



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. ECE 09838-15

AGENCY DKT. NO. PEA130002-206609

**NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
SOLID WASTE COMPLIANCE AND
ENFORCEMENT,**

Petitioner,

v.

**JIMMY BYRNE TRUCKING AND JIMMY
BYRNE, INDIVIDUALLY,**

Respondents.

Ray Lamboy, Deputy Attorney General, for petitioner (Christopher S. Porrino,
Acting Attorney General of New Jersey, attorney)

John A. Gonnella, Esq., for respondents

Record Closed: May 19, 2016

Decided: October 3, 2016

BEFORE **MARGARET M. MONACO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter involves a Notice of Civil Administrative Penalty Assessment (NOCAPA) issued by petitioner New Jersey Department of Environmental Protection (the Department) against respondents Jimmy Byrne Trucking and Jimmy Byrne. The NOCAPA cited respondents with six violations of the solid-waste regulations stemming from inspections in May 2013 and assessed a civil administrative penalty in the total amount of \$49,500. Respondents requested a hearing, via letter dated October 31, 2013, which the Department granted, and the matter was transmitted to the Office of Administrative Law for determination as a contested case. A hearing was held on February 3, 2016, after which the parties submitted a transcript of the hearing and post-hearing submissions in support of their respective positions. The record closed upon receipt of the last submission.

FACTUAL DISCUSSION

At the hearing, the Department offered testimony of Robert Gomez, and James Byrne testified on respondents' behalf. Based upon a review of the testimony and the documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I **FIND** the following preliminary **FACTS**:

James Byrne (Byrne) is a sole proprietor doing business as Jimmy Byrne Trucking. He has operated the company since 1991. Jimmy Byrne Trucking is a transporter of solid waste and Byrne, as sole proprietor, holds an A-901 license.

Robert Gomez (Gomez) has been employed by the Department for over twenty-five years, and has served as a supervising environmental specialist with the Bureau of Solid Waste Compliance and Enforcement, Transportation Oversight Unit, since 2002. He was personally involved in the May 9 and 10, 2013, inspections that led to the NOCAPA.

On the morning of May 9, 2013, Gomez received a telephone call from Roger Woodward (Woodward), an employee of BNK Restoration, an asbestos-abatement contractor that was performing work for the Port Authority of New York and New Jersey (Port Authority) at a site in Elizabeth, New Jersey. Woodward conveyed that he was having an issue with a Port Authority employee (Slovadan Bulkjovic) about removing an asbestos-filled container at the site, and provided to Gomez the identification number on the Department-issued decal on the container.

Gomez searched the New Jersey Environmental Management System (NJEMS) database using the decal number provided by Woodward. The NJEMS database showed that the decal had been issued to Jimmy Byrne t/a Jimmy Byrne Trucking. (P-3.) On or about May 5, 2011, Jimmy Byrne Trucking had ordered twenty-seven decals from the Department (i.e., twenty container decals and seven motor-vehicle-unit decals) for the registration period of July 1, 2011, through June 30, 2013. (See P-2; P-4.) The NJEMS revealed that on June 7, 2011, the company contacted the Department's Transporter Registration Unit and advised that it never received the decals it ordered, which the Department sends by first-class mail. (See P-3.) Although Gomez did not know the identity of the individual who had contacted the Department on June 7, 2011, Byrne testified that he had contacted the Department. In response, on June 7, 2011, the Department changed the status of the identification numbers on the originally issued decals in the NJEMS database from active to inactive and issued twenty-seven replacement decals to Jimmy Byrne Trucking. (See P-2 to P-4.)

