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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, SOLID WASTE COMPLIANCE AND ENFORCEMENT,	)	ADMINISTRATIVE ACTION FINAL DECISION
Petitioner,	)	OAL DKT NO.: ECE 00269-21
v.	)	AGENCY REF. NO.: PEA190001, 252805
CHARLES SIMSEK	)	
Respondent.	)	

This Order addresses the challenge by Charles Simsek (Respondent) to an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) issued by the New Jersey Department of Environmental Protection (Department or DEP) on March 5, 2019, assessing penalties against Respondent in the amount of $25,000 for violations of the Solid Waste Management Act (N.J.S.A. 13:1E-1 et seq.), the Solid Waste Utility Control Act (N.J.S.A. 48:13A1 et. seq.), and their supporting regulations. Administrative Law Judge (ALJ) Thomas R. Betancourt issued an Initial Decision on July 28, 2023, concluding the Department had met its burden of proof and had proven by a preponderance of the evidence that Respondent is liable for the violations.

After reviewing the record, and for the reasons set forth below, I ADOPT the Initial Decision.

FACTUAL AND PROCEDURAL BACKGROUND

Respondent holds a DEP solid waste self-generator transporter registration but holds neither a license nor a certificate of public convenience and necessity (CPCN). As such, Respondent is authorized to transport only self-generated solid waste. The Department found, however, that Respondent had contracted to and did collect, transport, and dispose of bulky waste that was not self-generated, but rather had been left behind by previous tenants at a property in Marlboro Township, Monmouth County. That Respondent contracted to remove solid waste he did not generate was initially implied by three letters from Respondent on Respondent's letterhead addressed to the owner of the property at which the cleanup occurred. These letters indicated a contract for cleanup services. On November 29 and 30, 2017, a Department inspector emailed the letters to Respondent, affording Respondent the opportunity to review and explain the letters. Respondent did not reply.

Four weeks later, on December 26, 2017, the Department issued a Notice of Violation (NOV) to Respondent. The Department determined that Respondent 1) engaged in the collection, transportation and disposal of solid waste without a license in violation of N.J.A.C. 7:26-16.3(a); 2) engaged in the collection, transportation and disposal of solid waste without a CPCN in violation of N.J.A.C. 7-26H-1.6(a); and 3) exceeded the limitations of his A-901 exempt self-generator DEP transporter registration in violation of N.J.A.C. 7:26-3.2(c). Respondent replied to the NOV via a Notice of Violation Compliance Response Form dated January 12, 2018. Critically, Respondent stated in his reply that he had contracted to perform cleanup services at the property and made no mention of and offered no denial that he authored the three letters, despite the existence and content of the letters appearing in the NOV.

Based on its investigation and Respondent's admission, the Department issued the contested AONOCAPA, assessing penalties against Respondent in the amount of $25,000. The Department based its assessment on a default finding of moderate seriousness at the midpoint of the range in the Department's penalty matrix at N.J.A.C. 7:26-5.4 and the default base penalty amounts at N.J.A.C. 7:26-5.5 and N.J.A.C. 7:26H-5.18, assessing, respectively, a $15,000 penalty for Respondents' violation of N.J.A.C. 7:26-16.3(a); a $5,000 penalty for Respondents' violation of N.J.A.C. 7:26H-1.6(a); and a $5,000 penalty for Respondents' violation of N.J.A.C. 7:26-3.2(c).

On March 29, 2019, Respondent requested an adjudicatory hearing to contest the AONOCAPA and corresponding penalties. The Department transmitted the matter to the Office of Administrative Law (OAL) where a hearing was held before ALJ Betancourt on April 25, 2023. The record remained open to permit the parties to obtain a transcript of the hearing and submit closing summations. The record was thereafter closed on June 2, 2023.

