State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. ECE 15995-13

AGENCY DKT. NO. PEA 090001-21632

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, AIR COMPLIANCE AND ENFORCEMENT,

Petitioner,

v.

HYBRID TEK, INC.,

Respondent.

Scott B. Dubin, Deputy Attorney General, appearing for petitioner, New Jersey Department of Environmental Protection (John J. Hoffman, Acting Attorney General of New Jersey, attorney)

Fayiz Hilal, respondent, appearing pro se[1]

Record Closed: June 1, 2015 Decided: June 25, 2015

BEFORE **SUSAN M. SCAROLA**, ALJ:

[1] Fayiz Hilal is an officer of the corporation, and has appeared as the representative of the respondent.

STATEMENT OF THE CASE

The Department of Environmental Protection (DEP or Department) issued an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) against respondent, Hybrid Tek, Inc., (HTI) for failing to allow lawful entry to a DEP inspector to inspect HTI's business premises. The DEP seeks to impose an $8,000 penalty against the respondent. Respondent contends that when the property was later inspected, no violations were noted, and therefore any fine imposed should be minimal.

PROCEDURAL HISTORY

On January 5, 2010, the DEP issued an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) against HTI for failing to allow lawful entry to a DEP inspector to inspect HTI's business premises in November 2009, and assessing an $8,000 penalty.

On January 24, 2010, Hybrid Tek requested a hearing and on November 30, 2012, the DEP granted that request. The matter was later transmitted to the Office of Administrative Law, where it was filed on October 31, 2013. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On February 25, 2015, the DEP filed a motion for summary decision, and on March 31, 2015, the respondent filed a response. The hearing was originally scheduled for April 20, 2015, but was adjourned at the request of the parties to permit them to engage in settlement discussions, which ultimately were not successful.

FACTUAL DISCUSSION

HTI, a New Jersey corporation, operates a manufacturing facility in Millstone Township, Monmouth County, New Jersey (the "facility" or "site"). HTI is a wholly owned subsidiary of Cetek Technologies, with offices in Poughkeepsie, New York.

Fayiz Hilal was listed as an officer of both corporations during the time period in question (November 2009).

HTI is in the business of applying thick film onto ceramics to make electronic components (similar to a silk-screen process). The process consists of a metal ink which is print-screened onto a ceramic base, and then thinned with DuPont thinner. The component is put through an electronic dryer and an infrared furnace to set. The facility does a small amount of soldering of the components. The facility uses toluene and acetone for cleanup. (Pet'r's Ex. 2, Eichman Cert., ¶ 17.)

On September 15, 2009, the Department was notified that employees at HTI had physical symptoms caused by an unknown gas release, and one employee had been transported to the hospital. (Id., ¶ 4.) That same day, a situational-awareness report was sent from DEP air inspector Andrew Brower to former DEP central regional office manager Patricia Conti. (Id., ¶ 5.) Brower contacted Monmouth County Hazmat and was informed that the release had been terminated and that Monmouth County Hazmat had left the scene. (Id., ¶ 6.) Brower was instructed that an air-compliance inspection should be performed at the site. (Id., ¶ 7.)

On September 22, 2009, the DEP received a complaint that HTI was releasing odors. (Id., ¶ 8.)

On November 25, 2009, Kevin Eichman, an inspector in the DEP's Air Compliance and Enforcement unit, drove to the HTI facility in a vehicle with a State license plate, and markings showing that it was a DEP car. (Id., ¶ 10.) He parked in HTI's parking lot. (Ibid.) At approximately 10:30 a.m., Eichman entered HTI's offices, where Barbara Catalano, HTI's office administrator and manager, happened to be on the telephone with Fayiz Hilal, a company officer who was working in Poughkeepsie at the time. (Id., ¶ 11.) Eichman told Catalano that he was a DEP inspector who wished to inspect the facility's operations. (Ibid.) She informed Eichman that she needed to get permission from Hilal to inspect, and handed the phone to Eichman so that he could speak to Hilal. (Ibid.) Eichman told Hilal that he was from the DEP, and that he was there to inspect the facility. (Id., ¶ 12.) Hilal told Eichman that he would not allow him to

enter and inspect without a search warrant. (Ibid.) Eichman then explained that HTI would be subject to administrative penalties if he were not permitted to inspect. (Ibid.) Eichman asked Hilal if he was denying entry, and Hilal said yes. (Ibid.)

