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IN THE SUPREME COURT OF THE STATE OF DELAWARE

DELAWARE SOLID WASTE AUTHORITY; GREGGO & FERRARA, INC., and CONTRACTORS HAULING, LLC,	)	Nos. 81, 2020 and 88, 2020 Consolidated
Appellees Below, Appellants/Cross-Appellees,	)	
v.	)	Court Below–Superior Court of the State of Delaware
DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL,	)	C.A. No. K-19-05-002
Appellant Below, Appellee/Cross-Appellant.	)	

APPELLANTS/CROSS-APPELLEES GREGGO & FERRARA, INC. AND CONTRACTORS HAULING, LLC'S SUR-REPLY BRIEF IN SUPPORT OF THEIR APPEAL OF APPELLEE/ CROSS-APPELLANT DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL SUR-REPLY BRIEF AND REPLY BRIEF IN SUPPORT ON CROSS APPEAL

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ARGUMENT

I. THE BURDEN OF PROOF SET FORTH IN 7 *DEL.C.* SECTION 6008(b) IS "THAT THE SECRETARY'S DECISION IS NOT SUPPORTED BY THE EVIDENCE" (NOT "SUBSTANTIAL EVIDENCE") ON THE RECORD BEFORE THE BOARD

Appellee/Cross-Appellant, Delaware Department of Natural Resources & Environmental Control's (hereinafter, "DNREC") continues to argue *ad nauseam* that 7 *Del C.* 6008(b) imposes a "substantial evidence" standard of review, despite the fact that the word "substantial" does not appear in that section. It is as if DNREC believes that its desired standard of review will materialize through repetition or sleight of hand. The burden of proof is simply upon the appellant before the Board to "show that the Secretary's decision is not supported by the evidence on the record before the Board." 7 *Del C.* 6008(b). The entire line of cases utilizing the substantial evidence standard of review are therefore inapplicable.

Further cutting against DNREC's argument that §6008(b), provides a substantial evidence standard of review is 7 *Del C.* 6009(b) which does, in fact, impose a "substantial evidence" standard of review on appeal to the Superior Court under that section. 7 *Del C.* 6009(b) states that the "Court may affirm, reverse or modify the Board's decision. The Board's findings of fact shall not be set aside unless the Court determines that the records

contain no substantial evidence that would reasonably support the findings. If the Court finds that additional evidence should be taken, the Court may remand the case to the Board for completion of the record." The substantial evidence standard applies because the appeal is on the record before the Board and the Superior Court does not take any additional evidence, unlike appeals to the Board under §6008(b).

The absence of the word "substantial" in §6008(b) must be considered purposeful, particularly because the "substantial evidence" standard of review is set forth in the following section. "There is generally an inference that omissions in a statute are intentional. This principle is commonly known as *Espressio unius est exclusio alterius*, or the expression of one thing means the exclusion of another." ***Dowling v. Board of Professional Counselors of Mental Health*, [1996 WL 527212, at *3 (Del. Super. Aug. 13, 1996)]** (citation omitted). Therefore, DNREC's argument that the General Assembly intended for the Board to apply a "substantial evidence" standard in this case is totally without merit.

DNREC's attempted sleight of hand is again raised in its attempt to muddy the waters of the clear distinction between the Board's standard of review versus the appellants burden of proof under 7 *Del. C.* 6008(b). DNREC states that the "criterion by which the Board measures the propriety

of the Secretary's decision is whether the appellant has shown that the decision is not supported by the evidence on the record before the Board." DNREC's Sur-Reply/Reply Br. at 2. While that statement is not untrue, it does not speak to the *standard of review*. In fact, DNREC here ignores the fact that the statute does not indicate that the Board must give any deference to the Secretary's decision. The very next sentence in DNREC's brief again attempts to slip the word "substantial" into the standard set forth in §6008(b), stating that, "[s]aid another way, the Board's criterion by which it measures the propriety of a case decision is whether substantial evidence on the record before the Board supports the Secretary's decision." DNREC's Sur-Reply/Reply Br. at 2. DNREC cannot rewrite the statute to apply a more deferential standard of review than that intended by the General Assembly.

DNREC's next argument is that because the Board affirmed the violations yet rescinded the penalties imposed by the Secretary the "Board improperly substituted its judgment for that of the Secretary's irrespective of whether the evidence on the record supported the Secretary's decision to impose an administrative penalty on G&F and Contractors." DNREC's Sur-Reply/Reply Br. at 3. This argument is illogical, as the Board has discretion to find G&F and Contractors liable for the violation, yet also finding that

their culpability did not reach the threshold for imposing an administrative penalty under 7 *Del. C.* §6005(b)(3) based on the additional evidence presented to the Board that the Secretary did not consider. There is nothing in 7 *Del. C.* §6008(b) stating that the Board must give a higher level of deference to the Secretary's imposition of administrative penalties as opposed to the liability determination, only that the Board may affirm, reverse, or remand.