INITIAL DECISION

In his Initial Decision, ALJ Betancourt concluded that the Department had met its burden of proof and had proven by a preponderance of the evidence that Respondent is liable for the violations. The ALJ based his conclusion on various sources of evidence, particularly Respondent's own admission in his response to the NOV and a finding that Respondent and his testimony were not credible. Respondent had testified that the three letters were not authored by him and that his apparent admission in his response to the NOV was rather intended to state that he contracted to perform demolition services and to thereafter clean up the consequent self-generated solid waste. The ALJ found otherwise, concluding that Respondent had authored the letters based on the fact that Respondent 1) admitted he was aware of the letters when he related a telephone conversation with the Department regarding the letters; and 2) failed to state in his

response to the NOV or the AONOCAPA that the letters were not authored by him. More important, the ALJ found that Respondent's testimony that he had contracted to perform demolition services and remove self-generated waste, contrary to his response in the NOV, was not credible. The ALJ determined that Respondent's own previous admission that he had contracted to perform cleanup services could not be interpreted to mean he was only going to remove self-generated waste. The ALJ therefore found that Respondent had in fact proffered an admission and was thus liable for the violations in the AONOCAPA. Based on these facts, the ALJ concluded that the default penalties assessed to Respondent were both reasonable and consistent with the findings in the AONOCAPA and the Department's penalty assessment provisions discussed above.

EXCEPTIONS

Respondent submitted exceptions to the Initial Decision by letter dated August 7, 2023, to which the Department submitted a reply on August 14, 2023. Respondent asserts that 1) the Department's assessment of penalties against him was arbitrary and capricious because the Department did not rely on reliable, credible, and competent evidence to support its allegations; 2) the three letters must not be afforded any weight because they lack credibility and reliability, are unsigned, unauthenticated, and constitute hearsay, and therefore cannot constitute legally competent evidence; 3) the Department failed to conduct a diligent investigation regarding the facts of this matter; and 4) Respondent's decision not to respond to the Department-inspector's emails or deny that he authored the letters does not constitute substantial and competent evidence to support the Department's allegations. The Department replied that ample, credible, competent, and admissible evidence was indeed put forth to support the ALJ's conclusions.

DISCUSSION

Upon independently reviewing the record, I believe the ALJ, having set forth the facts in exhaustive detail, ably reached the proper factual and legal conclusions. As such, I ADOPT the Initial Decision in its entirety and reserve the following discussion to address only Respondent's exceptions to the Initial Decision.

Each of Respondent's exceptions revolves around the credibility, competency, and admissibility of the evidence underlying the Department's determinations and the ALJ's findings and conclusions, particularly the three letters from Respondent to the owner of the property. Although the Department and the ALJ relied on and inferred that the three letters were in fact authored by Respondent, the Department's and ALJ's ultimate conclusions relied squarely on Respondent's own admission that he had contracted to perform cleanup services.[1] Critically, for the ALJ, that finding pivoted on Respondent's testimony regarding his own admission in his response to the Department's NOV. After conducting a full hearing, the ALJ determined Respondent and his testimony were not credible and clearly set forth his reasons for finding so, noting that Respondent's testimony was "largely non-sensical," contradictory, and "intentionally vague." The ALJ's credibility determination underlies his factual finding that Respondent not only wrote the letters, but that Respondent admitted he had contracted to perform cleanup services.

[1] To the extent the three letters support the ALJ's conclusions, I find the ALJ properly admitted and relied on them. Putting aside that hearsay, as Respondent himself notes in his exceptions, is admissible for certain purposes in an administrative proceeding (See N.J.A.C. 1:1-15.5), the letters constitute the statement of a party-opponent, which, under N.J.R.E. 803(b)(1) are hearsay exceptions for the purpose of administrative adjudicative proceedings. See Ruroede v. Borough of Hasbrouck Heights, 214 N.J. 338, 361-62. A statement constitutes an admissible statement by a party-opponent if it is offered against a party-opponent and is the party-opponent's own statement. N.J.R.E. 803(b)(1). Whether the party-opponent made the statement is a purely factual determination. See Konop v. Rosen, 425 N.J. Super. 391, 419-20 (App. Div. 2012). Here, the ALJ relied on significant circumstantial evidence to show that in fact Respondent authored the letters, including that the letters show Respondent's name and letterhead, DEP registration number, and cellphone number; they purport to conduct business with the property owner with whom Respondent admits to having a prior business relationship; testimony deemed credible from and the reports prepared by a Department investigator show the letters were provided by the property owner, who received them from Respondent; and Respondent did not deny authoring the letters in his responses to the NOV or AONOCAPA.