After receiving the telephone call from Woodward and searching the NJEMS database, Gomez and another Department inspector (Lawrence Lewis) drove that day to the Port Authority site in Elizabeth. Gomez took photographs at the site. (P-5 to P-9.) The roll-off container that the Port Authority would not allow BNK Restoration to remove displayed the name Jimmy Byrne Trucking t/a Jimmy Byrne and a Department-issued solid-waste-container decal with the identification number provided by Woodward. (See P-2; P-6 to P-9.)¹ The decal was affixed to the container with tape, and it was one of the decals that the company reported it never received and had been

¹ The container also included the name, address, telephone number and logo of Tri-State Transfer Associates, Inc. (Tri-State). (See P-5.)

inactivated in June 2011. The Department representatives confiscated the decal. On the way back to the office, Gomez contacted Port Authority employee Bulkjovic, who conveyed that Jimmy Byrne Trucking was the transporter hired by BNK Restoration, and the reason he would not allow the container to be removed from the site was because the decal number on the container was not one of the decals that had been submitted to the Port Authority on December 10, 2012, as being used for the project. (See P-2.) Bulkjovic further advised that a representative from Jimmy Byrne Trucking would be returning to the site the next day with a valid decal.

Gomez returned to the site on May 10, 2013, and a BNK Restoration employee provided Gomez with various documents. (See P-10.) The documents included a Tri-State "Manifest of Waste Containing Asbestos Order Form," which lists BNK Restoration as the general contractor and includes the direction, "Remember to use Jimmy Byrne Trucking for delivery, also make sure the dumpster has the proper decal on it (see following)." (P-10.) Attached to the order form were copies of six solid waste container decals that had been submitted to the Port Authority on December 10, 2012, as to the containers that would be used to perform the waste removal. The six decals were part of the original set of decals that Jimmy Byrne Trucking had reported as not being received, which the Department inactivated. (See P-4; P-10.) The documents also included copies of five NJDEP Transporter Vehicle Registration Cards issued to Jimmy Byrne Trucking.

Gomez spoke on his cell phone with Byrne from the site. According to Gomez's report, Byrne contacted him and wanted to know what was wrong with the decal on the container that the Port Authority would not allow him to remove, and Gomez explained that he had confiscated the decal because it was inactive in the Department's database based on Byrne's advice that he never received the decal, and the decal was also not permanently affixed to the container. (P-2.) Byrne informed Gomez that he received the original decals after he had notified the Department that he had not received the decals, and that he had all of the decals in his possession. (See P-2.) Gomez provided Byrne with the registration clerk's information so that he could return the inactivated

decals, and Byrne advised that a truck with another container was on its way to the site. (See P-2.)

A truck arrived at the site with a replacement roll-off container. Gomez took photographs of the cab and the container. (P-11.) The truck's cab displayed the name, address and logo of Tri-State and three Department decals issued to Jimmy Byrne Trucking. (P-11.) Two of the decals were from the previous registration cycle and had expired. The third decal was one of the decals that had been inactivated. The roll-off container that arrived with the truck also displayed an inactivated decal and lacked a capacity marking in cubic yards. (See P-2.) The vehicle was operated by Walter Gonzales, who had a replacement container decal for the container observed on May 9, 2013. That decal was also one of the decals that had been inactivated. At Gomez's request, the driver provided the motor-vehicle registration and insurance card for the vehicle, along with the Department-issued cab card. (See P-2.) Tri-State was the registered owner of the truck and the truck's license plate matched the Transporter Vehicle Registration Card issued to Jimmy Byrne Trucking. (See P-10; P-11.) The New Jersey Apportioned Cab Card for the truck lists Tri-State as the owner and "Jimmy Byrne JBT" as the carrier. (P-12.) Based on the information provided, Gomez requested a copy of the lease agreement, which the driver did not have in his possession. Gomez confiscated the three inactive decals and spoke with Byrne, who conveyed that he would send another representative out with replacement decals for the equipment. Two representatives arrived with replacement decals for the cab and the two containers, which were valid and were affixed to the equipment. (See P-2.)

After the inspection, Gomez returned to his office, where he obtained the lease agreement dated May 1, 2013, between Tri-State, as lessor, and Jimmy Byrne t/a Jimmy Byrne Trucking, as lessee, which the Department had in its records. (See P-12.) With regard to the truck that arrived on the site, the vehicle identification number on the NJDEP Transporter Vehicle Registration Card issued to Jimmy Byrne Trucking matched one of the roll-off trucks listed in the lease (i.e., a 2006 Peterbilt roll-off truck). The Department's records also included a Lease Certification, which was submitted to

the Department as part of the registration statement for the equipment. (See P-12.) After the incident, Byrne returned the inactivated decals to the Department.