Eichman had his DEP badge with him at the site. (Id., ¶ 13.) The front of the badge includes his date of birth and photograph. (Ibid.) The back of the badge states:

> This is to certify that Kevin Eichman #2023 is an inspector for the New Jersey Department of Environmental Protection with authority to enforce environmental laws and regulations and pursuant to N.J.S.A. 13:1D9 is **EMPOWERED TO ENTER AND INSPECT ANY BUILDING OR PLACE FOR THE PURPOSE OF INVESTIGATING AN ACTUAL OR SUSPECTED SOURCE OF POLLUTION OF THE ENVIRONMENT AND TO ASCERTAIN COMPLIANCE OR NON-COMPLIANCE WITH ANY CODES, RULES AND REGULATIONS OF THE DEPARTMENT. FAILURE TO PERMIT AN INSPECTION IS AN OFFENSE PUNISHABLE UNDER N.J.S.A. 2C:29-1**.
>
> [Ibid.; Eichman Cert., Appendix 5.]

Eichman read the entire passage from the back of his badge to Hilal. (Eichman Cert., ¶ 13.) After being denied entry, Eichman advised Hilal that a violation notice would be sent in the mail for HTI's failure to provide access to inspect the facility. (Id., ¶ 14.) He then returned the phone to Catalano and left the premises without conducting an inspection. (Ibid.)

Eichman prepared a report of his November 25, 2009, visit called a "Compliance Evaluation Summary." (Id., ¶ 15; Eichman Cert., Appendix 6.)

On December 2, 2009, Eichman returned to the facility to conduct an inspection (Eichman Cert., ¶ 16.), accompanied by Andrew Brower, a DEP air inspector with the DEP Air Compliance and Enforcement unit. (Ibid.) Catalano called Hilal, but was unable to reach him by phone. She allowed the inspectors into the facility and escorted them around the manufacturing area. (Ibid.)

During the December 2, 2009, inspection, the inspectors observed a room for soldering and a room for silk screening electronics with an oven. (Id., ¶ 17.) They also observed six screen-printing machines, three dryers, an infrared furnace, a ceramic trim saw, and a solder melting pot. (Ibid.) The use of toluene and acetone for cleanup was observed. (Ibid.) Eichman prepared a "Compliance Evaluation Summary" of the December 2, 2009, inspection. (Ibid.; Eichman Cert, Appendix 7.) No violations were found during the inspection.

The respondent, through an email received on March 30, 2015, from an attorney who indicated that he represented HTI,[2] stated:

> HTI does not dispute denial of access based upon the failure of the inspector to produce proper ID. When access was subsequently granted, no violations were found. No remedial measures were required. HTI contests the amount of the fine/penalty.

No other response was received.

LEGAL ANALYSIS AND CONCLUSION

A. Summary decision standard

N.J.A.C. 1:1-12.5 governs motions for summary decisions. The provisions of N.J.A.C. 1:1-12.5 mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment. Pursuant to these rules, a case may be dismissed before it is heard if, based on the papers and discovery that have been filed, it can be decided "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." N.J.A.C. 1:1-12.5(b). To survive a summary decision motion, the opposing party must show that "there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

[2] Thomas P. Halley, Esq., a New York attorney, had indicated that he represented the respondent and that he had discussed a resolution of this matter with the DEP. Although he sent correspondence to the OAL, he never filed to appear pro hac vice in this state.

Failure to do so entitles the moving party to summary decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995).

"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. While it is true that a judge is not to "weigh the evidence and determine the truth of the matter," Brill, supra, 142 N.J. at 540, "there is in this process a kind of weighing that involves a type of evaluation, analysis and sifting of evidential materials." Id. at 536. Thus, a judge is to scrutinize the competent evidential materials presented, in a light most favorable to the non-moving party, and consider whether a rational fact-finder could resolve the disputed issue in favor of the non-moving party. Id. at 540.

