

BEFORE THE ENVIRONMENTAL BOARD OF REVIEW

STATE OF OHIO

DOUG'S AUTO SERVICE : Case No. EBR 313035
: :
Appellant, : :
: :
v. : :
: :
DONALD SCHREGARDUS, DIRECTOR : :
OF ENVIRONMENTAL PROTECTION : :
: :
Appellee. : Issued: August 31, 1994

FINDINGS OF FACT. CONCLUSIONS OF LAW AND
FINAL ORDER

Issued By:

ENVIRONMENTAL BOARD OF REVIEW
Julianna F. Bull, Chairwoman
Toni E. Mulrane, Vice-Chairwoman
Jerry Hammond, Member

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NO. 17028-9
JES

STATEMENT OF CASE

This matter comes before the Environmental Board of Review ("EBR") upon an appeal by Appellant, Doug's Auto Service ("Doug's"), from an Order issued by Appellee, the Director of the Ohio Environmental Protection Agency ("Director", "OEPA") on September 16, 1993. Appellant timely filed an appeal of this action on September 30, 1993. A de novo hearing was held before the Board on May 24, 1994.

Douglas E. Amos, the owner of Doug's Auto Service appeared pro se. Vicki L. Deisner and James O. Payne, Jr., Assistant Attorneys General, represented the Director. Based on the evidence adduced at the de novo hearing, the pleadings and briefs of the parties and the Certified Record filed with the Board pursuant to Revised Code Section 3745.05, the Board makes the following Findings of Fact, Conclusions of Law and Final Order.

FINDINGS OF FACT

1. Ohio Revised Code Section 3704.14 requires the Director of the OEPA to establish and supervise a motor vehicle inspection and maintenance program in specified counties in Ohio which contain metropolitan areas that exceed the federal health standards for certain pollutants, i.e., "nonattainment areas". The State was required to establish this program to comply with the federal "Clean Air Act Amendments of 1977". (Hearing Transcript ["HT"] p. 9)

2. This program is generally referred to as the "AIM" (Automobile Inspection and Maintenance) Program.

3. The purpose of the AIM Program is to reduce the amount of carbon monoxide and hydrocarbons in the atmosphere that lead to low-level ozone and,

thus, air pollution. To this end, automobiles in federally specified nonattainment areas are required to be inspected to ensure they are in compliance with the laws regarding pollution control devices. Vehicles must pass this inspection in order for the vehicle to be registered in the state of Ohio. (Kent Sutton v. Schregardus, EBR 472610, Findings of Fact, Conclusions of Law and Final Order issued August 3, 1993)

4. To implement this program, the Director licenses certain private facilities to inspect vehicles in the nonattainment counties. (R.C. 3704.14(B))

5. Douglas E. Amos is the owner of Doug's Auto Service, located at 8844 Reading Road, Cincinnati, Hamilton County, Ohio. Hamilton County is one of the federally specified nonattainment counties which must establish an auto inspection program. (Appellee's Ex. 1, R.C. 3704.14(A))

6. On December 16, 1987, Doug's Auto Service filed an initial application with the OEPA, requesting to be licensed as a Class "A" Vehicle Inspection Station. (Appellee's Ex. 1)

7. On February 1, 1988, Doug's Auto Service had satisfied the requirements to qualify as an official Automobile Inspection and Maintenance (AIM) facility. Accordingly, on that date, Doug's Auto Service was issued a license authorizing it to conduct inspections pursuant to the AIM Program. (Appellee's Ex. 7)

8. Licenses issued under the AIM Program must be renewed annually. Doug's Auto Service applied for, and received, a renewal of its AIM license in 1989, 1990, 1991, 1992 and 1993. (R.C. 3704.14(B); Appellee's Ex. 2, 3, 4, 5, 6)

9. Each of the license applications filed by Doug's Auto Service for 1988-1993 included an agreement which was signed by Doug Amos, whose signature was notarized. The relevant portion of these written agreements provides as follows:

In making this application I, or we, understand

fully and agree to the following:

a. To act as directed by the Ohio Environmental Protection Agency when inspecting vehicles in accordance with the rules and regulations of the AIM program.

b. To maintain, in good working order, all required tools and test equipment prescribed in the minimum requirements as determined by the Ohio EPA.

