STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: February 10, 2015)

STATE OF RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT	:	
v.	:	**C.A. No. PC-2012-5551**
ADMINISTRATIVE ADJUDICATION DIVISION (IN RE: TOLIAS, PETRY, WRENN)	:	

DECISION

NUGENT, J. Before this Court is an appeal of a decision by the State of Rhode Island Department of Environmental Management's (DEM) Administrative Adjudication Division (AAD), dismissing a Notice of Violation (NOV) issued by DEM's Office of Compliance and Inspection (OC&I) against Stephen Tolias, John Wrenn, and Martin Petry (collectively, Respondents) regarding the breach of a dam and resulting wetlands and water quality impacts. DEM seeks a reversal of the AAD hearing officer's decision. Jurisdiction is pursuant to G.L. 1956 § 42-35-15. For the reasons stated below, this Court affirms the decision of the hearing officer.

I

Facts and Travel

1

The Dam Breach and Resulting Enforcement

Dam 397, New Pond Dam (the Dam), is located on Assessor's Plat 13, Lot 21 in the Town of Glocester, Rhode Island. (OC&I Ex. 12, at 2.) The property is owned by Respondent

Tolias. Id. On April 3, 2006, OC&I inspected the Dam after receiving a complaint from the Glocester Public Works Director, Alan Whitford, that the Dam had failed.[1] (In re Wrenn, John and Tolias, Stephen and Petry, Martin, AAD No. 08-006/FWE, Rhode Island Department of Environmental Management Administrative Adjudication Division Decision and Order, Sept. 26, 2012, (hereinafter, AAD Decision), at 1; OC&I Ex. 1.) Paul Guglielmino, senior sanitary engineer with OC&I's Dam Safety Program, and Adam Hill, environmental scientist with DEM Wetlands Compliance, inspected the Dam with Mr. Whitford and Captain David Laplante of the Glocester Police Department. (Tr. at 114, Jan. 17, 2012; OC&I Ex. 2, at 1; OC&I Ex. 3, at 2.)

According to Mr. Guglielmino's inspection report, the inspection revealed a breach (2006 breach) along the length of the Dam approximately twenty feet long and ten feet deep, appearing to be in the same location as prior breaches. (OC&I Ex. 2, at 1.) The inspection report additionally noted the presence of fill that had been placed along portions of the Dam. Id. Mr. Hill's inspection report additionally indicates that materials used in construction or filling of the Dam had washed into a nearby swamp, and there was an increased presence of sediment and silt in two downstream ponds. (OC&I Ex. 3, at 2.) A Glocester Police report from April 4, 2006 stated that Respondents Wrenn and Petry were engaged in backfilling to repair the Dam without a DEM permit to do so. (NOV ¶ 3.)

Bruce Ahern, senior environmental scientist with OC&I's Freshwater Wetlands Compliance Program, returned to the Dam with Mr. Hill on April 5, 2006 for a follow-up inspection, specifically related to the wetlands alterations. (OC&I Ex. 6, at 1.) Mr. Ahern observed the Dam breach and noted "various types of debris and/or fill material" present at the breach area, a drained New Pond, a dry spillway channel, and "deposition of gravel, sands, silts,

[1] The record reflects that the dam had previously failed in 2002 and 2005. (Tr. at 118, 121-22, Jan. 17, 2012.)

sediments, and other soil material" in a downstream swamp, river channel, and downstream pond. Id. at 1-2.

On August 10, 2006, OC&I issued a Notice of Intent to Enforce (NOIE) to Respondents for the Dam failure and subsequent alleged wetlands and water quality impacts. (OC&I Ex. 9, at 1.) The NOIE additionally included remediation instructions, including engaging an engineer or land surveyor to prepare a plan for restoring the wetlands to their unaltered state. Id. at 2. The restoration never took place. (AAD Decision, at 2.)

On April 30, 2008, OC&I issued a NOV to Respondents for violations of the Rhode Island Inspection of Dams and Reservoirs Act, G.L. 1956 § 46-19-3[2] (for substantially altering a dam), the Rhode Island Fresh Water Wetlands Act, G.L. 1956 § 2-1-21[3] (for altering freshwater wetlands), and the Rhode Island Water Pollution Act, § 46-12-5[4] (for discharging pollutants into

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[2] Section 46-19-3 provides, in full, "No dam or reservoir shall be constructed or substantially altered until plans and specifications of the proposed work shall have been filed with and approved by the director."

[3] Section 2-1-21 provides, in pertinent part, "No person . . . may excavate; drain; fill; place trash, garbage, sewage, highway runoff, drainage ditch effluents, earth, rock, borrow, gravel, sand, clay, peat, or other materials or effluents upon; divert water flows into or out of; dike; dam; divert; change; add to or take from or otherwise alter the character of any fresh water wetland as defined in § 2-1-20 without first obtaining the approval of the director of the department of environmental management." Section 2-1-21(a)(1).

[4] Section 46-12-5 provides, in pertinent part,

> "(a) It shall be unlawful for any person to place any pollutant in a location where it is likely to enter the waters or to place or cause to be placed any solid waste materials, junk, or debris of any kind whatsoever, organic or non organic, in any waters. (b) It shall be unlawful for any person to discharge any pollutant into the waters except as in compliance with the provisions of this chapter and any rules and regulations promulgated hereunder and pursuant to the terms and conditions of a permit. (c) It shall be unlawful to construct or install any industrial, commercial, or other establishment, to make any modification or addition thereto, or to undertake any development which may result in the discharge of any pollutant into the waters of the state, unless the discharge is

waters of the State), all without a DEM permit.[5] (NOV, at 4-5.) The NOV ordered remediation, as the NOIE had, and additionally assessed a $33,000 fine against Respondents. Id. at 5-6. Respondents Wrenn and Tolias sought a hearing on the NOV with AAD.[6] (Compl. ¶ 5.)

2

The AAD Hearing

The hearing was held on January 17 and 18, 2012. (Compl. ¶ 7.) The first witness to testify was Mr. Ahern, a senior environmental scientist with OC&I's Freshwater Wetlands Compliance Program. (Tr. 8-9, Jan. 17, 2012.) Mr. Ahern visited the Dam site once, on April 5, 2006, to perform a follow-up inspection with Mr. Hill. Id. at 40-41. Mr. Ahern testified—based on his prior Biological Inspection Report and the NOV—that the OC&I site inspections revealed

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> made to a system or means to prevent pollution approved by the director." Section 46-12-5(a)-(c).

[5] The NOV additionally cited Respondents for violations of related DEM regulations: Rule 7.01 of the DEM Rules and Regulations Governing the Administration and Enforcement of the Freshwater Wetlands Act, and Rules 9(A), 11(B), and 13(A) of the DEM Water Quality Regulations. (NOV, at 4-5.) Rule 7.01, at the time of issuance of the NOV, stated, in pertinent part, "[a] proposed project or activity which may alter freshwater wetlands requires a permit from the Director." Rule 9(A) provides, in pertinent part,

> "[n]o person shall discharge pollutants into any waters of the State or perform any activities alone or in combination which the Director determines will likely result in the violation of any State water quality criterion or interfere with one or more of the existing or designated uses assigned to the receiving waters or to downstream waters in accordance with rules 8.B, 8.C, 8.D, and 18 of these regulations."

Rule 11(B) provides, in full, "[n]o person shall discharge pollutants into the waters of the State except as in compliance with the provisions of Chapter 46-12, or other applicable chapters, of the Rhode Island General Laws or these regulations, and pursuant to the terms and conditions of an approval issued by DEM thereunder." Rule 13(A) provides, in pertinent part, "[n]o person shall: discharge any pollutant into or conduct any activity which will likely cause or contribute pollution to, the waters of the State . . . without having obtained all required approvals from the Director."

[6] Mr. Petry did not appeal the NOV. (AAD Decision, at 1.) According to DEM in its memorandum in support of its appeal, a request for an Order of Default against Mr. Petry was requested, but AAD never ruled upon that request.

impact or alterations—filling—of a swamp, a riverbank wetland, and multiple ponds. Id. at 37-39.

