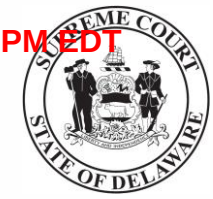

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DELAWARE SOLID WASTE AUTHORITY; GREGGO & FERRARA, INC., and CONTRACTORS HAULING, LLC,	)	**Nos. 81, 2020 and 88, 2020 Consolidated**
Appellees Below, Appellants/Cross-Appellees,	)	
v.	)	**Court Below--Superior Court of the State of Delaware**
DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL,	)	**C.A. No. K-19-05-002**
Appellant Below, Appellee/Cross-Appellant.	)	

OPENING BRIEF OF APPELLANTS GREGGO & FERRARA AND CONTRACTORS HAULING IN SUPPORT OF THEIR APPEAL

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DATED: June 1, 2020

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NATURE AND STAGE OF THE PROCEEDINGS

On November 28, 2018, the Delaware Department of Natural Resources and Environmental Control ("DNREC") issued three Secretary's Orders finding violations pursuant to 7 *Del.C.* Chapter 60[1] and 7 *Del.C.* § 1301. In Order No. 2018-WH-0066, the Secretary found that the Delaware Solid Waste Authority ("DSWA") had violated Condition II.I.2 because it had failed to ensure that all vehicles transferring solid waste from PTCTS possessed valid solid waste transporter permits. Further, the Secretary found that DSWA had violated conditions III.B.2 and V.B.3 for omitting CH from its annual reports. The Secretary assessed an administrative penalty of $18,174.80 pursuant to 7 *Del.C.* § 6005(b)(3)[2] and costs of $1,198.80 pursuant to 7 *Del.C.* § 6005(c) against DSWA.[3]

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[1] 7 *Del.C.* § 6005(b) prescribes penalties for violations not only of applicable statutory and regulatory provisions, but of permit conditions issued in accordance with those regulations. *See* 7 *Del.C.* §§ 6003(c), 6005(b)

[2] 7 *Del.C.* § 6005(b)(3) provides, in relevant part, as follows: "In his or her discretion, the Secretary may impose an administrative penalty of not more than $10,000 for each day of violation."

[3] 7 *Del.C.* § 6005(c)(1) provides, in relevant part, as follows: "Whenever the Secretary determines that any person has violated this chapter, or a rule, or regulation, or condition of a permit issued pursuant to § 6003 of this title, or an order of the Secretary, said person shall be liable for all incurred by the Department . . . ."

In Order No. 2018-WH-0067, the Secretary found that Greggo & Ferrara ("G&F") had violated 7 *Del. Admin. C.* § 1301-7.1.7[4] because it had hired a subcontractor that did not hold a permit for the transportation of solid waste. The Secretary assessed an administrative penalty of $14,800.00 pursuant to Section 6005(b)(3) and costs of $2,126.48 pursuant to Section 6005(c) and against G&F (A-1 to 7).

In Order No. 2018-WH-0068, the Secretary found that Contractors Hauling ("CH") had violated 7 *Del.C.* § 6003(a)(4)[5]and 7 *Del. Admin. C.* § 1301-7.1.1[6] because it had transported solid waste without a permit. The Secretary assessed an administrative penalty of $16,630.00 pursuant to Section 6005(b)(3) and costs of $2,126.48 pursuant to Section6005(c) against CH (A-8 to 14).

DSWA, G&F, and CH each filed a Notice of Appeal to the Environmental Appeal Board ("Board") on December 19, 2018, challenging the Secretary's Orders (A-15 to 20).

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[4] 7 *Del. Admin. C.* § 1301-7.1.7 states as follows: "Permitted solid waste transporters shall not use agents or subcontractors who do not hold permits for transporting solid waste."

[5] *Supra* note 4.

[6] 7 *Del. Admin. C.* § 1301-7. states, in relevant part, as follows: "No person shall transport solid waste, without first having obtained a permit from [DNREC], unless specifically exempted by these Regulations."

On February 12, 2019, the Board held an evidentiary hearing on the appeals, during which it heard testimony and reviewed evidence.[7] (A-29 to 125).

On May 13, 2019, the Board issued a unanimous written opinion overturning the Secretary's decisions in part and affirming them in part. Specifically, the Board held that the Secretary's decision that DSWA had violation Condition II.I.2 was erroneous because Condition II.I.2 was invalid, and that DSWA had not violated Conditions III.B.2 and V.B.3 because it had no knowledge that G&F was using vehicles owned by an affiliate until after the annual report was filed. Further, the Board affirmed the Secretary's conclusions that G&F and CH had violated statutory and regulatory provisions regarding transport of solid waste without a permit, but reversed the Secretary's penalty assessments against them, holding that G&F and CH's violations were excused. The Board remanded the Secretary's orders regarding G&F and CH, instructing the Secretary to rescind the penalties and costs because the violations were due to "understandable oversight" and "an innocent lack of communication."[8] (A-126 to 143).

