

**BEFORE THE DEPARTMENT OF RESOURCES RECYCLING AND RECOVERY
STATE OF CALIFORNIA**

IN THE MATTER OF THE ACCUSATION AGAINST:

CUEVAS MATTRESS INC. dba SPRING PEDIC BEDDING CO.

Respondent

File No.: IH22-002-MAT

DECISION AND ORDER

I. INTRODUCTION

The Department of Resources Recycling and Recovery (CalRecycle or Department) served its Accusation imposing penalties on Cuevas Mattress Inc., a California Corporation doing business as Spring Pedic Bedding Co. (Respondent), on February 10, 2022.

Respondent opposed the imposition of penalties and timely requested a hearing. A hearing was conducted on June 30, 2022, in Sacramento, California via video-conferencing. On that date, all evidence and testimony in this matter was received into the record and the record was closed.

Daniel Zlatnik, Attorney, CalRecycle, appeared on behalf of the Department. Ricardo Cuevas appeared on behalf of Respondent.

Douglas C. Jensen, Attorney IV, CalRecycle, presided over the hearing under a delegation of authority from CalRecycle Director, Rachel Machi Wagoner.

II. ISSUE

Whether the Department's imposition of penalties on the Respondent shall be sustained, overruled, or otherwise modified.

III. EVIDENTIARY MATTERS

Witnesses

The Department presented testimony from Rob Hammerstad (Hammerstad), a former Department inspector. Hammerstad inspected mattress retailers and their documents as part of his regular duties at CalRecycle. He testified regarding an October 21, 2020, inspection he conducted at one of Respondent's business locations- 5843 South Broadway in Los Angeles, California.

The Department presented testimony from Kirby Garrett (Garrett), a supervisor in the Department's Extended Producer Responsibility Compliance Unit (EPRCU). The EPRCU conducts enforcement in connection with the Used Mattress Recycling and Recovery Act (Act). Garrett testified regarding the EPRCU's record-keeping practices and his managerial duties, including review of inspector reports. He further testified regarding an inspection he participated in on January 31, 2018, at one of Respondent's business locations- 3504 East Olympic Boulevard, Los Angeles, California 90023.

Ricardo Cuevas (Cuevas) testified on behalf of Respondent.

Exhibits

Department Exhibits number 2-8, 10-17, and 19-21 were admitted without objection. Admission of Exhibit Number 1, Declaration of Gayle G. Hanlon (Declaration), was taken under submission.

The Declaration is hearsay. However, on examination, Cuevas admitted the factual allegations contained therein. Therefore, the declaration is admissible for the purpose of supplementing and explaining those admissions. (Gov. Code section 11513(d).)

Second Amended Accusation

The Department, during its closing statement at hearing, moved to orally amend its Accusation a second time by including 14 additional violations. Government Code section 11507 provides the following:

"At any time before the matter is submitted for decision the agency may file or permit the filing of an amended or supplemental accusation. All parties shall be notified thereof. If the amended or supplemental accusation presents new charges the agency shall afford respondent a reasonable opportunity to prepare his defense thereto, be he shall not be entitled to file a further pleading unless the agency in its discretion so orders. Any new charges shall be deemed controverted, and any objections to the amended or supplemental accusation may be made orally and shall be noted in the record." (Government Code section 11507.)

The Department's motion to amend its Accusation a second time is denied. First, section 11507 does not authorize oral amendments; rather, it requires that amendments *be filed*. Second, the Department's motion- made during closing arguments- did not afford Respondent an adequate opportunity to prepare his defense. The Department's First Amended Accusation, filed on June 17, 2022, shall be the operative Accusation in this matter.

IV. FINDINGS OF FACT

Ricardo Cuevas (Cuevas) is a managing executive of Cuevas Mattress, a California corporation doing business as Spring Pedic Bedding Co. (Respondent). Respondent sells mattresses at two retail locations: 5843 South Broadway, Los Angeles, California 90003 (Broadway Location) and 3504 East Olympic Boulevard, Los Angeles, California 90023 (Olympic Location). Respondent also renovates used mattresses for sales purposes at its Olympic Location.

The Mattress Recycling Council (MRC) is a Mattress Recycling Organization authorized by the Act. Respondent registered with the MRC as a mattress renovator and retailer on December 30, 2015, and regularly reported mattress sales and remitted recycling charges from January 2016 through November 2016. Respondent did not report sales or remit charges beginning in December 2016.

