STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: August 26, 2013]

ROLLINGWOOD ACRES, INC. et al.	:	
	:	
v.	:	**C.A. No. PC-2012-6341**
	:	
RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, et al.	:	

DECISION

HURST, J. This matter is before the Court on appeal from a decision of the Chief Hearing Officer of the Administrative Adjudication Division (AAD) of the Rhode Island Department of Environmental Management (DEM). Rollingwood Acres, Inc. (Rollingwood), Smithfield Peat Co., Inc. (Smithfield Peat), and Smithfield Crushing Co., LLC (Smithfield Crushing) (collectively, "Plaintiffs") appeal the decision, which denied Plaintiffs' motion for recovery of litigation expenses pursuant to the Rhode Island Equal Access to Justice Act (EAJA), codified at G.L. § 42-92-1, and Rule 20.00 of the Administrative Adjudication Division's Rules of Practice and Procedure. Jurisdiction is pursuant to Rhode Island General Laws 1956 § 42-35-15.

I

Facts & Travel

Rollingwood Acres, a Rhode Island business corporation with its principal place of business at 295 Washington Highway, Smithfield, Rhode Island, is the owner of property located at 961 Douglas Pike, Smithfield, Rhode Island, identified as Town of

Smithfield's Assessor's Plat 46, Lots 71 and 76 (Property). (Pls.' Ex. A, In re Rollingwood Acres, Inc./Smithfield Peat Co., Inc./Smithfield Crushing Co., LLC, AAD No. 06-004/WRE, Rhode Island Department of Environmental Management Administrative Adjudication Division Decision, (hereinafter, "AAD Decision"), at 39 ¶ 2.) At the Property, Smithfield Peat operates a leaf and yard waste composting facility, and Smithfield Crushing operates a rock crushing facility. Id. at 39 ¶¶ 5, 7.

On or about May 4, 1982, DEM issued a freshwater wetlands permit to Smithfield Peat and John D. Despres, authorizing Smithfield Peat to alter freshwater wetlands on the site by excavating, filling, and grading within fifty feet of an unnamed swamp for the purpose of peat removal, construction of two storm water detention basins, installation of a sewer line, and construction of a road. Id. at 39 ¶ 8. Smithfield Peat constructed a drainage structure under that approval, which consisted of two basins, a control structure, a 15-inch pipe, and two catch basins. Id. at 40 ¶ 13. To obtain and install this approved drainage structure, the Plaintiffs paid more than $100,000 over the course of more than two years. Id. at 40 ¶¶ 14-15.

From 1996 to 1997, DOT engaged in a project to improve Route 7 in Smithfield immediately adjacent to Plaintiffs Property. Id. at 40 ¶ 11. Prior to the DOT improvements, Plaintiffs had a properly functioning drainage structure, permitted by DEM. Id. at 40 ¶ 12. Although the DOT plan for improvements to Route 7 did not show any changes or alterations to Plaintiffs' drainage structure, and although Plaintiffs did not give permission to DOT to alter the drainage structure, DOT removed Plaintiffs' drainage structure. Id. at 40 ¶¶ 16, 18-19. The new structure, altered without the knowledge of

Plaintiffs or permission from DEM, caused the system to discharge increased sediment—that is, caused turbidity—into the nearby unnamed stream. Id. at 40 ¶¶ 21-23.

On or around December 3, 1996, Bill Riccio of the DOT made a complaint to DEM that Plaintiffs' drainage structure was causing sedimentation in the nearby unnamed stream. Id. at 41 ¶ 24. Sean Carney, a representative of DEM conducted inspections of the Plaintiffs' property and adjacent area on January 9, 1997 and January 21, 1997. Id. at 41 ¶ 25. During that inspection, Carney found new culvert pipes which did not conform with Plaintiffs' permit. Id. at 4-5.

On June 3, 1997, DEM issued a Notice of Intent to Enforce (NOIE) for sediment laden water to an unnamed stream. Id. at 41 ¶ 26. Nine years later, on a follow up inspection on another complaint, Peter Naumann went to the Site of the Plaintiffs' drainage structure, which was the subject of the prior NOIE. Id. at 30. During inspections on February 9 and 10 of 2005, and April 4, 2006, Representatives of DEM took samples of water discharge to test for turbidity. Id. at 41 ¶¶ 28-29.

