UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2542

September Term, 2014

MARYLAND DEPARTMENT OF
THE ENVIRONMENT

v.

DUSTIN GUTHMANN

Wright,
Nazarian,
Wilner, Alan M.
(Retired, Specially Assigned),

JJ.

Opinion by Wright, J.

Filed: February 11, 2016

This case arises from the November 21, 2013, decision of an Administrative Law Judge ("ALJ") before the Office of Administrative Hearings ("OAH") affirming a penalty imposed upon appellees, Dustin Guthmann and A&X Steel and Aluminum Company ("A&X") (collectively "Operators"), by the Department of the Environment ("the Department") for illegally discharging pollutants and oil into State waters. Operators filed for judicial review of the ALJ's decision on December 20, 2013. In its review, the Circuit Court for Anne Arundel County determined that the ALJ erred in affirming the Department's penalty assessment and remanded the matter back to OAH to re-examine the factors the court determined to be essential for the penalty assessment. The Department subsequently noted this timely appeal, presenting the following questions for our consideration:

1. Was the [ALJ]'s decision to affirm the Department's penalty legally correct and within the [ALJ]'s discretion?

2. Was the [ALJ]'s decision to affirm the Department's penalty supported by substantial evidence?

For the reasons detailed below, we hold that the ALJ did not err in affirming the Department's assessed penalties, and that his decision was supported by substantial evidence.

Facts

a. The Complaint

Dustin Guthmann took over ownership of an industrial facility at 2825 Annapolis Road in Baltimore ("the facility") on October 1, 2012, from his father, Thomas Guthmann, who had been the sole owner and operator of the facility for several decades

before Dustin Guthmann.[1] On March 8, 2012, prior to taking ownership of the facility, Dustin Guthmann formed A&X Steel and Aluminum Company, Inc. to operate the business.

The facility produces metal street lamps which are manufactured from metal sheets that are cut, formed into poles, fluted, and finished on site. The lamppost making process involves the use of hydraulic machines on bare ground. As a result of normal industrial activities in the facility, pollutants, including oil and grease from machinery, wash out during rainy weather and end up in the Middle Branch of the Patapsco River, a State-owned body of water. Operators began their process on October 1, 2012, without the requisite Department discharge permit. As a result, on March 18, 2013, the Department issued an Administrative Complaint, Order, and Penalty ("the Complaint") against Dustin Guthmann and the facility for illegally discharging pollutants and oil into State waters. The Complaint assessed a total penalty of $100,000.00 and included terms for corrective actions.

b. Penalties Hearing before the ALJ

On April 17, 2013, Operators requested a contested case hearing on the penalty assessment. The case was then transferred to OAH. On June 27, 2013, the parties filed 29 stipulations of undisputed facts and, thereafter, both the Department and the Operators filed motions for summary decision: Operators argued that *res judicata* barred the Department from enforcing the action, and that the action was moot due to the

[1] The facility had been in the Guthmann family for 65 years.

Department's actions against Thomas Guthmann.[2] Operators note that they "did not challenge the violations or the Order portion of the complaint, as [they] were already heavily engaged in performing the activities set out in the Order section of the complaint and in fact had completed much of the work."

The Department, however, argued that the action is only for the Operators's discharge of pollutants and oil since October 1, 2012, the time that Dustin Guthmann took over. The Department also sought summary decision as to its penalty assessment. It provided affidavits regarding the penalty assessment, and that the penalties complied with the applicable statutory penalty caps.

On August 29, 2013, the ALJ issued a written decision granting the Department's motion for summary decision as to liability but denied its summary decision on penalties. A penalty hearing was held on September 11, 2013, before the ALJ. During the hearing, the Department presented several witnesses. First, Julie Gowe, a Department enforcement coordinator, testified that Dustin Guthmann had not submitted a National

[2] At the time of the present action, Thomas Guthmann was the Defendant in an active case in the Circuit Court for Baltimore County involving the same allegations as against Dustin Guthmann ("the Baltimore County case"). The Baltimore County case involved numerous consent orders as well as orders arising from contempt actions filed against Thomas Guthmann that required him to perform specific physical clean-up activities at the facility and come into compliance with the Department's requirements. Operators allege that they "were engaged in completing [the requirements set out in the Thomas Guthmann complaint] at the time this action was filed in March of 2013."

