STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: March 20, 2012)

RHODE ISLAND PUBLIC TOWING ASSOCIATION, INC.	:	
v.	:	**C.A. No. PC 10-1016**
THOMAS F. AHERN, ADMINISTRATOR, R.I. DIVISION OF PUBLIC UTILITIES AND CARRIERS	:	**CONSOLIDATED WITH C.A. No. PC 10-7491 C.A. No. PC 11-1622**

DECISION

STONE, J. Appellant Rhode Island Public Towing Association ("RIPTA") appeals the Order of the Rhode Island Division of Public Utilities and Carriers finding that the Rhode Island Towing Storage Act does not authorize police departments and, as a result, private towers to impose continuing holds or impounds on vehicles. Jurisdiction is pursuant to R.I. Gen. Laws 1956 § 42-35-15.

I

FACTS AND TRAVEL

In October 2009, the Rhode Island Division of Public Utilities and Carriers ("Division") became aware that some police departments throughout Rhode Island had dramatically expanded their "hold" and "release" policies to include involuntary storage periods that exceeded the tariff prescribed, minimum one-day storage. The resulting storage fees could accrue in the amount of hundreds of dollars over the amount towers are allowed to charge under the tariff.

On February 16, 2010, RIPTA filed a declaratory judgment action in this Court. The Division subsequently filed a motion to stay the proceedings based on the fact that RIPTA had failed to exhaust its administrative remedies and that the Division possessed primary jurisdiction over the proceeding. This Court granted the Division's motion to stay and remanded the case back to the Division on April 22, 2010.

On May 26, 2010 RIPTA filed a petition for Declaratory ruling with the Division seeking a ruling as to "whether the storage fees imposed by a certified tower on a police department instigated motor vehicle storage impoundment at a private storage lot may be assessed against the owner of said vehicle or is it the liability and financial responsibility of the police department instigating the tow?" Simultaneously, RIPTA filed a motion to recuse the Hearing Officer, Mr. Spirito, as he had already written two letters on behalf of the Division related to the Division's policies.

On June 9, 2010, the Division held a conference during which it denied the motion to recuse but granted RIPTA's request to notify local police departments throughout Rhode Island of these proceedings. In the meantime, Warwick, Jamestown, Charlestown, Foster, Middletown, Cranston, Westerly, Smithfield, Cumberland, Coventry, Pawtucket, and West Warwick joined the proceedings.

On December 6, 2010, the Division issued Order No. 20200, setting forth the Division's reasoning for denying the motion to recuse and ruling on the issue presented by RIPTA in its petition for declaratory ruling. The Order precluded towers from charging consumers so-called "involuntary" storage fees in excess of the governing tariff and requisite amounts permitted by the Towing Storage Act, Title 39, chapter 12.1.

According to the Division, such fees resulted from unauthorized police holds extending beyond the vehicle owner's request to retake his or her car.

On December 28, 2010, RIPTA appealed Order No. 20200, seeking a stay of the order in the two other cases not yet consolidated. The Division opposed the stay request. On December 30, 2010, Coventry filed a motion to intervene in RIPTA's administrative appeal. On January 14, 2011, Coventry moved to consolidate the cases. On January 20, 2011, this Court denied RIPTA's request for stay of the order and allowed Coventry to intervene in the case.

On March 25, 2011, RIPTA filed another petition for declaratory judgment, seeking the Court's guidance on the scope of Order No. 20200. On May 5, 2011, this Court consolidated the three previously separate cases (PC 10-1016, PC 10-7491, and PC 11-1622) on the condition that the consolidated proceeding would be treated as an administrative appeal under the Administrative Procedures Act, R.I.G.L. 1956 § 42-35-1.

At this point, the Court intervened *sua sponte* over the Division's objection and directed RIPTA to prepare a release form for the Division's review. On July 28, 2011, the Court issued another decision ruling that no release form was necessary and denying the imposition of any interim relief. The stage was then set for the point we have reached now, and both sides submitted their memoranda of law regarding this administrative appeal.

