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NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, BUREAU OF HAZARDOUS WASTE COMPLIANCE AND ENFORCEMENT, Petitioner, v. ALTISOURCE SOLUTIONS, INC., and WILLIAM B. SHEPRO, Jointly and Severally Respondents.	ADMINISTRATIVE ACTION FINAL DECISION OAL DKT. NO.: ECE 02465-21 AGENCY DKT. NO.: PEA 190001-U2972

INTRODUCTION

This Order addresses the challenge by respondents, Altisource Solutions, Inc. (Altisource) and William B. Shepro (together, Respondents), to an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) issued by the New Jersey Department of Environmental Protection (the Department) on September 27, 2019, assessing a civil administrative penalty of $20,000 for alleged violations of the New Jersey Solid Waste Management Act, N.J.S.A. 13:1E-1 et seq. (SWMA), and the New Jersey Solid Waste Utility Control Act, N.J.S.A. 48:13A-1 et seq. (SWCA), and the regulations promulgated pursuant to both laws, specifically N.J.A.C. 7:26-3.2(a)(1) and -16.3(a), and N.J.A.C. 7:26H-1.6(a), respectively. Respondents also contend that Mr. Shepro is not a director of Altisource and was not properly served notice of the AONOCAPA.

On November 6, 2023, Administrative Law Judge (ALJ) Tricia M. Caliguire issued an Initial Decision, granting Respondents' motion for summary decision and denying the Department's motion for the same. The ALJ found that the preponderance of the credible, undisputed evidence did not prove that Respondents engaged in the business of solid waste in the course of providing property preservation services under the statutes and regulations in effect during the relevant time period. As such, the ALJ concluded that Respondents were not subject to the SWMA's licensing requirement on the commercial waste industry, known as the A-901 law, or the SWCA's certification requirement. Notwithstanding those findings, the ALJ found that Mr. Shepro had been properly named in and served with the AONOCAPA.

For the reasons set forth herein, I ADOPT the Initial Decision granting summary decision in favor of Respondents and denying summary decision in favor of the Department as MODIFIED below.

BACKGROUND

Factual and Procedural History

According to the undisputed record, Altisource is in the business of property preservation in New Jersey and other states. Property preservation is the process of performing a variety of services inside and outside of pre- and post-foreclosure properties at the request of loan servicing clients. The requested services include property repairs, inspections, and maintenance. Altisource does not perform property preservation services itself, however, but instead works with "affiliates" who provide the actual property preservation and inspection services to property owners.[1] The affiliates contract directly with independent contractors to perform a variety of property

[1] The record does not provide information regarding the affiliates or the agreements between Altisource or its affiliates and the owners of the subject properties.

preservation services. Altisource maintains a network of independent contractors from which its affiliates may select to carry out such services. Once Altisource's affiliates retain independent contractors, those contractors may then retain subcontractors to perform services related to property preservation and inspection.

At some point before March 2019, an affiliate of Altisource contracted with independent contractor REO Elite 1 LLC (REO) to "perform property preservation services" at 701 East State Street, Trenton (State Street Site).[2] REO in turn subcontracted with an individual named Ebase Egbe to perform "the services" on or about March 21, 2019.[3] According to Mr. Egbe, whom the Department interviewed on or about March 21, 2019, he held a solid waste transporter self-generator registration from the Department and an associated registration decal that was valid until June 30, 2019. As such, Mr. Egbe was authorized to transport only self-generated solid waste and to do so using only the vehicle registered with the Department for such purposes. However, on the day in question, Mr. Egbe performed the services using a U-Haul truck rather than the vehicle associated with the registration decal because, as stated by Mr. Egbe, the registered vehicle was not large enough.

As a result of the activity at the State Street Site, the Department issued an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) to Respondents on July 24, 2019 for violations of the SWMA and SWCA and their respective regulations. The Department alleged that Respondents had: 1) acted as a prime contractor without first obtaining

[2] The record suggests that the owner of the State Street Site is Wells Fargo Bank, N.A. (Wells Fargo). (Exh. G to Keatts Cert.). The Department submits the following exhibits relevant to the State Street Site: (i) a March 1, 2019 work order that does not mention Altisource and indicates that REO was to "remove debris from 3rd unit and also remove exterior debris" from the State Street Site, listing the client as "United Field Services" (Exh. G to Gomez Cert.); (ii) a March 18, 2019 work order with the heading "Altisource" and listing "REO Clean out" at the State Street Site as a line item (Exh. B to Hensor Cert.); and (iii) a sign posted at the State Street Site providing that "[t]his property is under the supervision of Altisource" and listing REO as the "vendor" (Exh. F to Gomez Cert.).

[3] The record does not include a copy of any agreement between REO and Mr. Egbe.

an approved registration in violation of N.J.A.C. 7:26-3.2(a)(1) by subcontracting with Mr. Egbe to remove solid waste in a truck that was not properly registered; 2) engaged "in the business of solid waste collection or solid waste disposal as defined by N.J.S.A. 48:13A-3" as a prime contractor in violation of N.J.A.C. 7:26-16.3(a) by subcontracting with Mr. Egbe to remove solid waste without an A-901 license; and 3) engaged in the collection, transportation, or disposal of solid waste in violation of N.J.A.C. 7:26H-1.6(a) by subcontracting with Mr. Egbe to remove solid waste without a certificate of public convenience and necessity. The AONOCAPA assessed a civil administrative penalty of $28,000.

