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-2012-3876**
	:	
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") appealed the portion of that Decision concluding that Plaintiffs had violated G.L. 1956 § 42-12.5.1-3 by discharging oil upon the land of the State without a permit issued by the Director of the DEM and had violated section 6(a) of the DEM Oil Pollution Control Regulations for having discharged oil onto the land of the state. 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 2 ¶ 2.) At the Property, Smithfield Peat operates a leaf and yard waste composting facility, and Smithfield Crushing operates a rock crushing facility. Id. ¶¶ 5, 7.

In 2004 or 2005, Smithfield Crushing or Smithfield Peat brought 500,000 tons of crushed rock from the Narragansett Bay Commission (NBC) operation to the Property. (Pls.' Ex. B, Proceedings at Hearing 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, Dec. 5, 2011 (hereinafter, "AAD Hearing"), at 171:6-23.) Independent trucks hired by Smithfield Peat transported the material. Id.

On February 9, 2005, DEM preformed an inspection of the Property. (Pls.' Ex. A, In re Rollingwood Acres, Inc./Smithfield Peat Co., Inc./Smithfield Crushing Co., LLC, AAD No. 06-004/WRE, AAD Decision, at 39 ¶ 9.) Peter Naumann of the DEM observed an oily sheen in one of the retention ponds, which led him to believe that there had been an oil spill at the site. Id. at 39 ¶ 9, 41 ¶ 37. That same day, a representative of Smithfield Peat engaged Lincoln Environmental, Inc., an emergency response contractor to recover spilled oil. Id. at 39 ¶ 9, 42 ¶ 41. Lincoln Environmental arrived at the property while Naumann was still conducting his initial inspection. Id. at 42 ¶ 43.

On February 10, 2005, Naumann returned to the Property to take samples from the retention pond for the presence of oil and to test the water's turbidity. Id. at 42 ¶ 45. The samples were sent to ESS Laboratories, Inc. for analysis, where it was determined that the samples indicated the presence of total petroleum hydrocarbons ("TPH"). Id. at 42 ¶ 47. The laboratory results showed that one sample contained TPH in the concentration of 191 milligrams per liter; another sample contained TPH in the concentration of 9.69 milligrams per liter. (Pls.' Ex. D, ESS Laboratory Report, at 10, 17.) According to Laurel Stoddard, a quality control and customer service employee of ESS Laboratories, the purpose of the tests performed was to create a chromatogram for comparison purposes. (Pls.' Ex. A, In re Rollingwood Acres, Inc./Smithfield Peat Co., Inc./Smithfield Crushing Co., LLC, AAD No. 06-004/WRE, AAD Decision, at 13-14.) She noted that hydraulic oil is in the same range as peat and leaves, but that she was not qualified to distinguish the test results. Id. at 14.

Naumann also had a "fingerprint analysis" conducted on the skim oil sample collected from the property. (Pls.' Ex. D, Site Inspection Report; Pls.' Ex. D, ESS Laboratory Report, at 37.).) According to Naumann, after a petroleum product is collected, it can be extracted with an organic solvent. That solvent solubizes the TBH, which can then be analyzed with a gas chromatograph. The gas chromatograph indicates the molecular weights of the TPH, and thereby the particular characteristics of a petroleum product. In this instance, the ESS Laboratories report concluded that the oil skim sample taken from the property was in the lube oil range. (Pls.' Ex. D, ESS Laboratory Report, at 37.)

Further, the AAD also heard testimony from Cosmo Spaziano, a truck driver who transported material to the Property during the time that the oil release was discovered. (Pls.' Ex. A, In re Rollingwood Acres, Inc./Smithfield Peat Co., Inc./Smithfield Crushing Co., LLC, AAD No. 06-004/WRE, AAD Decision, at 4.) In that testimony, Spaziano stated that there had been a hydraulic fluid leak at the Narragansett Bay Commission (NBC) project a few days prior to the discovery of the petroleum product on the Property. Id. at 35. He said that the 988 loader, by which the NBC material was loaded into the trucks, blew a hydraulic line. Id. at 22. Spaziano testified that he observed oil, which was "yellow like Mazola oil," dripping off the bottom of the machine onto the top of the material being loaded. Id. at 22-23.