When a motion for summary decision is made and supported, the burden shifts to the adverse party to set forth, by affidavit, specific facts showing there is a genuine issue resolvable only by an evidentiary proceeding. N.J.A.C. 1:1-12.5(b). Given this burden shift, a party opposing a summary-decision motion "who offers no substantial or material facts in opposition to the motion cannot complain if the court takes as true the uncontradicted facts in the movant's papers." Burlington Cnty. Welfare Bd. v. Stanley, 214 N.J. Super. 615 (App. Div. 1987). The New Jersey Supreme Court's standard for summary judgment is thus designed to "liberalize the standards so as to permit summary judgment in a larger number of cases" due to the perception that we live in "a time of great increase in litigation and one in which many meritless cases are filed." Brill, supra, 142 N.J. at 539 (citation omitted).

B. Violation of N.J.S.A. 26:2C-9.1

The Air Pollution Control Act ("APCA"), N.J.S.A. 26:2C-1 to -25.2, authorizes the DEP to control air pollution in accordance with its rules. The DEP is authorized to enter premises to inspect and enforce the APCA. N.J.S.A. 26:2C-9(b)(4). The APCA further provides that

> [n]o person shall obstruct, hinder or delay, or interfere with by force or otherwise, the performance by the department or its personnel of any duty under the provisions of this act, or of the act of which this act is amendatory and supplementary, or refuse to permit such personnel to perform their duties by refusing them, upon proper identification or presentation of a written order of the department, entrance to any premises at reasonable hours.
>
> [N.J.S.A. 26:2C-9.1.]

The APCA is a strict-liability statute, and regulations adopted under the APCA impose strict liability. N.J. Dep't of Envtl. Prot. v. Alden Leeds, Inc., 153 N.J. 272, 276 (1998).

The DEP is authorized to adopt rules and regulations preventing, controlling, and prohibiting air pollution throughout the state. N.J.S.A. 26:2C-8(a). DEP rules at N.J.A.C. 7:27-1.31(a) provide that

> [t]he Department and its representatives shall have the right to enter and inspect at any time, any facility or building, or portion thereof, including all documents and equipment on the premises, in order to ascertain compliance or noncompliance with this chapter or with any preconstruction permit, certificate, operating permit, order, authorization or other legal document issued pursuant thereto, or to verify any information submitted to the Department. This right is absolute and shall not be conditioned upon any action by the Department, except the presentation of appropriate credentials as requested, and compliance with appropriate safety standards.
>
> [Emphasis added.]

Courts have upheld warrantless inspections of pervasively regulated industries. New York v. Burger, 482 U.S. 691, 703, 107 S. Ct. 2636, 2644 96 L. Ed. 2d 601, 614 (1987). For such a search to be proper, Burger requires that, first, there is a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made. 482 U.S. at 702, 107 S. Ct. at 2644, 96 L. Ed. 2d at 614. Second, the warrantless inspection must be "necessary to further [the] regulatory

scheme." 482 U.S. at 702–03, 107 S. Ct. at 2644, 96 L. Ed. 2d at 614 (citation omitted). And third, the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. 482 U.S. at 703, 107 S. Ct. at 2644, 96 L. Ed. 2d at 614. In other words, the statute must advise the owner of the premises that the search is being made, and has a properly defined scope, and it must limit the discretion of the inspectors. Ibid.

Recently, the New Jersey Supreme Court ruled that administrative-inspection schemes can operate consistently with the Fourth Amendment prohibition against unreasonable search and seizure, even though there may be a lack of the requirement for a warrant. DEP v. Huber, 213 N.J. 338 (2013).

HTI defends that it "does not dispute denial of access based upon the failure of the inspector to produce proper ID." (March 30, 2015, reply e-mail from Thomas Halley, Esq.)[3] Hilal claims that he denied the DEP inspector access because he was not there to see Eichman's credentials. However, N.J.A.C. 7:27-1.31(a) only requires that an inspector produce the "appropriate credentials as requested." Although no case law or administrative decisions explain what is meant by "appropriate credentials" or "as requested," Eichman's production of his DEP badge appears to satisfy N.J.A.C. 7:27-1.31(a). Eichman read the language on his State-issued badge to Hilal over the phone, while the HTI office manager stood just a few feet away. Hilal did not instruct his office manager to examine or otherwise authenticate the badge, though he easily could have done so.

Moreover, HTI has not produced any affidavits either admitting or denying the facts set forth in Eichman's certification as required by N.J.A.C. 1:1-12.5(b). Therefore, the DEP's supported facts are deemed admitted for purposes of this motion.