Around the same time at a nearby location, another affiliate of Altisource contracted with independent contractor ProCraft Design Construction Inc. (ProCraft) "to perform property preservation services" at 65 Carroll Street, Trenton (Carroll Street Site).[4] ProCraft in turn subcontracted with A&S Preservation, LLC (A&S) to perform the services.[5] On or about August 8, 2019, A&S performed the contracted services at the Carroll Street Site. Based on the additional activity at Carroll Street Site and a mistaken penalty assessment in the previous AONOCAPA of July 24, 2019 related to the State Street Site, the Department issued an amended AONOCAPA on September 27, 2019, charging Altisource with violating the SWMA and SWCA and their respective regulations as stated in the superseded AONOCAPA and for engaging in the collection, transportation, or disposal of solid waste in violation of N.J.A.C. 7:26H-1.6(a) by subcontracting with A&S to remove solid waste without a certificate of public convenience and

[4] The record suggests that the owner of the Carroll Street Site is Wells Fargo. (Exh. H to Keatts Cert.). The record does not include a copy of any agreement between Altisource and/or its affiliate and ProCraft. The Department submits a work order with the heading "Altisource" that lists "REO Clean Out" at the Carroll Street Site as a line item; it does not mention ProCraft. (Exh. B to Schuettinger Cert).

[5] The record does not include a copy of any agreement between ProCraft and A&S.

necessity at the Carroll Street Site. The amended AONOCAPA reflected a corrected civil administrative penalty assessment of $20,000.[6]

As Respondents had previously requested an adjudicatory hearing on September 26, 2019 to contest the July 24, 2019 AONOCAPA, the Department noted in the amended AONOCAPA that no additional request for an adjudicatory hearing would be required as it would honor the previous request. Accordingly, the Department thereafter transmitted the matter to the Office of Administrative Law (OAL) on November 13, 2020, where Respondents and the Department each moved for summary decision.

Initial Decision

ALJ Tricia M. Caliguire issued an Initial Decision on November 6, 2023, finding the preponderance of the credible, undisputed evidence did not prove that Respondents violated the SWMA or SWCA and, therefore, granted Respondents' motion for summary decision and denied the Department's motion for the same. The ALJ determined the issues were: 1) whether Respondents acted as a "prime contractor" with respect to the State Street Site; 2) whether Respondents acted as a "broker" with respect to the Carroll Street Site; and 3) whether Mr. Shepro was properly named in and served with the AONOCAPA.

The ALJ first found that neither Altisource nor its affiliate[7] had engaged in the business of solid waste as a prime contractor with respect to the State Street Site. Because neither Respondents nor the Department cited caselaw regarding the interpretation of "prime contractor," the ALJ turned to the definition in the Department's Solid Waste rules, which provides:

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[6] All further references to the AONOCAPA refer to the amended version dated September 27, 2019.

[7] The ALJ explained that because Altisource provided "no information" regarding the agreements between either Altisource or its affiliates with the owners of the subject properties, the ALJ found "no reason to distinguish between Altisource and its affiliates." (Initial Decision at 7 n.5).

> [A] "prime contractor" means any person who enters into an oral or written agreement with a generator to store, collect, process, transfer, treat, or dispose of solid waste in this State through the use, control or possession of any solid waste transport unit.
>
> [N.J.A.C. 7:26-3.2(a)(1)(i) (emphases added).]

However, the ALJ found that a "prime contractor" is someone who "enter[s] into a contract with the generator of the solid waste to handle the waste using the prime contractor's equipment." (Initial Decision at 13 (citing N.J.A.C. 7:26-3.2(a)(1)(i)) (emphasis added)). Because nothing in the record suggests that Altisource entered into any contract for solid waste management services in which its own equipment would be used,[8] the Department could not show that Altisource or its affiliate acted as a prime contractor under the regulatory definition. As such, the ALJ concluded that neither Altisource nor its affiliate engaged in the business of solid waste as a prime contractor with respect to the State Street Site.

The ALJ then concluded that Altisource had not acted as a broker with respect to the Carroll Street Site. The ALJ noted that the statutory definition of a broker, as it relates to the A-901 licensing requirement at issue here, was amended after the AONOCAPA was issued. At the time the Department issued the AONOCAPA, the SWMA did not define the term "broker." See N.J.S.A. 13:1E-127 (effective May 9, 2011 to January 20, 2020). On January 21, 2020, after the Department issued the AONOCAPA, the Legislature amended the SWMA to include the following definition of a broker:

> "Broker" means a person who for direct or indirect compensation arranges agreements between a business concern and its customers for the collection, transportation, treatment, storage, processing,

[8] The ALJ found that the record does not make clear who the "generator" of the solid waste was, and thus with whom Altisource must have contracted in order to be considered a prime contractor under the definition. Nevertheless, as stated, the record does not suggest any contract whatsoever between Altisource and any person or entity for solid waste management services, and thus the identity of the generator is rendered unnecessary to conclude Altisource did not act as a prime contractor.

> transfer or disposal of solid waste or hazardous waste, or the provision of soil and fill recycling services.
>
> [N.J.S.A. 13:1E-127(n) (emphasis added).]

As amended, brokers are required to obtain a certificate of public convenience and necessity prior to arranging such services. Thus, because it is undisputed that Altisource did not itself perform solid waste management services, but rather that Altisource or its affiliate contracted with ProCraft, who then contracted with A&S to perform such services, the ALJ found that the threshold inquiry was whether the SWMA as amended applied retroactively to Altisource as a broker.

Analyzing the three factor-test set forth in James v. N.J. Mfrs. Ins. Co., 216 N.J. 552, 563 (2014), the ALJ determined that the factors weighed against retroactive application. As to the first factor—whether the Legislature expresses its intent that the law apply retroactively, either expressly or implicitly— the ALJ found that there is no language in the statute directing retroactive application, nor had the Department pointed to any instance in which the new definition of a broker was applied retroactively. As to the second factor—whether the amendment is simply curative—the ALJ found that the SWMA as amended is not simply curative because it expands the categories of persons subject to background checks. As to the third factor—whether the expectations of the parties warrant retroactive application— the ALJ found no evidence that the parties anticipated retroactive application. The ALJ therefore concluded that the SWMA's amended definition of a broker should not apply retroactively.