Specifically, Mr. Ahern testified he observed that a

> "large hole had blown through the dam, and the material that was on the [D]am was transported downstream, down slope into the swamp and into the streams . . . [and] all of the water drained out of the pond and carried—that water was then carried downstream along with the materials that it, you know, that were eroded away from the [D]am itself." Id. at 42.

In regard to the wetlands and water quality violations, he testified that he observed "deposit of nonnative sand and sediments and silt material in the areas downstream of the [D]am, in the river, the swamp, the riverbank wetland and a pond." Id. at 44-45. He explained that he was able to determine the extent of wetlands impact by comparison with "reference materials, such as aerial photographs." Id. at 46. Mr. Ahern additionally testified to conversations that he had with Mr. Tolias and Mr. Petry. Id. at 57-60. He and Mr. Tolias had discussed prior breaches of the Dam from 2000 through 2005, and Mr. Tolias had indicated that there had been "other parties" actually performing the physical repair work on some of the prior Dam breaches. Id. at 69, 71.

The Complaint Investigation Sheet drafted by Mr. Hill and introduced during Mr. Ahern's testimony was admitted as OC&I Exhibit 3 over the objections of Respondents' attorneys. Id. at 26. Those objections were based on hearsay in that Mr. Hill was not present[7] to testify and the document itself contained hearsay statements by additional persons not present at the hearing. Id. at 21-22, 24-25. The hearing officer ultimately admitted the document as a full exhibit, but observed that the hearing:

[7] Counsel for DEM testified that Mr. Hill would not be testifying because "[h]e is no longer with OC&I." Id. at 28. Mr. Ahern testified that he believes that Mr. Hill is now employed by DEM as an environmental police officer. Id. at 24.

> "is an administrative hearing and the Rules of Evidence are somewhat relaxed, especially with the respect to hearsay, I'm going to admit the document with, obviously, the recognition that you gentlemen are free to cross Mr. Ahern on the points you've raised, and, also, I will give it the weight that I deem appropriate based upon your cross-examination of him on those points, okay."[8] Id. at 26.

On cross-examination, counsel for Mr. Wrenn questioned Mr. Ahern on the aerial photographs that he utilized in determining the extent of the wetlands impacts. Id. at 81. Mr. Ahern explained that the purpose of the photographs is "to assess the character of the wetland, the freshwater wetlands that were existing in and around the dam, upstream, downstream," and into the surrounding wetlands. Id. He stated that he used aerial photographs from 1999 and 2003 in reviewing the 2006 breach's impacts. Id. at 82. He admitted that any impacts occurring between 2003 and the 2006 breach would not be reflected by the 2003 aerial photographs, and he acknowledged that breaches had occurred between those time periods. Id. at 83-84.

DEM's second witness was Paul Guglielmino, senior sanitary engineer in OC&I's Dam Safety Program. Id. at 113-14. He testified that his first inspection of the Dam was in 2000, a "routine inspection" to examine the condition of the Dam, which Mr. Guglielmino identified as "poor" at that time. Id. at 116-17. He next inspected the Dam in 2002 in response to a complaint that the Dam had failed. Id. at 118. That inspection did reveal a breach in the Dam, but OC&I did not take any enforcement action because "if a dam failed, or partially failed, we have not required—the Department hadn't required that it be repaired, unless the remnants are causing some other problem, or could have caused a problem, like if it was partially failed and there was concern that further failure could cause more." Id. at 119.

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[8] The hearing officer also admitted OC&I Exhibits 7 and 9—notes to the file from Mr. Ahern regarding telephone conversations—on the same grounds that hearsay may be heard in administrative hearings and he would "give it the weight [he] deem[s] appropriate." Id. at 73-74, 78.

Mr. Guglielmino returned to the Dam for a follow-up inspection in 2005 because he was in the area, and he observed that the previously breached portion of the Dam had been repaired. Id. at 119-20. He testified that DEM received another complaint of Dam failure in 2005, and then the final one in 2006—the instant complaint—in which he performed an inspection. Id. at 121-22. On cross-examination, Mr. Guglielmino indicated that, after his 2000 inspection, he believed that the Dam would fail at some future point if it went without maintenance. Id. at 135.

The final witness presented by DEM was Harold Ellis, a supervising environmental scientist with OC&I's Wetlands Program. (Tr. at 258, Jan. 18, 2012.) Mr. Ellis was involved with the 2006 breach from a supervisory standpoint, and he was involved in the preparation of the NOIE and the NOV. Id. at 260-62, 282. He testified regarding the decision to name the three Respondents in the NOIE and the NOV, naming Mr. Tolias as the owner of the Dam who had made prior repairs and naming Mr. Wrenn because his attorney had indicated that he provided funding and access for the Dam repair. Id. at 279, 287-88.

At the close of DEM's presentation of witnesses, Mr. Tolias' attorney moved for judgment as a matter of law under Super. R. Civ. P. 50 (Rule 50),[9] arguing that DEM failed to meet its burden of establishing that Mr. Tolias violated § 46-19-3 because no evidence had been submitted establishing that Mr. Tolias had substantially altered the Dam in 2005 or 2006. Id. at 314. He additionally argued that DEM's failure to prove a violation of § 46-19-3 favored dismissal of the allegations of the wetlands and water quality violations because those violations flowed from the alleged violation of § 46-19-3. Id. at 315. The hearing officer reserved

[9] The DEM AAD regulations permit all motions available under the Super. R. Civ. P. Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters § 8.00(a)(1) (2012).

judgment on the Rule 50 motion, preferring that the parties submit post-hearing memoranda to aid in clarification of the issues and evidence. Id. at 323.

Mr. Wrenn additionally moved for judgment as a matter of law. Id. at 325. In regard to the alleged wetlands violations, he argued that DEM had failed to present evidence distinguishing the wetlands damage from the 2006 breach and damage from prior incidents. Id. at 326. Additionally, he argued that DEM did not present any evidence that Mr. Wrenn engaged in physical alteration of the Dam, and he therefore could not be liable for substantial alterations to the Dam or for damages resulting from the breach. Id. at 330-31. The hearing officer similarly reserved judgment on Mr. Wrenn's motion, favoring a ruling after a full hearing and submission of post-hearing memoranda.[10] Id. at 332-33.

The Respondents, specifically Mr. Tolias, put on only one witness, Mr. Tolias himself. Mr. Tolias testified that in 2002 he met with Mr. Guglielmino after the Dam breached. Id. at 338-39. He recalled that Mr. Guglielmino informed him that he would need to repair the Dam, although the repair could wait until after Mr. Tolias finished constructing his house. Id. at 339. He also stated that Mr. Guglielmino never told Mr. Tolias that he would need a permit to fill the Dam. Id. Mr. Tolias did testify that he undertook repairs to the Dam on one occasion, but did not elaborate. Id. at 340. At the end of Mr. Tolias' testimony, both Respondents rested. Id. at 344.

The AAD rendered its decision in IN RE: Wrenn, John and Tolias, Stephen and Petry, Martin, AAD No. 08-006/FEW on September 26, 2012. The hearing officer concluded that Respondents had not violated § 46-19-3 because the repairs engaged in by Mr. Tolias or other

[10] The record does not reflect that the hearing officer ever ruled on the motions for judgment as a matter of law. Rather, he rendered a final decision after the full hearing and submission of post-hearing memoranda. Given that none of the parties have raised this as an error, the Court does not view this as an abuse of discretion.

persons did not constitute substantial alterations to the Dam. (AAD Decision, at 11.) Additionally, the hearing officer concluded that DEM had failed to present sufficient evidence to establish that Respondents had engaged in additional backfilling of the Dam, which allegedly was the reason for the excessive debris released to the downstream wetlands. Id. at 12. Therefore, the hearing officer concluded that DEM did not meet its burden of proving a violation of §§ 2-1-21 or 46-12-5 for allowing fill or pollutants into wetlands. Id. at 13. DEM filed a timely appeal with this Court. (Compl. ¶ 17.)

II

Standard of Review

This Court's review of a final agency action is guided by the Rhode Island Administrative Procedures Act (APA), § 42-35-15(g), which provides, in full:

> "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, inferences, 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 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."