[3] See Footnote 2.

C. Penalty

Whenever the DEP has cause to believe that an entity is violating any provision of the APCA, the Department shall cause a prompt investigation. N.J.S.A. 26:2C-14. If upon inspection the DEP discovers a violation of the provisions of the APCA, "it shall be authorized to order such violation to cease and to take such steps necessary to enforce such an order." Ibid. The order to cease the violation shall include, among other things, "the amount of the fine which shall be imposed." Ibid.

Further, any person who violates any provision of the APCA "shall be liable to a civil administrative penalty of not more than $10,000 for the first offense, not more than $25,000 for the second offense, and not more than $50,000 for the third and each subsequent offense." N.J.S.A. 26:2C-19(b); see also N.J.A.C. 7:27A-3.1 and -3.5(a) (prescribing the same penalty amounts). If the violation is of a continuing nature, each day during which it continues shall constitute an additional, separate and distinct offense. Ibid.

More specifically, N.J.A.C. 7:27A-3.7 states:

> (a) The Department may assess a civil administrative penalty against each violator who refuses, inhibits or prohibits immediate lawful entry and inspection of any premises, building, or place, except private residences, by any authorized Department representative.
>
> (b) Each day that a violator refuses, inhibits or prohibits immediate lawful entry and inspection of any premises, building, or place, except private residences, by any authorized Department representative, shall be an additional, separate and distinct offense.
>
> (c) The amount of the civil administrative penalty for offenses described in this section shall be $8,000 for the first offense, $16,000 for the second offense, and $40,000 for the third and each subsequent offense.
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> (d) The Department may, in its discretion, treat an offense as a first offense solely for civil administrative penalty determination purposes, if the violator has not

> committed the same offense in the five years immediately preceding the date of the pending offense.
>
> (e) A violation under this section is non-minor and, therefore, not subject to a grace period.

However, pursuant to N.J.A.C. 7:27A-3.5(e), the Department may, in its discretion, adjust the amount of any penalty assessed pursuant to this section or under N.J.A.C. 7:27A-3.6, -3.7, -3.8, -3.9, -3.10, or -3.11, based upon any or all of the factors listed in (e)(1) through (6). No such factor would constitute a defense to any violation. The factors are:

> 1. The compliance history of the violator;
>
> 2. The number of times and the frequency with which the violation occurred;
>
> 3. The severity of the violation, including impact on the environment;
>
> 4. The nature, timing and effectiveness of any measures taken by the violator to mitigate the effects of the violation for which the penalty is being assessed;
>
> 5. The nature, timing and effectiveness of measures taken to prevent future similar violations, and the extent to which such measures are in addition to those required under an applicable statute or rule; and
>
> 6. Any other mitigating, extenuating or aggravating circumstances.
>
> [N.J.A.C. 7:27A-3.5(e).]

Therefore, while N.J.A.C. 7:27A-3.7 does not provide for any "range" of penalties, but rather provides that the "amount of the civil administrative penalty . . . shall be $8,000 for the first offense," the regulatory scheme permits the Commissioner to exercise discretion over the amount of the penalty ultimately sought to be imposed.[4] In this matter, the respondent did not permit the inspection to occur after the inspector

[4] See, e.g., N.J. Dep't of Envtl. Prot. v. Cycle Chem, Inc., 365 N.J. Super. 58 (App. Div. 2003), certif. denied, 185 N.J. 390 (2005), where the decision of the Commissioner to modify the penalty within a range was affirmed.

presented his credentials and authority to enter. The following mitigating factors are present: HTI had no prior violations; this violation occurred once; and the DEP was allowed entry the following week and no violations were found upon the inspection.

When the aggravating factors are weighed against the mitigating factors, it is apparent that some consideration should be given to the respondent's subsequent cooperation with the inspector, and the lack of any noted violation on the premises. For the foregoing reasons, a penalty of $6,000 is appropriate for HTI's violation of N.J.S.A. 26:2C-9.1.

ORDER

It is hereby **ORDERED** that the motion for summary decision on behalf of petitioner is **GRANTED**. The respondent shall pay the mandatory minimum penalty of $6,000 to the DEP within thirty days.

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.

June 25, 2015
DATE

SUSAN M. SCAROLA, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/cb