As such, the ALJ turned to the definition of a broker as provided by the Department's Solid Waste rules in September 2019 when the Department issued the AONOCAPA. The rules defined a "broker" as:

> [A]ny person, not registered with the Department, who for compensation (e.g., a commission or fee) arranges for the

> transportation or disposal of solid waste or hazardous waste, other than waste generated by that person.
>
> [N.J.A.C. 7:26-16.2 (emphasis added).]

The ALJ noted that the definition of a "broker" under N.J.A.C. 7:26-16.2 strongly implies that registration is not required. The ALJ recognized a lack of published caselaw in which a broker, as defined prior to 2020, is engaged in the solid waste business as a result of arranging for transportation or disposal of solid waste, or in which a company offering property preservation services, like those of Altisource, was deemed a broker or otherwise engaged in the business of solid waste. However, the ALJ noted that unpublished decisions relied upon by Respondents determined whether an entity was subject to the licensure requirements by considering factors such as whether waste management services were substantial or whether the entity exercised significant control over such services. In light of these decisions, the ALJ concluded that Altisource did not engage in the business of solid waste with respect to the Carroll Street Site, specifically noting that Altisource contracted with ProCraft to perform property preservation services at the Carroll Street Site that were mostly unrelated to the collection and disposal of solid waste. As such, the ALJ determined that Altisource was not required to hold either an A-901 license under the SWMA nor a certificate of public convenience and necessity under the SWCA.

Lastly, the ALJ determined that Mr. Shepro was properly named in and properly served with the AONOCAPA. Although Respondents contend that Mr. Shepro was never a director of Altisource, they failed to respond to the Department's submission of Altisource's registration papers or Altisource's web page from May 2019, which describe Mr. Shepro as "Chairman of the Board of Directors and Chief Executive Officer." (Exhs. C and D to Gomez Cert.). The ALJ found that Altisource had thus provided information to the Department that was sufficient for an agency to conclude that Mr. Shepro was a director and could be held jointly and severally liable

for Altisource's violations. Regarding service, the ALJ concluded that any error in serving Mr. Shepro was purely technical because Mr. Shepro had in fact received a copy of the AONOCAPA and had the opportunity to mount a defense.

Exceptions

The Department and Respondents filed exceptions to the Initial Decision on November 20 and December 1, 2023, respectively. In its exceptions, the Department: 1) took exception to the ALJ's interpretation of the definition of prime contractor, contending that the ALJ erred by reading into the definition that one is considered a prime contractor only if one's own equipment is used; 2) contended the ALJ incorrectly concluded that Altisource's property preservation services did not amount to brokering because only a portion of the services involved waste; and 3) asserted the ALJ incorrectly minimized Altisource's level of involvement in brokering the removal of solid waste. Respondents assert in their exceptions that the ALJ's initial decision should be adopted and stress that, even if the ALJ improperly interpreted the definition of prime contractor, the Department nonetheless failed to show that Respondents entered into an agreement with a "generator" and thus has not shown Altisource is liable for the violations.

DISCUSSION

The ALJ found that summary decision in favor of Respondents was appropriate because there were no issues of material fact in dispute and, as a matter of law, Respondents were not subject to the requirements of the SWMA or SWCA. Under N.J.A.C. 1:1-12.5(b), a motion for summary decision may be granted if the parties' submissions "show 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." The standard for summary decision is the same as that for summary judgment under Rule 4:46-2. A.B. v. Bd. of Educ. of City of Hackensack, Bergen Cnty., No. A-0999-21, 2023 WL

6471244, at *3 (N.J. Super. Ct. App. Div. Oct. 5, 2023). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c). In reviewing a motion for summary decision, a judge must decide "whether the competent evidential materials . . . are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Piccone v. Stiles, 329 N.J. Super. 191, 195 (App. Div. 2000) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

"Summary judgment should be granted, in particular, 'after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" Ibid. (quoting Celotex Corp., 477 U.S. at 322). Where a regulatory agency is enforcing the law, the agency bears the burden of proof. Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987). The agency must prove its case by a preponderance of the credible evidence, ibid., which has been defined as "the greater weight of credible evidence in the case," State v. Lewis, 67 N.J. 47, 49 (1975). Under strict liability statutes, such as the SWMA, only the prohibited act must be proven; intent to violate is not an essential element. Dep't of Env't Prot. v. Lewis, 215 N.J. Super. 564, 573 (App. Div. 1987); Dep't of Env't Prot. v. Harris, 214 N.J. Super. 140, 147 (App. Div. 1986).

The parties do not dispute that Altisource held neither an A-901 license nor a certificate of public convenience and necessity at the time the Department issued the AONOCAPA. Likewise, the parties do not dispute that Altisource performs no actual field services, and that all services are performed by third parties. The parties assert obverse conclusions, however, based on these

undisputed facts. The Department asserts that Altisource engaged in the business of solid waste without an A-901 license in violation of the SWMA and SWCA by 1) acting as a "prime contractor" with respect to the State Street Site, and 2) acting as a "broker" with respect to the Carroll Street Site. Respondents in their turn assert that the Department has failed to demonstrate that Altisource was required to hold an A-901 license or certificate of public convenience and necessity under the statutes and regulations in effect at the time the Department issued the AONOCAPA and is therefore not liable for the alleged violations. For the following reasons, I concur with the ALJ that summary decision in favor of Respondents was appropriate. No issue of material fact is in dispute and, as a matter of law, the undisputed record does not prove that Respondents are subject to the license requirements of the SWMA or SWCA.

