State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON MOTION TO ENFORCE SETTLEMENT
OAL DKT. NO. ECE-WE 05202-10
AGENCY #PEA 090002-193876

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

Kevin J. Fleming, Deputy Attorney General, for petitioner (Christopher S. Porrino, Attorney General of New Jersey, attorneys)

Martha N. Donovan, Esq., for respondents (Norris, McLaughlin & Marcus, attorneys)

Record Closed: July 24, 2017 Decided: August 8, 2017

BEFORE **GAIL M. COOKSON,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The respondents, the Land of Make Believe and Christopher Maier, filed an appeal contesting the findings and penalties imposed in an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) issued on January 15, 2010, by petitioner, the New Jersey Department of Environmental Protection, Bureau of Water Compliance and Enforcement (Department). The total penalty assessed in the AONOCAPA was $156,500.00. The request for a hearing was transmitted as a contested case by the Department to the Office of Administrative Law where it was filed on May 17, 2010. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. I think it fair to say that this case has had a long and sometimes tortured past.

The matter was initially assigned to the Honorable Tahesha L. Way, A.L.J., who held a case management conference on July 14, 2010. The matter was placed on the Inactive List for over two years on the request of respondents due to a pending collateral criminal matter. When the matter was reactivated in 2013, a prehearing schedule was entered allowing for the submittal of expert reports but also for the filing of dispositive motions. After briefing and oral argument, Judge Way issued a decision granting partial summary decision on some aspects of the AONOCAPA and denying it on others, under date of March 19, 2014. A sub-set of the penalties in the AONOCAPA in the amount of $16,500 were affirmed by summary decision. Hearing dates were ultimately scheduled for late January and February 2015 on the remaining issues. However, Judge Way resigned from the OAL in November 2014, and this case was transferred to the Honorable Tiffany M. Williams, A.L.J.

Judge Williams scheduled new hearing dates in June 2015 but those were then adjourned until November 2015. On November 4, 5, and 6, 2015, the evidentiary hearings were commenced in front of Judge Williams. Additional dates were needed to complete the plenary hearings but Judge Williams resigned from the OAL before the end of 2015. At that time, the case was reassigned to myself. During a telephonic

status conference with counsel, the parties consented to my commencing the hearings where they left off, supplemented by reading the transcripts from November, in order to save the time and expense of recalling fact witnesses and out-of-state expert witnesses. Accordingly, hearings continued on May 11 and 13, 2016. At approximately 2:30 p.m. on May 13, 2016, following the conclusion of a witness' examination, the parties took some time to discuss settlement of all remaining issues, under the watchful and facilitative eye of yet another Administrative Law Judge.

At approximately 4:30 p.m. on Friday, May 13, 2016, a settlement was placed on the record. Fourteen months have passed since that day and there has still been no filing of an executed agreement, the reasons for which bring us to the present motion by respondents to enforce the settlement they thought was agreed upon on that lucky Friday the 13th. The record from that day sets forth the following colloquy:

> **The Court**: --and after we concluded a witness at approximately 2:30 we took a break from hearing testimony and a colleague of mine, not involved in this action, assisted the parties in discussing a potential resolution of the case. I waited in my office and now I have been called back in and I understand that Counsel have a proposal they would like to put on the record.
>
> **Ms. Donovan:** Yes, Judge. The Land of Make Believe and Christopher Maier, both of whom are Respondent's to the Administrative Order and Notice of Administrative Penalty Assessment dated January 15, 2010, are collectively combined making a payment, a settlement payment, with no admission of liability for any of the allegations alleged in the AONOCAPA of $55,000 to be – with no admission of liability, as I said, to be paid once we have negotiated and signed a hopefully simple settlement agreement containing the provisions of the payment, the resolution of all of the allegations in the AONOCAPA, including the ones that were subject to Judge Way's initial decision and a side letter with the DEP and to be signed by the DEP indicating that Mr. Cavanaugh will no longer be the investigator at the Land of Make Believe and that Mr. Paull has recused himself from any involvement in any future Notices of Violations or enforcement actions of any other kind in connection with the Land of Make Believe.

The Court: Let me just state that I'm assuming it will -- the way this will work is you'll submit the settlement agreement to me and I'll do an ID settlement and it goes to the Commissioner, so it should be payable upon my initial decision and the settlement becoming a final decision by the Commissioner.

Ms. Donovan: Then, Your Honor, what we'll do is we'll negotiate the agreement and the side letter and make sure that we send that -- that we send the settlement agreement to you once we've got everything taken care of with regard to the side letter because Mr. Paull did not want his recusal or Mr. Cavanaugh's not participating in the inspections to be part of the settlement agreement.