In reviewing the agency decision, this Court sits as an appellate court with a limited scope of review, providing deference to the hearing officer's credibility determinations of the live witness testimony. Envtl. Scientific Corp. v. Durfee, 621 A.2d 200, 206 (R.I. 1993). The hearing officer's "impressions as he or she observes a witness and listens to testimony 'are all important to the evidence sifting which precedes a determination of what to accept and what to

disregard.'" Id. (quoting Laganiere v. Bonte Spinning Co., 103 R.I. 191, 196, 236 A.2d 256, 258 (1967)). The Court's review is limited because it observes a cold record and must rely on the hearing officer's observations of live testimony. Id. (citing Laganiere, 103 R.I. at 196, 236 A.2d at 259). Particularly when the hearing included conflicting testimony, this Court will defer to the hearing officer's credibility determinations and related factual findings unless the hearing officer was clearly wrong. Id. at 206-07.

In evaluating the AAD Decision, this Court must ensure that the decision is supported by legally competent evidence. Id. at 208 (citing Barrington Sch. Comm. v. R.I. State Labor Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992)). The agency's factual conclusions will be upheld if they are supported by legally competent evidence in the record, and the final decision will be upheld unless one of the reversible errors from § 42-35-15(g) is met. Id.

III

Analysis

A

Agency and Mr. Wrenn's Actions

Respondent Wrenn primarily contends that DEM failed to prove by a preponderance of the evidence that Mr. Wrenn entered into an agency relationship with Mr. Petry. DEM avers that it did present sufficient evidence to meet its burden; namely, that Mr. Wrenn admitted to providing funding for Dam repairs and providing access for Mr. Petry to cross his property to the Dam. DEM asserts that the AAD Decision was arbitrary and clearly erroneous because the hearing officer did not address DEM's agency argument. Mr. Wrenn counters that although he admitted to providing funding and access for the Dam repair work, DEM presented no evidence regarding the amount of funding, what the funds were used for, and how his share of funding

compared to the funding provided by others. Therefore, Mr. Wrenn argues that the hearing officer did not err in finding that DEM had not sustained its burden in proving the allegations against him.

A fundamental agency concept is that a principal will be subject to liability for actions "conducted by his agent, whom he has authorized . . . to conduct it in the way in which it is conducted, as if he had personally entered into the transaction." State v. Distante, 455 A.2d 305, 306 (R.I. 1983). A principal's liability for acts of his or her agent has been recognized in the environmental context. Id. (holding that defendants would have been liable for filling of wetlands, if the State had proved the existence of wetlands, when the physical filling was undertaken by defendants' agents).

However, finding an agency relationship requires three elements: "(1) the principal must manifest that the agent will act for him, (2) the agent must accept the undertaking, and (3) the parties must agree that the principal will be in control of the undertaking." Cayer v. Cox R.I. Telecom, LLC, 85 A.3d 1140, 1143 (R.I. 2014) (citing Rosati v. Kuzman, 660 A.2d 263, 265 (R.I. 1995)). The existence of an agency relationship must be proven not only in law, but also based on the facts of the particular case. See id. at 1144. One key factual inquiry in determining the existence of an agency relationship is the principal's "right or power to exercise control over the method and means of performing the work." Id.

In rendering the AAD Decision, the hearing officer observed that "[t]he argument against Respondent Wrenn was DEM's understanding that Wrenn had provided access to the [D]am across his property and provided money for materials for repairing the [D]am. No specifics were given regarding the repairs or amount of money given. . . . No other details were provided." (AAD Decision, at 9.) These observations are supported by testimonial evidence in the record.

On cross-examination, Mr. Ahern testified that to his knowledge, the only evidence of Mr. Wrenn's liability was that he "provided some financing towards the repair of the [D]am." (Tr. at 88, Jan. 17, 2012.) Mr. Ellis provided nearly identical testimony. (Tr. at 288, 293, 308-09, Jan. 18, 2012.) The lack of factual development limits the hearing officer's, and this Court's, ability to find an agency relationship. See Lauro v. Knowles, 739 A.2d 1183, 1185 (R.I. 1999) (refusing to find an agency relationship because the plaintiff had not submitted sufficient factual evidence that the defendant-surgeon controlled the conduct of the anesthesia personnel who allegedly caused plaintiff's injury). Therefore, the hearing officer's rejection of the agency relationship is supported by legally competent evidence in the record.[11] See Envtl. Scientific Corp., 621 A.2d at 208 (citing Barrington Sch. Comm., 608 A.2d at 1138).

Taking DEM's argument on this issue to its logical conclusion would lead to finding an agency relationship anytime a person offers money to a neighbor or friend for a project. Evidence in the record indicates that Mr. Petry approached several neighbors to solicit funds to repair the Dam, yet DEM maintains that Mr. Wrenn's funding created an agency relationship. See OC&I Ex. 10, at 1. As DEM offered no evidence on the quantity or use of the money provided by Mr. Wrenn, a person offering $20 or $30 to a neighbor completing a home project could find him or herself liable for any damages—personal, environmental, or otherwise—that flow from the neighbor's home project. Therefore, because DEM did not present sufficient evidence on the details of Mr. Wrenn's payment, this Court finds that the hearing officer's

[11] Although the hearing officer did not make an express finding of fact that DEM failed to prove that Mr. Petry acted as Mr. Wrenn's agent, his finding on the matter is clear from his findings that DEM did not provide any specifics on the repairs or the amount of money provided by Mr. Wrenn. (AAD Decision, at 9.) The hearing officer also expressly adopted an argument put forth by Respondent Wrenn to the same effect. Id. at 12. These findings are sufficient for this Court to review the AAD Decision in regard to Respondent Wrenn.

conclusion that DEM failed to meet its burden of proof in regard to Mr. Wrenn on all allegations was not arbitrary or clearly erroneous.[12] See § 42-35-15(g).

B

Hearing Officer's Consideration of § 46-19-4

DEM next argues that the AAD Decision was clearly erroneous, capricious, and an unwarranted exercise of discretion because it was based on an irrelevant statutory provision, § 46-19-4. This statutory provision requires that DEM inspect any dam that it has reason to believe is unsafe and to issue a notice to the owner of the dam listing the repairs required to return the dam to a safe state. Sec. 46-19-4(a).[13] DEM argues that it cited Respondents under

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[12] As the Court has found that the hearing officer did not err in finding that DEM failed to meet its burden of proof in regard to Respondent Wrenn with respect to all allegations, the remainder of this Decision will focus exclusively on Respondent Tolias.

[13] Section 46-19-4(a) provides, in full:

> "The director of the department of environmental management, on application made to him or her in writing by any person owning or representing property liable to injury or destruction by the breaking of any dam or reservoir, or on an application made by any mayor or city council of any city, or by the town council of any town, on account of danger of loss of life or of injury to any highway or bridge therein, from the breaking of any dam or reservoir, or, without the complaint, whenever he or she shall have cause to apprehend that any dam or reservoir is unsafe, shall forthwith view and thoroughly examine the dam or reservoir, or cause the dam or reservoir to be viewed and examined. And if in the judgment of the director the dam or reservoir be not sufficiently strong to resist the pressure of water upon it, or if from any other cause the director shall determine the dam or reservoir to be unsafe, or if in his or her judgment there is reasonable cause to believe that danger to life or property may be apprehended from the unsafe dam or reservoir, the director shall determine whether the water in the reservoir shall be drawn off in whole or in part, and what alterations, additions, and repairs are necessary to be made to the dam or reservoir to make the dam or reservoir safe, and shall forthwith in writing under his or her hand notify the owner or person having control of the dam or reservoir to cause the additions, alterations, and repairs in the dam or reservoir to be made within a time to be limited in

§ 46-19-3, not § 46-19-4, and never made a finding that the Dam was unsafe under § 46-19-4. However, the hearing officer heard testimony regarding § 46-19-4 and, according to DEM, considered the statute and related testimony in rendering his decision. DEM avers that consideration of this statute was inappropriate, and therefore, the AAD Decision was clearly erroneous and reversible. Respondent Tolias counters that the hearing officer referenced § 46-19-4 in his decision only to make clear that DEM had not cited Respondents under that statutory provision. He argues that the AAD Decision was not based on a consideration of § 46-19-4 and, therefore, was not clearly erroneous.