On January 31, 2018, the Department conducted an inspection of the Olympic Location. Cuevas was present at the inspection. An inspection report notes "not all records to support annual reporting requirements were made available", "Department records indicate that the business did not submit the annual report for the 2016 calendar year that was due May 1, 2017", and "some records requested are not kept by the business, not available or do not currently support annual reporting requirements."

On April 14, 2018, the Department issued Respondent a Notice of Noncompliance identifying its findings from its January 2018 inspection and instructing Respondent to correct outstanding violations to achieve compliance at future inspections.

On May 1, 2018, Respondent timely submitted its 2017 annual report.

On January 30, 2019, the Department conducted a second inspection of the Olympic Location. The business was found to be compliant, although one area of concern was noted- that the business monitor CalRecycle's Mattress Stewardship Program website for manufacturer and brand compliance.

On March 12, 2019, the Department issued to Respondent a Notice of Compliance identifying its findings from its January 30, 2019, inspection.

On May 1, 2019, Respondent timely submitted its 2018 annual report.

Beginning on February 5, 2020, the Department emailed Respondent a reminder that its 2019 annual report was to be submitted to the Department by May 1, 2020. Additional reminders were emailed on March 11, 2020, April 2, 2020, and April 16, 2020.

On April 28, 2020, the Department extended the May 1 deadline to July 1 in consideration of the "Covid-19 public health emergency".

On June 4, 2020, the Department emailed Respondent reminding it to submit its annual report by July 1, 2020. Additional reminders were emailed on June 17, June 24, and June 30, 2020.

In early July 2020, the Department prepared a "Past due and Required Actions" to be mailed to Respondent again notifying Respondent that its annual report was past due. However, the notice was inadvertently not mailed out.

In mid-July 2020, the Department prepared its "second notice for failure to submit the 2019 annual report". The 'second notice' states "failure to submit the 2019 Annual Report by July 31, 2020 will result in further actions by the Department including penalties of up to \$5,000 per day, as specified in PRC section 42993.1(a)." Around this time, the Department realized that it had failed to mail out the "Past Due and Required Actions" notice it had prepared earlier in the month. Rather than modifying the notices to reflect this inadvertent omission, the Department mailed out the unaltered notices simultaneously.

In mid-September 2020, Garrett contacted Cuevas by telephone regarding Respondent's outstanding 2019 annual report.

On September 16, 2020, the Department emailed to Respondent a copy of the annual reporting form and again noting that the 2019 annual report was past due.

On October 21, 2020, the Department conducted an inspection of the Broadway Location. It verified that Broadway Location was conducting retail mattress sales and requested records demonstrating remittance of recycling charges collected with mattress sales. The remittance records were not immediately provided, but the Department was provided mattress sale receipts which demonstrated proper collection of the recycling charge.

At the October 21 inspection, the Department provided Respondent with a Notice of Required Actions (NORA). The NORA required Respondent to provide records within seven days including: 1) proof of recycle charge remittance to an MRO; and, 2) information on the use of the Department's website.

On October 29, 2020, Respondent submitted its 2019 annual report to the Department by email.

On November 10, 2020, the Department delivered to Respondent a Notice of Noncompliance requiring Respondent to "take corrective action and provide ... information to CalRecycle with thirty (30) days of this notification [November 9, 2020]." The notice required Respondent to provide documentation of a recent recycle charge remittance to the MRC. The notice indicated that "failing to correct" could lead to violations subject to penalties.

On December 14, 2020, the Department delivered to Respondent a Second Notice of Violation. It notified Respondent that it remained in violation for failing to provide documentation demonstrating that it had reported sales and remitted recycling charges to the MRC. The Notice provided "failure to respond to this notice by January 11, 2020 ... will result in penalties of up to \$5,000 per day".

On January 20, 2021, the Department delivered to Respondent a Notice of Continuing Violation. Again, it notified Respondent that it was in violation for failing to provide records demonstrating recycling charge remittances and subject to penalties.

On June 6, 2022, the Department obtained 669 receipts from the Broadway Location spanning April 2020 to March 2022. The Department determined that the receipts documented collection of a recycling charge in connection with all 764 total mattress sales.

On June 6, 2022, the Department obtained 60 receipts from the Olympic Location spanning approximately August 2020 to March 2022. The Department determined that the receipts documented a failure to collect the recycling charge in connection with 92 of 118 total mattress sales.

On February 10, 2022, the Department served Respondent with its Accusation seeking penalties for violations of the Act. A First Amended Accusation was served on June 17, 2022.

