NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1590-07T1

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

Petitioner-Respondent,

v.

MAGIC DISPOSAL, INC.,

Respondent-Appellant.

Argued November 13, 2008 - Decided August 10, 2009

Before Judges Stern, Lyons and Waugh.

On appeal from a Final Agency Decision of the New Jersey Department of Environmental Protection.

Gerard Quinn argued the cause for appellant (Cooper Levinson, attorneys; David M. DeClement, of counsel and on the brief).

Bruce A. Velzy, Deputy Attorney General, argued the cause for respondent (Anne Milgram, Attorney General, attorney; Lewis A. Scheidlin, Assistant Attorney General, of counsel; Mr. Velzy, on the brief).

PER CURIAM

Respondent Magic Disposal, Inc. (Magic) appeals from a final administrative determination of the Department of Environmental Protection (DEP), which adopted the initial decision of an Administrative Law Judge (ALJ) and imposed a $700,000 penalty for violations of the Solid Waste Management Act and Magic's solid waste facilities permit.[1] After a seven day hearing, the ALJ adopted DEP's "closing submission" based on the evidence which "support[ed] the basis for the penalty together with facts supporting the need for deterrence." He found DEP witnesses to be credible and did not find Magic's president, Steven Wazen, "very persuasive." Wazen appeared "frustrated with the rules and regulations" applicable to this operation, and "[h]is tone and demeanor was that of someone who rejected . . . important environmental safeguards as unnecessary, excessive and unimportant."

We affirm the final administrative determination. R. 2:11-3(e)(1)(D), (E).

Magic argues that "[w]here there is no chance to redress the harm or no chance of reoccurrence, the State cannot impose such a harsh penalty" and that "[t]he final action of NJDEP [was] arbitrary, capricious and unjust."

[1] The $700,000 penalty had been imposed by the DEP, and the ALJ "affirm[ed] the penalty imposed by the NJDEP."

DEP issued an Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) on January 25, 2005, alleging violations covering a thirty-four month period between February 6, 2002 and December 8, 2004. During that time, Magic's solid waste facilities permit allowed it to operate as a transfer station and a materials recovery facility. At the hearing before the ALJ, Magic acknowledged it was "primarily" "giving up" on the issues relating to "liability" in connection with the operation of its transfer station-materials recovery facility between 2002 and 2005, and its main defense merely challenged the amount of the penalty imposed.

The Chancery Division had previously entered five enforcement orders against Magic, from October 2001 to July 2004, and the ALJ sustained DEP's determination of a "major" violation, which involves an "intentional, deliberate, purposeful, knowing or willful act or omission." N.J.A.C. 7:26-5.5(h)(1). The ALJ gave reasons for the quantum of the penalty, because the offenses "increased in number" over time and many were "repeated" throughout "the two year" period. While the misconduct was deemed "major," the "seriousness" of the violations warranted a "moderate" assessment and the $35,000 penalty assessment was at the midpoint of the penalty matrix of $30,000 to $40,000 a day for "major" misconduct but only

"moderate" "seriousness." See N.J.A.C. 7:26-5.5(f)(2). Furthermore, the ALJ emphasized that while "[t]he commissioner is authorized to assess a civil administrative penalty . . . for each violation," N.J.S.A. 13:1E-9e, DEP only assessed the $35,000 penalty for each of the twenty violation dates, rather than for each specific violation. Thus, the ALJ agreed with DEP's assessment in the AONOCAPA.

Specifically, the ALJ noted "stipulations of facts," and that "[t]he Solid Waste Management Act is a strictly liability statute," and found that the record supported the $700,000 penalty assessed by DEP based on the facts. He found a "pattern of defiance rather than cooperation" by Magic. The ALJ found Magic's departure from the solid waste transfer station and recovery facilities business, because its permit was not renewed in 2005, should not affect the assessment:

> Respondent's activities or violations spanned over twenty dates during a two year period (February 6, 2004 [sic] through December 8, 2004). They increased in number, rather than decreased, as time progressed. Many of the violations are repeated throughout this period. The NJDEP could have imposed a penalty for each specific violation, rather than consolidating the multiple infractions that occurred on each day. A penalty of $35,000 has been imposed for twenty specific dates, totaling $700,000. There are well in excess of 100 specific violations occurring over the twenty days. This could have resulted in a penalty in the millions of dollars. A