The Board's decision to reverse the administrative penalties is based on the evidence before the Board that would reasonably support the findings and is within the statutory confines. *See* 7 Del. C. §6005(b). §6005(b)(3) states that, "[a]ssessment of an administrative penalty shall be determined by the nature, circumstances, extent and gravity of the violation, or violations, ability of the violator to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation and such other matters as justice may require." The Board considered these factors and held that, as to G&F, the violation was a result of "understandable oversight" and no environmental harm or damage occurred. EAB Appeal No. 2018-08, p. 11. As to CH, the Board considered the "innocent nature" of the offense and the fact that no environmental harm

or damage occurred. EAB Appeal No. 2018-08, p. 12. Therefore, this Court should affirm the Board's decision.

DNREC's argument with respect to whether the trial before the Board is a trial *de novo*, is simply a red herring. *De novo* review is an "appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial Court's ruling." *Black's Law Dictionary*, (8th Ed. 2004). An appeal under 7 *Del. C.* §6008(b) includes the entire record before the Secretary and all new evidence and testimony submitted by the parties during the Board hearing. In this situation, the review differs from a trial *de novo* in that the Board hears additional evidence, yet is akin to *de novo* review in that the Board is not explicitly required to show deference to the Secretary's factual findings and legal conclusions. The standard of review and burden of proof is set forth in 7 *Del. C.* §6008(b) and properly interpreted in ***Tulou v. Raytheon Serv. Co.*, A.2d 796 (Del. Super. March 6, 1995).**

II. THE BOARD IS STATUTORILY AUTHORIZED TO "AFFIRM, REVERSE, OR REMAND" ANY APPEAL WHICH INCLUDES ANY ADMINISTRATIVE PENALTIES ASSESSED BY THE SECRETARY UNDER SECTION 6005(c)

Regarding the Board's review of an administrative penalty, DNREC repeats the same arguments already discussed above. To summarize, first DNREC invents the argument that G&F/CH argue that the Board should have applied a *de novo* standard of review when evaluating the Secretary's administrative penalty. Second, DNREC argues that the *de novo* standard (which G&F/CH never actually discussed or argued applied in the case *sub judice*) – is "clearly at odds with §6008(b)'s substantial evidence standard as well as Delaware case law demonstrating that review of an agency's penalty decision is more deferential." DNREC's Sur-Reply/Reply Br. at 6.

Addressing those arguments *seriatim*, G&F/CH refer the Court to the previous section addressing DNREC's arguments with respect to the *de novo* standard of review. Next, the continued assertion that §6008(b) sets forth a "substantial evidence" standard is disingenuous at best. DNREC states three times in Section II of its brief that the substantial evidence standard of review applies. This despite the word "substantial" being conspicuously absent from that section, and actually present in §6009, the only logical conclusion being that the General Assembly purposefully omitted the word

"substantial" from §6008 to make it explicitly clear that the substantial evidence standard *does not* apply to the Board's review of an agency decision.

Lastly, these continued attempts to read a word into the statute suggests the DNREC believes its case can only be salvaged if the "substantial evidence" standard of review is read into §6008(b). This clearly was not the intent of the legislature. The substantial evidence standard of review is meant to apply to findings of fact when the Superior Court reviews a decision of the Board. Under 7 *Del. C.* §6009(b), "the Board's findings of fact shall not be set aside unless the Court determines that the records contain no substantial evidence that would reasonably support the findings." The Superior Court does not take additional evidence, but is empowered to remand the case to the Board to complete the factual record. This scenario is quite different than an appeal to the Board where there was no hearing before the Secretary.

DNREC argues that ***Kirpat, Inc. v. Delaware Alcoholic Beverage Control Comm'n*** stands for the proposition that the Board in this case should have applied a more deferential standard of review to the Secretary's imposition of administrative penalties than it applied to the review of the liability determination. **[1998 WL 731577 (Del. Super. Mar. 31, 1998)].**

DNREC's Sur-Reply/Reply Br. at 6. In essence, DNREC is arguing that the Board should have applied *Kirpat* when reviewing the imposition of administrative penalties, rather than the standard set forth in 7 *Del. C.* §6008(b). ***Kirpat***, however, involved an appeal to the Superior Court from the Delaware Alcoholic Beverage Control Commission under an entirely different statutory scheme and under an entirely different standard of review.

A review of ***Kirpat*** actually undercuts DNREC's arguments with respect to the proper standard of review the Board was to apply in the case *sub judice*. A review of the substantial evidence standard of review as set forth in *Kirpat* demonstrates just how dissimilar this standard of review is from that set forth in 7 *Del. C.* §6008(b). As stated by the Court in ***Kirpat***:

> An appeal from an administrative agency is on the record without a trial de novo. The function of the reviewing court is to determine whether there exists substantial evidence on the record to support an agency's decision. Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The Court does not sit as a trier of fact with authority to weigh evidence, determine [witness] credibility, or make factual findings and conclusions. If an administrative agency decision is supported by substantial evidence the Court does not substitute its judgment for that of the [agency], even if it would have reached a different conclusion, or if the matter had come before it in the first instance. The Court will affirm the decision if it is free of error of law, and will afford substantial weight to the Commission's interpretation of a statute which it is charged with enforcing provided said construction is not clearly erroneous. *Id.* at *2 (internal citations and quotations omitted).

