State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, SOLID WASTE COMPLIANCE AND ENFORCEMENT,

Petitioner,

v.

DGRT STABLES, LLC DOING BUSINESS AS DGRT SERVICES, MICHAEL D'ANGELO AND DERRICK GREENBERG,

Respondents.

OAL DKT. NO. ECE 07448-15

AGENCY DKT. NO. PEA 150001-U2353

Elspeth Faiman Hans, Deputy Attorney General, for petitioner (Robert Lougy, Acting Attorney General of New Jersey, attorney)

Alton Kenney, Esq., for respondents (Starkey, Kelly, Kenneally, Cunningham and Turnbach, attorneys)

Record Closed: April 13, 2016 Decided: May 20, 2016

BEFORE **ELLEN S. BASS**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was filed as an appeal by DGRT Stables, LLC (DGRT) and Michael D'Angelo from a Notice of Civil Administrative Penalty Assessment (NOCAPA) issued by petitioner, the New Jersey Department of Environmental Protection (the Department), on or about February 4, 2015. The Department alleged that DGRT and D'Angelo engaged in the brokering of solid waste without an A-901 license, in violation of N.J.A.C. 7:26-16.3(a); and without a certificate of public convenience and necessity (CPCN), in violation of N.J.A.C. 7:26H-1.6(a). It assessed a penalty of $50,000 per named party, but via letter dated March 13, 2015, amended the NOCAPA to assess an aggregate penalty of $50,000 against both parties. D'Angelo and DGRT requested an administrative hearing on March 2, 2015. The matter was transmitted to the Office of Administrative Law (OAL) as a contested case on May 22, 2015.

On August 17, 2015, the Department filed a motion for leave to amend the NOCAPA to add Derrick Greenberg as a party and to assess an economic benefit penalty of $50,000. Respondents opposed the motion, which was granted via order dated September 18, 2015. An Amended NOCAPA was issued to DGRT, D'Angelo, and Greenberg on October 16, 2015. In the Amended NOCAPA, the Department assessed a penalty of $50,000 against respondents for violation of N.J.A.C. 7:26-16.3(a), and an additional economic benefit penalty of $50,000 in accordance with N.J.A.C. 7:26-5.9, for a total penalty assessment of $100,000.

The Department filed a Notice of Motion for Summary Decision and a supporting brief and certifications on March 21, 2016. Respondents opposed the motion via a brief filed on April 13, 2016. The Department replied to respondents' opposition via brief filed on April 14, 2016, at which time the record closed.

FINDINGS OF FACT

The Alleged Transportation of Solid Waste

The penalties assessed by the Department arise from work performed by DGRT in 2013 to transport fill from 572-580 Marin Boulevard in Jersey City, New Jersey (the Mecca Site) to 3996 Route 516 in Old Bridge, New Jersey (the VisionStream Site). The Jersey City location is owned by Fourteen Florence Street Corporation, and a business on the premises is operated by Mecca and Sons Trucking Co. The Old Bridge property is owned by VisionStream LLC, which according to information obtained by James Scully, an investigator with the Department's Bureau of Solid Waste Compliance and Enforcement, was developing a mixed-use commercial-residential property on the site. The fill material was to be used to raise the grade of the property.

The salient facts are not in dispute, and I **FIND**:

1. DGRT is a New Jersey limited liability company which was formed on December 1, 2011, and dissolved on May 13, 2015.

2. In 2013, Greenberg was the president, owner, and managing member of DGRT.

3. D'Angelo was involved with DGRT as a salesman, promoter, and day-to-day operator of the company from its formation until its closing.

4. D'Angelo has never been a corporate officer of DGRT and was not a payroll employee of DGRT in 2013.

5. In 2013, D'Angelo was a "consultant" and served as the company's "daily operations manager."

6. In 2013, Greenberg and D'Angelo exercised joint decision making for DGRT's business affairs.

7. Greenberg was aware of all key aspects of DGRT's business with Mecca and VisionStream and communicated daily with D'Angelo with respect to DGRT's business.