Gomez authored a report addressing his actions and conclusions. (P-2.) In his report, Gomez stated:

The incident . . . was completely avoidable. Mr. Byrne notified the Department on 6/7/11 that he did not receive the series of cab and container decals . . . [and] [b]ased on this the Department inactivated them and issued replacement decals. According to Mr. Byrne he received the first set of decals in the mail after he made notification to the Department on 6/7/11. Had Mr. Byrne immediately returned those decals to the Department it would have prevented him from placing inactivated decals on his equipment

Gomez concluded in his report:

The first set of decals was mailed to Mr. Byrne via first class mail. So it [is] not possible for me to determine whether he had them in his possession or not when Mr. Byrne notified the Department on 6/7/11 that he never received them. However, even if I provide Mr. Byrne with the benefit of doubt, he failed to return them and then began using them on his equipment. To use these decals after he made notification that he never received them was a deliberate act. I observed several of these inactivated decals in use and saw a submittal to the Port Authority that these decals were the ones he intended to use on Port Authority work

Use of the inactivated decals constitutes use of unregistered solid waste equipment. By notifying the Department he never received decals he ordered, using them, and also submitting them to the Port Authority constitutes a submission of inaccurate and misleading information

Gomez issued a Notice of Violation to Jimmy Byrne Trucking, dated May 16, 2013, citing six violations related to improper equipment markings, the failure to have the lease agreement in the vehicle, and the use of the inactivated decals. (P-13.) Jimmy Byrne Trucking submitted a Compliance Response Form, dated June 3, 2013,

setting forth the corrective action taken (i.e., placed active decals on the cab and the two roll-off containers on May 10, 2013; put the lease that had been approved by the Department in the cab of the truck; and the truck was being lettered to display the capacity of the truck). (P-14.) It also states, "On the date of the violation 5/10/13, Jimmy Byrne Trucking had active decals and a lease; however, they [sic] negligent in not putting them on the vehicle and containers."

On October 11, 2013, the Department issued a NOCAPA to Jimmy Byrne Trucking and Jimmy Byrne individually stemming from the May 2013 inspections. (P-1.) The NOCAPA cited respondents with violation of N.J.A.C. 7:26-3.4(h)(1) based on the driver's inability to produce the lease for the cab; violation of N.J.A.C. 7:26-3.4(h)(2) based on the cab displaying an expired solid-waste decal; violation of N.J.A.C. 7:26-3.4(h)(3) based on the two roll-off containers not being marked with the capacity of the units in cubic yards in letters and numbers at least three inches in height; and violation of N.J.A.C. 7:26-3.4(h) based on the decal being taped to the roll-off container and the cab only displaying the lessor's company name (Tri-State). The Department did not assess a penalty for these four violations "because they were corrected in a reasonable timeframe according to the Grace Period Law." (P-1.)

The NOCAPA also cited respondents for not having properly registered equipment in violation of N.J.A.C. 7:26-3.2(a)(2) with regard to the cab and the two containers that had inactivated decals. It further imposed a penalty predicated on N.J.A.C. 7:26-5.6(a), and described this noncompliance as follows:

Submitted inaccurate information or made a false statement, representation or certification in any application, record or other document. Specifically, Respondents notified the Department's Transporter Registration Unit on 6/7/11 that they had never received decals. Taking Respondents at their word, the Department issued replacement decals and inactivated the originals. However, the Department subsequently observed the inactivated decals to be fixed on Respondent's equipment. As Respondents used both the original and replacement decals, this was a knowing and deliberate act. In addition, these inactivated decals were

also submitted to the Port Authority for use on Port Authority jobs as if they were valid decals.

The Department determined that the above two violations did not qualify for Grace Period Law protection from penalties, and assessed penalties in the amount of \$4,500 and \$45,000, respectively, for the violations.

The record is bereft of evidence that respondents had been previously cited by the Department for any violations from when the company began operating in 1991 until May 2013. Gomez testified that he did not personally have any other issues with Jimmy Byrne Trucking prior to the 2013 incident, and Byrne testified that he had no violations from the Department before the May 2013 incident.²

THE TESTIMONY

Apart from the testimony that forms the basis of the above findings of fact, a summary of other pertinent testimony follows.