During the hearing, Respondent Tolias' attorney elicited testimony on cross-examination from Mr. Guglielmino in regard to § 46-19-4. Mr. Guglielmino testified that § 46-19-4 places certain inspection requirements upon DEM in regard to dam safety. (Tr. at 181-82, Jan. 18, 2012.) He testified that DEM had a responsibility under § 46-19-4 to send a notice to a dam owner if the agency determined that the dam was unsafe. Id. at 182. Mr. Guglielmino additionally testified that DEM was aware of the history of the Dam but did not send Mr. Tolias a notice under § 46-19-4 ordering any repair work to the Dam.[14] Id. at 189, 210.

In rendering the AAD Decision, the hearing officer's only conclusion in regard to § 46-19-4 was that "OC&I did not cite RIGL §46-19-4 . . . in the NOV against Respondents." (AAD Decision, at 15.) When laying out the allegations, the hearing officer did not include § 46-19-4 in the list of statutes allegedly violated. Id. at 2. Additionally, the hearing officer stated that, despite knowledge of historical safety issues and prior citations under § 46-19-4, "I must analyze the charges contained in the NOV regarding the breach in 2006." Id. at 13. The hearing officer

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> the notice; and may order the water in the reservoir to be drawn off, in whole or in part, as the director may determine."

[14] DEM did send such a notice to the owner of the Dam in 1987. (Tr. at 192, Jan. 18, 2012.)

specifically stated that the "central issue" before him was "whether DEM proved, by a preponderance of the evidence, that the Respondents failed to comply with RIGL §46-19-3 which prohibits the substantial alteration to a dam" without DEM approval. Id. at 10-11. He then rendered his decision on that issue based on a conclusion that any work done to the Dam just prior to the 2006 breach did not constitute a substantial alteration, the standard laid down in § 46-19-3. Id. at 11.

The hearing officer's statements in the AAD Decision—that DEM had not cited Respondents under § 46-19-4 in the NOV, and that he was limiting his review to the NOV's allegations—make clear that despite DEM's claims, he did not consider § 46-19-4 in his substantive determinations. The hearing officer properly limited his decision to the allegations brought by DEM in the NOV. His decision was rooted in the meaning of substantial alteration, not dam safety. Therefore, this Court finds that the hearing officer properly considered only § 46-19-3 in reaching his decision on the issue of the Dam breach and did not consider testimony on § 46-19-4. As a result, the AAD Decision was not in violation of statutory provisions, clearly erroneous, capricious, or an unwarranted exercise of discretion. See § 42-35-15(g).

C

Hearing Officer's Consideration of the Evidence Presented

DEM additionally asserts that the AAD Decision is clearly erroneous, arbitrary, and affected by error of law because the hearing officer ignored the reliable and probative evidence presented at the hearing and contained in the record. DEM asserts that, as the owner of the property on which the Dam sits, Mr. Tolias would be de facto liable for any Dam alterations because he is the only person who could have applied for the necessary permits. In regard to the evidence of Dam alterations, DEM points to reports and testimony of several DEM inspectors

indicating that the inspectors observed evidence of backfilling when they performed their inspections of the Dam. However, the hearing officer found that DEM did not meet its burden of proof regarding substantial alterations based on backfilling. DEM asserts that this finding constitutes an arbitrary decision because it ignored competent evidence in the record. Respondent Tolias counters that the witness testimony and other evidence presented during the hearing were insufficient to prove that Mr. Tolias engaged in substantial alterations of the Dam without DEM approval.[15] Regarding the evidence presented at the hearing and the hearing officer's treatment of that evidence, the parties cite to several evidentiary rules which the Court will address in seriatim.

1

Hearsay

A substantial portion of the evidence submitted during the hearing constituted hearsay. DEM argues that Rhode Island has a flexible treatment of hearsay at the agency level, and therefore, the hearing officer properly admitted the hearsay evidence but then improperly ignored a substantial portion of that evidence.

Under the APA, "[t]he rules of evidence as applied in civil cases in the superior courts of this state shall be followed" during administrative adjudications. Sec. 42-35-10(1). In Rhode Island Superior Court, as in other courts, "[h]earsay is not admissible" unless one of several exceptions to the hearsay rule applies. R.I. R. Evid. 802. However, this inadmissibility is

[15] Mr. Tolias also argues that DEM failed to present evidence that Mr. Tolias granted Mr. Petry permission to alter the Dam. He therefore asserts that he cannot be responsible for any substantial alterations conducted by Mr. Petry. However, as the hearing officer found that DEM failed to prove that anyone made substantial alterations to the Dam, this Court need not address this argument.

flexible in the agency adjudication context.[16] In an adjudication, otherwise inadmissible evidence may be admitted "when necessary to ascertain facts not reasonably susceptible of proof under [the rules of evidence] . . . if it is of a type commonly relied upon by reasonably prudent men and women in the conduct of their affairs." Sec. 42-35-10(1); DePasquale, 599 A.2d at 136.

Although a hearing officer should admit reliable hearsay evidence at a hearing, "[t]he weight to be attached to any evidence in the record will rest within the sound discretion of the [hearing officer] in accordance with the Rules of Evidence." Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters, § 16.00(o) (2012) [hereinafter AAD Rules]. The decision on admission and weight of hearsay evidence is left within the sound discretion of the hearing officer, and this Court will only overturn his or her decision for abuse of discretion or if it is clearly erroneous. Foster-Glocester Reg'l Sch. Comm., 854 A.2d at 1018 (citing § 42-35-15(g)(6)); see Charles H. Koch, Jr., Admin. Law and Prac. § 5:52[4] (3d ed. 2010).

Many of the documents submitted by DEM at the hearing contained hearsay. Specifically, DEM sought to admit a Complaint Investigation Sheet drafted by Mr. Hill from the April 3, 2006 inspection (OC&I Ex. 3), notes taken by Mr. Ahern during telephone conversations with Mr. Petry and Mr. Tolias (OC&I Exs. 7, 8), and notes taken by DEM staff during meetings with Respondents (OC&I Exs. 10, 11). Mr. Hill's Complaint Investigation Sheet contained statements made by Mr. Whitford, the Glocester Public Works Director, and Captain Laplante of the Glocester Police Department. These statements as well as those contained within Mr.

[16] The purpose of the rule against hearsay is to "prevent juries from rendering a verdict based on 'unreliable or confusing testimony[,]'" but that danger is not present in an administrative adjudication where the fact finder is a trained hearing officer with specialized knowledge in the subject matter of the adjudication. Foster-Glocester Reg'l Sch. Comm. v. Bd. of Review, 854 A.2d 1008, 1018 (R.I. 2004) (citing DePasquale v. Harrington, 599 A.2d 314, 316 (R.I. 1991)).

Ahern's notes, his related testimony, and the meeting notes from various DEM staff constitute hearsay because the statements were made by an out-of-court declarant and offered to prove the truth of the statements. See R.I. R. Evid. 801(c).

With the first hearsay objection, regarding Mr. Hill's Complaint Investigation Sheet, the hearing officer recognized the problem of hearsay but qualified that "this is an administrative hearing, the rules are relaxed." (Tr. at 22-23, Jan. 17, 2012.) He observed that OC&I had relied upon the document in pursuing the enforcement action. Id. Although he stated that Mr. Hill should testify at the hearing to authenticate the report, he would admit the document "with, obviously, the recognition that [Respondents] are free to cross Mr. Ahern on the points [they've] raised, and, also, I will give it the weight that I deem appropriate based upon [the] cross-examination of him on those points." Id. at 26. The hearing officer's remaining responses to hearsay objections were consistent with this first response; he admitted the hearsay statements with the condition that he would decide on the weight of the evidence later. Id. at 74.