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[7] The Secretary's three orders were combined into one appeals hearing pursuant to an agreement among the parties at a prehearing conference held on January 18, 2019.

[8] Bd. Order at11-2 (May 13, 2019).

DNREC filed a timely Notice of appeal to the Superior Court on May14, 2019, challenging the Board's decision in all respects, except for its finding that G&F and CH had violated Delaware environmental statutes and regulations.

On January 29, 2020, the Superior Court, by The Honorable Noel Eason Primos, in a Memorandum Opinion and Order, affirmed the Board's determination that Condition II.I.2 is invalid but reversed the Board's determination that DSWA did not violate Permit Conditions III.B.2 and V.B.3 and reversed the Board's determination that no administrative penalties should be imposed upon G&F and CH. ***Delaware Department of Natural Resources and Environmental Control v. Delaware Solid Waste Authority, Greggo & Ferrara, Inc. and Contractors Hauling, LLC*, [2020 WL 495210 (Del. Super.)]** ("Opinion") (Exhibit A).

Thereafter, all parties filed Applications for Certification of Interlocutory Appeal.

On February 25, 2020, this Court found that the January 29, 2020 Order determined a substantial issue of material importance that merited appellate review before a final judgment and that the following criteria of Supreme Court Rule 42(b)(iii) apply: subsections (A); (C); (G); and (H) and consolidated all three Interlocutory appeals.

This is the Opening Brief of Appellants Greggo & Ferrara and Contractors Hauling in support of their Appeals.

SUMMARY OF ARGUMENT

I. **THE BOARD APPLIED THE PROPER LEVEL OF DEFERENCE TO THE SECRETARY'S DECISION**

II. **THE SUPERIOR COURT CONFLATES STRICT LIABILITY AS TO THE VIOLATION OF 7 *DEL.C.* §6005 WITH STRICT LIABILITY FOR ADMINISTRATIVE PENALTIES UNDER 7 *DEL.C.* §6005(B)(3)**

III. **DNREC CANNOT RECOVER COSTS UNDER 7 *DEL.C.* §6005(C), AS THE SECRETARY NEVER SUBMITTED A DETAILED BILLING OF EXPENSES TO G&F AND CONTRACTORS, AS REQUIRED BY 7 *DEL.C.* §6005(C)(1)**

STATEMENT OF FACTS

DSWA operates three waste transfer stations in Delaware. These stations receive municipal solid waste from public and private sources, providing a local destination where one may take waste, rather than traveling to a landfill site that is often farther away than a transfer station. Waste received at a transfer station is collected and subsequently transported to a landfill (Opinion @ *1).

The waste transfer station of interest in the present case is DSWA's Pine Tree Corners Transfer Station (hereinafter "PTCTS"), located near Townsend, Delaware. Waste from PTCTS is taken to DSWA's Central Solid Waste Management Center (hereinafter "CSWM") landfill near Sandtown, Delaware. PTCTS is subject to DNREC permits, one of them being permit SW-06/04. Under PTCTS Permit SW-06/04 Condition III.B.2 (hereinafter "Condition III.B.2"), DSWA must submit an annual report by March 1 listing the transporters that hauled waste to or from PTCTS the previous reporting year.[9] A second permitting requirement, PTCTS Permit

[9] Condition III.B.2 provides, in relevant part, as follows: "No later than March 1st each year, the DSWA shall submit an annual report to the DNREC. This annual report shall summarize Transfer Station operations for the previous year and include . . . [a] list of transporters that hauled waste to and from the facility during the year covered by the report."

SW-06/04 Conditions II.I.2 (hereinafter "Condition II.I.2"), provides as follows:

> "All vehicles transporting waste from the Transfer Station shall have a valid solid waste transporters permit issued by the DNREC. In their contracts with transporters hauling waste from the Transfer Station, the DSWA shall stipulate that the contractor maintain a valid solid waste transporter permit issued by the DNREC. DSWA shall investigate and determine the current validity of the permit if it has reason to suspect the permit is not valid. All vehicles transporting waste collected by the HHW collection program from the Transfer station shall have a valid hazardous waste transporters permit issued by the DNREC." (Opinion @ *1 & 2).