Robert Gomez

Gomez addressed the violations that resulted in penalties against respondents. He testified that the violation for not having registered equipment related to the cab and two containers that displayed invalid decals, and the Department assessed the base penalty of \$4,500 for this violation. With regard to the violation concerning the submission of inaccurate or false information, Gomez explained that the regulation states that the penalty should not be less than \$40,000 or more than \$50,000 for “each intentional, deliberate, purposeful, knowing or willful act or omission by the violator,” and respondents were assessed the mid-point, or \$45,000. As to the rationale for assessing a penalty against Byrne for violating that regulation, Gomez testified:

We felt that it was deliberate on Mr. Byrne’s behalf because he made . . . application in May of 2001. A month later in

² The parties noted that there was a pending proceeding regarding the revocation of Byrne’s license.

June of 2011, the decals were reported as never received. We had to take his word at that point that he never received them, because it's first-class mail. So, you know, a month goes by and you don't receive something, you must not have received it. So, we . . . reissued decals.

Then, in May of 2013 . . . we conducted this inspection on the 9th, and then, I was back there on the 10th, and we observed . . . four decals that were being put into use that had been reported as never received

In addition, Slovadan had said that in December of 2012, the package of decals that he was supplied with . . . were the inactive container decals.

Gomez described that Byrne should have notified the Department and/or returned the decals once he realized that he had both the inactive and the active decals. Gomez articulated his belief that Byrne did not make an unintentional error regarding the decals. With regard to the rationale for inferring that Byrne gave non-accurate or false information to the Department regarding the decals, Gomez stated that the Tri-State equipment was "another area of concern." He noted that the cab was owned by Tri-State and was not marked as Jimmy Byrne. He also referred to concerns relating to documentation listing a mailing address for another company in Kearny and the containers being supplied by Tri-State.

Gomez acknowledged that the issues that are the subject of the hearing involved a two-day issue on May 9 and 10, 2013, and that Jimmy Byrne Trucking corrected every issue. As to whether Byrne gave him a reason why the incident happened, Gomez testified that Byrne advised that his wife had been ill and it was an oversight on his part. He described that the Department representative who received the call about not receiving the decals "took the caller at face value because they had enough information that it made sense to him," and explained that the decals are sent by first-class mail and there is no way for the Department to track if someone did or did not receive them. Gomez agreed that it did not trigger any concern on behalf of the Department that Jimmy Byrne Trucking called about not receiving the decals, and acknowledged that there have been other instances where a company has reported not receiving decals and replacement ones were issued, along with occasions in the past

where the Department has not sent the decals out on time. Gomez admitted that he did not know whether or not the replacement active decals had been put to use on other equipment. He admitted that the valid decals that were ultimately brought to the site "were in appropriate condition"; the backings on the decals were removed and the decals had apparently not been on other equipment. Jimmy Byrne Trucking also returned the inactive decals after the incident. Gomez did not ask Byrne why he gave the Port Authority inactive decals when he had active ones in his possession.

James Byrne

Byrne testified that during the period of May 9 and 10, 2013, his wife suffered from liver cancer and he was taking her to chemotherapy every two weeks, after which she was "shot down" for two or three days "so [he] wasn't around all the time." Byrne's wife died on March 18, 2014. He described that during this period he was not attending to business as he normally would have been and testified, "[f]or five years before my wife died, I was like an absentee. I was there; I wasn't there." Prior to her death, Byrne's wife was the president of Tri-State.

As to the incident in issue, Byrne testified that Ron Fink, an employee of Tri-State, was doing work for Byrne when he was not around. He described that Fink submitted the decal request on behalf of Jimmy Byrne Trucking in May 2011. Byrne later testified that he did not remember whether he made this request or had someone else do it. According to Byrne, after the decal request had been submitted, Fink informed him that "we didn't get the decals for New Jersey," and Byrne then called the Department and advised that he did not receive the decals. He described, "I was probably putting the decals or he was putting the decals on containers, but I didn't know they were canceled, because we received the new ones," and "I didn't know we received the new ones." He also described that Fink was in charge of the placement of the decals on the equipment in May 2013, Fink was probably putting the decals on the Tri-State containers, and Fink probably gave them to a Tri-State mechanic to put on the containers. Byrne explained that the containers were Tri-State containers, and his company leases containers from Tri-State.