In their appeal, RIPTA asks this Court to reverse and overrule the Division's administrative ruling (Order 20200). According to RIPTA, the Hearing Officer's ruling was contrary to the specific wording of the Towing Storage Act. The Division argues

that such relief would be inappropriate, because the public would be denied their statutory right to retrieve their vehicles.

Specifically, the Division's ruling states that RIPTA's interpretation of the Towing Storage Act would result in vehicle owners paying "$24 per day for as many days as the police department decides to keep the vehicle impounded at the certificated tower's storage lot." The Division found that there is no such authority to impose involuntary storage fees on vehicle owners in the Towing Storage Act, once they have requested the retake of their vehicle and proven ownership of it. Order 20200, p. 7.

Finally, RIPTA asserts that the Hearing Officer should have recused himself from this matter. According to RIPTA, he used phrases such as "convoluted," "shocking," and "baseless" to describe RIPTA's position, and this proves his bias in the Division's favor. Further, Hearing Officer Spirito rendered a legal opinion on behalf of the Division while serving as their Chief Legal Counsel. On those grounds, RIPTA renews its motion for Mr. Spirito to recuse himself.

II

STANDARD OF REVIEW

This Court's appellate review of administrative agencies such as the Division is governed by the Rhode Island Administrative Procedures Act, as set forth in § 42-35-1, et. seq. See Rossi v. Employees' Retirement Sys. of R.I., 895 A.2d 106, 109 (R.I. 2006). The applicable standard of review, codified at Section 42-35-15(g), provides in pertinent part:

> (g) "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings or it may reverse or modify

the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inference, conclusions or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary or capricious or characterized by abuse of discretion of clearly unwarranted exercise of discretion."

In an administrative appeal, this Court "shall not substitute its judgment for that of the agency." Johnston Ambulatory Surgical Assoc. v. Nolan, 755 A.2d 799, 805 (R.I. 2000). The Court must "uphold the agency's conclusions when they are supported by any legally competent evidence in the record." Rocha v. Public Utilities Comm'n, 694 A.2d 722, 725-26 (R.I. 1997). Substantial deference is due to an agency's interpretation of a statute. In Re: Narragansett Bay Comm'n General Rate Filing, 808 A.2d 631, 635 (R.I. 2002). Such deference is due even if the agency's interpretation is not the only permissible interpretation that could be applied. Autobody Assoc. of Rhode Island v. State Dept. of Business Regulation, 996 A.2d 91, 97 (R.I. 2010).

III

DISCUSSION

First, the Court addresses the issue of the Hearing Officer's recusal. The Court finds that the Division is correct in finding that Spirito did not need to recuse himself from this matter simply because he criticized RIPTA's position as being "convoluted."

Where a hearing officer's alleged bias was simply "a temporary 'tilt' of an intellectual and pragmatic sort" (as contrasted with a bias stemming from self-interest), recusal was not required. Champlin's Realty Associates v. Tikoian, 989 A.2d 427, 453 (R.I. 2010). As in Champlin's, RIPTA provides the Court with no evidence indicating that Mr. Spirito was a self-interested party that needed to recuse himself from this decision of the Division. Simply the fact that he works for the Division is insufficient, because if that were the case, the Court would require his recusal at every Division hearing.

Next, the Court considers the respective parties' arguments concerning the Division's interpretation of the Towing Storage Act. The Division's position is that the Towing Storage Act does not authorize local law enforcement to impose continuing holds or impounds on vehicles that are the subject of non-consensual tows. According to the Division, the Towing Storage Act only vests municipal police departments with limited authority to remove vehicles from public rights of way not to impose a continuing hold or impound on them.

The text of the statute in question states as follows:

> "Any member of any police department or the owner or person in control of private property may order the removal of any abandoned or unattended vehicle or, any member of any police department upon completion of a vehicle survey report, as defined in this chapter, may order the removal of any abandoned vehicle of no value by a certificated tower and may instruct the certificated tower to remove said vehicle to its own place of storage." Sec. 39-12.1-3.