The first issue is whether Altisource acted as a prime contractor without first obtaining an approved registration in violation of N.J.A.C. 7:26-3.2(a)(1) or engaged "in the business of solid waste collection or solid waste disposal in violation of N.J.A.C. 7:26-16.3(a) when it or its affiliate contracted with REO for property preservation services at the State Street Site, including removal of solid waste, and REO contracted with Mr. Egbe to actually remove the solid waste. Pursuant to the SWMA, the Department regulates "solid waste collection activities, solid waste facilities and solid waste disposal operations" and requires registration of all such operations. N.J.S.A. 13:1E-4. The SWMA's licensing requirement for the commercial waste industry is known as the A-901 law. N.J.S.A. 13:1E-133. The SWMA is "designed to extend strict State regulation to those persons involved in the operations of these licensed activities so as to foster and justify the public confidence and trust in the credibility and integrity of the conduct of these activities." N.J.S.A. 13:1E-126. The SWMA is intended to further the State's vital interest in excluding "persons who have pursued economic gains in an occupational manner or context

violative of the criminal code or civil public policies of the State" from the solid or hazardous waste industries. Ibid.

To receive an A-901 license, an individual or business must disclose extensive information to the Department and submit to background investigations by the Attorney General to demonstrate their fitness, integrity, and expertise. N.J.S.A. 13:1E-133. "No person shall engage in the collection or disposal of solid waste in this State without first filing an application for a registration statement or engineering design approval and obtaining approval thereof from the Department." N.J.S.A. 13:1E-5(a); see also N.J.A.C. 7:26-16.3(a). As previously noted, the SWMA is a strict liability statute and thus only the proscribed act must be proven to establish liability. Lewis, 215 N.J. Super. at 573.

Relevant here, the SWMA's regulations provide that the licensing requirement extends to a person acting as a "prime contractor." Specifically, "[n]o person shall act as a prime contractor or subcontractor for the transportation of solid waste in this State without first obtaining an approved registration statement from the Department." N.J.A.C. 7:26-3.2(a)(1). The regulations define a "prime contractor" as someone "who enters into an oral or written agreement with a generator to store, collect, process, transfer, treat, or dispose of solid waste in this State through the use, control or possession of any solid waste transport unit." N.J.A.C. 7:26-3.2(a)(1)(i) (emphasis added). The applicability of the regulation to prime contractors "ensure[s] that all those, including . . . prime contractors who are in a position to control the provision of solid and hazardous waste services, will be subject to A-901 scrutiny," "improve[s] the quality of the solid waste and hazardous waste industries[,] and reduce[s] future rate increases to consumers resulting from anti-competitive behavior in the industry." 33 N.J.R. 4218(a) (emphasis added). Otherwise, "individuals who have been barred from the solid waste industry in the state for having violated

the solid waste laws could enter into agreements as prime contractors performing solid waste services" and "have the ability to choose subcontractors, and to negotiate terms, prices and conditions under which the subcontractor would operate." In Re Solid Waste Services, Inc., No. EPE 90022-94, 1993 WL 601877, *7 (N.J. Adm. Oct. 30, 1993). Finally, although neither the statute nor regulations define the term "generator" in the context of solid waste, it is generally understood as the person or entity that produces waste. See Div. of Solid Waste Mgmt. v. Tempesta & Sons Co., 96 N.J.A.R.2d (EPE) 247, 1996 WL 763485, at *16 (N.J. Adm. April 6, 1996) ("It is reasonable to infer that the materials were not source separated, that is, separated by the generators.").[9]

Thus, to prevail on summary decision, the Department must show that Altisource entered into an agreement with a generator of solid waste for solid waste management services. Consistent with Respondents' position, the Department has not demonstrated that Altisource entered into any such agreement. To begin, the record is unclear as to who the "generator" was, and neither party has submitted evidence to show that Altisource entered into an agreement with a generator of solid waste. Further, the record does not include any contract between Altisource, or any of its affiliates, and the owner of the State Street Site. Nonetheless, it is undisputed that Altisource is in the business of property preservation at the request of loan servicing clients and it appears that the owner of the State Street Site is Wells Fargo (Exh. G to Keatts Cert.), but nothing in the record suggests that Wells Fargo generated the solid waste at issue.

Likewise, nothing in the record suggests that REO generated the solid waste at issue. The Department provided a document with the heading "Altisource" that lists "REO Clean Out" at the

[9] The term "generator" is defined in the regulations under the subchapter for medical waste. See N.J.A.C. 7:26-3A.5 (a "generator" is "any person, by site, whose act or process produces regulated medical waste").

State Street Property as a line item. (Exh. B to Hensor Cert.). While this evidence suggests that Altisource engaged REO to remove solid waste, it does not demonstrate that REO was the generator of the solid waste. Moreover, nothing in the record suggests that Altisource selected Mr. Egbe as REO's subcontractor, controlled the provision of solid waste services, or negotiated the terms, prices, and conditions under which Mr. Egbe would operate once REO subcontracted with Mr. Egbe to perform the actual solid waste removal. See 33 N.J.R. 4218(a) (regulation of prime contractors "ensure[s] that all those, including . . . prime contractors who are in a position to control the provision of solid and hazardous waste services, will be subject to A-901 scrutiny"); see also Solid Waste Services, Inc., 1993 WL 601877, *7 (absent regulation, prime contractors would "have the ability to choose subcontractors, and to negotiate terms, prices and conditions under which the subcontractor would operate").

Further, although the Department submits a photograph of a sign indicating that the State Street Site was "under the supervision of Altisource" (DEP Br. at 7; Ex. F to Gomez Cert.), this likewise does not demonstrate that Altisource entered into an agreement with a generator or controlled the provision of solid waste services; the Department's argument that "it must be assumed that Altisource entered into these agreements" in the absence of any such agreements is unsupportable. (DEP Br. at 6–7). As a result, because the Department has not made a showing on an essential element of its case, namely, that Altisource entered into an agreement with a generator for the removal of solid waste, it has not met its burden for summary decision.[10]

[10] See Atkinson, 37 N.J. at 149; Celotex Corp., 477 U.S. at 322–23 (after adequate time for discovery, summary judgment should be entered against a party who fails to establish the existence of an element essential to that party's case on which that party will bear the burden of proof at trial because such failure of proof "renders all other facts immaterial" and thus there can be "no genuine issue as to any material fact" for trial).