Byrne testified that the decals were kept in his office. He admitted in his response to the Department's request for admissions that "[t]he respondent received and retained the first set of decals and the second set of decals" (P-18), and testified, "[w]e must have got them." Byrne stated, "if I have the old ones and the new ones, I don't know the difference, because I didn't know they were expired until Mr. Gomez got in touch with my office." He described that he was with his wife on May 9 and 10, 2013, and, after Gomez informed Byrne of the problem, Byrne directed Fink to do what had to be done, stating that Fink did it because Byrne was taking care of his wife. Byrne testified that Gomez advised him that the decals were no good because he got the new ones, Byrne "found the new ones," and he then sent the inactive decals back to the Department.

LEGAL DISCUSSION AND CONCLUSIONS

Pursuant to the Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq., the Department is responsible for the regulation of solid waste in New Jersey, including the collection, transportation, storage and disposal of solid waste. Toward that end, the Department has been given the power and duty to promulgate rules and regulations concerning solid-waste collection and disposal activities. See N.J.S.A. 13:1E-6.

The Department has promulgated regulations governing the transportation of solid waste. See N.J.A.C. 7:26-3.1 et seq. Pertinent to the within matter, N.J.A.C. 7:26-3.4(h) directs:

Each registered solid waste vehicle . . . used in the collection or transportation of solid waste shall properly, permanently, and conspicuously display a current State of New Jersey solid waste decal and the New Jersey Department of Environmental Protection (N.J.D.E.P.) registration number and the name of the registered company in letters and numbers at least three inches in height, and, except for solid waste containers, shall carry the current N.J.D.E.P. registration certificate in the solid waste cab. Current solid waste decals must be permanently affixed to the driver's side of each solid waste vehicle, prior to transport of solid

waste to, from or within New Jersey or prior to the unit being placed into service or before receiving waste.

1. A copy of any lease filed in connection with the solid waste registration of a solid waste vehicle shall be carried in the solid waste cab and made available to Department representatives upon inspection or request.
2. Only current period decals shall be displayed. Expired decals must be removed from the solid waste vehicle prior to affixing current registration period decals
3. In addition, there shall be affixed to the driver's side of each registered solid waste vehicle, in letters and numbers at least three inches in height, the capacity of the solid waste transport unit in cubic yards, in tons or in gallons, so as to be visible to the operator of the solid waste facility.

The regulations further direct that “[n]o person shall engage or continue to engage in the transportation of solid waste in this State without first obtaining an approved registration statement from the Department.” N.J.A.C. 7:26-3.2(a). In this regard, “[a]ny device used for transportation of solid waste shall be registered with the Department as either a solid waste cab, trailer, container, or single-unit vehicle.” N.J.A.C. 7:26-3.2(a)(2). The registration period is biennial and runs from July 1 through June 30 of each odd-numbered year. N.J.A.C. 7:26-3.2(a). The decals obtained by transporters through the registration process must be permanently affixed to the equipment and expired decals must be removed. N.J.A.C. 7:26-3.4(h); N.J.A.C. 7:26-3.4(h)(2).

All solid-waste vehicles registered with the Department for the transportation of solid waste must be owned or leased by the applicant, and, if leased, a copy of the lease, along with a copy of the Motor Vehicle Registration card, must be supplied when filing the registration statement. N.J.A.C. 7:26-3.2(h). Transporters who lease their equipment must also submit an affidavit or certification to the Department, certifying that they “must exercise exclusive use, possession and control over each piece of solid waste equipment which is included in this application for a registration statement while

such equipment is used to transport solid waste” and “must take reasonable measures to ensure that the . . . equipment will not, during the period of the lease, be used by any other person for the purpose of transporting solid waste.” N.J.A.C. 7:26-3.2(i)(7). Transporters must keep a copy of the lease in the solid-waste cab. N.J.A.C. 7:26-3.4(h)(1). In addition, transporters “shall, for purposes of solid waste activities and to the extent provided for under New Jersey law, be responsible for the actions and omissions of their lessors and their vehicle operators” N.J.A.C. 7:26-3.2(l).