. . .
I obligate myself and my employees to conduct honest, thorough and efficient inspections, as promptly as possible, in accordance with the Ohio Environmental Protection Agency Rules, Regulations and Procedures Manual for the Automobile Inspection and Maintenance (AIM) Program. (Appellee's Ex. 1, 2, 3, 4, 5, 6)

10. The license issued to Appellant authorizes Doug's Auto Service to conduct AIM inspections for a fee of \$8.00 per inspection. Inspection stations purchase inspection certificates from the state of Ohio at a cost of \$3.00 each, thus allowing the station to make a profit of \$5.00 per test. (H.T. 11, R.C. 3704.14(B)(3), OAC 3745-26-09)

11. Only authorized facilities may conduct AIM inspections and issue compliance certificates.

12. Furthermore, only certified inspectors may conduct motor vehicle inspections at a licensed facility. The requirements for being certified as an inspector under the AIM program are set out in OAC 3745-26-06(F) and include possessing a current Automotive Service Excellence Certification in engine performance and completing a training course sponsored by the OEPA. (Appellee's Ex. 2, 3, 4, 5, 6; OAC 3745-26-06(F))

13. The OEPA provides each licensee under the AIM program with a computer. This computer has special software which indicates to the certified inspector what emission control components must be inspected depending upon the make, model, year and engine size of the vehicle which is presented for inspection.

(H.T. 11)

14. In addition to supplying a computer, Ohio EPA also provides each licensee with a procedures manual which sets forth the rules and regulations of the AIM program. (H.T. 12)

15. In order to ensure that licensed AIM facilities are complying with the rules and regulations of the AIM program, the OEPA has a quality assurance program that includes overt and covert audits. (H.T. 18; OAC 3745-26-04(Q))

16. In an overt audit, an Ohio EPA representative visits the inspection station and checks a number of things, including: that the official AIM sign, the station's license, and the inspectors' certificates are all properly displayed; that there are an adequate number of inspectors on duty during posted business hours; that the station has a sufficient supply of inspection certificates and that the blank certificates are stored in a secure place; that the station's equipment is in proper working order; and, that the personnel at the station understand the procedures of the program. Overt audits are conducted approximately every three months. (H.T. 18, 60; OAC 3745-26-04)

17. In a covert, or undercover audit, a vehicle is tampered with by OEPA inspectors in such a way that the vehicle can not pass the AIM inspection. The tampered vehicle is then taken by an OEPA inspector to a licensed facility and presented for inspection. (H.T. 19, 81)

18. On October 28, 1992, Mr. E. Bryan Skanes, an Auto Emissions Inspector Supervisor for the OEPA, conducted a covert audit at Doug's Auto Service. Mr. Skanes testified that, with one of his staff members, Raoul D'Assari as a witness, he disconnected the Exhaust Gas Recirculation (EGR) valve on a vehicle which he then presented for inspection at Doug's Auto Service. (H.T. 79-80)

19. Despite the fact that the EGR valve had been disconnected, which would

preclude the vehicle from passing an AIM inspection, at the conclusion of the inspection a passing certificate was issued for this vehicle by Doug's Auto Service. (Appellee's Ex. 12)

20. Immediately after the covert audit, Mr. Skanes completed a Covert Audit Report documenting what had transpired during the covert audit. (Appellee's Ex. 11)

21. On November 13, 1992, Mr. Skanes sent a letter to Doug Amos at Doug's Auto Service, informing Mr. Amos that his facility had failed a covert audit. Attached to the letter was a "Facility Inspection Report" which outlined the results of the covert inspection. (Appellee's Ex. 13)

22. On February 25, 1993, the Director issued a Notice and Findings of Violation and Orders to Doug's Auto Service, in which the failed covert inspection of October 28, 1992 was documented. In these Findings and Orders 13 violations were noted, 4 violations of which had occurred during the covert audit and 9 earlier violations of OAC 3745-26-04(P), failing to download the AIM computer on a weekly basis. Finally, the Findings and Orders directed Doug's Auto Service to pay a civil penalty of \$100 for these violations. (Appellee's Ex. 8)

23. Doug's Auto Service did not appeal the Director's February 25, 1993 Findings and Orders. (H.T. 25)

24. On March 17, 1993, Raoul D'Assari, an Auto Emissions Inspector for the OEPA, conducted a covert audit at Doug's Auto Service. Specifically, Mr. D'Assari testified that on March 17, 1993, he observed his supervisor, Bryan Skanes, remove the air pump belt from a car which Mr. D'Assari subsequently presented at Doug's Auto Service for an AIM inspection. (H.T. 133-134; 173)

25. Mr. D'Assari further testified that he watched the inspector inspect the

car and he observed that the inspector did not verify the Vehicle Identification Number (VIN) on the vehicle, which is a violation of OAC 3745-26-11(I). (H.T. 135)

26. In addition, despite the fact that the air pump belt had been removed from the car, which would preclude the vehicle from passing an AIM inspection, a passing certificate was issued for this vehicle by Doug's Auto Service. (Appellee's Ex. 16)