8. On March 20, 2013, D'Angelo signed a handwritten contract with VisionStream LLC on behalf of DGRT, through which DGRT agreed to provide 2000 loads of clean fill to VisionStream's Old Bridge project between May 1, 2013, and June 30, 2013.

9. The VisionStream contract provided that the material provided by DGRT was to meet NJ residential criteria.

10. On May 15, 2013, D'Angelo and Michael Mecca signed a letter (the Mecca letter) confirming that DGRT would remove recycled concrete aggregate (RCA) fill commingled with asphalt millings from Mecca's location.

11. The Mecca letter states that DGRT would be paid $250 per load for the material.

12. In the Mecca letter, D'Angelo confirmed that Mecca had provided him two soil analyses for the material, one of which showed "minor exceedances in the NJ residential criteria."

13. The Mecca letter further provided that "the only representation made . . . is what this analysis represents," and that "[b]y accepting the RCA/Fill [DGRT] acknowledge[s] and accept[s] all New Jersey environmental rules, regulations and specifications associated with the disposal location where [DGRT is] taking this RCA."

14. DGRT subcontracted with various trucking companies to move the material from the Mecca Site to the VisionStream Site.

15. The material located at the Mecca Site was from the demolition of a

warehouse formerly located on that site.

16. Between May and July of 2013, DGRT's subcontractors transported 895 loads of material from the Mecca Site to the VisionStream site.

17. D'Angelo and Greenberg had no degree in chemical analysis or geotechnical knowledge prior to signing the Mecca letter.

18. An analytical report dated July 24, 2012, for the "Mecca Stock Pile 580 Marin Blvd, NJ" showed benzo (a) pyrene contamination in excess of residential and non-residential direct-contact standards.

19. Benzo (a) pyrene is a compound that is listed on the New Jersey Right to Know Hazardous Substance List as a carcinogen and mutagen.

20. Greenberg and D'Angelo contend that they detrimentally relied upon the representations of the Mecca letter, and that they believed that DGRT and its subcontractors were hauling clean fill from the Mecca site.

21. They likewise contend that they relied on representations made in a May 14, 2013, letter from Patrick Fontana of VisionStream that the material being hauled was clean fill.

22. They contend that the Amended NOCAPA "drove DGRT out of business," and forced it to dissolve.

23. Neither DGRT nor any person engaged in its business has ever held an A-901 license.

24. Department investigator Scully observed dirt in the piles of fill at the VisionStream site.

DGRT's Economic Benefit

Respondents dispute the Department's calculation of the economic benefit it derived from transporting the controverted materials from the Mecca Site to the

VisionStream Site. The Department asserts that DGRT was paid $223,650 by Mecca for removing the controverted material. DGRT also received $40,220 from VisionStream for the 895 loads it delivered to the VisionStream site from the Mecca site. DGRT paid its subcontractors $200 per load to transport the material from the Mecca site to the VisionStream site. DGRT paid a subcontractor $20 per load to use an excavator to load the trucks at the Mecca site. The Department thus calculates that DGRT made a profit of $66,970 for transporting the controverted material from the Mecca site to the VisionStream site.

Respondents baldly assert that these figures are inaccurate, but offer no invoices, cancelled checks, formal accounting documents, or certifications that so demonstrate. And the documents supplied by the Department support its calculations of the profits derived. Anthony Hodge, General Manager of Mecca, supplied Scully with a report showing payments from The Fourteen Florence Street Corporation in the amount of $223,650. Cancelled checks accompany that report; they are made out to DGRT; they are endorsed by DGRT "for deposit only"; and they total $223,650.

Sam Gupta, Project Manager at VisionStream, confirmed the amount his company paid to DGRT. DGRT invoiced VisionStream in the amount of $57,100, but only paid DGRT $51,500, per reconciliation sheets supplied by Gupta.[1] This was for 1146 loads, and only 895 loads were transported from the Mecca Site. An explanation for the $40,220 figure ultimately relied upon by the Department is contained in the certification of Robert Harkins, an Environmental Specialist with the Department, who clarifies as follows:

> From the payment of $51,500 for the 1146 loads, I calculated that DGRT was paid $44.94 per load by VisionStream for the material it delivered to the VisionStream Site. Because 895 loads of the material delivered by DGRT to the VisionStream Site were from the

[1] DGRT asserts that it was underpaid by $5,000. This was accounted for by the Department, which recognized that it did not receive the full amount invoiced by it.