Turning to the within matter, the undisputed evidence supports, and respondents do not contest, that they violated N.J.A.C. 7:26-3.4(h)(1) based on the driver’s inability to produce the lease for the cab; violated N.J.A.C. 7:26-3.4(h)(2) based on the cab displaying an expired solid-waste decal; violated N.J.A.C. 7:26-3.4(h)(3) based on the two roll-off containers not being properly marked with the capacity of the units in cubic yards; and violated N.J.A.C. 7:26-3.4(h) based on the decal being taped to the roll-off container and the cab only displaying the lessor’s company name. Pursuant to the law providing for the use of grace periods for minor violations, N.J.S.A. 13:1D-125 et seq., the Department did not assess a penalty for these violations, which are classified as minor violations. See N.J.A.C. 7:26-5.4(g)(6). Notwithstanding the absence of a penalty, I **CONCLUDE** that the Department has satisfied its burden of proving, by a preponderance of the credible evidence, respondents’ violation of the aforementioned regulations.

The Department further found that respondents violated N.J.A.C. 7:26-3.2(a)(2), for which it assessed a penalty in the amount of \$4,500. N.J.A.C. 7:26-3.2(a)(2) unambiguously mandates that “[a]ny device used for transportation of solid waste shall be registered with the Department as either a solid waste cab, trailer, container, or single-unit vehicle.” The evidence demonstrates that the two containers and the truck observed by Gomez on May 9 and 10, 2013, displayed invalid decals with inactivated identification numbers. Jimmy Byrne Trucking fully acknowledged in its Compliance Response Form that the cab and two containers had inactive decals and did not contest the status of the decals at the hearing. In short, in view of the inactive nature of the decals, the equipment was not properly registered with the Department. Whether this

was due to an oversight, negligence, or otherwise is not pertinent. Neither the Solid Waste Management Act nor N.J.A.C. 7:26-3.2(a) stipulate an intent requirement in order for a penalty to be imposed for this violation, and the Department must only prove the proscribed action. See Dep't of Env'tl. Prot. v. Harris, 214 N.J. Super. 140, 147–48 (App. Div. 1986). Similarly, whether or not respondents affixed the invalid decals to the equipment is of no consequence, since a transporter is responsible for actions and omissions by their lessors and vehicle operators. N.J.A.C. 7:26-3.2(l).

I **CONCLUDE** that the Department has shouldered its burden of proving, by a preponderance of the credible evidence, respondents' violation of N.J.A.C. 7:26-3.2(a)(2). I further **CONCLUDE** that the imposed \$4,500 penalty is consistent with the regulations and cannot be said to be arbitrary, capricious, or unreasonable. Pursuant to N.J.A.C. 7:26-5.4(g)(6), a failure to ensure that any device used for the transportation of solid waste is registered with the Department in violation of N.J.A.C. 7:26-3.2(a)(2) is a non-minor violation with no grace period and carries a base penalty of \$4,500 for each violation. Indeed, although each violation of the regulation "shall constitute an additional, separate and distinct violation" for which a penalty may be imposed, N.J.A.C. 7:26-5.4(b), the Department treated the violations relating to the truck and two containers as only one violation.

Finally, the Department determined that respondents were subject to a civil administrative penalty pursuant to N.J.A.C. 7:26-5.6. That regulation provides for a civil administrative penalty "for submitting inaccurate or false information" and states:

The Department may assess a civil administrative penalty pursuant to this section against each violator who submits inaccurate information or who makes a false statement, representation or certification in any application, record or other document required to be submitted or maintained pursuant to the Act or any rule promulgated, any administrative order, permit, license or other operating authority issued, any district solid waste management plan approved pursuant to the Act.

[N.J.A.C. 7:26-5.6(a).]