The First Amended Accusation seeks penalties totaling \$87,630 in connection with two counts: Count I alleges that Respondent failed to submit a timely 2019 annual report in violation of PRC section 42991(a); Count II alleges that Respondent failed to collect and remit recycling charges to the MRC in violation of PRC section 42989.1. Specifically, the Accusation alleges that Respondent failed to remit recycling charges since December 2016. It further alleges that "Respondent violated PRC section 42989.1(b) at least 92 times from August 4, 2020, through March 25, 2000, by selling mattresses without the recycling charge added to the price of the mattress...".

A hearing was conducted on June 30, 2022, in Sacramento, California via video-conferencing.

V. LEGAL ANALYSIS

The Used Mattress Recovery and Recycling Act (Public Resources Code (PRC) section 42985 et seq.) (the Act) was established in order to reduce illegal dumping, increase recycling, and substantially reduce public agency costs for the end-of-life management of used mattresses. The Department provides enforcement oversight of the Act and is authorized to impose administrative civil penalties on mattress retailers for violations.

Administrative Civil Penalty

The Department is authorized to impose penalties for violations of the Act.

"The department may impose an administrative civil penalty on any ... retailer that is in violation of this chapter. The amount of the administrative civil penalty shall not exceed five hundred dollars (\$500) per day, but, if the violation is intentional, knowing, or reckless, the department may impose an administrative civil penalty of not more than five thousand dollars (\$5,000) per day." (PRC section 42993.1(a).)

In assessing or reviewing the amount of civil penalty imposed for a violation of this article, the department or the court shall consider the totality of the circumstances, which may include, but is not limited to, the following:

- (a) The nature, circumstances, extent, and gravity of the violation(s).
- (b) The number and severity of the violation(s).
- (c) Evidence that the violation was intentional, knowing, or negligent.
- (d) The size of the violator.
- (e) History of violation(s) of the same or similar nature.
- (f) The willfulness of the violator's misconduct.
- (g) Whether the violator took good faith measures to comply with this chapter and the period of time over which these measures were taken.
- (h) Evidence of any financial gain resulting from the violation(s).
- (i) The economic effect of the penalty on the violator.
- U) The deterrent effect that the imposition of the penalty would have on both the violator and the regulated community.
- (k) Any other factor that justice may require. (Title 14 California Code of Regulations (CCR) section 18970.)

Here, the Department seeks to impose penalties upon Respondent totaling \$87,630 in connection with two counts.

Burden of Proof

Absent a statute or other authority fixing a different standard, the burden of proof requires proof by a preponderance of the evidence. (Evidence Code (EC) section 115.) Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting. (EC section 500.) Therefore, the Department meets its burden of proof by establishing each charge by a preponderance of the evidence.

Statute of Limitations and Laches

Statutes of limitation are inapplicable to administrative proceedings. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1088.) However, in "appropriate circumstances, the defense of laches may operate as a bar to a claim by a public administrative agency ... if the requirements of unreasonable delay and resulting prejudice are met." (*Fountain Valley Regional Hospital & Medical Center v. Banta* (1999) 75 Cal.App.4th 316.)

Laches is an equitable principle that bars certain claims or proceedings based on a combination of unreasonable delay in pursuing the claims and prejudice based on that delay. It is "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." (*Robert J. v. Catherine D.* (2009) 171 Cal.App.4th 1500, 1521.)

There are two general ways to demonstrate unreasonable delay and resulting prejudice. In the first, the party arguing laches bears the burden of proof and is required to present evidence sufficient to tip the equitable balance toward preclusion in order to prevail. In the second, an unreasonable delay is established as a matter of law and prejudice is presumed. In this scenario, the party opposing the imposition of laches bears the burden of demonstrating there was a reasonable excuse for the delay.

To establish unreasonable delay as a matter of law and presume prejudice, courts "sometimes adopted for purposes of laches 'a period within which its aid must be sought similar to that prescribed in analogous cases at law.'" (*Brown v. State Personnel Bd.* (1985) 166 Cal.App.3d 1151, 1158.) Thus, where "no statute of limitations directly applies but there is a statute of limitations governing an analogous action at law, the period may be borrowed as a measure of the outer limit of reasonable delay in determining laches." (*Brown* at p. 1160.)