Operators conceded at oral argument that this case is not barred by *res judicata* because it involves statutory violations after October 1, 2013, whereas Thomas Guthmann's case involved violations prior to that date.

Pollutant Discharge Elimination System ("NPDES") permit for A&X until March 2013, a year after the company was formed and days after the Department issued the Complaint. Further, Ms. Gowe testified that the Department was forced to conduct water sampling for the Operators, which was similar to the sampling the Operators would be required to conduct themselves as a condition of the NPDES permit, at a cost of $1000.00 to the Department. The Department also called Mark Mank, a toxicology expert, who testified as to the concentration of pollutants in the sampling taken from the facility as being "so significant that the soil would actually contain visible liquid pollutants." These pollutants, Mr. Mank opined, could have adverse health risks on the facility's workers and could also make their way onto other properties and State water, where they create a public health risk as well as ecological health risk to the environment. In his testimony, Mr. Mank explained that as the oil breaks down in the environment, it releases different chemicals, including carcinogens and chemicals, that could cause kidney damage and neurotoxicity.

Dustin Guthmann also testified at the hearing. He explained that, while he was aware when he began operations of the Facility without an NPDES permit, that a permit was required and that his "understanding was . . . [w]e had to generally cleanup to get ourselves within bounds to actually be accepted for a permit and other paperwork." Dustin Guthmann continued to operate illegally because "to stop operating would completely end any chance of me getting a permit" and "would be counterproductive to getting the facility within compliance." Dustin Guthmann testified that a $10,000.00

penalty would likely shut down the facility and a $5,000.00 penalty "would put a very hard strain on" business. However, Dustin Guthmann introduced no financial documents into evidence to support this claim.

On November 21, 2013, the ALJ issued a decision finding that the penalties proposed by the Department were appropriate under the factors set forth in the Md. Code (1982, 2013 Repl. Vol.), Environment Article ("EA") §§ 9-342(b) and 4-417. The ALJ determined that (1) the violations were willful; (2) the discharges of pollutants would result in "some injury to waters of the State;" (3) potential environmental harm is created by discharge of excess pH; (4) "the business does not generate sufficient revenue to properly address the environmental issues affecting the facility;" (5) the discharge of pollutants in excess of water quality standards near State waters created the potential for environmental harm;" (6) Dustin Guthmann had not determined whether control technology could reasonably eliminate the violations because he had not engaged a consultant to determine a way to bring the facility into compliance; and (7) the discharge violations were ongoing and established a recurrent pattern. The ALJ, thus, determined that the $50,000.00 penalty under § 9-342 and the $50,000.00 penalty under § 4-417, totaling $100,000.00, were appropriate.

c. Judicial Review

On December 20, 2013, Operators filed for judicial review of the ALJ's decision to affirm the Department's penalty assessment. Upon review, the circuit court remanded

the matter back to OAH after determining that the ALJ erred in affirming the Department's penalty assessment. The Department subsequently noted this appeal.

Additional facts will be included below as they become relevant to our discussion.

Discussion

I. Standard of Review

On appellate review of an administrative decision, this Court reviews the final agency decision itself, not the decision of the circuit court. *Halici v. City of Gaithersburg*, 180 Md. App. 238, 248 (2008) (citations omitted). In our review, we are "limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *Id*. (citation and internal quotations omitted). If substantial evidence "does exist in the record . . . the courts may not substitute their judgment for that of the [agency] which is presumed to exercise a degree of expertise" in its field. *Tochterman v. Baltimore Cty.*, 163 Md. App. 385, 408 (2005) (citations omitted).