A violation of this regulation is deemed to be “non-minor and, therefore, not subject to a grace period.” N.J.A.C. 7:26-5.6(e). The amount of the penalty that may be assessed hinges on the conduct of the violator. In this regard, the regulation instructs:

(c) The Department shall assess a civil administrative penalty for violations described in this section based on the conduct of the violator at the mid-point of the following ranges except as adjusted pursuant to (d) below:

1. For each intentional, deliberate, purposeful, knowing or willful act or omission by the violator, the civil administrative penalty per act or omission shall be in an amount of not more than \$ 50,000 nor less than \$ 40,000 per act or omission; and
2. For all other conduct, the civil administrative penalty, per act or omission, shall be in the amount of \$ 1,000 per violation.

(d) The Department may adjust the amount determined pursuant to (c) above to assess a civil administrative penalty in an amount no greater than the maximum amount nor less than the minimum amount in the range described in (c) above, on the basis of the following factors:

1. The compliance history of the violator;
2. The nature, timing and effectiveness of any measures taken by the violator to mitigate the effects of the violation for which the penalty is being assessed;
 - i. Immediate implementation of measures to effectively mitigate the effects of the violation will result in a reduction to the bottom of the range.
3. The nature, timing and effectiveness of any measures taken by the violator to prevent future similar violations;
 - i. Implementation of measures that can reasonably be expected to prevent a recurrence of the same type of violation will result in a reduction equal to the bottom of the range.

4. Any unusual or extraordinary costs or impacts directly or indirectly imposed on the public or the environment as a result of the violation; and/or
5. Other specific circumstances of the violator or the violation.

[N.J.A.C. 7:26-5.6(c) and (d).]

In this matter, the Department assessed a penalty of \$45,000, relying on N.J.A.C. 7:26-5.6(c)(1). In contrast to the other violations, and as acknowledged in the Department's brief, N.J.A.C. 7:26-5.6(c)(1) imposes a scienter requirement, and the Department must prove that respondents acted intentionally, deliberately, purposefully, knowingly, or willfully. The Department bears the burden of proving this violation by a preponderance of the credible evidence. See In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962). Evidence is said to preponderate "if it establishes 'the reasonable probability of the fact.'" Jaeger v. Elizabethtown Consol. Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). The evidence must "be such as to lead a reasonably cautious mind to the given conclusion." Bornstein v. Metro. Bottling Co., 26 N.J. 263, 275 (1958). Precisely what is needed to satisfy this burden necessarily must be judged on a case-by-case basis.

There is no dispute that Jimmy Byrne Trucking contacted the Department about not receiving the decals that it ordered, and the company ultimately received both sets of decals. However, I do not embrace the Department's stance that the "evidence in the record supports a finding that Jimmy Byrne Trucking knowingly provided false information to the Department by falsely claiming in June 2011 that he had not received 27 decals he ordered, prompting the Department to send him 27 replacement decals at no additional cost." Preliminarily, I afford no weight to the evidence and arguments offered by the Department relating to matters such as respondents' alleged relationship or dealings with Tri-State or other companies, employees that Jimmy Byrne Trucking may or may not have had, or whether or not Jimmy Byrne Trucking complied with its lease with Tri-State or the Lease Certification filed with the Department. Simply put, these matters go beyond the scope of this proceeding and have no bearing on whether or not the Department has satisfied its burden of demonstrating that respondents

intentionally, deliberately, purposefully, knowingly, or willfully provided false or inaccurate information to the Department regarding its decals. The NOCAPA under review includes no cited violations relating to these matters. Plainly, the Department cannot satisfy its burden of proof as to violations that were charged by suggesting that respondents may be guilty of other violations that were not charged.