27. Immediately after the covert audit, Mr. D'Assari completed a Covert Audit Report documenting what had transpired during the covert audit. In his report Mr. D'Assari noted that the inspector had failed to identify the tampering, i.e., the removed air pump belt, and he had failed to verify the automobile's VIN number. (Appellee's Ex. 15)

28. At the hearing in this matter, Mr. Amos questioned Mr. D'Assari regarding a discrepancy between the VIN number Mr. D'Assari had entered on his Covert Audit Report and the VIN number which was entered in the Vehicle Inspection Report prepared by Doug's Auto Service. Evidence was not presented to the Board to establish which of these numbers was accurate. (H.T. 149-155)

29. On April 2, 1993, E. Bryan Skanes, as the Area Supervisor for the OEPA Cincinnati Field Office, sent a letter to Doug Amos at Doug's Auto Service, informing Mr. Amos that his facility had failed a covert audit. Attached to the letter was a "Facility Inspection Report" which outlined the results of the covert inspection. (Appellee's Ex. 14)

30. On September 16, 1993, the Director issued a Notice and Findings of Violation and Orders to Doug's Auto Service, in which the failed covert inspection of March 17, 1993 was documented. The Findings and Orders stated that the following three violations had been noted during the covert audit: 1)

Failure to verify the vehicle identification number (VIN), in violation of OAC 3745-26-11(I); 2) Failure to detect the tampered air injection reaction system, i.e., the removal of the air pump belt, in violation of OAC 3745-26-11(A)(6); and, 3) Issuing a passing certificate to a noncomplying vehicle, in violation of OAC 3745-26-11(D). (Appellee's Ex. 9)

31. In addition, after noting that Doug's Auto Service had previously been fined \$100 on February 25, 1993 for violations of OAC Chapter 3745-26, the Director proceeded to levy a \$250 civil penalty for the violations emanating from the March 17, 1993 covert audit. (Appellee's Ex. 9)

32. On September 30, 1993, Appellant timely filed an appeal of this action of the Director with the Board. In his Notice of Appeal, Appellant set forth two assignments of error: 1) That the finding of violation was against the manifest weight of the evidence, in that Appellant claims his inspector did verify the VIN number on the automobile that was presented, and he further asserts that the automobile did have its air pump belt in place and showed no signs of tampering; and, 2) Imposition of a civil penalty of \$250 by the OEPA without due process of law is contrary to the U.S. and Ohio Constitutions. (Notice of Appeal)

CONCLUSIONS OF LAW

1. Pursuant to R.C. 3745.05, the statutory duty of review imposed on the Board in a de novo hearing is a determination of whether the action of the Director which is under appeal is unreasonable or unlawful.

2. Unlawful means that the action taken by the Director is not in accordance with the relevant, applicable law. Unreasonable means that the action is not in accordance with reason, or that it has no factual foundation. Only where the Board can find from the certified record filed in the case and from the

evidence which was produced at the de novo hearing that there is no valid factual foundation for the Director's action, or that the action was not in accordance with law, can the action under appeal be found to be unreasonable or unlawful. (Citizens Committee to Preserve Lake Logan v. Williams, 56 Ohio App. 2d 61 [1977])

3. Where the evidence adduced in the record produced before the Board demonstrates that the action taken by the Director is reasonable and lawful the Board must affirm the action of the Director. The Board may not substitute its judgment for that of the Director. (Citizens Committee, supra.)

4. Ohio Revised Code Section 3704.17 is the statute which authorizes the Director to take certain actions when a licensed AIM facility violates the regulations of the AIM program. Specifically, R.C. 3704.17 provides in relevant part:

The director of environmental protection . . . may issue a notice of violation to the owner or operator of an inspection station licensed under division (B) of section 3704.14 of the Revised Code . . . , who the director or his representative finds has violated any specific prohibition or has failed to comply with any affirmative requirement of that section or any rule adopted under it. The notice of violation shall set forth the specific violation or failure to comply allegedly committed by the owner, operator, or inspector and shall be accompanied by an order requiring the owner, operator, or inspector to pay the director the appropriate civil penalty prescribed in this division. An owner, operator, or inspector who receives a notice of violation and order under this division for such a first violation or failure to comply is liable for a civil penalty of one hundred dollars.

5. This section further provides:

An owner, operator, or inspector who receives a notice of violation and order under this division for such a second or subsequent violation or failure to comply is liable for a civil penalty of two hundred fifty dollars.

(Emphasis added.)