In the AAD Decision, the hearing officer indicates that he gave little weight to the hearsay admitted during the hearing. In regard to the Complaint Investigation Sheet, the hearing officer specifically observed that the statements of Mr. Whitford and Captain Laplante were not entitled to any weight because neither man testified at the hearing, and Mr. Hill did not have personal knowledge of the matter when he drafted the document, so the statements lacked competence. (AAD Decision, at 10.) In regard to the remaining hearsay evidence, the hearing officer adopted Respondent Wrenn's classification of the evidence as "speculative reports and information based on interviews, meetings, [and] phone calls," dismissing the evidence as holding little weight. Id. at 12.

The hearing officer did not err or abuse his discretion in admitting the hearsay evidence presented by DEM. See § 42-35-10(1). Moreover, in the AAD Decision, the hearing officer determined that the hearsay evidence presented was not sufficiently reliable to be granted much, if any, weight. See Foster-Glocester Reg'l Sch. Comm., 854 A.2d at 1018. Given that most of the hearsay evidence constituted notes drafted by OC&I staff from meetings and other interactions with opposing parties, the hearing officer did not err or abuse his discretion in determining that the evidence was not sufficiently reliable to be granted much weight. See § 42-35-10(1); Koch, supra § 5:52[4] (stating "[w]hereas the agency may admit reports or other documents which might be technically inadmissible hearsay, questionable credibility of the reports will make them inappropriate to form substantial evidence"). Contra Johnson v. U.S., 628 F.2d 187, 191 (D.C. Cir. 1980) (affirming the United States Civil Service Commission's consideration of hearsay in its determination because the hearsay was highly probative given that "all three out-of-court declarants were disinterested witnesses to the event").

2

The Business Record Exception

DEM asserts that the Glocester Police report, which was admitted for the limited purpose of showing that DEM received notice of the Dam failure, should have been admitted in full because it constituted a business record and therefore qualified as admissible evidence under R.I. R. Evid. 803(6). In arguing that the police report qualified as a business record, DEM relies upon this Court's decision in Ferris Ave. Realty, LLC v. Huhtamaki, C.A. No. PB-2007-1995 (Mar. 19, 2013),[17] wherein the Superior Court concluded that an invoice created by a third party

[17] As a decision of the Superior Court, Ferris Ave. Realty is not binding upon this Court. However, the Court's decision in that case would not apply here even if it were binding. In Ferris Ave. Realty, the Court admitted an invoice via testimony of the recipient company, even

was admissible under R.I. R. Evid. 803(6) because the receiving party had relied upon it and the invoice had been incorporated into the party's records. DEM argues that the police report should have been admitted because it was received by DEM staff and relied upon during the inspections and drafting of the NOV and therefore is a DEM business record. Hence, DEM asserts that the hearing officer erred in limiting the admissibility of the report. Respondent Tolias counters that the hearing officer did not err in limiting the admissibility of the report, but, he avers, even if the hearing officer's decision was in error, it was harmless error because the pertinent information contained in the police report was also admitted via testimony and other evidence.

Our Supreme Court

> "has set forth a four-part test for the admissibility of a hearsay business record: 'First, the record must be regularly maintained in the course of a regularly conducted business activity. Second, the source of the information must be a person with knowledge. Third, the information must be recorded contemporaneously with the event or occurrence, and fourth, the party introducing the record must provide adequate foundation testimony.'" Martin v. Lawrence, 79 A.3d 1275, 1282 (R.I. 2013) (quoting R.I. Managed Eye Care, Inc. v. Blue Cross & Blue Shield of R.I., 996 A.2d 684, 691 (R.I. 2010)).

Adequate foundation requires a showing of the first three elements as well as authentication of the document. Id. (citing R.I. Managed Eye Care, Inc., 996 A.2d at 691). The authentication must be completed by "the custodian of records or some 'other qualified witness.'" Boscia v. Sharples, 860 A.2d 674, 679-80 (R.I. 2004) (holding that plaintiff's medical record could have been admitted under R.I. R. Evid. 803(6) if it had been authenticated by a person with "personal

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though the company that drafted the invoice did not testify or authenticate the invoice. C.A. No. PB-2007-1995 at 19. However, both the sending and receiving parties have a means to validate an invoice: the sender has personal knowledge of the price and the recipient has personal knowledge of the payments made. See id. However, in this case, DEM had no independent personal knowledge of the information provided by the Glocester Police.

knowledge of the making and keeping of the" records, but plaintiff's own testimony was insufficient because he did not have such personal knowledge).

OC&I introduced a copy of the Glocester Police report detailing the officer's observations from the initial police investigation of the Dam breach on April 1, 2006. (OC&I Ex. 4.) To support the document, DEM elicited testimony from Mr. Guglielmino about its source:

> "Q. . . . Do you have any idea where this document is maintained within the department?
> A. I know there is a copy in the dam file.
> Q. So, you've seen this document before?
> A. Yes.
> Q. Does this look like a fair and accurate copy of the document that's contained in the file you reviewed?
> A. Yes." (Tr. at 124-25, Jan. 17, 2012.)

However, Respondents objected to admission of the document, arguing that it contained hearsay upon hearsay: an alleged DEM document containing statements made by the Glocester Police, recording statements made by other parties, such as Mr. Petry. Id. at 125. In light of the multiple hearsay concerns, the hearing officer decided to admit the police report, but to limit its admission "for the limited purpose of showing that [the report] was received by the Department and it was used by [Mr. Guglielmino] in the course of his investigation." Id. at 128.

Although DEM argues that the police report qualified for admission despite being hearsay under the business record exception, the report was never properly authenticated. See Martin, 79 A.3d at 1282 (affirming a trial justice's refusal to admit an insurance form filled out by plaintiff's deceased mother prior to her death as factual evidence of the events of a car accident because the plaintiff, executor of his mother's estate, had failed to bring in a representative from the insurance company to authenticate the document). DEM attempted to authenticate the document via the testimony of Mr. Guglielmino. However, Mr. Guglielmino, as

a DEM employee, could only testify as to the chain of custody of the document after it came into DEM's possession. The Glocester Police Department is the body that produced the document and eventually delivered it to DEM. Therefore, DEM would need to have a representative of the Police Department who had knowledge of the drafting and maintenance of the report testify in order to properly authenticate it. See Boscia, 860 A.2d at 679-80. Absent this authentication, the document could not be admitted under R.I. R. Evid. 803(6), and the hearing officer did not err or abuse his discretion in limiting the admissibility of the document in light of the hearsay concern. See Martin, 79 A.3d at 1282.

3

Statements Against Interest

DEM observes that several of its exhibits, specifically OC&I Exhibits 8, 10, and 11, contain admissions and statements against interest that Mr. Tolias admitted to DEM staff that he brought in fill and repaired the dam. DEM argues that these statements contained in DEM's notes constitute statements against interest which were admissible outside the hearsay context under R.I. R. Evid. 804(b)(3).

Under R.I. R. Evid. 804(b)(3),[18] a statement made by the party against whom it is proposed to be utilized is admissible if the declarant is unavailable as a witness. The statements

[18] R.I. R. Evid. 804 provides, in pertinent part:

> "The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: . . . (3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or propriety interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless

on which DEM seeks to rely were allegedly made by Mr. Tolias during meetings and phone conversations with DEM staff. However, Mr. Tolias was clearly available given that he actually was a witness who testified at the hearing. Therefore, DEM cannot seek to utilize R.I. R. Evid. 804(b)(3) to move those statements outside the hearsay context to strengthen their reliability. Accordingly, the hearing officer's determination that those statements were hearsay did not constitute an error of law.

4

Sufficiency of Evidence

As previously stated, DEM argues that the AAD Decision was clearly erroneous, arbitrary, and affected by error of law because the hearing officer ignored the extensive evidence presented by DEM against Respondents. Respondents counter that the AAD Decision was not clearly erroneous because DEM failed to prove its allegations against Respondents by a preponderance of the evidence.