The parties' arguments regarding whether Altisource's affiliate may be considered its agent do not lead to a contrary conclusion. Specifically, Respondents argue that Altisource could not have been a prime contractor because an unidentified affiliate of Altisource entered into an agreement with REO, rather than Altisource itself. In response, the Department cites the March 1, 2019 work order that does not mention Altisource and indicates that REO was to "remove debris from 3rd unit and also remove exterior debris" from the State Street Site, listing the client as "United Field Services" (DEP Br. at 7; Exh. G to Gomez Cert.). Although the work order appears to support Respondents' position by demonstrating that an entity other than Altisource contracted with REO, Respondents deny that the work order was generated by or was ever in the possession of Altisource. Regardless, the argument regarding agency is inapposite. Even assuming, consistent with the Department's position, that Altisource's affiliate is its agent, the work order does not show that Altisource or its affiliate contracted with a generator of solid waste.

As a result, there is no evidence in the record to demonstrate that Altisource, or any affiliate agent, entered into an agreement with the generator of solid waste at the State Street Site.[11] This alone is dispositive. Therefore, although it is unclear upon what basis the ALJ found that one is considered a prime contractor only if one's own equipment is used, for the foregoing reasons I concur with and ADOPT the ALJ's conclusion that the undisputed record does not show that Altisource acted as a "prime contractor" with respect to the State Street Site.[12] I MODIFY the

[11] To further support Respondents' argument that Altisource's affiliates are not its agents, Respondents submit an additional certification of Altisource director Abigail Schuettinger, stating that Altisource has no subsidiaries, Altisource is an "indirect subsidiary of Altisource S.ar.l." (the Sarl) "which is a limited liability company organized under the laws of Luxembourg, and the Sarl enters into contracts with vendors in the United States in connection with property preservation services. (Reply at 6 & Second Schuettinger Cert. ¶¶ 3–5). Respondents' submission does not change the analysis or the conclusion that there is no evidence in the record to demonstrate that Altisource, or any affiliate agent, entered into an agreement with the generator of solid waste at the State Street Site.

[12] I need not reach Respondents' alternative argument that the record does not show Altisource is a "subcontractor" as that term is defined in the Solid Waste rules because, as Respondents point out in their reply brief (Reply at 11–

conclusion accordingly, basing this conclusion on the Department's failure to show Altisource, or any affiliate agent, entered into an agreement with the generator of solid waste at the State Street Site.

The second issue is whether Altisource engaged in the business of solid waste as a "broker" when Altisource or its affiliate contracted with ProCraft to perform property preservation services at the Carroll Street Site and ProCraft subcontracted with A&S to perform the work.[13] The parties agree that Altisource did not physically handle, collect, or transfer solid waste for disposal at the Carroll Street Site. Respondents maintain that Altisource is in the "property preservation business" and its services do not require it to engage in the business of solid waste.

As the ALJ noted, at the time the Department issued the AONOCAPA in 2019, the SWMA did not provide a definition of the term "broker." See N.J.S.A. 13:1E-127 (effective May 9, 2011 to January 20, 2020)). However, the SWMA's accompanying regulations defined a "broker" as any person, not registered with the Department, who for compensation (e.g., a commission or fee) arranges for the transportation or disposal of solid waste or hazardous waste, other than waste generated by that person. N.J.A.C. 7:26-16.2 (emphasis added). As of January 21, 2020—after the Department issued the AONOCAPA—the SWMA was amended to include the following definition of a broker:

> "Broker" means a person who for direct or indirect compensation arranges agreements between a business concern and its customers for the collection, transportation, treatment, storage, processing, transfer or disposal of solid waste or hazardous waste, or the provision of soil and fill recycling services.

10), the Department does not dispute Respondents' position and asserts only that Altisource should be considered a "prime contractor." Similarly, I need not reach Respondents' argument that Mr. Egbe is licensed as a self-generator because it is outside of the scope of this decision whether Mr. Egbe violated any law or regulation.

[13] This issue was recently decided in a separate agency action with a similar factual scenario. See Dept. of Envt'l. Prot. v. Cyprexx Services, LLC, et al., OAL Docket No. ECE 02467-21 (Dec. 7, 2023) (concluding respondents did not engage in the business of solid waste in the course of providing property preservation services).

> [N.J.S.A. 13:1E-127(n) (emphasis added).]

The legislative history explains that "[t]his bill amends existing law to expand the requirement for background checks to a broader range of persons involved in the solid waste industry, such as sales persons, consultants, and brokers." Assembly Appropriations Committee Statement to Senate, No. 1683 (December 12, 2019) (emphasis added).

Pursuant to the SWCA, the Department regulates the rates at which waste management services are provided as a means of providing safe, adequate, and proper waste management services to the public. N.J.S.A. 48:13A-2.[14] Among other things, the SWCA prohibits a person from "engag[ing] in the business of solid waste collection or solid waste disposal" without a "certificate of public convenience and necessity issued by [the Department]." Id. 48:13A-6; see also N.J.A.C. 7:26H-1.6(a). The SWCA broadly defines "solid waste collection services" and "solid waste disposal services" as the services provided by persons "engaging in" the business of solid waste collection and solid waste disposal, respectively. N.J.S.A. 48:13A-3. The SWCA's accompanying regulations provide that:

> "Engaged in the business of solid waste" means obligating oneself, through a contract or some other means, to provide collection, transportation, treatment, storage or disposal of solid waste in the State of New Jersey, including employment of a licensed hauler, including a subsidiary, to do the actual collections, transportation, treatment, storage or disposal.
>
> [N.J.A.C. 7:26H-1.4 (emphasis added).]