II. Statutory Framework of Administrative Penalties

The ALJ's decision affirming the Department's penalty assessment addressed the Operators' penalties under both Title 9, Subtitle 3, and Title 4, Subtitle 4, of the EA. The Department sought a total penalty amount of $100,000.00 against Operators: $50,000.00 for violations of §§ 9-322 and 9-323 and $50,000.00 for violations of § 4-410.

a. Title 9, Subtitle 3: The Maryland Water Pollution Control Act

In Title 9, Subtitle 3, of the EA, also known as the Maryland Water Pollution Control Act, the General Assembly established a comprehensive scheme governing discharge of pollutants into State waters pursuant to its obligations under the federal Clean Water Act.[3] § 9-322 states that "a person may not discharge any pollutant into the waters of this State."[4] EA § 9-323 further requires:

> (a) A person shall hold a discharge permit issued by the Department before the person may construct, install, modify, extend, alter, or operate any of the following if its operation could cause or increase the discharge of pollutants into the waters of this State:
>
> (1) An industrial, commercial, or recreational facility or disposal system[.]

Title 9 of the EA defines "discharge" as "(1) The addition, introduction, leaking, spilling, or emitting of a pollutant into the waters of this State; or (2) The placing of a pollutant in a location where the pollutant is likely to pollute." EA § 9-101.

EA § 9-342(a) imposes civil sanctions for any person "who violates any provision of this subtitle." At the time the Department imposed a penalty pursuant to EA § 9-342

[3] The Environmental Protection Agency ("EPA") delegated its authority to "issue a permit for the discharge of any pollutant, or combination of pollutants," that comply with the requirements of the Clean Water Act to Maryland under 33 U.S.C. § 1342(b). *See Assateague Coastkeeper v. Alan & Kristin Hudson Farm*, 727 F. Supp. 2d 433, 435-36 (D. Md. 2010) (explaining that "Maryland administers the federal [pollutant permit] program and issues federal discharge permits in the State" because states are responsible for "issuing permits that conform to federal standards").

[4] EA § 9-322 carves out an exception by referencing Title 4, Subtitle 4, which permits emergency discharges of oil and sediment from agricultural operations, which is inapplicable to the Operators.

on Operators, the Department could impose a penalty of no more than $5,000.00 for each day of violation, not to exceed $50,000.00 total.[5] The Department must consider the following factors to determine the penalty:

(1) The willfulness of the violation, the extent to which the existence of the violation was known to but uncorrected by the violator, and the extent to which the violator exercised reasonable care;
(2) Any actual harm to the environment or to human health, including injury to or impairment of the use of the waters of this State or the natural resources of this State;
(3) The cost of cleanup and the cost of restoration of natural resources;
(4) The nature and degree of injury to or interference with general welfare, health and property;
(5) The extent to which the location of the violation, including location near waters of this State or areas of human population, creates the potential for harm to the environment or to human health or safety;
(6) The available technology and economic reasonableness of controlling, reducing, or eliminating the violation;
(7) The degree of hazard posed by the particular pollutant or pollutants involved; and
(8) The extent to which the current violation is part of recurrent patter on the same or similar type of violation committed by the violator.

EA § 9-342(b)(2)(ii). The Department is not required to reduce the penalty it chooses to impose in light of any mitigating factors as long as the penalty is within the statutory limits. *Neutron Prods., Inc. v. Md. Dep't of the Env't.*, 166 Md. App. 549, 595 (2006).

b. Title 4, Subtitle 4: The Maryland Water Pollution and Abatement Act

Title 4, Subtitle 4, of the EA, also known as the Maryland Water Pollution and Abatement Act, addresses the discharge of oil, prohibiting any person from discharging or permitting the discharge of oil in any manner into or on State waters, except in the

[5] As of October 1, 2014, the statute provides for a maximum penalty of "$10,000 for each violation, but not exceeding $100,000 total." EA § 9-342(b)(2)(i).

event "of emergency imperiling life or property, unavoidable accident, collision, or stranding, or as authorized by a permit issued under [ER] § 9-323 of this article." EA § 4-410(a). For any violations of Title 4, Subtitle 4, the Department may impose a penalty of up to $10,000.00 for each day of violation, not to exceed $100,000.00 total for all violations. EA § 4-417(d). EA § 4-417(d) outlines seven factors the Department must consider in assessing the civil penalty:

> (1) The willfulness of the violation;
> (2) The damage or injury to the water of the State or the impairment of its users;
> (3) The cost of clean-up;
> (4) The nature and degree of injury to or interference with general welfare, health, and property;
> (5) The suitability of the waste source to its geographic location, including priority of location;
> (6) The available technology and economic reasonableness of controlling, reducing, or eliminating the waste; and
> (7) Other relevant factors.