During adjudication on an agency enforcement action, the agency bears the burden to prove by a preponderance of the evidence that the respondents violated the cited laws. AAD Rules § 15.00(d). The hearing officer must evaluate the evidence presented, determine the appropriate weight to grant to said evidence, and determine whether the agency has met its burden of proof. AAD Rules § 16.00(o). If the hearing officer finds that the evidence of the agency and respondents balance, then the hearing officer must rule in favor of the respondents as the agency bears the burden of proof. See Faenger v. Petty, 441 S.W.3d 199, 204-05 (Mo. App. W.D. 2014). In reviewing the AAD Decision, this Court will give deference to the hearing officer's credibility determinations of conflicting testimonial evidence unless those

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> corroborating circumstances clearly indicate the trustworthiness of the statement." R.I. R. Evid. 804(b)(3).

determinations are clearly wrong. Envtl. Scientific Corp., 621 A.2d at 206-07. This Court will uphold the AAD Decision as long as that decision is supported by legally competent evidence and is not clearly erroneous, arbitrary, or an abuse of discretion. See id. at 208.

The majority of the evidence that DEM presented against Mr. Tolias was rejected by the hearing officer in making his decision because the evidence constituted hearsay. DEM had presented notes from its meetings with Respondents that indicated that Mr. Tolias was aware of Mr. Petry's work on the Dam prior to the 2006 breach, but these notes of out-of-court statements were rejected as hearsay. See OC&I Ex. 10. DEM also introduced Mr. Hill's Complaint Investigation Sheet, which included hearsay statements from Mr. Whitford and Captain Laplante that Mr. Petry and Mr. Wrenn repaired a dam owned by Mr. Tolias. See OC&I Ex. 3. Mr. Ahern's notes from a telephone conversation with Mr. Petry additionally supported claims that Mr. Tolias was aware of the repair work to the Dam. See OC&I Ex. 7. All of these statements were hearsay and therefore were disregarded by the hearing officer in rendering the AAD Decision. See AAD Decision, at 10.

After discounting the hearsay evidence, the hearing officer was left primarily with the hearing testimony to render his decision. An affidavit by Mr. Wrenn did state that "[t]o the best of my knowledge," Mr. Tolias has made physical alterations to the Dam "over the years," but qualified that alterations were also undertaken by "numerous neighbors and residents of the community . . . [and] unknown vandals." (OC&I Ex. 14, at 2 ¶ 4.) Mr. Guglielmino testified that Mr. Tolias was cited not for physical work on the Dam but rather because he was the owner of the Dam. (Tr. at 213-14, Jan. 18, 2012.) In regard to the evidence of the 2006 Dam breach and resulting harms, Mr. Ahern had testified that he based his wetlands violation allegations on the presence of "nonnative sediment/sand in the swamp and in the stream channel downstream"

as well as the presence of physical debris in the wetlands. (Tr. at 42, Jan. 17, 2012.) Mr. Ahern's Biological Inspection Report and Site Inspection Report additionally detail the wetlands impacts and state that all of the wetlands alterations resulted from the Dam breach. (OC&I Exs. 5, 6.)

The hearing officer also heard extensive testimony and received evidence that contradicted OC&I's claims against Mr. Tolias. The record contains an affidavit from Mr. Tolias averring that "at no time" did he authorize Mr. Petry or Mr. Wrenn to make repairs to the Dam. (OC&I Ex. 12.) Mr. Tolias additionally testified at the hearing that he never gave anyone authority to make repairs or to maintain the Dam between April of 2001 and April of 2006. (Tr. at 336, Jan. 18, 2012.) Additionally, multiple witnesses testified as to the potential for vandalism at the Dam. (Tr. at 79, Jan. 17, 2012; Tr. at 220-21, 228, 338, Jan. 18, 2012.)[19] In fact, Mr. Guglielmino testified on cross-examination that he did not know who actually made the physical alterations to the Dam. (Tr. at 223, Jan. 18, 2012.)

Contrary evidence was also presented at the hearing in regard to the physical Dam breach. Mr. Guglielmino's inspection report from April 3, 2006 noted the presence of fill material in the Dam that "appeared to be the newly added fill material." (OC&I Ex. 2, at 1.) However, Mr. Tolias testified and affirmed that he had previously engaged in repair work on the Dam via filling, and that others had done so as well, all prior to the alleged repair work by Mr. Petry in 2005 or 2006. (Tr. at 340, Jan. 18, 2012; OC&I Ex. 12, at 2 ¶ 4.)

Additionally, Mr. Ahern testified that the evidence he relied upon for the wetlands violations was nonnative sediment and physical debris present in the wetlands. (Tr. at 42, Jan. 17, 2012.) He compared his site observations with the prior character of the wetland based on

[19] Although hearsay, the notes from DEM's meeting with Mr. Tolias indicate that Mr. Tolias witnessed two children near the Dam who ran away when he approached. (OC&I Ex. 11.)

aerial photographs. Id. at 46. However, on cross-examination, Mr. Ahern admitted that (1) the aerial photographs were from 2003 or earlier and would not reflect subsequent changes to the area; and (2) because of the "evergreen overstory" covering portions of the wetlands, "it was very difficult to document whether there were any impacts" to the wetlands as of 2003. Id. at 81, 101. Therefore, the Court finds that alterations to the wetlands may have occurred prior to the alleged Dam alterations relevant here and not been present in the photographs either because of their age or obscurity.[20]

As the majority of DEM's evidence against Respondents was presented in the form of hearsay, this Court gives great deference to the hearing officer who heard extensive live testimony. See Envtl. Scientific Corp., 621 A.2d at 206. The hearing officer himself observed, in declining to rule on the Respondents' Motions for Judgment as a Matter of Law, "I think there's been a lot of evidence presented that's conflicting as well as contradictory." (Tr. at 322, Jan. 18, 2012.) Deferring to the hearing officer's determination that the hearsay was not entitled to significant weight, little evidence exists against Respondents, as noted above, and what evidence remains is contradictory. Given the agency's burden of proof and the dearth of non-hearsay evidence against Respondents, the hearing officer's finding that DEM had not put forth sufficient evidence to support its burden was not in violation of constitutional or statutory provisions, clearly erroneous, or affected by other error of law. See Faenger, 441 S.W.3d at 204-05 (holding that "'[w]hen the [hearing officer] finds the parties to be equally credible . . . , it has, in effect, declared that the [burden-carrying party] did not satisfy [its] burden of proof'"). As the hearing officer properly exercised his discretion in considering contradictory evidence and live

[20] Mr. Ahern additionally confirmed a statement quoted in DEM's meeting notes that stated "Bruce Ahern cannot say for sure how much of the material in the wetland is new material/how much is from prior washout." (Tr. at 92-93, Jan. 17, 2012.)

testimony, the AAD Decision was not clearly erroneous, arbitrary, or affected by error of law. See § 42-35-15(g).

D

Substantial Alterations

DEM additionally asserts that the hearing officer improperly applied the law on what constitutes a substantial alteration. Conversely, Respondent Tolias avers that the hearing officer could not have found that Respondents engaged in substantial alterations to the Dam because DEM failed to prove the legal meaning of "substantial alteration."

Although all parties frequently referred to Dam repairs or maintenance throughout the proceeding, the actual restriction set forth in § 46-19-3 is that "[n]o dam or reservoir shall be constructed or substantially altered until plans and specifications of the proposed work shall have been filed with and approved by the director." (Emphasis added.) The hearing officer's conclusion in the AAD Decision was that "the evidence presented during the Hearing failed to prove by a preponderance of the evidence that the Respondents substantially altered Dam #397." (AAD Decision, at 11, emphasis in original.)

1

DEM's Burden of Proof

In his opposition to DEM's appeal, Respondent Tolias argues that DEM failed to provide any evidence on the meaning of "substantial alteration." As a result, Mr. Tolias argues that the hearing officer had no basis to determine whether Respondents, or anyone else, substantially altered the Dam. Mr. Tolias asserts that DEM's appeal must fail because the agency failed to establish what constitutes a substantial alteration.

Hearing officers are statutorily authorized to take administrative notice "of judicially cognizable facts." Sec. 42-35-10(4). The DEM regulations related to administrative hearings additionally permit a hearing officer to take administrative notice of "properly adopted rules and regulations adopted by the agencies of this State or Federal agencies." AAD Rules § 16.00(i); see also Hooper v. Goldstein, 104 R.I. 32, 37, 241 A.2d 809, 812 (1968) (holding that an administrative tribunal "may notice the rules and regulations promulgated by the appropriate officials of that department"). Given that the statute at issue was within the purview of DEM enforcement, the hearing officer had the legal capacity to take administrative notice of the statutory provision and the meanings ascribed to the provision by our courts. See Hooper, 104 R.I. at 37, 241 A.2d at 812. Therefore, Tolias' argument—that DEM could not have met its burden on the allegations because it failed to present evidence on what constitutes a substantial alteration—is without merit.

