, Mail Station 35
Tallahassee, Florida 32399-3000

NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.