Since the statute does not provide law enforcement with the authority to impose continuing holds, the Division found that fees arising out of those holds are not permissible either. Generally, the Division believes that the statute's intent was to provide safeguards and tort liability protections to the state's regulated towing companies not to provide law enforcement with long-term impoundment authority.

On the other hand, RIPTA asserts that the Towing Storage Act was enacted to regulate and protect three parties: the car owner, the certified tower, and law enforcement agencies. According to RIPTA, the Division reads the Towing Storage Act in the light most favorable to the driver and neglects the two other parties, the tower and the law enforcement agency. RIPTA's argument rests partially on the title of the Towing Storage Act: since it is called the "Towing Storage Act," it must logically authorize long-term impounds and storage of vehicles. Further, RIPTA asserts that the Towing Storage Act authorizes long-term impoundment requiring payment by vehicle owners based on the following section: "You may take possession of the vehicle at any time during regular business hours by appearing with a police release if required, and payment of all charges accrued to date of retaking." Sec. 39-12.1-13.

RIPTA argues that the result of the Division's ruling is that "Plaintiff's members must disregard a police department "hold" and release the motor vehicle immediately to the owner of the vehicle . . . or honor the police "hold" and waive or not collect their storage fees." (RIPTA Mem. of Law, p. 14.) However, this is not the case. The Division's Order explicitly prohibits police departments from "holding" or preventing release of vehicles once an owner requests the retake of their car. Therefore, the plaintiffs will not be required to disregard police department holds, because the police are not authorized to prevent the release of these vehicles in the first place. Logically then, it makes sense that the towing companies will have to release the vehicles and only charge for fees accrued up until the point of their release.

Furthermore, RIPTA's arguments based on §§ 39-12.1-13 and 12.1-14 need not be addressed by this Court as they were not raised in the administrative proceedings.

RIPTA has therefore waived its right to raise those arguments here. See Marcantonio v. R.I. Dept. of Health, 2010 WL 581511 (R.I. Super. 2010). Finally, RIPTA does not cite any case law in its Memorandum of Law to bolster its position.

This Court must defer to the Division's interpretation of the statute as long as it is "supported by any legally competent evidence in the record." Rocha v. Public Utilities Comm'n, 694 A.2d 722, 725-26 (R.I. 1997). By that standard of review, their interpretation, that the Towing Storage Act provides local law enforcement with narrowly circumscribed authority "to remove" vehicles from public rights of way, is a valid one. (Order 20200.) The Court must follow the clear and unambiguous language of the statute. Martone, 824 A.2d at 431. That language does not authorize a municipal police department to impose a continuing hold of a vehicle when the department has directed a towing company to remove the vehicle from a state road or highway for posing a hazard. Instead, the Towing Storage Act simply "provides the authority for police personnel to do the bare minimum required to clear the roadways of vehicles and nothing more." Order 20200, p. 49.

The right of law enforcement to remove vehicles is quite limited. Specifically, the Towing Storage Act allows for the removal of vehicles from public rights of way only in four limited situations: to clear the public ways of hazardous conditions, to remove abandoned and unattended vehicles, to remove vehicles in violation of parking ordinances, or to remove vehicles from a person arrested for any criminal offense. Sections 39-12.1-1 and 39-12.1-3(c)(2).

In light of the statute's overall purpose—to protect the general public from having to pay unreasonable fees to towing companies—the interpretation of the language cited

above makes sense. In its Order, the Division references a particularly bothersome scenario that was taking place in Johnston. The Johnston Police Department had a "policy that require[d] such a release for every type of police-ordered tow and the Department only provides such releases on weekdays, and moreover only between the business hours of 8 a.m. and 4 p.m." Order 20200, p. 45. This is precisely the type of scenario the Division intended to prevent by issuing its Order. The Division was correct in finding that the Towing Storage Act does not grant such an authority to police departments. Such policies would result in vehicle owners having to pay unreasonable, involuntary storage fees, a result that is in contravention of the Towing Storage Act's purpose.