The standard for a violation under the Water Quality Regulations is for turbidity that is in excess of 10 NTU over natural background. Id. at 41 ¶ 30. Although the regulations define "background" as the water quality upstream of all point and nonpoint sources of pollution, DEM failed to take any upstream samples. Id. at 41 ¶ 33. The water samples were not performed in conformance with the water quality regulations or statutes, and they could therefore not be used to prove a turbidity violation. Id. at 41 ¶¶ 33-34.

On November 6, 2006, DEM issued a notice of violation, alleging that Plaintiffs had violated Sections 46-12-5(a) and (b) of the Rhode Island Water Pollution Act; Rules

9(A), 11(B), and 13(A) of the DEM's Water Quality Regulations; Section 46-12.5.1-3 of the Rhode Island Oil Pollution Control Act; Sections 6(a), 12(b)(2), and 12(b)(3) of the DEM's Oil Pollution Control Regulations; and Rule 31(a)(1)(vii) of the DEM's Regulations for the Rhode Island Pollution Discharge Elimination System. (Pls.' Ex. F, In re Rollingwood Acres, Inc./Smithfield Peat Co., Inc./Smithfield Crushing Co., LLC, No. OC&I/Water Pollution 06-07, Rhode Island Department of Environmental Management Office of Compliance and Inspection, (hereinafter, "Notice of Violation"), at 4-5.)

Plaintiffs appealed the NOV to the Administrative Adjudication Division of DEM. After multiple hearings in 2011 and 2012, the Chief Hearing Officer issued a decision on June 27, 2012, dismissing a substantial portion of the allegations against Plaintiffs, and all but approximately 7% of the fine imposed against Plaintiffs. (Pls.' Ex. A, In re Rollingwood Acres, Inc./Smithfield Peat Co., Inc./Smithfield Crushing Co., LLC, AAD Decision.) In that Decision, the Chief Hearing Officer further concluded that the DEM had failed in its burden of proving any violation of the Rhode Island Water Pollution Act or the DEM's Water Quality Regulations.

On July 27, 2012, Plaintiffs filed a request for attorney's fees and costs under G.L. § 42-91-1 and Rule 20.00 of the AAD Rules of Practice and Procedure. On September 18, 2012, the Hearing Officer issued a decision denying Plaintiffs' request for attorneys fees and costs. (Pls.' Ex. L, In re Rollingwood Acres, Inc./Smithfield Peat Co., Inc./Smithfield Crushing Co., LLC, AAD No. 06-004/WRE, Rhode Island Department of Environmental Management Administrative Adjudication Division, (hereinafter, "Litigation Expenses Decision"), at 5.) That Decision was based entirely on the

conclusion that Plaintiffs were not a "party" within the meaning of the EAJA. Id. This Appeal followed.

II

Standard of Review

Under § 42-35-15, "[a]ny person, . . . who has exhausted all administrative remedies available to him or her within [an] agency, and who is aggrieved by a final order in a contested case is entitled to judicial review" by the Superior Court. Under this scheme, 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, inferences, conclusions, or decisions are:

> (1) In violation of the constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Affected by other error or 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 or clearly unwarranted exercise of discretion.

Sec. 42-35-15.

The scope of Superior Court's review of an agency decision has been characterized as "an extension of the administrative process." R.I. Pub. Telecomms. Auth. v. RISLRB, 650 A.2d 479, 484 (R.I. 1994). As such, "judicial review is restricted to questions that the agency itself might properly entertain." Id. (citing Envtl. Scientific Corp. v. Durfee, 621 A.2d 200, 208 (R.I. 1993)). "In essence, if 'competent evidence exists in the record, the Superior Court is required to uphold the agency's conclusions.'" Auto Body Ass'n of R.I. v. State of R.I. Dep't of Bus. Regulation, 996 A.2d 91, 95 (R.I.

2010) (quoting Envtl. Scientific Corp., 621 A.2d at 208). Accordingly, this Court defers to the administrative agency's factual determinations provided that those determinations are supported by legally competent evidence. Arnold v. R.I. Dep't of Labor & Training Bd. of Review, 822 A.2d 164, 167 (R.I. 2003). Legally competent evidence is "some or any evidence supporting the agency's findings." Auto Body Ass'n of R.I., 996 A.2d at 95 (quoting Envtl. Scientific Corp., 621 A.2d at 208).

DEM utilizes a two-tier review process. Under that process, grievances are heard first by a hearing officer, who issues a recommended decision to the Director of the DEM. Then, the Director considers the decision, along with any further briefs or arguments, and renders his or her own decision. This two-step procedure has been likened to a funnel. Envt'l Scientific Corp., 621 A.2d at 207-08. The hearing officer, at the first level of review, "sits as if at the mouth of the funnel" and analyzes all of the evidence, opinions, and issues. Id. The DEM Director, stationed at the "discharge end" of the funnel, the second level of review, does not receive the information considered by the hearing officer first hand. Id.