Consequently, the ALJ found that Respondent's latent denial that he had contracted to perform cleanup services was not credible, and that in fact his previous admission to the contrary was dispositive.

The ALJ, who has the benefit of hearing witnesses and observing their demeanor, is generally in a better position to determine the credibility of witnesses and their testimony. See Matter of J.W.D., 149 N.J. 108 (1997). "[T]rial courts' credibility findings are often influenced by matters such as observations of the character and demeanor of the witnesses and common human experience that are not transmitted by the record." See In re Taylor, 158 N.J. 644 (1999) (quoting State v. Locurto, 157 N.J. 463, 474 (1999)). In accordance with the Uniform Administrative Procedure Rules, unless there is evidence that the ALJ's factual findings based on the credibility of lay witnesses were arbitrary, capricious, or unreasonable, or are not supported by sufficient competent and credible evidence in the record, then no basis exists for rejecting those credibility determinations or the ALJ's factual findings based on them. See N.J.A.C. 1:1-18.6.[2]

Here, I find no basis in the record to conclude that the ALJ's credibility determinations were arbitrary or were not based on sufficient competent evidence in the record, and therefore I find no reason to reject the ALJ's factual finding that Respondent's latent denial should not supersede his earlier admission that he contracted to perform cleanup services. Therefore, I concur with the ALJ that Respondent admitted in his response to the Department's NOV that he contracted as such. His doing so without a license and CPCN is sufficient to prove the Department's case, and there is no dispute that Respondent holds neither a license nor CPCN.

[2] N.J.A.C. 1:1-18.6(c) provides that "[t]he agency head may not reject or modify any finding of fact as to issues of credibility of lay witness testimony unless it first determines from a review of a record that the findings are arbitrary, capricious or unreasonable, or are not supported by sufficient, competent, and credible evidence in the record."

I note the Department's determination to issue the AONOCAPA in the first place was not based merely on the three letters, but instead on various sources of competent evidence in addition to the letters, including, most critically, Respondent's admission. The ALJ's determinations relied no less on a variety of competent evidence, including not merely the letters and Respondent's admission, but Respondent's testimony as well. The combined probative force of the relevant and competent evidence in this matter supports the ALJ's conclusion that Respondent is liable for the violations.

As a result, I ADOPT the ALJ's conclusion that the Department has met its burden of proof that Respondent engaged in the collection, transportation and disposal of solid waste without a license in violation of N.J.A.C. 7:26-16.3(a); engaged in the collection, transportation and disposal of solid waste without a license and a CPCN in violation of N.J.A.C. 7-26H-1.6(a); and exceeded the limitations of his A-901 exempt self-generator DEP transporter registration in violation of N.J.A.C. 7:26-3.2(c). As such, I ADOPT the ALJ's conclusion that the penalties assessed in the AONOCAPA are both reasonable and consistent with the findings in the AONOCAPA and the Department's penalty assessment provisions.

CONCLUSION

After reviewing the record, and for the reasons set forth above, I ADOPT the ALJ's Initial Decision. IT IS SO ORDERED.

Dated: March 8, 2024

Shawn M. LaTourette, Commissioner
Department of Environmental Protection

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION
SOLID WASTE COMPLIANCE AND ENFORCEMENT

v.

CHARLES SIMSEK

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