2

Alterations to Dam 397

DEM contends that the hearing officer misapplied the law on the meaning of "substantial alteration" in rendering the AAD Decision. The hearing officer cited Powers v. Lawson, 86 R.I. 441, 136 A.2d 613 (1957) in rendering the AAD Decision on whether Respondents engaged in substantial alterations of the Dam. DEM argues that Powers is improper in this context because it relates to § 46-19-5, not § 46-19-3. Additionally, DEM points to the age of the Powers case, arguing that the statutory scheme had changed since 1957.[21] Respondents counter that the

[21] DEM makes two additional arguments that the hearing officer erred in his interpretation of "substantial alteration." However, both arguments fail. First, DEM argues in its memorandum in support of its appeal that "[i]f three (3) unapproved alterations occurring over the course of four (4) years that resulted in a significant dam breach are not considered 'substantial,' DEM cannot imagine a situation that would be considered 'substantial.'" However, DEM's

hearing officer's treatment of the meaning of substantial alterations was consistent with both the language and general intent of the statutory scheme.

If a hearing officer applies an improper definition of a statutory or regulatory term, the misapplication constitutes an error of law, and this Court must remand the matter. See Distante, 455 A.2d at 306 (remanding a Superior Court decision because "the trial justice misconceived the definition of flood plain"). In this case, the hearing officer's primary factual determination was that DEM failed to meet its burden of proof that any changes made to the Dam by any party constituted "substantial alterations" under § 46-19-3. See AAD Decision, at 11.

Our Supreme Court has spoken only once on the meaning of "substantial alterations" in the context of a dam, in Powers v. Lawson, as cited by the hearing officer. In Powers, the owners removed three planks from the crest of a dam, lowering the level of the dammed pond by two to two and one-half feet, without submitting plans to DEM for the plank removal. 86 R.I. at 443, 136 A.2d at 614. The chief of the division of harbors and rivers[22] testified that he believed removal of the planks constituted a substantial alteration because it exposed portions of the pond bottom, resulting in mud flats, pollution, and breeding of mosquitoes. Id. at 444, 136 A.2d at 614. The trial justice agreed with the chief of the division of harbors and rivers and held that the removal of the planks did constitute a substantial alteration. Id. at 444, 136 A.2d at 615.

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enforcement decisions undermine this argument. DEM cited Respondents exclusively in relation to the 2006 Dam breach. (NOV, at 1-4.) Therefore, they cannot rely on reference to prior breaches to argue substantial alteration for the 2006 breach. Second, DEM asserts that the fact that the Dam actually breached constitutes evidence that substantial alterations occurred. However, this argument does not carry weight because an unmaintained dam may breach without the owner taking any action on the dam. See Tr. at 135, Jan. 17, 2012 (testimony of Mr. Guglielmino that the Dam was "[d]estined for failure at some point" if it was not maintained).

[22] The division of harbors and rivers was responsible for dam safety prior to the establishment of DEM in 1965.

On appeal, our Supreme Court held that the trial justice had erred in finding that the removal of the planks constituted a substantial alteration. Id. at 445, 136 A.2d at 615. The Court found that the purpose of requiring agency approval prior to undertaking substantial alterations is to prevent danger to life and property from the breaking of the dam. Id. at 445-46, 136 A.2d at 615. The Court equated the removal of the planks to a partial abandonment of the dam, lowering the water level to decrease the safety risk posed by the dam. Id. at 446, 136 A.2d at 616. Therefore, the Court held that such partial abandonment did not constitute a substantial alteration under the statutory scheme because it would decrease the safety risk posed by the dam rather than potentially create a safety issue. Id.

In rendering the AAD Decision in this matter, the hearing officer observed that DEM's allegations of substantial alterations were based on "evidence of material used to carry out dam repair and backfilling operations including plywood, broken wood planks partially buried in the beach area, sand bags, deposited sand and gravel material." (AAD Decision, at 12.) The hearing officer also noted that evidence was presented that the breach may have been caused by vandals[23] rather than any intentional repair work to the Dam. Id. The hearing officer held that in light of our Supreme Court's discussion of substantial alterations in Powers, this evidence was insufficient to support DEM's burden of proof that Respondents had engaged in substantial alterations of the Dam. Id.

DEM argues that the hearing officer improperly relied upon Powers because the statute has been altered in the intervening time period. The Court observes that the statutory scheme has since been recodified; however, the substance of the law has remained unchanged. In Powers, the court based its decision on "Inspection of Mill-dams and Reservoirs," G.L. 1923 Ch. 638.

[23] Extensive evidence of potential vandalism of the Dam is present throughout the record. (Tr. at 220-21, 229, 338, Jan. 18, 2012; NOV at 3; OC&I Ex. 8; OC&I Ex. 11, at 1; OC&I Ex. 14, at 2.)

The court examined § 4, which provides, "No dam or reservoir shall be constructed or substantially altered until plans and specifications of the proposed work shall have been filed with and approved by the said chief." G.L. 1923 Ch. 638 § 4. Other than a substitution of the chief of the division of harbors and rivers for the DEM director, this language is identical to the current language of § 46-19-3. Consequently, the hearing officer's application of the Supreme Court's interpretation was not affected by error of law. See 1A Norman J. Singer & J.D. Shambie Singer, Sutherland on Statutes and Statutory Construction § 28:11 at 638 (7th ed. 2009) (stating that "courts presume that if the language used in the code fairly admits of a construction consistent with the old law it was not the legislature's intent to change the meaning of the law through a revision of the language").

Likewise, the hearing officer did not abuse his discretion or exceed his authority in finding that DEM failed to meet its burden to prove that Respondents performed substantial alterations to the Dam. First, under Powers, minor repairs or changes done for the purpose of promoting safety of life or property do not constitute substantial alterations under § 46-19-3. See Powers, 86 R.I. at 446, 136 A.2d at 616. Mr. Guglielmino testified that he "never made a determination that this dam was unsafe," even though repair work was undertaken in the past. See Tr. at 225, 247, Jan. 18, 2012. In fact, Mr. Tolias testified that after a breach in 2002, Mr. Guglielmino told Mr. Tolias to "go ahead and fill it in." Id. at 339. Therefore, legally competent evidence exists in the record supporting the hearing officer's determination that OC&I failed to meet its burden of proof that Respondents engaged in substantial alterations, as the evidence could just as likely support simple repair work that would not invoke § 46-19-3. See Envtl. Scientific Corp., 621 A.2d at 208 (citing Barrington Sch. Comm., 608 A.2d at 1138).

Additionally, the evidence contained in the record establishing that filling was done at the Dam site was contradictory. Although evidence of plywood, planks, sand bags, and other debris was present at the Dam site and downstream, (AAD Decision, at 12), Mr. Ahern testified that this debris was evidence that it "had been utilized as backfill during some prior repair operations or from historical breaches." (Tr. at 49, Jan. 17, 2012, emphasis added.) Considering the additional evidence of prior breaches in the Dam and potential vandalism, the hearing officer evaluated all of the evidence, made credibility determinations of the witness testimony, and concluded that DEM did not meet its burden in proving that Respondents undertook substantial alterations to the Dam in relation to the 2006 breach. This Court defers to the hearing officer's credibility determinations and finds that there was competent evidence in the record to support the hearing officer's conclusion based on those credibility determinations. See Envtl. Scientific Corp., 621 A.2d at 206, 208.