In its Decision, the AAD noted that "during the initial investigation there was some confusion in determining petroleum product from graphite from the shale." (Pls.' Ex. A, In re Rollingwood Acres, Inc./Smithfield Peat Co., Inc./Smithfield Crushing Co., LLC, AAD No. 06-004/WRE, AAD Decision, at 35.) Nonetheless, it accepted as "valid and reliable all test results presented by RIDEM that there was a petroleum product discovered on [Plaintiffs'] property." Id. It found credible the testimony of Spaziano, and found that a hydraulic leak had occurred at the NBC project a few days before February 9, 2005. Id. at 43 ¶ 56-57. Based on Spaziano's credible testimony and the test results presented by DEM, the AAD concluded that the DEM had demonstrated by a preponderance of evidence that Plaintiffs had discharged oil onto the land of the state without a permit issued by the Director of DEM in violation of § 42-12.5.1-3 and § 6(a) of the DEM Oil Pollution Control Regulations. (Pls.' Ex. A, In re Rollingwood Acres, Inc./Smithfield Peat Co., Inc./Smithfield Crushing Co., LLC, AAD No. 06-004/WRE,

AAD Decision, at 44 ¶¶ 4-5.) The AAD concluded, however, that the DEM had failed to sustain its burden of proof that Plaintiffs had failed to immediately report the release of oil to DEM or that Plaintiffs had failed to immediately stop, contain, and remove the oil or waste material. Id. at 36.

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

A

AAD Decision

Plaintiffs argue that the hearing officer erred in upholding the Notice of Violation for the discharge of oil because there was insufficient credible and reliable evidence in the record to support the Decision. Specifically, Plaintiffs contend that the "laboratory results and other evidence do not definitely prove the presence of oil at the Property[.]" (Pls.' Mem. in Support of Appeal, Rollingwood Acres Inc., et al. v. R.I. Dep't of Envtl. Mgmt., et al., No. PC-2012-3876, at 7.)[1] In response, DEM argues that the violations are supported by legally competent evidence found in the administrative record. Further,

[1] Although Plaintiffs argue that the fact that there was no evidence estimating the *amount* of petroleum issued, amount of petroleum is not an element of this violation. See § 46-12.5.1-3; Oil Pollution Control Regulations, § 6(a). Accordingly, this Court does not consider that argument.

DEM argues, this Court should uphold its original penalty assessed against Plaintiffs, as the hearing officer arbitrarily and erroneously reduced the original penalty without basis.

Section 46-12.5.1-3 of the General Laws provides that "No person shall discharge, cause to be discharged, or permit the discharge of oil into, or upon the waters or land of the state except by regulation or by permit from the director." The section further provides that any person who violates a provision of this chapter or any rule or regulation issued pursuant to it shall be strictly liable to the state. Sec. 46-12.5.1-3.

The Oil Pollution Control Regulations, which are regulations implemented under § 46-12, "to prevent the discharge, escape or release of oil into the waters of the State and to preserve and protect the quality of the waters of the State," further state that:

> "No person shall place oil or pollutants into the waters or land of the State or in a location where they are likely to enter the waters of the State, except in compliance with the terms and conditions of a permit or order issued by the Director."

Oil Pollution Control Regulations, § 6(a). Those regulations additionally provide that in the event that an oil release does occur:

> "it is the responsibility of any person subject to these regulations to . . . (1) Immediately cease all further oil transfer operations until such time as the release is stopped and any oil spill debris material is removed; (2) Immediately stop discharge, begin containment and removal of the oil and waste material; [and] (3) Immediately report the incident to the Department of Environmental Management, Division of Groundwater[.]"

Id. § 12.