The Court: Yeah, that's fine.

Mr. Maier: And also about the website -- (out of microphone range)

The Court: I just meant the payment should come not after --

Mr. Maier: And what we're going to do on the website.

Ms. Donovan: Oh, and with regard to the website which we've discussed, the Data Miner website, it's our understanding that once the settlement agreement has been finalized that that document will appear on the website to show that the AONOCAPA was settled with no admission of liability.

The Court: It will be inputted into Data Miner the way documents of that type are normally inputted in the ordinary course.

Mr. Fleming: Okay. And you understand everything -- [out of microphone range]

Unidentified Male [Chief Paull]: Yes.

Mr. Fleming: The State agrees with the settlement as it has been described.[1]

FACTUAL DISCUSSION

[1] There is some additional dialogue that took place on the record with regard to how the Stipulation of Settlement would be indirectly accessible to the public by way of an entry in the NJEMS system and therefrom pulled into Data Miner. It is not essential to the issues in contention on this motion.

Based upon a review of the evidence presented, I **FIND** as **FACT** the following:

1. A settlement was reached through extensive in-person negotiations on Friday, May 13, 2016, which was intended to resolve all issues in dispute under the AONOCAPA, inclusive of the partial summary decision granted earlier in the matter in favor of the Department.

2. Representatives of both parties acknowledged the agreement.

3. It was set forth that the writing up of the agreement would happen as expeditiously as possible.

4. The terms of the settlement that were placed on the record were:

   a. Payment of $55,000 in settlement of all penalties assessed in the AONOCAPA, inclusive of the partial summary judgment order.
   b. No admissions of liability by Land of Make Believe or Christopher Maier.
   c. Recusal of Richard Paull and Charles Cavanaugh from assignment by the Department to Land of Make Believe for inspection, enforcement or any other official duties, but by way of a side letter agreement only.

5. There were no conditional qualifications placed on the proposed terms of the settlement by either the parties or counsel.

ISSUES TO BE ADDRESSED BY CURRENT MOTION

Notwithstanding the above, an executed settlement agreement was never forthcoming. As weeks dragged into months, my office remained in touch with counsel as to the status of the submission. Between January and March 2017, it became increasingly clear that there were dueling versions of a draft agreement and no consensus as to which terms mirrored those verbally agreed upon on May 13, 2016.

On April 10, 2017, I convened a telephone conference with counsel to discuss the draft stipulations. Prior to the conference, I had reviewed the transcript and both draft versions. During the call, I made some suggestions as to which terms, conditions and "whereas" clauses seemed to conform to the record, which might be non-controversial even if new, and which seemed to form the heart of the current controversy. I requested each counsel to review all of the above with their clients and seek to resolve the impasse on both substantive and boilerplate provisions over which their versions disagreed.

On May 17, 2017, another telephone conference was convened with counsel at which time it was reported that certain central drafting disputes could not be resolved. It was represented both orally and in writing that the $55,000 settlement payment was being held in the attorney trust account of respondents' counsel. One remaining dispute centered on the consequences should respondents fail to make the settlement payment, as issue that I noted at the time could be thorny in theory but might in reality be minor insofar as the "money was already in the bank." Thus, the principal disputes were narrowed to the "side letter" recusing Paull and Cavanaugh from any future involvement with Land of Make Believe, and a provision making the present settlement evidence of a "prior violation" for purposes of enhancing any future penalty assessments, notwithstanding that respondents made no admissions of any liability on the allegations set forth in the AONOCAPA.

During that conference, I gave respondents' counsel leave to file a motion to enforce the settlement placed on the record with opportunity for the Deputy to respond, in order to bring this matter to a conclusion one way or the other.

LEGAL DISCUSSION AND CONCLUSIONS

As both parties recognize, it is a well-established principle of the law that "settlement of litigation ranks high in [the] public policy" of New Jersey. Pascarella v. Bruck, 190 N.J. Super. 118, 125 (App. Div.), certif. denied, 94 N.J. 600 (1983). See also Department of the Pub. Advocate v. Board of Pub. Util., 206 N.J. Super. 523, 528 (App. Div.1985).