6. There is plain disagreement between Mr. D'Assari and Mr. Amos regarding the presence of the air pump belt and whether the inspector at the March 17, 1993 covert audit checked the automobile's VIN number. In such instances, where the testimony offered at hearing presents disagreement among witnesses, the Board will defer to the action of the Director where that action is otherwise reasonable and lawful. We feel the record before us is sufficient to support a finding that the Director's action in imposing a \$250 civil penalty for the violations at issues was both reasonable and lawful in this case, and should be affirmed. (See Copperweld Steel Co. v. Shank, EBR 781787, issued October 24, 1989)

7. Furthermore, we are not persuaded by Appellant's argument that he has been denied due process of law as a result of the imposition of the instant civil penalty. This same argument was recently disposed of by the Court of Appeals for Lorain County thusly:

Courts of Appeals of Ohio have long recognized the unique nature of proceedings before the EBR. See e.g., Citizens Committee v. Williams (1977), 56 Ohio App. 2d 61, 69-70. In determining the constitutionality of those proceeding, this court must presume the constitutionality of the relevant statutes. R.C. 1.47; Lyle Const., Inc. v. Div. of Reclamation (1987), 34 Ohio St. 3d 22, 24. The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Armstrong v. Manzo (1965), 380 U.S. 545, 552, 14 L.Ed. 2d 62, 66. We find that Appellant was afforded that right to be heard and, therefore, the assignment of error is not well taken. Kent Sutton, dba Sutton Service Center v. Schregardus, decided April 4, 1994, Lorain County Court of Appeals.

8. Despite our affirmance of the Director's action herein, the Board feels compelled to note our continuing concern over the apparent lack of any consistent, formal policies or procedures for verifying the tampering of vehicles

used in covert audits under the AIM program. Indeed, while we have reviewed some cases in which the tampering was well-documented through the use of logs and photographs, there have been other instances, such as the case presented herein, where the Director's action is substantiated solely through the testimony of OEPA officials. This is not to say that we question the validity of this testimony, we merely feel that it would be extremely beneficial to have a standard procedure in place which would document the tampering for covert audits. In the absence of such tangible documentation, these appeals will invariably rest entirely on the testimony of witnesses. In such cases, given our very limited scope of review, we feel we must acquiesce to the determination of the Director.

9. We, therefore, conclude that the action of the Director in the present case was reasonable and lawful and should be affirmed.

FINAL ORDER

As a result of the above, the Board hereby rules to AFFIRM the Director in the above-captioned case.

The Board, in accordance with Section 3745.06 of the Revised Code and Ohio Administrative Code 3746-13-01, informs the parties that:

Any party adversely affected by an order of the Environmental Board of Review may appeal to the Court of Appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation to the court of appeals of the district in which the violation was alleged to have occurred. Any party desiring to so appeal shall file with the Board a Notice of Appeal designating the order appealed from. A copy of such notice shall also be filed by the Appellant with the court, and a copy shall be sent by certified mail to the Director of Environmental Protection. Such notices shall be filed and mailed within thirty days after the date upon which Appellant received notice from the Board

by certified mail of the making of an order appealed from. No appeal bond shall be required to make an appeal effective.

Entered in the Journal
of the Board this 3/24
day of August, 1994.

THE ENVIRONMENTAL BOARD OF REVIEW

Juliana F. Bull
Juliana F. Bull, Chairwoman

Toni E. Mulrane
Toni E. Mulrane, Vice-Chairwoman

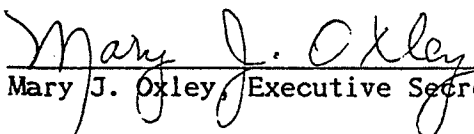
Jerry Hammond
Jerry Hammond, Member

COPIES SENT TO:

DOUG'S AUTO SERVICE
C/O DOUGLAS E. AMOS [CERTIFIED MAIL]
DONALD SCHREGARDUS, DIRECTOR [CERTIFIED MAIL]
Vicki L. Deisner, Esq.
Lori Massey, Esq.
James O. Payne, Jr., Esq.

CERTIFICATION

I hereby certify that the foregoing is a true and accurate copy of the FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER in DOUG'S AUTO SERVICE v. DONALD SCHREGARDUS, DIRECTOR OF ENVIRONMENTAL PROTECTION, Case No. EBR 313035 entered into the Journal of the Board this 31st day of August, 1994.



Mary J. Oxley, Executive Secretary

Dated this 31st day of
August, 1994, at Columbus, Ohio.



Attorney General
Lee Fisher

INTEROFFICE MEMORANDUM

TO: EES Attorneys
FROM: Vicki Deisner, AAG *VKD*
DATE: September 1, 1994
RE: EBR Final Order in AIM Case

For those of you doing AIM cases, you may want to review this decision since the Board outlines what it considers to be "areas of improvement" for the AIM program to incorporate.

/lac