As noted above, the scope of review of this court is an extension of the administrative process. The Superior Court is confined to a determination of whether there is any legally competent evidence to support the agency's decision. Envtl. Scientific Corp., 621 A.2d at 208; Barrington Sch. Committee v. R.I. State Labor

Relations Bd., 608 A.2d 1126, 1138 (R.I. 1992). "'If competent evidence exists in the record considered as a whole, the court is required to uphold the agency's conclusions.'" Envtl. Scientific Corp., 621 A.2d at 208 (quoting Barrington Sch. Committee, 608 A.2d at 1138). This Court may only reverse or modify the agency's decision if it is "[c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Sec. 42-35-15(g)(5).

In this matter, regarding the oil violation, the AAD concluded that there was a petroleum product spilled on Plaintiffs Property. (Pls.' Ex. A, In re Rollingwood Acres, Inc./Smithfield Peat Co., Inc./Smithfield Crushing Co., LLC, AAD No. 06-004/WRE, AAD Decision, at 35.) It arrived at that conclusion based on the "valid and reliable" test results submitted by DEM. Id. Those results established that the TPH of the sample was within the carbon range of hydraulic oil. (Pls.' Ex. K, Proceedings at Hearing 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, Dec. 1, 2011 (hereinafter, "Dec. 1 Hearing"), at 59:8-60:1.) Further, a fingerprint analysis done of that sample identified the sample as "lube oil range." (Pls.' Ex. D, Site Inspection Report; Pls.' Ex. D, ESS Laboratory Report, at 37.).)

Further, the AAD heard—and found credible—testimony from Cosmo Spaziano, who stated that there had been a hydraulic fluid leak at the NBC project a few days prior to the discovery of the petroleum product on the Property. (Pls.' Ex. A, In re Rollingwood Acres, Inc./Smithfield Peat Co., Inc./Smithfield Crushing Co., LLC, AAD No. 06-004/WRE, AAD Decision, at 4, 35.) Spaziano testified that the 988 loader, by

which the NBC material was loaded into the trucks, blew a hydraulic line, and that he observed oil, which was "yellow like Mazola oil," dripping off the bottom of the machine onto the top of the material being loaded. Id. at 22-23. Under these circumstances, and in view of the entire record, this Court concludes that the AAD Decision, concluding that there had been an oil spill on Plaintiffs' Property was not clearly erroneous, as there was credible and legally competent evidence to support that conclusion in the administrative record.

Further, although the assessment of the original violation was based in part on the determination that Plaintiffs "didn't take any action to address [the spill]," the AAD found to the contrary. Specifically, the AAD noted that there was no evidence that oil or hydraulic fluid had been released from equipment on Plaintiffs' Property; that credible evidence made it more likely than not that the petroleum product came to Plaintiffs' Property from the NBC project; that Plaintiffs were not aware of the oil discharge until February 9, 2005, and upon discovering the spill, immediately contacted Lincoln Environmental. (Pls.' Ex. A, In re Rollingwood Acres, Inc./Smithfield Peat Co., Inc./Smithfield Crushing Co., LLC, AAD No. 06-004/WRE, AAD Decision, at 35-36.) Specifically, the AAD noted that Lincoln Environmental responded to the site to begin cleanup and containment while Naumann was still conducting his initial investigation. Id. at 36. Accordingly, the reduction of the penalty against Plaintiffs was not clearly erroneous, as it was supported by evidence in the administrative record. Similarly, this Court cannot conclude that the hearing officer's conclusions that Plaintiffs "should not be held responsible to pay for analysis of turbidity tests which were not conducted properly" is error.

B

Spoliation

Alternatively, Plaintiffs argue, the Hearing Officer erred in allowing into evidence the laboratory results regarding oil testing, because the samples were destroyed before the Notice of Violation was issued, and the Plaintiffs were unable to conduct their own testing of the samples upon which the DEM relied in issuing the Notice of Violation. The DEM, in contrast, contends that the Plaintiffs' spoliation argument must fail because the Plaintiffs failed to introduce any evidence that the DEM destroyed the sample out of bad faith or intended to suppress "the truth." Rather, the DEM's destruction of the sample was a matter of routine procedure after producing the laboratory results, and the Plaintiffs did not request the opportunity to independently test the samples.