In *Malaga County Water District v. State Water Resources Board* (272 Cal.Rptr.3d 548)- a case concerning the imposition of administrative penalties by the State Water Board- the court adopted a three-year 'unreasonable delay' period. In so doing, the Court rejected the Water Board's contention that laches cannot bar agency enforcement actions for public policy considerations. Rather, the Court found that the application of laches furthers the public policy goals of constant water quality monitoring, effective and speedy enforcement, and immediate cleanup of the state's waters. "Allowing the government to store endless years of prior violations for prosecution in administrative proceedings rather than requiring immediate correction and cleanup through administrative penalties, where those same violations cannot be adjudicated in court, would provide an impermissible end-run around the goals of effective and speedy enforcement embodied in the statutory scheme, and could potentially lead to long-standing uncorrected pollution of the state's waters." (*Malaga* at 469.) Thus, the *Malaga*

Court found, permitting the doctrine of laches to preclude state violations furthers the important public policy of quick and timely enforcement.

Here, Respondent failed to remit beginning in December 2016, yet the Department didn't issue a notice of violation until November 10, 2020- nearly four years later. During that interim period, the Department had many contacts with Respondent, but did not address the outstanding remittances. In fact, on March 12, 2019, the Department notified Respondent that its Olympic Location was "in compliance with the California Used Mattress Recovery and Recycling Act". While the "Notice of Compliance" issued by the Department was presumably limited in scope, it could have been construed by Respondent as an affirmation of its ongoing, non-compliant practices.

Nonetheless, it's not necessary to examine whether there was unreasonable delay and prejudice here, because Respondent did not raise a laches or other equitable defenses. Even if it had raised a laches defense, Respondent would have been unlikely to prevail on it considering Cuevas' broad admission that he regularly ignored his obligations under the Act and written communications from the Department. Nonetheless, the record supports that compliance may have been achieved here without the need for significant penalties through timely enforcement and consistent communication.

Count 1- Late 2019 Annual Report

Mattress renovators are required to submit to the Department and to the MRC an annual report including the number of mattresses renovated by the business during the preceding year. (PRC section 42991; 14 CCR section 18966.) Public Resources Code section 42991 provides:

"(a) On or before May 1, 2017, and annually thereafter, a person that is engaged in business as a recycler or renovator shall submit to the department and to the mattress recycling organization a report that includes the following:

(1). Quantitative information on the number of mattresses received and recycled or renovated in the state during the preceding calendar year.

(2). Other information deemed necessary by the department that is reasonably related to compliance with this chapter and that can be reasonably compiled.

(b)- [omitted for relevance]

(c). The department shall make the information provided pursuant to this section available to interested parties and to the public. The department shall not disclose any confidential proprietary information." (PRC Section 42991)

Here, the Department seeks a penalty of \$15,030.00 for Respondent's failure to timely submit its annual report for 2019. It is undisputed that the report was due on July 1, 2020 but was not submitted to the Department until October 29, 2020- 120 days late. Respondent does not dispute that the report was late but contends that the penalty is too high. As there is no factual dispute, the only issue to address is the penalty amount.

Intentional, Reckless or Knowing

Under most circumstances, the Department may impose an administrative civil penalty of up to \$500.00 per day, per violation. However, where a violation is "intentional, knowing, or reckless", the department may impose an enhanced administrative civil penalty of up to five thousand dollars (\$5,000) per day. (PRC section 42993.1(a).) Here, the Department seeks to impose an enhanced penalty, contending that Respondent violated Section 42991 "knowingly and willfully." (The Department uses the term "willfully" in its Amended Accusation. However, "willfully" does not appear in the statute and the Department provides no explanation for its use. Therefore, it will be disregarded.)

In support of its allegation that Respondent's violation of Section 42991 is 'knowing', the Department notes that Respondent had timely submitted its annual report for the previous two years- 2017 and 2018. The Department further points to numerous email reminders and written notices provided to Respondent on July 20, 2020, that stated "failure to submit (sic) the 2019 Annual Report by July 31, 2020 will result in further actions by the Department including penalties of up to \$5,000 per day...".

Cuevas suggests that his compliance issues arose when his secretary quit in approximately December 2016. However, Respondent timely submitted annual reports in May 2017 and May 2018. Respondent's failure to submit its 2019 annual report in July 2020 cannot be attributed to a personnel change that occurred in 2016. Moreover, Cuevas admitted that he simply ignored written notices from the Department concerning the outstanding annual report.

Respondent's failure to timely submit its 2019 annual report was 'knowing' and 'reckless' as demonstrated by its previous history of compliance and its admission that it ignored written notices from the Department. An enhanced penalty of up to \$5,000 per day is authorized.

Totality of the Circumstances

In assessing the amount of civil penalty imposed for a violation, the Department must consider the "totality of the circumstances." (14 CCR section 18970.)