III. The ALJ's decision to affirm the penalty was legally correct and did not warrant a remand by the circuit court.

a. Substantial evidence exists in the record to support the ALJ's findings.

We will not remand the ALJ's decision if substantial evidence exists in the record to support the ALJ's findings and conclusions. *Halici*, 180 Md. App. at 248. In his written decision, the ALJ provided a detailed explanation of why he affirmed the Department's $100,000.00 penalty to Operators: $50,000.00 for violating provisions of Title 9, Subtitle 3, and $50,000.00 for violating Title 4, Subtitle 4, of the EA. The ALJ appropriately considered each of the statutory factors in EA §§ 9-342(b) and 4-417(d), and, as the Department notes, "[t]he facts support the penalty."

i. Support for Title 9, Subtitle 3

In reviewing the Department's penalty, the ALJ engaged in an analysis of each the EA § 9-342 factors required to be considered. First, EA § 9-342 asks the Department to assess the willfulness of the violation and the extent to which violator knew, but failed, to correct the violation. In analyzing this factor, the ALJ explained that Dustin Guthmann began operating the facility on October 1, 2012, without a NPDES permit, and he continued to do so until finally filing for the permit application after he was served with the complaint.[6] Dustin Guthmann testified that he was aware of the environmental issues involving the facility since 2005, but he, like his father before him, nevertheless, continued to operate without a NPDES permit.

Second, EA § 9-342 requires looking at any actual harm to the environment or to human health, including injury to or impairment of the use of waters of this State or the natural resources of the State. The Department established that the discharges from the facility resulted in an excess of aluminum and iron going directly into State waters, impacting freshwater aquatic life.

Third, regarding the cost of cleanup and restoration of natural resources, the ALJ noted that while neither party offered evidence as to the exact cost of the cleanup and restoration of natural resources, the Operators will be unable to install pollution control

[6] The application Dustin Guthmann submitted contained no sampling data and was not prepared with the assistance of an environmental consultant. As a result, his application was inadequate. The Department, at its own expense, then obtained sampling data for the facility which showed the extent to which Operators were emitting pollutants into State waters without a permit.

equipment for cost reasons. The ALJ stated that "[e]ven if no penalties were assessed, the Facility is unlikely to generate sufficient revenue to bring the operations into environmental compliance." The Operators claim that once this case concludes and attorney's fees will no longer be an issue, they will be able to afford $1,000.00 a month for sampling, to pay the environmental consultant, and afford "to remain in compliance with environmental laws."

Fourth,[7] the ALJ determined the extent to which the location of the violation contributed to the harm to the environment or to human health and safety. The ALJ explained that the surface drainage on the facility eventually flows through an outfall on the property boundary that ultimately makes its way into the Patapsco River, which is located three miles downstream from the facility.

Fifth, the available technology and economic reasonableness of reducing or eliminating the violation must be assessed. The ALJ noted that "although Dustin Guthmann is aware that he must comply, he has not taken the steps necessary to even begin the process of compliance, that is, engage an environmental consultant or engineer to develop appropriate control technology to bring the discharges into compliance." The ALJ, thus, determined that the technology is available but that the Operators had not made use of it.

[7] This is the fifth factor listed in the statute. The ALJ did not address the fourth factor in EA § 9-342: "The nature and degree of injury to or interference with general welfare, health, and property."

Finally,[8] the ALJ considered the extent to which the current violation is part of a recurrent pattern of the same or similar type of violation committed by the violator. At the time the ALJ made his decision, Operators had yet to obtain a NPDES permit or make any attempts to reduce their impact. They, therefore, violated EA §§ 9-322 and 9-323 every day of their operation since October 1, 2012. After explaining each factor, the ALJ concluded that the "penalty of $50,000 is supported by evidence. The [Department] calculated its penalty based on 124 days of violation. The number of days that the [Operators] have been operating without a permit far exceeds 124 days."