Our Supreme Court has held, therefore, that the "further away from the mouth of the funnel that an administrative official is . . . the more deference should be owed to the fact finder." Id. A hearing officer's credibility determinations, for example, should not be disturbed unless they are "clearly wrong." Id. at 206. Thus, this Court will "reverse factual conclusions of administrative agencies only when they are totally devoid of competent evidentiary support in the record." Baker v. Dep't of Emp't Training Bd. of Review, 637 A.2d 360, 363 (1994) (quoting Milardo v. Coastal Res. Mgmt. Council, 434 A.2d 266, 272 (R.I. 1981)).

Nonetheless, when the findings of the Director do not adequately explain the rationale for the administrative agency's decision, the Court may remand the matter to the agency so that it can make additional findings. See § 42-17.7-6; Envtl. Scientific Corp., 621 A.2d at 200. "Section 42-17.7-6 also requires the DEM to ground its rejection of the hearing officer's findings upon an adequate rationale." Envtl. Scientific Corp., 621 A.2d 200. If the Director fails to support that rejection with competent legal evidence, then this Court may remand the matter to the Director to make specific findings in support of that rejection. See id.

III

Analysis

Plaintiffs argue that the decision of the AAD was affected by error of law because it erroneously required Plaintiffs to establish that their net worth was less than $500,000 at the time the adjudicatory proceeding was initiated. They contend that the net worth requirement is inapplicable to Plaintiffs—Rhode Island corporations—and is only applicable to individuals seeking to claim party status under the statute. In contrast, DEM argues that the statute requires that any entity seeking an award under the statute must demonstrate its net worth.

To qualify for a fee award under the Equal Access to Justice Act (EAJA), the movant must meet the very specific circumstances outlined in G.L. § 42–92–3 and codified in AAD Rule 20.00. The EAJA states, in pertinent part, that

> "Whenever the agency conducts an adjudicatory proceeding subject to this chapter, the adjudicative officer shall award to a prevailing party reasonable litigation expenses incurred by the party in connection with that proceeding. The adjudicative officer will not award fees or expenses if he or she finds that the agency was substantially justified in actions leading to the proceedings and in the proceeding itself. The adjudicative

> officer may, at his or her discretion, deny fees or expenses if special circumstances make an award unjust."[1]

§ 42-92-3. Further, the EAJA defines "party" as:

> "any individual whose net worth is less than five hundred thousand dollars ($500,000) at the time the adversary adjudication was initiated; and, any individual, partnership, corporation, association, or private organization doing business and located in the state, which is independently owned and operated, not dominant in its field, and which employs one hundred (100) or fewer persons at the time the adversary adjudication was initiated."

Sec. 42-92-2.

Although the Equal Access to Justice Act (EAJA) does not provide the appropriate burden of proof to be applied in these proceedings, our Supreme Court has often noted that when a Rhode Island statute is modeled after a federal statute, as in this case, the Court should follow the constrictions put on it by the federal courts unless there is strong reason to do otherwise. Lalliberte v. Providence Redevelopment Agency, 109 RI 565, 575 288 A2d 502, 508 (R.I. 1972), Iorio v. Chin, 446 A2d 1021, 1022, (R.I. 1982); see Hall v. Kuzenka, 843 A.2d 474, 476 (R.I. 2004) ("[W]here the Federal rule and our state rule are substantially similar, we will look to the Federal courts for guidance or interpretation of our own rule." (quoting Heal v. Heal, 762 A.2d 463, 466-67 (R.I. 2000))). The First Circuit has held that the burden of proof under the EAJA is that which is normally required in a civil case—preponderance of the evidence. See United States v. Yoffe, 775 F.2d 447, 450 (1st Cir. 1985). The First Circuit further held that it follows the traditional standard of review, upholding findings of fact unless they are clearly erroneous, and reviewing de novo rulings of law. Id.

[1] The parties do not dispute that DEM is an "agency" as defined in § 42-92-2(3), that the underlying hearing leading to Respondent's EAJA claim was an "adjudicatory proceeding" as defined in § 42-92-2(2) and that the hearing officer meets the requirement as an "adjudicatory officer" set forth in § 42-92-2(1).