"'Spoliation' is defined as: '[t]he intentional destruction of evidence[.]'" Farrell v. Connetti Trailer Sales, Inc., 727 A.2d 183, 184 n.1 (R.I. 1999) (quoting Black's Law Dictionary 1401 (6th ed.1990)). "Under the doctrine omnia praesumuntur contra spoliatorem, '[a]ll things are presumed against a despoiler or wrongdoer,' Black's Law Dictionary 1086 (6th ed. 1990), the deliberate or negligent destruction of relevant evidence by a party to litigation may give rise to an inference that the destroyed evidence was unfavorable to that party." Tancrelle v. Friendly Ice Cream Corp., 756 A.2d 744, 748 (R.I. 2000). The doctrine merely permits an inference that the destroyed evidence would have been unfavorable; it does not make that inference conclusive. State v. Barnes, 777 A.2d 140, 145 (R.I. 2001); N.H. Ins. Co. v. Rouselle, 732 A.2d 111, 114 (R.I. 1999).

A presumption that the destroyed evidence was unfavorable "does not arise where the destruction was a matter of routine with no fraudulent intent." Barnes, 777 A.2d at 145 (quoting 29 Am. Jur. 2d Evidence § 244 at 256). Further, "it is generally held that the necessary consumption or destruction of the evidence in state crime laboratory tests does not violate the accused's rights, even though the accused is thus prevented from subjecting any of the hard physical evidence to tests by his own expert." Id. (citing Annotation, Consumption or Destruction of Physical Evidence Due to Testing or Analysis by Prosecution's Expert as Warranting Suppression of Evidence or Dismissal of Case against Accused in State Court, 40 A.L.R.4th 594, 597 (1985); People v. Griffin, 761 P.2d 103, 107 (Cal. 1988); State v. Dechaine, 572 A.2d 130, 133 (Me. 1990); Commonwealth v. Gordon, 666 N.E.2d 122, 136 (Mass. 1996); 29A Am. Jur. 2d Evidence § 1006 (1994)).

Plaintiff simply argues:

> "the oil violation contained in the NOV was based on the laboratory samples. Therefore, based on the fact that the evidence had been destroyed before the NOV had even been issued, depriving the Plaintiffs of an opportunity to test the samples independently."

The mere fact that the evidence was destroyed, however, is not sufficient to permit an inference that the destroyed evidence was unfavorable to the DEM. See Barnes, 777 A.2d at 145; Farrell, 727 A.2d at 187 ("Preclusion of [allegedly spoliated] evidence . . . was unwarranted, we conclude, because defendants introduced no evidence of bad faith or willful destruction of this evidence."). Destruction of the samples was a matter of routine procedure by ESS Laboratories. See Barnes, 777 A.2d at 145; Farrell, 727 A.2d at 187; see also Smith v. State, 270 Ga. 68, 70, 508 S.E.2d 145, 148 (1998) ("Where there is only enough material to perform one test, an independent test is impossible and, thus,

admission of the test results does not violate the defendant's due process rights."). Further, the Plaintiffs did not request an opportunity to independently test the samples. Under these circumstances, this Court concludes that the AAD did not err by allowing the laboratory results regarding oil testing into the record. See Barnes, 777 A.2d at 145; 29 Am. Jur. 2d Evidence § 244 at 256.

IV

Conclusion

After review of the entire record, the Court finds that the AAD's decision was supported by legally competent evidence. The decision, therefore, was not in violation of the constitutional or statutory provisions; in excess of its statutory authority; affected by error or law; clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or arbitrary or capricious or characterized by abuse of discretion. Substantial rights of the Plaintiffs have not been prejudiced. Accordingly, the appeal of the Board's decision is denied. 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.
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COURT:	Providence County Superior Court
DATE DECISION FILED:	August 26, 2013
JUSTICE/MAGISTRATE:	Hurst, J.
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