ii. Support for Title 4, Subtitle 4

The ALJ provided his reasoning for the $50,000.00 assessed penalty to Operators "for oil pollution violations for adding, introducing, leaking, spilling or otherwise emitting pollutants into water of the State without a permit" pursuant to EA § 4-417(d), which requires that the administrative penalty shall be up to $10,000.00 for each day of violation, not exceeding a total sum of $100,000.00. Title 4, Subtitle 4, also requires that a number of factors be evaluated, many of which overlap with EA § 9-342, including willfulness; damage or injury to the waters of the State; cost of cleanup; the nature and degree of injury to or interference with general welfare, health and property; the

[8] The seventh factor listed in EA § 9-342 requires the degree of hazard posed by the pollution. Because the Department did not present evidence concerning the degree of hazard associated with the discharges of aluminum, iron, and the 6.35 pH, the ALJ did not consider that factor in determining whether the penalties were appropriate. It is not necessary that each factor be met in order for the penalty to be issued. *American Recovery Co., Inc. v. Md. Dep't of Health and Mental Hygiene*, 306 Md. 12, 19 (1986).

suitability of the waste source to its geographic location; the available technology and economic reasonableness of controlling, reducing, or eliminating waste; and other relevant factors.

The ALJ explained that water samples taken on June 28 and July 23, 2013, from local water sources showed a significant presence of Total Petroleum Hydrocarbons – Diesel Range Organics in excess of water quality criteria. Mr. Mank testified as to the adverse health effects to both the public and Operators' employees resulting from contact with the pollutants, including cancer and neurotoxicity problems. The ALJ noted that Operators failed "to fully understand the environmental and health risks associated with operating the business" because Dustin Guthmann had not only neglected to provide his employees with any protective safety measures, but he also "learned for the first time at the hearing that exposure to these pollutants can cause these potential health risks." Operators, therefore, had "not undertaken the necessary remedial efforts to avoid the discharge of these pollutants" even after consulting with an environmental engineer.

The ALJ made note during his discussion of Operators' "lack of financial resources" as being "likely a significant contributing factor for" their failure in putting remedial measures in place, including the lack of the use of any meaningful technology. Because Operators managed the facility without a permit and continuously discharged oil and pollutants into State waters, without regard to the safety of the public or the safety of their own employees, the ALJ found that the $50,000.00 penalty was fully supported

"after evaluating the factors found in [ER §] 4-417(d)" which is only half of the maximum penalty provided for by the statute.

b. The Operators' ability to pay the penalty is not a factor for consideration in either statute.

Operators argue that the ALJ's decision must be modified because their ability to pay the penalty should have been taken into account. They contended that their financial status is an important consideration fitting into "other relevant factors" in EA § 4-417(b). Operators also allege that the assessed penalty "exceeds by enormous proportions what [Operators] could ever pay, as well as being multiple times more than what would put the company out of business permanently."[9] They further argue that the heavy financial burden of the penalty would forestall any such chances and may result in the task "eventually fall[ing] to the State" instead of motivating clean-up efforts by Operators.

Operators have stated this position in a letter from Thomas Guthmann's counsel to the Department on December 20, 2012:

> It defies understanding how or why the Department of the Environment would require a small struggling business such as this to adhere to the same extremely complex and technical documentation and planning requirements as large corporations. My client did not, nor does his son [Dustin Guthmann] have the resources or the capability to comply with requirements which, by your own admission, necessitate the services of an environmental engineer.

[9] The ALJ had before him the financial circumstances of the Operators. Dustin Guthmann testified that even a penalty as low as $5,000.00 would put a substantial strain on Operators, and a $10,000.00 fine would place the business at risk of shutting down. Operators support these figures with testimony that they only had "$27,000 in the bank, but that [they] could afford to pay the costs of remediation and ongoing testing once legal fees were no longer necessary." Operators offered no other evidence of their financial status. The ALJ, thus, considered implicitly the "other relevant factors."

The ALJ cited this letter and explained that this "letter suggests that [Operators] should receive a special exemption from following Maryland's environmental laws, merely because they operate a small company with limited financial resources." He goes on to point out that Operators "have not produced any authority that would permit such an exemption, mainly because none exists." In considering whether the penalty would shut the business down, as Operators claim, the ALJ noted that "if the business cannot control the pollutants it generates, then stopping the business from operating, although an unfortunate result, is the only way to prevent the continuing discharge of pollutants" because environmental laws were designed to protect "the health and safety of all citizens."