As such, the SWCA applies to those directly "engaged" in the business of solid waste management. Neither the SWCA nor its regulations mention "brokers."

[14] All references in the text of the statute to the Board of Public Utilities (BPU) should be read as applicable to the Department. All responsibility and powers conferred upon the BPU with respect to the Solid Waste Industry were transferred to the Department via reorganization Plan No. 002-1991 and 001-1994. 23 N.J.R. 2563(a) (Sept. 3, 1991); 26 N.J.R. 2171 (June 6, 1994).

Under the foregoing statutory scheme, only after the Department issued the AONOCAPA was the SWMA amended to define a broker more specifically as a person who "arranges agreements between a business concern and its customers" for waste management services, N.J.S.A. 13:1E-127(n), "to expand the requirement for background checks to a broader range of persons involved in the solid waste industry, such as . . . brokers." Assembly Appropriations Committee Statement to Senate, No. 1683. In other words, the SWMA as amended now defines a broker as one who arranges a contract between two or more other parties for waste management services and requires that such brokers register with the Department. Thus, while the Department urges deference be paid to the agency's interpretation of its own regulations, it is also urging application of the definition of a "broker" that was not effective until after the AONOCAPA was issued.

At the time the Department issued the AONOCAPA, the SWMA did not provide a definition of the term "broker," nor did it clearly require a "broker" to register under the A-901 law. See N.J.S.A. 13:1E-127 (effective May 9, 2011 to January 20, 2020)). Rather, the SWMA's accompanying Solid Waste Utility Rules defined a "broker" as "any person, not registered with the Department, who . . . arranges for the transportation or disposal of solid waste or hazardous waste, other than waste generated by that person." N.J.A.C. 7:26-16.2 (emphasis added). As such, consistent with the ALJ's decision, before deciding whether Altisource may be considered a "broker" under the SWMA as amended, the question is whether the SWMA's definition of broker should apply retroactively. I concur with the ALJ that it does not.

Generally, "[s]ettled rules of statutory construction favor prospective rather than retroactive application of new legislation." Ardan v. Bd. of Review, 231 N.J. 589, 609 (2018) (quoting James, 216 N.J. at 563). There are two steps to determine whether a statute can apply

retroactively: (1) "'whether the Legislature intended to give the statute retroactive application' and (2) whether retroactive application 'will result in either an unconstitutional interference with vested rights or a manifest injustice.'" Id. at 610 (quoting James, 216 N.J. at 563). In considering the first step of the analysis, courts look at three factors: "(1) when the Legislature expresses its intent that the law apply retroactively, either expressly or implicitly; (2) when an amendment is curative; or (3) when the expectations of the parties so warrant." Ibid. (quoting James, 216 N.J. at 563). "Once it has been determined that a statute is subject to retroactive application, a separate inquiry requires examination for manifest injustice to the party adversely affected by retroactive application of the changed law." James, 216 N.J. at 565.

Beginning with the first step of the retroactivity analysis—whether the Legislature expresses intent that the law apply retroactively—I find that the SWMA as amended does not apply retroactively for largely the same reasons discussed by the ALJ and set forth by Respondents (Resp. Br. at 16–18). First, the Department does not point to any instances in which the new definition of broker was applied retroactively and there is no language in the statute directing retroactive application. Second, there is no evidence that the Legislature revised the SWMA because the prior version of the statute contained an error or ambiguity. Instead, as the statutory text reflects and the legislative history confirms, the amendment was intended to expand the law; the SWMA as amended "expand[s]" the categories of persons subject to the registration requirements. Assembly Appropriations Committee Statement to Senate, No. 1683 (December 12, 2019). "[A] legislative amendment is not considered 'curative' merely because the Legislature has altered a statute so that it better serves public policy objectives." Ardan, 231 N.J. at 612 (noting that each time the Legislature amends a law, it acts to "improve the scheme" and "[i]f this was all that was required in order to meet the curative exception, every amendment would automatically

be subject to retroactive application") (quoting Kendall v. Snedeker, 219 N.J. Super. 283, 289 (App. Div. 1987)). Third, retroactive application of the SWMA is not warranted by the expectations of the parties in this case. Respondents argue that in light of the legislative language and intent, there can be no reasonable expectation that it would retroactively apply. And as Respondents point out in their reply, the Department did not respond to their retroactivity argument. "The expectation of retroactive application should be strongly apparent to the parties in order to override the lack of any explicit or implicit expression of intent for retroactive application." James, 216 N.J. at 573. Here, the Department's position as to retroactivity is unclear; the Department notes the post-amendment definition without providing any retroactivity analysis. Thus, the expectations of the parties does not warrant retroactivity.

Therefore, I concur with the ALJ that the first step of the retroactivity analysis indicates that the Legislature intended the SWMA's amendment to apply prospectively rather than retroactively. As such, I need not reach the question of whether retroactive application would give rise to an unconstitutional interference or a manifest injustice. James, 216 N.J. at 563.[15]

Having determined that the definition of a "broker" under the SWMA as amended does not apply retroactively, I further concur with the ALJ that the applicable statute and regulations are those that were in effect in September 2019 when the Department issued the AONOCAPA, and that were cited in same. As noted above, prior to January 2020, the SWMA did not provide a

[15] Even if the SWMA as amended applied retroactively, consistent with Respondents' position (Resp. Br. at 18), the Department does not provide clear authority that shows Altisource would be considered a "broker" under N.J.S.A. 13:1E-127(n). The statute provides that a "broker" is one who "arranges agreements between a business concern and its customers" for waste management services. N.J.S.A. 13:1E-127(n). Applying this definition in the instant case, Altisource would have had to arrange an agreement between two other parties. However, contrary to the Department's argument (DEP Br. at 10), the record does not suggest that Altisource, and/or its agent, arranged an agreement between two other parties. Rather, the undisputed facts provide that Altisource and/or its agent contracted with ProCraft, and ProCraft subcontracted with A&S (Facts ¶ 8). The Department does not submit evidence to show that Altisource arranged the agreement between ProCraft and A&S. Nor does it provide any authority that has considered such a subcontract to be an agreement "between a business concern and its customers" under the amended broker definition in N.J.S.A. 13:1E-127(n).