> Mecca Site, I calculated that DGRT was paid $40,220.33 by VisionStream for the material from the Mecca Site.[2]

In handwritten answers to interrogatories, respondents accept the methodology used to calculate the $40,220.33 figure. They nonetheless assert that all of the money was not received; but concede "there may be a missing check." Again, their claims regarding payments received are unsupported by any certifications, or business or bank records.

Relative to the expenses incurred by DGRT for subcontractors to haul and excavate, several checks paid by DGRT to these subcontractors, and shared by DGRT during discovery, allowed Harkins to calculate a per load rate of $200 as to three different haulers. Likewise, relative to excavation costs, three checks shared by DGRT allowed Harkins to determine that it paid $20 per load for excavations. When $220 is multiplied by the 895 loads at issue, Harkins determined that the expenses incurred by DGRT amounted to $196,900. When this sum is deducted from the money paid by Mecca and VisionStream, it yields a profit of $66,970.

DGRT urges that its expenses were greater than $196,900, and indeed, amounted to $250,399. But Harkins points out that DGRT supplied no invoices or payment logs to verify the expenses it claims to have incurred. DGRT did not do so via discovery, and does not do so now. A handwritten statement by D'Angelo and Greenberg accompanies their answers to interrogatories, and states that bank records reveal that their expenses exceeded $250,000. But these bank records remain unshared to date.

I **FIND** that DGRT's work on this project yielded a profit of $66,970.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

N.J.A.C. 1:1-12.5 provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show

[2] These calculations give DGRT the benefit of the doubt. Had Harkins based his calculation on the $57,100 amount actually invoiced, it would have yielded a higher per load rate, and would have attributed more money to the Mecca loads. ($57,100/1146 =$49.82. $49.82 x 895 =$44,593.80.)

that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c), which provides that "the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party offers no affidavits or matter in opposition or only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995) (citing Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)); see also Housel for Housel v. Theodoridis, 314 N.J. Super. 597, 604 n.3 (App. Div. 1998).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, supra, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214. I **CONCLUDE** that this matter is ripe for summary decision, and that the Department is entitled to judgment as a matter of law.

The Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq. (the Act), tasks the Department with regulating the collection, transportation, storage, and disposal of solid waste. N.J.S.A. 13:1E-126 through 13:1E-135 (the A-901 statutes), and accompanying regulations, N.J.A.C. 7:26-16.1 et seq., impose a licensing requirement on the solid

waste industry, with the goal of eliminating the dangers of unsound, unfair, and illegal business activities. N.J.S.A. 13:1E-126. Under the requirements of the law, no individual or business entity may engage in the "collection, transportation, treatment, storage, transfer or disposal of solid waste" in New Jersey without an A-901 license. N.J.A.C. 7:26-16.3(a). Licensees must also obtain a Certificate of Public Convenience and Necessity before engaging in solid waste collection or disposal. N.J.A.C. 7:26H-1.6(a).

Persons transporting or brokering solid waste are strictly liable for compliance with the Act, and engaging in these activities without proper authorizations is a violation of the Act "regardless of intent." N.J.S.A. 13:1E-9.3(a)(b). Thus, the Department bears the burden only of proving a statutory violation. See NJDEP v. Lewis, 215 N.J. Super. 564, 572 (App. Div. 1987), where the court stated that the "cited statutes neither refer to nor require a finding of intent to violate the act before their remedies may be invoked . . . only the doing of the proscribed act need be shown." Respondents thus can find no solace in arguments of detrimental reliance on representations made by Mecca and VisionStream. I **CONCLUDE** that the Department has met its burden of demonstrating a violation of the Act.