Here, the evidentiary record supports the Department's contention that it considered the totality of the circumstances to determine the appropriate penalty. At hearing, the Department presented documentary evidence and witness testimony establishing

Respondent's complete compliance history. That history demonstrates that Respondent knowingly ignored his obligations under the Act.

Respondent alleges that the penalty is too high- that it will cause Respondent to "go broke" and force the dissolution of the business. However, there is nothing in the record, besides Cuevas' statement, that demonstrates the economic impact the Department's proposed penalty will have on Respondent. While the "economic effect of the penalty on Respondent" is a penalty factor included by section 18970, the Department is not required to consider it. Regardless, the Department cannot be expected to consider economic impact where there's no evidence of it.

Count 1 Penalty- \$15,030

The Department has established by a preponderance of the evidence that Respondent's violation was "knowing" pursuant to PRC section 42991 and the record supports the Department's contention that it considered the totality of the circumstances in assessing the total penalty. The Department is not obligated to consider the economic impact the penalty will have on Respondent, particularly where Respondent has not provided any evidence of the impact.

The assessed penalty of \$15,030 is sustained.

Count II- Failure to Collect and Remit Recycling Charge

Mattress retailers are required to add a recycling charge to the purchase price of mattresses and clearly display the charge on customer receipts. The recycling charges collected must be remitted to a MRO like the MRC. Public Resources Code section 42989.1 provides:

"(a). Commencing 90 days after the date the department approved the budget pursuant to Section 42988.1, each manufacturer, renovator, retailer, or distributor that sells a mattress to a consumer or to the ultimate end user of the mattress in the state shall add the charge to the purchase price of the mattress. The charge shall be clearly visible on the invoice, receipt, or functionally equivalent document by the seller to the consumer as a separate line item.

(b). The charges collected pursuant to subdivision (a) shall be remitted to the mattress recycling organization in accordance with procedures established by the mattress recycling organization."
(PRC Section 42989.1.)

The Department alleges Respondent has failed to remit any recycling charges since November 2016. It further alleges that Respondent failed to collect the recycling charge at least 92 times from August 4, 2020, through March 25, 2000, at the Olympic location.

The Department seeks an enhanced penalty of \$72,600. Respondent admits the Department's allegations, but contends that the penalty is too high. As there is no factual dispute, the only issue to address is the penalty amount.

Intentional, Reckless. or Knowing

As discussed above, the Department must demonstrate by a preponderance of the evidence that the violation was "knowing, intentional, or reckless" to impose an enhanced penalty.

Cuevas contends that Respondent failed to remit beginning in December 2016 due to personnel changes. While a personnel change could help explain a short disruption in Respondent's business practices, the violation here continued over six years. During that time, Respondent received multiple notices, but Cuevas admitted that he regularly ignored written correspondence from the Department.

The continuing nature of Respondent's violation and his admission that he ignored notices demonstrates that Respondent's violation was knowing and reckless, and therefore, subject to enhanced penalties.

Totality of the Circumstances

As discussed above, the evidentiary record supports the Department's contention that it considered the totality of the circumstances to determine the appropriate penalty. Therefore, the Department's proposed penalty of \$72,600 in connection with Count II is sustained.

VI. CONCLUSION

There is no dispute as to the material facts in this matter. Cuevas admits that Respondent submitted its 2019 Annual Report to the Department 120 days late. He further admits that in several instances between August 2020 and March 2022 Respondent failed to collect the recycling charge at its Olympic Location. Finally, Cuevas admits that Respondent stopped remitting the recycling charges it collected in connection with mattress sales beginning in December 2016.

While Respondent does not dispute the material facts underlying the Department's Accusation, he requests that the proposed civil administrative penalty of \$87,630 be reduced, contending that the penalty will force the business to close. However, Respondent provides no evidence demonstrating the economic impact of the penalty on the business. In fact, Respondent doesn't present any mitigating circumstances whatsoever in support of his request that the penalty be reduced. Rather, Respondent freely admits that he simply ignored his obligations under the Act and written communications from the Department.

The testimony and documentary evidence provided by Department at hearing establishes Respondent's compliance history and supports its contention that it considered the totality of the circumstances in determining the penalty amounts; therefore, its proposed penalty is sustained.

VII. DECISION AND ORDER

The Department's proposed total penalty of \$87,630, as set forth in its First Amended Accusation, is sustained.

IT IS SO ORDERED.

DATED: 10/4/22

[Signature: /Douglas C. Jensen/]

Douglas C. Jensen
Attorney IV
Department of Resources
Recycling and Recovery
(CalRecycle) Hearing Officer