> penalty for each specific violation, on each given day, would not have been unreasonable, given the environmental risk and conduct involved.
>
> Magic's poor operation exposed the environment, its employees and the area residents to potential rodent problems, odor, unsafe air particulates and unmanaged leachate to name just a few. Although there was no significant environmental event, the purpose of the permit conditions and environmental regulations are to be proactive, so as to prevent such events. Respondent's attitude seemed to be indifferent to the regulations or the conditions in the permit. This conduct exposed the site and neighborhood to added risks. Notwithstanding the risks, the NJDEP minimized the penalty by only asserting it on a daily basis rather than on a per violation basis. Thus, respondent's argument that the penalty is unreasonable, excessive, or inequitable, is without merit.
>
> . . . .
>
> In the instant matter, Magic took no notable action to correct the violations during the two years in question. And, respondent still works in the solid waste industry as a hauler. Thus, the deterrence component of the penalty remains in play because it works to deter Magic and others from engaging in similar behavior and encourages solid waste operators or haulers to mitigate once a violation has occurred.

As noted, Magic essentially attacks only the penalty imposed. It argues that "the events complained of took place at a transfer station . . . which has since been closed since 2005 with no possibility of reopening" and that no environmental or

health hazard ever occurred. It asserts that only "base penalties" should have been imposed, see N.J.A.C. 7:26-5.4, that even if there are sufficient proofs that "the matrix is appropriate" resulting in penalties under N.J.A.C. 7:26-5.5, the penalty was not "equitable" due to the lack of "environmental harm" and the inability to reopen the station.

It is well settled that we can reverse the final administrative determination of an "administrative agency only if it is arbitrary, capricious or unreasonable or it is not supported by substantial credible evidence in the record as a whole." Henry v. Rahway State Prison, 81 N.J. 571, 579-80 (1980). Moreover, we can "alter a sanction imposed by an administrative agency only 'when necessary to bring the agency's action into conformity with its delegated authority. The Court has no power to act independently as an administrative tribunal or to substitute its judgment for that of the agency.'" In Re Herrmann, 192 N.J. 19, 28 (2007) (quoting In re Polk, 90 N.J. 550, 578 (1982)). Furthermore, the sanction must be "shocking" in order to obtain judicial relief. Id. at 28-29.

Under our scope of review, we cannot disturb the sanction based on "at least one or more violations . . . on each of the twenty days indicated." Nor can we disturb the use of the penalty matrix or the findings "that the violations were

moderate and the conduct was major." Solid waste regulations permit a choice between a base penalty or the penalty matrix and the later is to be imposed when, based on the particular violations, DEP finds that the base penalty embodied in N.J.A.C. 7:26-5.4 "would be too low to provide a sufficient deterrent effect as required by the Act." See N.J.A.C. 7:26-5.5(a)(1). The lack of contest to the fact finding supports deference to the agency's application of its own penalty guidelines, and as the ALJ noted, independent of the fact that there is need for general deterrence, Magic remains in the hauling business, and deterrence as well as the number and repeat nature of violations are factors in evaluation of the application of N.J.A.C. 7:26-5.5. Moreover, as the midpoint of the guideline "sentencing" was used, the agency did not make an arbitrary assessment.

In reviewing the extensive record in this case, we are struck by the number of repeat violations of Magic's permit, particularly following the prior notices of violation. It is on this basis, independent of the stipulations of violations by Magic at the hearing, that the ALJ could reasonably uphold DEP's determination of a "major" conduct assessment. Moreover, although no single violation was serious enough to be "major" in itself, the reasons provided warrant the assessment of "moderate" seriousness, and the record as a whole supports the

determination. Finally, even though Magic was denied the renewal of its solid waste facility permit and the transfer station and materials recovery facility was closed in 2005, the record, including the need for deterrence of others in the operation of transfer stations and material recovery facilities, warrants the assessment imposed.

Affirmed.