State of New Jersey
DEPARTMENT OF ENVIRONMENTAL PROTECTION

CHRIS CHRISTIE
Governor

KIM GUADAGNO
Lt. Governor

BOB MARTIN
Commissioner

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, BUREAU OF WATER COMPLIANCE AND ENFORCEMENT, Petitioner, v. LAND OF MAKE BELIEVE AND CHRISTOPHER MAIER, Respondents.	ADMINISTRATIVE ACTION FINAL DECISION OAL DKT. NO. ECE-WE 05202-10 AGENCY REF. NO. PEA 090002-193876

This Order addresses an appeal of an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) issued on January 15, 2010, by the Department of Environmental Protection (Department) to the Land of Make Believe (LOMB) and its owner, Christopher Maier, alleging violations of the New Jersey Water Pollution Control Act, N.J.S.A. 58:10A-1 et seq., and its implementing rules, N.J.A.C. 7:14A; the Water Supply Management Act, N.J.S.A. 58:1A-1 et seq., and its implementing rules, N.J.A.C. 7:19; the New Jersey Subsurface and Percolating Waters Act, N.J.S.A. 58:4A-4.1 et seq., and its implementing rules, N.J.A.C. 7:9D; and the New Jersey Safe Drinking Water Act, N.J.S.A. 58:12A-1 et seq., and its implementing rules, N.J.A.C. 7:10. The Department assessed a penalty of $156,500 for violations related to the use and operation of the water wells and septic system on LOMB's property in Hope Township, Warren County, which is open to the public as an amusement and

water park. Respondents requested a hearing and the Department transferred the matter to the Office of Administrative Law (OAL) as a contested case.

The matter was held on the inactive list at the OAL for two years at respondents' request due to a pending collateral criminal matter. In March 2014, after the matter was re-activated and various procedural details were resolved, Administrative Law Judge (ALJ) Tahesha L. Way issued a decision on cross-motions for summary decision filed by the parties. ALJ Way's Order found in favor of the Department on two of the violations cited in the AONOCAPA, specifically, that LOMB failed to apply for a Water Use Registration as required by N.J.A.C. 7:19-2.18, and that LOMB failed to properly maintain its Well No. 2, as required by N.J.A.C. 7:9D-2.1. The civil administrative penalties assessed for these violations were $15,000 and $1,500, respectively, and the ALJ affirmed the penalties. In all other respects, the ALJ denied the cross-motions and set the matter down for hearing. Neither party sought interlocutory review of the ALJ's Order Granting Partial Summary Decision, leaving review to be included in the Final Decision on completion of the case.

Before the hearing commenced, ALJ Way resigned and ALJ Tiffany M. Williams assumed the case and heard three days of testimony on November 4, 5, and 6, 2015. Before the hearings could be completed, ALJ Williams resigned and the matter was reassigned to ALJ Gail M. Cookson. The parties agreed to continue the hearing where they left off once ALJ Cookson had the opportunity to review the transcripts of the three days of completed testimony.

The hearing was resumed on May 11 and May 13, 2016. Before completing testimony on May 13, the parties agreed to and did engage in settlement discussions in the presence of another, neutral ALJ. The Department's Chief of the Northern Bureau of Water Compliance and Enforcement, Richard T. Paull, participated in the settlement discussions with the Deputy Attorney

General assigned to the case. LOMB and Maier were represented by counsel and Maier participated in the discussions.

At the conclusion of the discussions, the parties returned to ALJ Cookson's hearing room and counsel for LOMB reported the essential terms of the settlement reached. Those terms were that LOMB and its principal would pay $55,000 (of the assessed $106,500)[1] in settlement of the AONOCAPA (T135),[2] without admission of liability as to any of the allegations set forth therein. (T137) This penalty amount would encompass the alleged violations considered by ALJ Way in her Order Granting Partial Summary Decision. Id. The Department, both through Mr. Paull and the Department's counsel, agreed with those terms of settlement. In response to counsel's question, "And you understood everything – (out of microphone range)" (T137), Mr. Paull responded: "Yes." (T137) Counsel then advised ALJ Cookson: "The State agrees with the settlement as it has been described."