Respondents Did Not Hold an A-901 License
and the Material Hauled was Solid Waste

Respondents concede that they did not hold an A-901 license, but urge that the composition of the material they hauled from Jersey City to Old Bridge is in dispute, and requires that this matter proceed to plenary hearing. In support of this argument, they rely exclusively on VisionStream's representation that "the data received from the Mecca Site material was deemed to meet the environmental requirements set forth in the VisionStream contract." Indeed, they point out that Mecca likewise represented that a soil analysis showed only "minor exceedances." But they do not share any expert data from VisionStream, Mecca, or any other source, that could call into question the findings of the Department's investigators. As a result, their arguments are unavailing.

The Act defines "solid waste" generally as "garbage, refuse, and other discarded materials resulting from industrial, commercial and agricultural operations, and from domestic and community activities." N.J.S.A. 13:1E-3. The Department's regulations echo the statutory definition, and define solid waste as "garbage, refuse, sludge, or any other waste material." N.J.A.C. 7:26-1.6(a). The regulations also define specific categories of solid waste; relevant here is the category of "construction and demolition waste," which is defined as "waste building material and rubble resulting from construction, remodeling, repair, and demolition operations on houses, commercial buildings, pavement, and other structures." N.J.A.C. 7:26-1.4. Construction and demolition waste may contain, among other things, "concrete," "asphalt," "other masonry," "roofing materials," and "dirt." Ibid.

It is uncontroverted that the material at issue was generated from the demolition of a warehouse at the Mecca Site. The material was described by Mecca as containing RCA and "asphalt millings." Scully observed dirt in the fill at the VisionStream site. I **CONCLUDE** that because the material hauled was generated from the demolition of a warehouse, and contained concrete, asphalt, and dirt, it unquestionably met the definition of construction and demolition waste, per N.J.A.C. 7:26-1.4, and was solid waste. Importantly, construction and demolition waste is specifically excluded from the definition of "clean fill." N.J.A.C. 7:26-1.4.

Moreover, the Department's regulations further provide that "any material that is discharged, deposited . . . or placed on any land or water so that such material or any constituent thereof may enter the environment or be emitted into the air or discharged into ground or surface waters" is solid waste. N.J.A.C. 7:26-1.6(c). Laboratory analysis of the material at issue showed that it was contaminated with benzo (a) pyrene, a compound that is listed on the New Jersey Right to Know Hazardous Substance List as a carcinogen and mutagen. N.J.A.C. 8:59, App'x A and B. That analysis indicated that the concentration of benzo (a) pyrene exceeded the level set by the Department in its direct contract soil remediation standard as the maximum safe level for residential and non-residential uses. See N.J.A.C. 7:26D, App'x 1. The Department thus persuasively argues that "while the material was piled at the site, as well as when it was

subsequently used as fill, the benzo (a) pyrene it contained could enter the environment, either as airborne dust or by leaching into surface water, and cause harm to human health." For this additional reason, **CONCLUDE** that the material at issue meets N.J.A.C. 7:26-1.6(c)'s definition of solid waste.

The Individual Liability of Greenberg and D'Angelo

N.J.A.C. 7:26-16.3(a) provides that "no person" shall engage in the solid waste industry without a license. "Person" is defined to include individuals, companies, corporations and corporate officials. N.J.A.C. 7:26-1.4. Corporate officers may be held liable under the responsible corporate office doctrine if they "were actual participants in the operation of [the corporation] that resulted in the violation or would have been in a positon to prevent those violations." DEP v. Standard Tank Cleaning Corp., 284 N.J. Super. 381, 403 (App. Div. 1995). It is uncontroverted that Greenberg was the president and sole owner of DGRT at the time of the violations at issue. But more importantly, he was aware of all key aspects of DGRT's business with Mecca and VisionStream; communicated daily with D'Angelo with respect to DGRT's business; and made decisions jointly with D'Angelo. I agree with the Department, and **CONCLUDE** that, as a result, Greenberg is personally liable for DGRT's violation of N.J.A.C. 7:26-16.3(a).