> Where the parties agree upon the essential terms of a settlement, so that the mechanics can be "fleshed out" in a writing to be thereafter executed, the settlement will be enforced notwithstanding the fact the writing does not materialize because a party later reneges.
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> [Bistricer v. Bistricer, 231 N.J. Super. 143, 145 (Ch. Div. 1983)]

Respondents argue that all the material terms of the settlement were agreed on during the extensive negotiations that took place on the afternoon of the last hearing date. They assert that there was no provisional or conditional language, nor was there any notice that petitioner needed to get approvals that were unavailable to it during the settlement discussions. Both parties had ample opportunity to make phone calls as necessary and to caucus separately. Petitioner's representatives and the Deputy appeared to avail themselves of those opportunities.

Petitioner argues that the respondents knew that a settlement agreement would still have to be submitted in writing to me and that, therefore, there was no final agreement but just the outlines of a proposal as of May 13, 2016. It also states that any recusal of Department personnel had to resolved separately.

I concur with respondents' argument and will grant the motion to enforce the settlement. I find that petitioner's position to be unpersuasive and disingenuous. As found above, and as the transcript of the record makes clear, there was nothing provisional or conditional about the settlement terms placed on the record before me on

May 13, 2016. Neither the Deputy nor any representative of the Department ever indicated that approvals from either the Department or the Division of Law had not been procured and would be necessary before they could sign off on any agreement. All that remained was to reduce the terms to a writing, with the addition of noncontroversial boilerplate language (releases, etc.).

> As we have indicated, this settlement covered a series of complex and substantial business and property relationships between the parties. The terms were, of necessity, numerous and, to be fully implemented, required effectuation of numerous documents. We reject, however, defendant's claim that all that the trial judge found had been agreed to was simply nothing more than "the broad parameters" of a settlement. The terms he found the parties agreed to were, though complex, clearly the essential terms of the settlement.
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> [Lahue v. Pio Costa, 263 N.J. Super. 575, 595-596 (App. Div. 1993)]

As I advised during a later conference, the non-binding but essential "whereas" provisions included in the Deputy's draft should also be viewed by respondents as noncontroversial. They set the framework for the reduction in the calculation of the penalties for the allegations set forth in the AONOCAPA, from which the compromise settlement amount was crafted. The compromise of $55,000 presupposed a regulatory adjustment to the AONOCAPA, so their addition to the draft settlement supports and does not undermine the orally recorded stipulation, and I so **CONCLUDE**. But a material term of the settlement was respondents' insistence that they were not admitting to the liability of any of those allegations. If, as petitioner now claims, it was critical to the Department to include a provision that future enforcement actions would be enhanced by deeming the current settlement as a prior violation, that should have been disclosed on May 13, 2016. Either it too would have been placed on the record, or the settlement negotiations would have broken down and the hearing resumed. As established in the moving papers, not every Department settlement has that provision, nor is it statutorily required.

Further, to imply that the recusal "side letter" violates public policy and trumps the public policy that favors settlements is a form of bad faith at this late date. There has been no requirement that the Department forego its regulatory obligation to inspect, investigate and enforce the environmental laws at the Land of Make Believe; rather, it was merely an agreement that two individual civil servants recuse themselves from this one site in their tours of duty. It was agreed that it needed to be expressed in a separate writing. It was not agreed or even articulated on May 13, 2016, that it had yet to be separately resolved and approved.

The fact is that this 2010 AONOCAPA was settled after dispositive motion practice and five hearing days because both parties determined that it was in each of their own interests to do so. The fact that one party is a state agency does not undermine the findings of fact set forth above and on the record, nor the important public policy of favoring settlements of even administrative disputes:

> The Board, contending that in modifying its final decision it appropriately balanced the equities so as to accord the same provisional treatment to two similarly situated utilities under its supervision, ignores several essential points. . . We find this reason given by the Board as a basis for modifying the agreement not to outweigh our public policy favoring settlement.
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> [Dep't of Public Advocate, supra, 206 N.J. Super. At 530-31]

In sum, I **CONCLUDE** that the appropriate course here is to enforce the agreement as set forth in its essential terms on the record on May 13, 2016. Both parties bound themselves on that day, and both are bound to honor it now.

ORDER

For the reasons set forth above, it is hereby **ORDERED** that the respondents Land of Make Believe and Christopher Maier's motion to enforce the settlement

agreement placed on the record on May 13, 2016, is **GRANTED**. It is further **ORDERED** that the AONOCAPA be deemed settled on the terms and conditions set forth above, and only such terms and conditions, together with the side agreement that two specific Department employees only shall not be assigned to inspect or enforce compliance by Land of Make Believe from this date forward.

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, PO 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.

Gail M. Cookson

August 8, 2017 — **GAIL M. COOKSON**, ALJ

DATE

Date Received at Agency: 8/8/17

Mailed to Parties:

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