E

Wetlands and Water Quality Violations

In regard to the alleged violations of wetlands and water quality statutes and regulations, DEM asserts—as it did for the allegation of substantial alteration to a dam without a permit—that the hearing officer make an arbitrary finding by ignoring substantial evidence in the record. DEM points to the inspection reports and testimony of the inspectors indicating that extensive debris from the Dam breach ended up in several wetlands. It asserts that this evidence was sufficient to meet the agency's burden of proof and the hearing officer acted arbitrarily in ignoring this evidence.[24]

[24] In its reply memorandum to this Court, DEM asserts that Respondents are liable for the wetlands and water quality violations because those violations resulted from the alterations to the Dam. In light of this asserted connection, the hearing officer's conclusion that Respondents were

The primary evidence of the wetlands and water quality violations were Mr. Ahern's observations of "nonnative sediment/sand in the swamp and in the stream channel downstream" and in the surrounding wetlands area. (Tr. at 42, Jan. 17, 2012.) However, this evidence was not uncontradicted. On cross-examination, Mr. Ahern testified that a statement contained in DEM meeting notes, "Bruce Ahern cannot say for sure how much of the material in the wetland is new material/how much is from prior washout," is accurate. Id. at 92-93. Mr. Ahern testified that the aerial photographs that he used to determine the extent of impact were not precise in confirming the exact downstream impact of the breach because "it was very difficult to document whether there were any impacts at that time [the photograph was taken]. Much of the area has an evergreen overstory, difficult to see through." Id. at 101.

In light of the conflicting testimony provided by Mr. Ahern on the certainty of the wetlands impacts, this Court will defer to the hearing officer's credibility determinations. See Envtl. Scientific Corp., 621 A.2d at 206. The hearing officer held that "there was no specific evidence presented that the Respondents did any activities which may alter freshwater wetland" regarding the 2006 breach. (AAD Decision, at 13.) He made specific note of the problems with the aerial photography as well as the potential for vandalism of the Dam. Id. at 4, 13. The hearing officer's decisions in regard to the alleged wetlands and water quality violations are not arbitrary because there is competent evidence in the record of both the potential of vandalism and the deficiency of the aerial photographs in differentiating the wetlands impacts from the 2006 breach and from prior events. See § 42-35-15.

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not liable for substantial alterations to the Dam would lead to the logical conclusion that they are also not liable for the wetlands and water quality violations. However, as the Respondents have not raised this argument, the Court here considers the merits of DEM's assertion on the issue of the wetlands and water quality violations.

F

Equal Access to Justice Act

At the conclusion of his memorandum to this Court, Respondent Wrenn requests attorney's fees pursuant to the Rhode Island Equal Access to Justice for Small Businesses and Individuals Act (EAJA), §§ 42-92-1 through 42-92-8. Mr. Wrenn requests attorney's fees on the grounds that DEM's position throughout the proceedings had no reasonable basis in law or fact and, therefore, the agency's position was not substantially justified. Mr. Wrenn provides no specific argument in support of his request.

The EAJA "was propounded to mitigate the burden placed upon individuals and small businesses by the arbitrary and capricious decisions of administrative agencies made during adjudicatory proceedings." Taft v. Pare, 536 A.2d 888, 892 (R.I. 1988). Under the EAJA, a prevailing party in an administrative adjudication may recover reasonable litigation expenses unless the hearing officer determines that the agency was substantially justified in its actions during the proceeding. Sec. 42-92-3.[25] Substantial justification is defined under the EAJA to mean "that the initial position of the agency, as well as the agency's position in the proceedings, has a reasonable basis in law and fact." Sec. 42-92-2(7). Our Supreme Court has further clarified that substantial justification only requires that agency decisions are "clearly reasonable, well founded in law and fact, solid though not necessarily correct." Krikorian v. R.I. Dep't of Human Servs., 606 A.2d 671, 675 (R.I. 1992).

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[25] Section 42-92-3 provides, in relevant part:

> "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 Court finds that DEM's enforcement action against Respondent Wrenn was substantially justified because it was reasonably based in law and fact both initially and throughout the proceedings. When DEM first received a complaint that the Dam had breached, Captain Laplante of the Glocester Police informed Mr. Hill that Mr. Petry had stated that he and Mr. Wrenn were repairing the Dam. (OC&I Ex. 3, at 2.) Although DEM did not know the extent of the work performed by Mr. Petry and Mr. Wrenn, their work on the Dam and its subsequent breach led DEM to suspect that their work may have constituted substantial alterations, which require DEM approval under § 46-19-3. As a result, DEM included Mr. Petry and Mr. Wrenn in their investigation of the Dam breach. (Tr. at 265, 279-80, Jan. 18, 2012.) Therefore, DEM was justified in law and fact in initiating its investigation of Mr. Wrenn. See § 42-92-2(7).

Throughout the investigation and during the hearing, DEM remained reasonably justified in law and fact because the investigation revealed additional evidence against Mr. Wrenn. An affidavit submitted by Mr. Tolias stated that Mr. Wrenn and Mr. Petry entered onto his land to repair the Dam in 2006 without his permission. (OC&I Ex. 12, at 2.) Additionally, Mr. Wrenn's attorney stated to DEM that Mr. Wrenn's involvement was limited to providing funding for the repair and access to the Dam across his property. (Tr. at 288, Jan. 18, 2012.) DEM therefore had some factual evidence that Mr. Wrenn may have personally engaged in substantial alterations of the Dam, which would violate § 46-19-3. Additionally, Mr. Wrenn's attorney's statement led DEM to believe that—at the very least—an agency relationship existed between Mr. Wrenn and Mr. Petry. Therefore, if Mr. Petry had violated § 46-19-3 by his work on the Dam, Mr. Wrenn would be vicariously liable as well. See Distante, 455 A.2d at 306.

Although the hearing officer found that DEM had not presented sufficient evidence to establish an agency relationship, that finding alone does not preclude DEM's position in pursuing the enforcement action from being substantially justified. See Krikorian, 606 A.2d at 675 (holding that substantial justification requires that agency's positions be "solid though not necessarily correct"). DEM had evidence of an agency relationship and pursued that evidence in its statutorily mandated duty to enforce violations of dam safety, wetlands protection, and water quality laws. See §§ 46-19-3, 2-1-21, 46-12-5. As explained above, the agency's position was reasonably based in law and fact and was therefore substantially justified. See § 42-92-2(7). Because DEM's position was substantially justified, Respondent Wrenn is not entitled to recovery of attorney's fees or other litigation expenses under the EAJA.[26] See § 42-92-3.

IV

Conclusion

This Court finds that the hearing officer's decision that DEM failed to meet its burden of proof on the alleged dam, wetlands, and water quality violations was not arbitrary, clearly erroneous, or affected by error of law. DEM did not put forth detailed evidence of Mr. Wrenn's relationship with Mr. Petry sufficient to establish an agency relationship. The hearing officer did not abuse his discretion in allowing testimony of statutory provisions not cited in the NOV because he restricted his decision to the cited statutes. The hearing officer's evidentiary rulings both at the hearing and in the AAD Decision were not in violation of statutory authority or

[26] The Court additionally notes that Mr. Wrenn did not provide this Court with evidence that he qualifies as a "party" under the EAJA. To be entitled to reimbursement of attorney's fees under the EAJA, an individual respondent must have had a "net worth [of] less than five hundred thousand dollars ($500,000) at the time the adversary adjudication was initiated." Sec. 42-92-2(5). If this Court did find that DEM was not substantially justified in the proceeding against Mr. Wrenn, he would still be precluded from recovery until he provided this Court with evidence that his net worth is less than $500,000. However, as this Court has found that DEM was substantially justified, this issue has become moot.

clearly erroneous. Finally, the hearing officer's decisions in regard to substantial alterations to the Dam, alterations of wetlands, and discharge of pollutants were not arbitrary, capricious, or affected by other error of law. Therefore, this Court affirms the AAD Decision to dismiss the NOV. Substantial rights of DEM have not been prejudiced. Counsel for Respondents shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**State of Rhode Island Department of Environmental Management v. Administrative Adjudication Division, et al.**
CASE NO:	**PC-2012-5551**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**February 10, 2015**
JUSTICE/MAGISTRATE:	**Nugent, J.**
ATTORNEYS:	
For Plaintiff:	**Marisa Desautel, Esq.**
For Defendant:	**Timothy J. Robenhymer, Esq.** **Gregory L. Benik, Esq.**