The standard of review in ***Kirpat*** is inapposite to that under §6008(b). First, in an appeal to the Board from the Secretary's decision under 7 *Del. C.* §6008, the substantial evidence standard of review was purposefully omitted from that section. Second, in many ways the Board functions as a trial court, taking new evidence, determining witness credibility, and making its own factual findings and conclusions, unlike the appeal to the Superior Court in ***Kirpat***. Fourth, §6008(b) does not require the Board to explicitly afford any deference to the Secretary's decision, least of all "substantial weight" to the Secretary's interpretation of the statute. The fact that §6008(c) requires the Board to "take due account of the Secretary's experience and specialized competence and of the purposes of this chapter in making its determination" is a clear indication that little or no deference is required in appeals under §6008(b).

With respect to ***Kirpat's*** review of the Commission's sanction of revocation, the Court reviewed it under an "abuse of discretion" standard, a review not applicable in the instant dispute. *Id.* at *3. The Court stated, "an administrative agency has discretion in choosing a penalty if the sanction is not outside its statutory confines, is based upon substantial evidence on the record, and free from error of law. The Court will afford substantial weight to the commission's interpretation of a statute which it is charged with

enforcing, provided said construction is not clearly erroneous." *Id.* (citations omitted). Clearly, this standard of review is one that applies to the Superior Court under a different statutory scheme. If anything, this deferential standard of review suggests the Superior Court should give deference to the Board's interpretation of the applicable statutes and review of the penalty determination.

This same analysis applies to the ***Warmouth*** decision cited by DNREC on page 7 of their Sur-Reply/Reply Brief. ***Warmouth v. Del. State Bd. of Examiners in Optometry*, 514 A.2d 1119 (Del. Super. Oct. 2, 1998).** There, the Superior Court applied a deferential standard to a penalty determination made by the Delaware State Board of Examiners in Optometry. The Court stated, the "choice of a penalty by an administrative agency if based on substantial evidence and not outside its statutory authority is a matter of discretion to be exercised solely by the agency." *Id.* at 1123 (citations omitted). Here, the agency entitled to this discretion is the Board. The Board is not required to give this level of deference to the Secretary under 6008(b), as evidenced by the plain language of that statute in contrast with §6008(c) which requires deference to the Secretary's experience and specialized competence. The Board may "affirm, reverse, or

remand" any appeal of the Secretary, which includes the administrative penalties assessed by the Secretary under §6005(c).

III. THE SECRETARY LACKS STATUTORY AUTHORITY TO "UPDATE" COST ASSESSMENT

DNREC now argues that it is incurring additional costs, that the Secretary's cost assessments were simply "initial," and that nothing precludes it from seeking to recover these additional costs following the exhaustion of this appeal. DNREC's Sur-Reply/Reply Br. at 8-12. This argument lacks merit, as there is no mechanism by which the Secretary could regain jurisdiction to issue an "updated" cost assessment which G&F and CH could then appeal. The cost assessments issued by the Secretary are that set forth in Order No. 2018-WH-0067 and 2018-WH-0068. As noted by the Secretary in those orders, those costs "were incurred by the Department in abating and investigating of the noted violations." Secretary's Order #2018-WH-0067, p.12 and #2018-WH-0068, p. 120.

DNREC's line of reasoning would lead to the absurd result that a party seeking to appeal the Secretary's cost assessment is penalized by the Secretary's failure to submit a detailed billing of expenses to the liable person, as that party then becomes liable for additional costs incurred by DNREC in the appeal process. Whereas, if the Secretary issues the detailed billing of expenses at the time it issues its order, the liable party is appealing a fixed amount set forth in the detailed billing and not further costs incurred

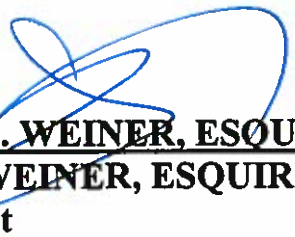
in the appeal process. This leads to the absurd result of penalizing the appellant and awarding DNREC for the Secretary's failure to act under the statute, and discourages one from taking an appeal.

Even if this Court were to agree that DNREC can delay submitting the detailed billing until after liability has been established in the appeal process, the amount DNREC could seek thereafter should be limited to the amount stated in the Secretary's Orders. However, DNREC has waited an unreasonable amount of time, as nearly two years have passed since the Secretary issued his Orders. Allowing DNREC to file the detailed billing at the conclusion of this case (or even further out, since no time limit is stated in the statute) would prevent the timely administration of justice and encourage the Secretary in future cases to withhold filing the detailed billing, as doing so only benefits DNREC and penalizes the appellant.

CONCLUSION

Based upon the reasons and authorities set forth in the Opening, Answering, Reply and Sur-Reply Briefs of Appellants Greggo and Ferrara and Contractors Hauling, the Opinion of the Superior Court should be reversed and this case should be remanded for entry of an Order affirming the decision of the Environmental Appeals Board.

Respectfully submitted,



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