In this matter, the AAD's conclusion that Plaintiffs are not parties within the meaning of the EAJA rested on a ruling of law. Specifically, that conclusion rested on the determination that the EAJA required that Plaintiffs show that "they had a 'net worth of less than Five Hundred Thousand Dollars ($500,000) at the time of [sic] the adversary adjudication was initiated.'" (Pls.' Ex. L, In re Rollingwood Acres, Inc./Smithfield Peat Co., Inc./Smithfield Crushing Co., LLC, Litigation Expenses Decision, at 5 (quoting § 42-92-2(5).) Thus, according to the AAD, the Plaintiffs' failure to demonstrate that they had a net worth of less than Five Hundred Thousand Dollars at the initiation of the adjudication, meant that they did not meet their burden of proof establishing themselves as "parties" within the EAJA or AAD Rule.

Like the Federal Statute on which it is modeled, the Rhode Island EAJA provides two separate definitions under which an entity can claim "party" status. See 28 U.S.C. § 2412(d); § 42-92-2. 28 U.S.C. § 2412(d) allows an individual to recover fees if his or her individual net worth is under $2 million, and a corporation to recover if its net worth is under $7 million and it has fewer than 500 employees. General Laws § 42-92-2 allows an individual to recover fees if his or her net worth is less than $500,000, and a corporation to recover if it does business in the state, is located in the state, is independently owned and operated, not dominant in its field, and employs fewer than 100 persons at the time the adversary adjudication was initiated.

The plain and unambiguous meaning of this statute is that an entity may qualify as a "party" under there statute under two separate categories. See Chambers v. Ormiston, 935 A.2d 956, 960 (R.I. 2007). In fact, in 1993, in In re Truk-Away of Rhode Island,

Inc., the AAD for the DEM *itself* held that for Truk-Away, a Rhode Island Corporation, to be a "party" it need only show:

> "1. That Truk-away is a corporation doing business and located in RI.
> 2. That the business is independently owned and operated.
> 3. That Truk-away is not dominant in the field.
> 4. That the waste hauler employed no more than 100 people at the time of the adversary adjudication."

1993 WL 330069, at *3 (R.I. Dep't Envtl. Mgmt. Aug. 6, 1993). In that case, the DEM did not discuss, or require, Truk-Away's net worth. See id.

Further, in other states in which both "party" categories have a net worth requirement—and under the federal statute—legislatures have given a specific net worth requirement for each group. See 28 U.S.C. § 2412(d). Nelson v. State Bd. of Veterinary Med., 938 A.2d 1163, 1165-66 (Pa. Commw. Ct. 2007) (noting the separate net worth requirements in the Pennsylvania analog to the EAJA). Further, net worth requirements under the EAJA are typically higher for businesses than individuals. See 28 U.S.C. § 2412(d) (containing a $2 million net worth requirement for individuals, and a $7 million net worth requirement for businesses). Similarly, Courts have interpreted statutes giving only an individual net worth requirement to limit individual net worth only, rather than the net worth of corporations. See New York State Clinical Lab. Ass'n, Inc. v. Kaladjian, 85 N.Y.2d 346, 354, 649 N.E.2d 811, 815 (1995)

In this matter, the parties do not dispute that Plaintiffs are independently owned companies doing business in Rhode Island. Further, although the statute does not define the term "dominant in the field," the parties do not dispute that Plaintiffs are not dominant in their field. In addition, the parties do not dispute that Plaintiffs employed fewer than 100 people at the time the adjudicatory proceeding was initiated.

IV

Conclusion

After review of the entire record, the Court finds that the AAD's decision was affected by error of law, in that it incorrectly determined that Plaintiffs are not a "party" within the meaning of the EAJA by reason of the net worth requirement. Substantial rights of Plaintiffs have been prejudiced. Accordingly, this matter is remanded to make findings of fact adequate to support conclusions of law on whether Plaintiffs are entitled to reasonable litigation expenses. Specifically, the AAD shall make findings of fact adequate to support conclusions of law on whether Plaintiffs were a prevailing party in the underlying adjudicatory proceedings; whether the DEM instituted the underlying adjudicatory proceeding without substantial justification; and the extent of reasonable litigation expenses. Counsel for the prevailing parties shall submit an Order and Final Judgment in accordance with this Decision.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Rollingwood Acres, Inc., et al. v. Rhode Island Department of Environmental Management, et al.
CASE NO:	PC 12-6341
COURT:	Providence County Superior Court
DATE DECISION FILED:	August 26, 2013
JUSTICE/MAGISTRATE:	Hurst, J.
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