The legislative purpose of the State's environmental laws is not frustrated by the imposition of the penalty, as Operators argue. They assert that the fines under EA §§ 9-342 and 4-417 are punitive in nature and assessing a penalty in excess of what Operators are able to pay would place Operators "out of business [and] serves no legitimate purpose and does not efficiently achieve the goal of the statute." If the company goes out of business, they argue, then the State would be left with the bill of cleanup efforts. We disagree with the Operators. In the "Declaration of Policy" provision of Title 9, Subtitle 3, the General Assembly explained that "[t]he purpose of this subtitle is to establish effective programs and to provide additional and cumulative remedies to prevent, abate, and control pollution of the waters of this State." EA § 9-302(a). The section goes on to highlight that "the quality of the waters of this State is

vital to the interests of the citizens of this State, [and] pollution is a menace to public health and welfare, creates public nuisances, harms wildlife, fish, and aquatic life, and impairs domestic, agricultural, industrial, recreational, and other legitimate beneficial uses of water[].” EA § 9-302(b). The civil penalties under these statutes are imposed to change and prevent illegal behavior so that the policy goals of the State can be met. Waiving them for the Operators, in light of their willful disregard of statutory requirements, would not only be inappropriate but would also open the door to all violators challenging their penalties based on hardship.

In enacting EA §§ 9-342(b) and 4-417(d), the General Assembly specified a number of factors that the Department must consider when assessing penalties, and the financial disposition of the violator is not enumerated as a factor. Title 4, Section 4, does provide consideration for “other relevant factors,” however, even if the financial status of the violator were to be considered, it would not carry more weight than the listed factors. The language of both statutes requires the penalty to be assessed by considering the degree of the damages caused by the violators and the willfulness of their actions. Operators, however, ask us to make paramount a requirement of the consideration of the violator’s personal circumstances. Absent any evidence of the General Assembly’s intention to put some weight on the violator’s financial circumstances, we refuse to hold that the ALJ erred in not explicitly considering Operators’ financial circumstances.

Operators claim that "a lump sum at the present time, in the amount of $20,000 or more would put [them] out of business." However, the State does not necessarily require that fee only be paid in one lump sum. EA § 8-510(b)(4) provides:

> If any person who is liable to pay a penalty imposed under this section fails to pay it after demand, the amount, together with interest and any costs that may accrue, shall be:
> (i) A lien in favor of this State on any property, real or personal of the person; and
> (ii) Recorded in the office of the clerk of court for the county in which the property is located.

EA § 8-510(b)(4) instructs both the State and the penalized entity of the ways in which the State may recover if payment is not or cannot be made.[10]

IV. Conclusion

Operators ask us to reduce their penalty so that they may willfully violate laws set in place to protect the public because the repercussions of breaking these laws would cause a financial burden. However, the Maryland General Assembly has intentionally specified the factors to be considered in assessing penalties for violations of Title 9, Subtitle 3, and Title 4, Subtitle 4, in which almost all factors, in some way, revolve around the violator's willingness to pollute and the extent of the pollution; there is no enumerated factor that calls for the consideration of the hardship on the violator or his financial status. Operators, at the time of the penalty and the appeal, had failed to obtain

[10] Furthermore, during oral argument, the Department stated to this Court and before Operators that if Operators cannot pay the $100,000.00 sum at once, a payment plan may be worked out between the State and Operators, and that such agreements are not uncommon. The panel was also informed that a discharge permit has now been issued by the Department.

a NPDES permit for their business and continued to operate each day knowing that daily operation without a permit is a recurrent violation. We agree with the ALJ that "[e]nvironmental laws are designed to protect the environment and the health and safety of all citizens . . . [which] cannot be placed in jeopardy by any business, big or small." The ALJ appropriately considered all of the statutory requirements and the record provided substantial evidence in support of the Department's decision. We would therefore, affirm the decision of the ALJ.

JUDGMENT VACATED. CASE REMANDED TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY WITH DIRECTIONS TO AFFIRM THE ADMINISTRATIVE DECISION. COSTS TO BE PAID BY APPELLEES.