Based upon a review of the totality of the evidence, I **CONCLUDE** that the Department has failed to establish, by a preponderance of the credible and competent evidence, that respondents intentionally, deliberately, purposefully, knowingly, or willfully provided false or inaccurate information to the Department or others regarding its decals. Contrast NJDEP v. Martinez, 96 N.J.A.R.2d (EPE) 121. For example, the Department offered no evidence that respondents were using both sets of decals to support a reasonable inference that they knowingly provided false information to the Department in order to secure and use excess decals. Gomez further acknowledged that the replacement valid decals that were ultimately brought to the site had apparently not been used on other equipment. Apart from this, other than the different numbers on the decals, no evidence was offered that there was any variation between the valid and invalid decals, such as a change in color or other markings, to enable a recipient to distinguish between the two sets of decals and to alert a recipient as to the decals that were intended to be replacements for any other decal that may have been received. The record also does not include evidence that the replacement decals were accompanied by a letter confirming their replacement status or advising that any other decal should not be used and should be returned to the Department. Beyond this, that respondents brought additional invalid decals to the site after being alerted to the problem and despite their apparent possession of valid decals makes no sense. This evidence militates against the conclusion that respondents' action was an intentional, deliberate, purposeful, knowing, or willful attempt to falsely mislead the Department and, instead, lends support for the conclusion that respondents' use of the invalid decals was simply a mistake due to Byrne's admitted lack of attention to his business. However, Byrne's failure to attend to his responsibilities as a licensed waste transporter does not absolve him from liability. Suffice it to say, the information that he gave to the Department about not receiving the decals, while perhaps accurate when given,

ultimately turned out to be inaccurate, along with the status of the decals that had been submitted to the Port Authority. Had Byrne been more attentive to his business affairs, he would have recognized the error and could have timely corrected the inaccurate information by returning the original set of decals, which, in turn, would have avoided the decals being used on equipment. Pursuant to N.J.A.C. 7:26-5.6(c)(2), a civil administrative penalty of \$1,000 may be imposed for any act or omission relating to the submission of inaccurate information or a false statement and, in contrast to N.J.A.C. 7:26-5.6(c)(1), proof of intentional, deliberate, purposeful, knowing, or willful action is not required. I **CONCLUDE** that the totality of the circumstances supports that respondents violated N.J.A.C. 7:26-5.6, warranting a penalty in the amount of \$1,000.³

ORDER

I **ORDER** that that the Department's determination that respondents violated N.J.A.C. 7:26-3.4(h), N.J.A.C. 7:26-3.4(h)(1), N.J.A.C. 7:26-3.4(h)(2), and N.J.A.C. 7:26-3.4(h)(3) be and hereby is **AFFIRMED**. I further **ORDER** that the Department's determination that respondents violated N.J.A.C. 7:26-3.2(a)(2), for which it imposed a penalty in the amount of \$4,500, be and hereby is **AFFIRMED**. I **ORDER** that the Department's assessment of a penalty in the amount of \$45,000 based on the provisions of N.J.A.C. 7:26-5.6(c)(1) be and hereby is **REVERSED**, and a \$1,000 penalty pursuant to N.J.A.C. 7:26-5.6(c)(2) be and hereby is imposed.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Environmental Protection does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this

³ Inasmuch as this is the minimum penalty proscribed, the factors listed in N.J.A.C. 7:26-5.6(d) are not applicable.

recommended decision shall become a final decision in accordance with N.J.S.A.
52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, PO Box 402, Trenton, New Jersey 08625-0402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 3, 2016

DATE


MARGARET M. MONACO, ALJ

Date Received at Agency:

Date Mailed to Parties:

jb

APPENDIX

List of Witnesses

For Petitioner:

Robert Gomez

For Respondents:

James Byrne

List of Exhibits

For Petitioner:

- P-1 Notice of Civil Administrative Penalty Assessment dated October 11, 2013
- P-2 Transporter Investigative Report by Robert Gomez
- P-3 Screenshot of the New Jersey Environmental Management System
- P-4 List of decals
- P-5 to P-11 Photographs
- P-12 Lease dated May 1, 2013
- P-13 Notice of Violation dated May 16, 2013
- P-14 Letter from John A. Gonnella, Esq., to Robert Gomez dated June 3, 2013
- P-15 Not in evidence
- P-16 Not in evidence
- P-17 Non-Hazardous Waste Manifest
- P-18 Respondents' Answers to Interrogatories, Production of Documents and Requests for Admissions
- P-19 Copy of registration cards and decals with handwritten note

For Respondents:

- R-1 Letter from John A. Gonnella, Esq., to the NJDEP dated October 31, 2013
- R-2 Correspondence from John A. Gonnella, Esq., dated August 16 and 20, 2012, and April 23, 2015