definition of the term "broker." See N.J.S.A. 13:1E-127 (effective May 9, 2011 to January 20, 2020)). However, the Department's Solid Waste Utility Rules define a "broker" as "any person, not registered with the Department, who . . . arranges for the transportation or disposal of solid waste or hazardous waste, other than waste generated by that person." N.J.A.C. 7:26-16.2 (emphasis added). As the ALJ noted, the Department's Solid Waste Utility Rules strongly suggest that brokers are not required to register. See In re Penn Foundry, Inc., 94 N.J.A.R.2d (EPE) 36, 1993 WL 558218, at *12 (N.J. Adm. Nov. 30, 1993) (noting that N.J.A.C. 7:26-16.2 "seems to imply that brokers are not obligated to register with the Department."); see also 32 N.J.R. 693(a) (suggesting that pursuant to N.J.A.C. 7:26-16.2, a broker is not generally required to register for an A-901 license, if, for example, the broker arranges for a licensed company to transfer the waste so long as the broker is not controlling the transfer of waste itself).

Both parties acknowledge a lack of binding caselaw on point, but both parties discuss unpublished decisions, issued prior to the SWMA's amendment, that show courts have considered such factors as whether waste management services were a substantial portion of the work being performed or whether the entity exercised significant control over such services to determine whether an entity was subject to the registration requirements of the SWMA or merely acted as a broker. See In re the Matter of the Bid for Removal and Disposal of PCB Contaminated Materials at the Burnt Fly Bog-Uplands Site, Contract X-25867, 1993 N.J. Super. Unpub. Lexis 10, at *3 (App. Div. April 21, 1993) (remediation company that subcontracted for transportation of waste was deemed not to be a solid waste transporter subject to licensing requirements because "the non-transportation work" was "substantial" and company performed numerous activities unrelated to transportation of waste); but see Department v. Amco Resource Recovery, Inc., et al., No. 5926-89T3, *2–3 (App. Div. June 4, 1991) (rejecting company's argument that it simply brokered

transportation of solid waste where it "exercised significant control over solid waste collection" by "supervis[ing] all aspects of the collection" and "negotiat[ing] the contract prices directly with the customers"). An agency decision similarly considered an entity that had significant control over waste management services to be subject to the relevant licensure requirements. See Dept. of Envt'l. Prot. v. Adamo Container Servs., et al., No. ESW 08241-00S, 2001 N.J. Agen. Lexis 587, at *11–12 (N.J. Adm. Nov. 28, 2001) (concluding a company could not avoid liability for engaging in the business of solid waste without a license by holding itself out as a broker where it "placed itself directly in the middle of the removal process," and exercised control over all aspects of the process, including seeking customers who generated waste, setting prices for disposal containers, negotiating with collectors, and arranging for delivery and removal of containers at customer sites).

In light of the above decisions, I concur with the ALJ that Altisource did not engage in the business of solid waste as a result of its property preservation services such that it was required to obtain an A-901 license. It is undisputed that Altisource is in the business of providing property preservation services, such as repairs, inspection, and maintenance, not all of which in this case generated waste and the majority of which were altogether unrelated to waste management. It is also undisputed that Altisource was retained by a loan servicing client, believed to be the commercial bank, Wells Fargo, to perform property preservation services to restore the Carroll Street Site. Moreover, it is undisputed that Altisource contracted with ProCraft for the property preservation services, who then contracted with A&S to perform the actual work. The Department relies on the sign posted at the State Street Site—not the Carroll Street Site—providing that "[t]his property is under the supervision of Altisource," listing REO as the "vendor," and providing REO's "contact phone number" (Exh. F to Gomez Cert.) to argue that Altisource "handles

customer complaints" and "all aspects of the cleanout." (DEP Brief at 14). However, the Department did not submit evidence to show that Altisource exercised significant control over solid waste management services at the Carroll Street Site, such as negotiating contract prices for solid waste management directly with its client, seeking clients who generated solid waste, setting prices for disposal containers, or arranging for delivery and removal of containers. Therefore, I ADOPT the ALJ's conclusion that Altisource did not engage in the business of solid waste under either the SWMA or the SWCA and was therefore not required to obtain an A-901 license under the SWMA or a certificate of public convenience under the SWCA.

The Department's remaining arguments do not lead to a contrary conclusion. Specifically, the Department relies on the definition of "engaged in the business of solid waste" in its Solid Waste Utility Regulations at N.J.A.C. 7:26H-1.4. However, as previously noted, neither the SWCA nor its regulations contemplated brokers of solid waste services at the time of the alleged violations. Rather, the SWCA explicitly applied to those directly "engaged" in solid waste management. N.J.S.A. 48:13A-3. Here, it is undisputed that Altisource did not itself engage in solid waste management. And while the Solid Waste Utility Regulations define an entity that is "engaged in the business of solid waste" to include one that "employ[s] . . . a licensed hauler . . . to do the actual collections," N.J.A.C. 7:26H-1.4, the Department does not point to anything in the record that supports a legally-binding employment relationship between Altisource and ProCraft or A&S. To the contrary, it is undisputed that Altisource engaged ProCraft as an independent contractor, and ProCraft further engaged A&S as an independent contractor for services at the Carroll Street Site.

Similarly, while the Department relies on the clause "obligating oneself, through a contract or some other means" in the definition of "Engaged in the business of solid waste" at N.J.A.C.