The parties also discussed the concept of recusal of Mr. Paull and the other inspector involved in this matter, Charles Cavanaugh. The Department did not agree to include recusal, i.e., that Paull and Cavanaugh would not be involved in any future enforcement inspections involving LOMB, in the Stipulation of Settlement, but appear to have agreed to include the recusal concept in a "side letter" to be developed separately. Id. No further terms were recited for the record nor any caveats provided, e.g., that further approvals for settlement were required.

After the record was closed, it took some time for the parties to exchange drafts of the settlement agreement. The Department sought to include additional terms that were not recited on the record and LOMB sought to change certain recitations in the "Whereas" clauses describing the

[1] The Department modified the total penalty from $156,000 to $106,500 based on review of the facts, including information obtained during discovery.
[2] "T" refers to the Transcript of Recorded Proceedings in this matter on May 13, 2016.

violations alleged in the AONOCAPA. The Department further advised LOMB and ALJ Cookson that it could not agree to the recusal side letter as a matter of public policy. The Department also advised that approval for the settlement and the side letter had not been provided by the Department or the Attorney General's Office. LOMB then filed a motion to enforce the oral settlement as recited before the ALJ on May 13, 2016 and the Department opposed that motion. Both sides provided certifications which, to some extent, purported to describe the settlement discussions that took place on May 13, 2016.

ALJ Cookson issued her Initial Decision on Motion to Enforce Settlement on August 8, 2017, in which she concluded that the parties agreed to settlement in the amount of $55,000, inclusive of the violations discussed in the earlier partial summary decision order, and without admission of liability by LOMB or Maier. She also found that there was agreement on the issue of recusal of Paull and Cavanaugh, but that this concept would be addressed by way of a side letter. In addition, the ALJ found that there were no conditional qualifications placed on the proposed terms of the settlement by either the parties or counsel. The ALJ further noted that the non-binding but essential "Whereas" provisions included in the Department's draft of the Stipulation of Settlement should also be viewed by LOMB as noncontroversial as they set the framework for the reduction of the penalty amount. The ALJ rejected the Department's proposed insertion into the draft agreement of a provision that the current settlement would be deemed a prior violation for any future enforcement actions, finding that this critical term should have been recited on the record if the Department intended for it to apply to the agreement. The ALJ therefore concluded that the settlement should be enforced as agreed to on the record and as set forth in the Initial Decision.

The Department filed exceptions to the Initial Decision dated August 22, 2017. The Department concedes that a settlement is a contract but argues that there was no meeting of the minds and hence no contract because the parties intended to continue to negotiate both a settlement agreement and the separate side letter. Moreover, the Department now argues that the side letter is unenforceable because it is not part of the settlement agreement and is void as against public policy. The Department argues further that inserting into the draft settlement agreement the provision that the settled violations are to be considered prior offenses is statutorily required by the Penalty Enforcement Law of 1999, N.J.S.A. 2A:58-11(d).

LOMB responded to the Department's exceptions on August 29, 2017, disputing the Department's recitations about the terms of settlement and restating its prior arguments concerning finality of the agreement recited on the record on the last day of hearing, May 13, 2016.

DISCUSSION

As ALJ Cookson found and the parties concede, the settlement of litigation is held in high favor under the law. Pascarella v. Bruck, 190 N.J. Super. 118, 125 (App. Div.) certif. denied, 94 N.J. 600 (1983). A settlement agreement is contractual and parties are bound to their agreements, absent fraud or coercion. Id. The terms of settlement may be enforced, even in the absence of a written agreement. A settlement must also be consistent with public policy and can be set aside if an agreement violates public policy. See Vasquez v. Glassboro Service Association, Inc., et al., 83 N.J. 86, 99 (1980) (internal citations omitted).