Since the Towing Storage Act does not grant local police the authority to impound vehicles, it follows then, as the Division states, that division-regulated towers may not impose involuntary storage fees resulting from continuing police department holds on vehicle owners. Further, the language of the Towing Storage Act explicitly provides that "the registered and/or legal owner may retake possession at any time during business hours by appearing, proving ownership, and paying all charges due the certificated tower pursuant to its published tariff." Sec. 39-12.1-8(a)(3). This language clearly bolsters the Division's position that vehicle owners should not be required to present the tower with a signed release in order to obtain their vehicle from storage after a private tow.

Importantly, the Division distinguishes between "charges that are rightfully billable to the vehicle owners in cases of abandoned and unattended vehicles from," on the other hand, "the police 'hold' cases in issue in this matter." Order 20200, p. 27.

Therefore, it is very important to note that the Division's position is that there is no provision in § 39-12.1-3 for the accrual of storage fees when the owner may not retake the vehicle. On the other hand, vehicle owners who abandon their vehicles and do not attempt to retrieve them would remain liable for the costs of storage. The rationale of that policy is that those costs are voluntarily imposed on the vehicle owner through his actions (or inactions). If, however, an owner tries to retrieve his vehicle, and the tower refuses due to a police "hold," then the owner is not liable for accruing storage fees because the police are not authorized to hold cars under the Towing Storage Act, and such fees would be involuntary. The tower must release the car to the registered owner.

Regarding towers' release of vehicles, the parties discussed at the Court's hearing the issue of liability for towers releasing vehicles that are in unsafe condition to registered owners, who may then cause damage or sustain injuries on the road due to their unsafe vehicles. The Court finds that towers may simply require that registered owners sign a liability release form upon attempting to retrieve their vehicle. This release form, signed with remarks regarding the state of the vehicle when the tower released it to the owner, is sufficient to resolve the towers' fear that they will be susceptible to liability if they release towed vehicles out into the community. In fact, the Division has already begun requiring that towers use such an invoice to release vehicles since 2005. This Court has already decided that the invoice "contains all of the pertinent information to protect the public interest" because it allows towers to leave remarks and it requires a signature for release. Rhode Island Public Towing Ass'n, Inc. v. Ahern, et al., 2011 WL 3382483 (R.I. Super. 2011).

In sum, the Division found that storage fees charged when the owner is prevented from retaking their vehicle due to a police hold are outside the scope of the approved tariff and therefore, unreasonable charges in contravention of the Towing Storage Act. The Towing Storage Act explicitly requires that all towing charges be reasonable:

> "WHEREAS, The motoring public has a right when delegating to law enforcement the selection of an operator in the towing-storage business, to expect that the charges for the services to be rendered will be reasonable and compensatory." Sec. 39-12.1-1.

In its conclusion, the Division clarifies that voluntary or "appropriate fees in cases of non-consensual police department instigated tows, shall constitute the charge for the tow service required to remove the vehicle from the public roadway, an after-hours release fee (when applicable), and all storage time linked to retrieval delays directly caused by the vehicle owner (or lienholder)." Order 20200, p. 70.

The Division held that, pursuant to this language, vehicle owners must simply "1) prove ownership of the vehicle and 2) pay all accrued charges due to the tower pursuant to the tower's tariff." The statute does not require a police release document before an owner can retrieve their vehicle from a tower. Order No. 20200, p. 68. The tariff's language also states this explicitly: towers are required "to release vehicles to the owner or lien holder upon demand and upon presentation of the towing charges regardless of the type of vehicle towed." Tariff, ¶ 4(c).

IV

CONCLUSION

The Division did not clearly err in its interpretation of the statute and tariff. Instead, in light of the language of Rhode Island's Towing Storage Act, the Division's interpretation is a logical understanding of the Towing Storage Act with a favorable

outcome for the general public and, in some cases, an unfortunate result for towers. Nonetheless, the interpretation of the administrative agency and the intent of the General Assembly must be respected.

The decision of the Division is therefore affirmed.