7:26H-1.4 to argue that Altisource in fact engaged in the business of solid waste through the work order issued to REO,[16] the Department has not submitted any contract or evidence thereof between Altisource and the owner of the Carroll Street Site under which Altisource can be said to have obligated itself to provide solid waste management services. Further, the Department provides no caselaw in which a contract for property preservation services, such as that between Altisource and ProCraft, or a work order for a "Clean Out," such as that issued to REO for the Carroll Street Site (Exh. B to Schuettinger Cert.), is considered significant exercise of control over solid waste management services. As such, the Department has provided no evidence to show that Altisource exercised significant control over waste management services at the Carroll Street Site.

Therefore, in sum, I concur with the ALJ that the credible, undisputed evidence does not prove that Altisource violated the SWMA or the SWCA and ADOPT, as MODIFIED above, the ALJ's conclusion that the AONOCAPA must be dismissed with prejudice.

Notwithstanding dismissal of the AONOCAPA, I will briefly address the third issue—whether Mr. Shepro was properly named in and served with the AONOCAPA. Respondents assert that Mr. Shepro was not a director of Altisource and is therefore not a proper party. Respondents also assert that Mr. Shepro was not served with the AONOCAPA. Additionally, Respondents contend that Mr. Shepro was not served in accordance with the Hague Convention as a resident of Luxembourg, although Respondents do not describe the Convention's required method for such service, nor do Respondents cite authority for the same. In response, the Department submits a copy of Altisource's registration form in which Altisource identified Mr. Shepro as its director and

[16] The Department argues Altisource engaged ProCraft "to perform the cleanout service as explained on the work order provided by Altisource." (DEP Br. at 10 (citing Schuettinger Cert. ¶ 11 (citing Exh. B to Schuettinger Cert.))). The work order on which the Department appears to rely has the heading "Altisource" and lists "REO Clean Out" at the Carroll Street Site as a line item; it does not mention ProCraft. (Exh. B to Schuettinger Cert.).

a copy of Altisource's website indicating that Mr. Shepro has been Altisource's CEO since May 2019. (DEP Br. at 15–16; Exhs. C and D to Gomez Cert.). In reply, Respondents do not directly respond to the Department's submissions identifying Mr. Shepro as Altisource's director and instead focus on their assertion that Mr. Shepro was not properly served with the AONOCAPA.

The ALJ found and I concur that Mr. Shepro was properly named as a director of Altisource. Altisource supports its assertion that Mr. Shepro was never a director with a certification from Altisource's Director of Operational Excellence for Field Services, Abigail Schuettinger (Schuettinger Cert. ¶ 3). However, a "self-serving" certification by a party that "directly contradicts his [or her] prior representations" does not necessarily create a genuine factual dispute sufficient to defeat summary judgment. Metro Mktg., LLC v. Nationwide Vehicle Assurance, Inc., 472 N.J. Super. 132, 148 (App. Div. 2022) (alteration in original) (quoting Winstock v. Galasso, 430 N.J. Super. 391, 396 (App. Div. 2013)). Rather, courts "must 'evaluate whether a true issue of material fact remains in the case notwithstanding [that] testimony,'" by considering, for example, whether the certification reasonably clarifies the earlier statement. Id. at 149 (quoting Shelcusky v. Garjulio, 172 N.J. 185, 201 (2002)).

Here, as the ALJ pointed out, Altisource does not address the inconsistency between Ms. Schuettinger's statements and the registration papers filed by Altisource with the New Jersey Secretary of State in which Mr. Shepro is included in the list of directors or the Altisource web page from May 2019 that describes Shepro as "Chairman of the Board of Directors and Chief Executive Officer." (Gomez Cert., Ex. D.) The ALJ found and I concur that the failure to respond is strong evidence that regardless of Mr. Shepro's actual role within the company, Altisource gave information to the State of New Jersey sufficient for the Department to conclude that he was a

director and could be held jointly and severally liable for any violations. I therefore ADOPT the ALJ's conclusion that Mr. Shepro was properly named in the AONOCAPA.

Regarding proper service, as the ALJ noted, service by administrative agencies can be made "in any manner that meets fundamental procedural due process, namely 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action.'" Shannon v. Academy Lines, Inc., 346 N.J. Super. 191, 196 (App. Div. 2001) (quoting Mullane v. Cent. Hanover Bank and Trust Co., 339 U.S. 306, 314 (1950)). The service rules are liberally construed to effectuate service where service is actually received. See James v. City of Jersey City, 187 F.R.D. 512, 516–17 (D.N.J. 1999) (due process satisfied where notice was actually received); see also Peju Province Winery v. Eibert, No. A-5008-05, 2007 WL 1468635, at *10–12 (App. Div. May 22, 2007) (due process satisfied where notice was actually received and service on corporate officer by certified mail to corporate office was reasonably calculated); Rosa v. Araujo, 260 N.J. Super. 458, 463 (App. Div. 1992) (due process satisfied even where complaint was served on the wrong person where defendant actually obtained a copy of the complaint). Therefore, I concur with the ALJ's conclusion that any error in serving Mr. Shepro was purely technical because he actually received a copy of the AONOCAPA and had the opportunity to mount a defense,[17] and I ADOPT the ALJ's conclusion that Mr. Shepro received adequate notice.

CONCLUSION

Having reviewed the record, and for the reasons set forth above, I hereby ADOPT the ALJ's Initial Decision as modified. IT IS SO ORDERED.

[17] In light of the foregoing, I do not reach the question of whether Mr. Shepro was served in accordance with the Hague Convention.

Dated: May 6, 2024

Shawn M. LaTourette
Commissioner

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,
BUREAU OF HAZARDOUS WASTE COMPLIANCE
AND ENFORCEMENT

PETITIONER,

v.
ALTISOURCE SOLUTIONS, INC.,
AND WILLIAM B. SHERPO,
JOINTLY AND SEVERALLY,

RESPONDENTS.

OAL DKT. NO.: ECE 02465-21
AGENCY DKT. NO.: 190001-U2972

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