Unlike Greenberg, D'Angelo was neither a member, employee, or officer of DGRT. Rather, he was a "consultant" and was responsible for the company's daily operations. He admits that he was involved with the brokering and transport of the material from the Mecca site. As a result, I **CONCLUDE** that D'Angelo is personally liable for the violations of N.J.A.C. 7:26-16.3(a); See DEP v. Strategic Envtl. Partners, ECE 05826-13, Final Decision (February 17, 2016), <http://njlaw.rutgers.edu/collections/oal/>.

The Penalties Imposed

Under the Act, the Department may assess a civil administrative penalty of up to $50,000 for each violation, and each day that a violation continues may be considered a separate violation. N.J.S.A. 13:1E-9(e). The formula for calculating a penalty is detailed at N.J.A.C. 7:26-5.5. Under the regulation, the Department must categorize the seriousness of the violation and the conduct of the violator as major, moderate or minor, and then use the matrix at N.J.A.C. 7:26-5.5(f)(2) to determine the appropriate penalty range. Violations are assessed at the mid-point, unless listed penalty adjustment factors apply. Here, the Department characterized the seriousness of the violation and respondents' conduct as major, and adjusted the penalty to the top end of the range. I **CONCLUDE** that the Department's determination was reasonable, supported by the regulatory scheme, and should be upheld.

A violation is of "major" seriousness where it "[h]as caused or has the potential to cause serious harm to human health or the environment," or where the violation "seriously deviates from the requirements of [the Act] or any rule promulgated [under it] . . . includ[ing], but not limited to violations which are in complete contravention of the requirement." N.J.A.C. 7:26-5.5(g)(1). This violation clearly had the potential to cause harm to human health, as respondents transported material contaminated with a known carcinogen to a site being developed for residential and commercial use. Furthermore, respondents' conduct in brokering and transporting solid waste was in complete contravention of the requirement they be licensed to do so. Their conduct frustrated the purpose of A-901 licensure, which is to minimize the risk to the public posed by solid waste brokers and transporters with insufficient reliability, expertise and competency to do so in a manner that is safe for the public and compliant with Department regulations.

An individual's conduct is a "major" violation if it arises from an "intentional, deliberate, purposeful, knowing, or willful act or omission by the violator." N.J.A.C. 7:26-5.5(h)(1). Here, respondents proceeded to transport the controverted material after being made privy to the fact that analytical reports showed "minor exceedances in the NJ residential criteria" due to "5% asphalt millings commingled into the stockpile."

Their contention that they mistook their load for clean fill is thus unpersuasive. Despite being alerted by Mecca to a potential concern about contamination, they neither investigated further, nor took steps to obtain the required licensure. The Department's characterization of their violation as "major" was appropriate under the totality of the circumstances.

Finally, in light of the risk to the public created by the conduct of these respondents, the Department appropriately assessed the highest penalty in the "major" range. Indeed, N.J.A.C. 7:26-5.5(i) provides that the penalty may be adjusted based on "any unusual or extraordinary costs or impacts directly or indirectly imposed on the public or the environment." I **CONCLUDE** that the Department correctly increased the penalty from the midpoint to $50,000.

Regulations furthermore allow the Department to recoup any profit made by a violator, up to $50,000 per violation, in the form of a penalty for economic benefit. N.J.A.C. 7:26-5.9. Here, respondents profited in the amount of $66,970. Their contentions to the contrary are unsupported by the certifications or other documentation needed to defeat the Department's motion for summary decision. I **CONCLUDE** that the Department's imposition of an additional $50,000 penalty was consistent with the regulations and should be upheld.

ORDER

Based on the foregoing, the motion for summary decision filed by the Department is **GRANTED** and the Amended NOCAPA with a total penalty assessment of $100,000 is **AFFIRMED**.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Environmental Protection does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, P.O. Box 402, Trenton, New Jersey 08625-0402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

May 20, 2016

DATE **ELLEN S. BASS**, ALJ

Date Received at Agency: _____

Mailed to Parties: _____