Here, the transcript of May 13, 2016 does not leave any room for doubt that the parties agreed to essential terms of settlement of this matter: specifically, a monetary amount and a provision stating that settlement is without admission of liability and that the agreement would

encompass all the violations, including those discussed in ALJ Way's Order on Partial Summary Decision. Counsel for the Department agreed with these terms of the settlement and, in the presence of the ALJ, asked whether Paull understood the terms. These communications on the record followed the discussions during which the Department and counsel conferred with their respective management. No additional terms were entered into the record, including that further approvals were required. On the existing record, I am constrained to conclude, therefore, that the Department agreed to these terms as set forth above and that the drafting to follow was incidental to this agreement. I ADOPT the Initial Decision as to these essential elements of the settlement. I further conclude that the Department's recitation in the "Whereas" clauses of the history of the alleged violations as a predicate for outlining the reduced penalty is appropriate and Respondents were wrong to strike these provisions from the draft agreement.

On the side letter, however, I reach a different result. Whether the parties intended to agree to the recusal of Paull and Cavanaugh is immaterial, as that agreement, if it was made, is against public policy and therefore void. There is nothing in the record before me, including ALJ Way's Order Granting Partial Summary Decision, which suggests that the Department's staff abused their enforcement discretion or performed their duties in an arbitrary or capricious manner intended to harass or single out LOMB. Without such findings, imposing a recusal on staff of the Department would be improper. Further, agreeing to remove specific staff from their statutory enforcement responsibilities would be an unworkable precedent for the Department or any regulatory agency whose resources are limited. The allegations made in the Department's AONOCAPA are serious; LOMB operated and continues to operate an amusement and water park open to the public. Enforcement of the state environmental laws and regulations governing the property must be enforced objectively and uniformly. The parties recognized the issues raised by the recusal request

by agreeing that it could not be incorporated into the settlement agreement and would instead be considered as a side letter. That side letter raises the same concerns as does inserting a recusal provision in the settlement agreement and the concept in and of itself violates public policy. I therefore REJECT this aspect of the Initial Decision.

I leave to another day any consideration of whether the payment of a penalty in settlement of an AONOCAPA would constitute a prior violation under the Penalty Enforcement Law (PEL), N.J.S.A. 2A:58-11(d), as suggested by the Department. This matter was not brought under the PEL either in the first instance or to enforce a final Order; therefore, the PEL has no application here and it need not be discussed. To the extent the Department intended that the agreed-to civil administrative penalty settlement amount be considered a prior violation for the purpose of determining subsequent offender status, such a provision would have been an essential term of settlement that needed to be recited on the record, particularly in light of the agreement that the settlement was without admission of liability. I therefore agree with and ADOPT the ALJ's conclusion that this term is not part of the agreement.

CONCLUSION

Having reviewed the record and the parties' exceptions and replies, I ADOPT the ALJ's conclusions as to the parties' agreement to the essential terms of settlement and the lack of conditional qualifications to those terms. I REJECT the ALJ's finding that the parties concluded their negotiation of the side letter and MODIFY the Initial Decision to find that any agreement to permit the recusal of Department personnel involved in this matter is void as against public policy and therefore not part of the settlement agreement. The parties are directed to finalize a writing evidencing settlement as set forth herein within twenty (20) days of the date of this Final Decision.

The Department shall provide Respondents with the appropriate invoice for payment of the $55,000 penalty amount, which is to be made without admission of liability. Failure to pay the agreed upon amount in the time prescribed in the Department's invoice shall render the penalty settlement of $55,000 final and subject to enforcement as a final Order.

IT IS SO ORDERED.

September 8, 2017
DATE

Bob Martin, Commissioner
New Jersey Department of
Environmental Protection

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,
BUREAU OF WATER COMPLIANCE AND ENFORCEMENT
v.
LAND OF MAKE BELIEVE AND CHRISTOPHER MAIER

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