In July 2017, DSWA contracted with a private entity, G&F, whereby G&F was to operated PTCTS.[10] In order to enter this contract, G&F had to provide DSWA with a copy of G&F's relevant DNREC-issued permits. G&F commenced operating PTTS on or about September 1, 2017, and at some point in September 2017, G&F enlisted its affiliate, CH, as a subcontractor to haul waste out of PTCTS (Opinion @ *2).

On or about June 14, 2018, Mr. Michael D. Parkowski, a senior-level employee of DSWA, received information indicating that a vehicle leaving PTCTS did not appear to have a valid DNREC-issued solid waste transporters permit. On or about the same day, Mr. Justin Wagner, a facility

[10] DSWA's remaining duty, as owner of PTCTS, was to operate the scale house in which trash is weighed before entering or leaving PTCTS.

manager at PTCTS, received information that G&F may have been using vehicles belonging to CH to transport solid waste out of PTCTS. Upon further investigation, DSWA confirmed that G&F had been using CH vehicles to transport waste out of PTCTS.[11] (Opinion @ *2).

On July 25, 2018, Officer Austin Tyler, a DNREC enforcement official, stopped a vehicle owned by CH that was carrying solid waste from PTCTS. The vehicle did not possess a proper DNREC-issued solid waste transporters permit, in violation of 7 *Del.C.* § 6003.[12] After this incident, G&F engaged a third party to carry waste from PTCTS until CH received a valid DNREC-issued solid waste transporters permit (Opinion @ *2).

On February 12, 2019, the Board held its evidentiary hearing.

In its May 13, 2019 Decision, the Board initially set forth in great detail its Summary of the Evidence:

> "In its case-in-chief, appellant DSWA presented evidence of two witnesses: Michael Parkowski and Justin Wagner.

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[11] DSWA claims that, prior to this point, it was unaware that G&F had enlisted CH as a subcontractor to haul solid waste out of PTCTS. Whether this was the first time that DSWA learned of this fact is irrelevant to the Court's decision.

[12] 7 *Del.C.* § 6003(a)(4) provides, in relevant part, as follows: "No person shall, without first having obtained a permit from the Secretary, undertake any activity . . . [i]n a way which may cause or contribute to the . . . transportation . . . of solid wastes, regardless of the geographic origin or source of such solid wastes. . . ."

"Mr. Parkowski testified that:

"(1) He is Chief of Business and Governmental Services at the DSWA. Tr. At p. 49.[13] (A-33).

"(2) He has worked at DSWA for 15 years and oversees the licensing program for DSWA that issues licenses to public collectors who collect trash from households. Tr. At 50. (A-34).

"(3) The reason for a transfer station is to eliminate the need for trash haulers to travel long distances to the landfills with relatively small loads of waste. Tr. At p. 52. (A-36).

"(4) A contract was awarded to Greggo and Ferrara to operate the PTFCTS. Tr. at p. 53. (A-37).

"(5) The contract requires that G&F will ensure that all vehicles transporting waste from PTCTS shall have a valid solid waste transporter permit issued by DNREC. Tr. at p. 55. (A-39).

"(6) He received a call in the middle of June alerting him that a truck leaving PTCTS did not have a transporter permit sticker on the truck. Tr. at p. 58. (A-42).

"On cross-examination, Mr. Parkowski acknowledged that:

"(7) No one at DSWA told G&F or CH to stop transporting waste until they resolved the permitting issue. Tr. at p. 64. (A-48).

"Mr. Wagner testified that:

[13] The abbreviation "Tr." is used to refer to the transcript of the Board's hearing on February 12, 2019.

"(1) He is the Facility Manager for the CSWMC and the PTCTS and that his duties include the administration and direction of operations at both sites. Tr. at p. 69. (A-53).

"(2) The numbered stickers affixed to trucks are used to track the tonnage going from the transfer stations to the landfills. Tr. at p. 70. (A-54).

"(3) He 'believed' it was June 14th that he was informed that G&F might have been using trucks belonging to CH and that he contacted G&F's manager at PTCTS, Mr. Howarth, and was told that CH would be applying for a permit. Tr. at p. 72. (A-56).

"(4) He did not tell Mr. Howarth that G&F were not to use CH vehicles because it was clearly stated in the contract. Tr. at p. 72. (A-56).

"(5) He had no knowledge of CDH on March 1, 2018 when the Annual Report was required to be submitted. Tr. at p. 74. (A-58).

"In their case-in-chief, appellee DNREC presented evidence of two witnesses: Officer Austin Tyler and Tara Grazier.

"Officer Tyler testified that:

"(1) He stopped a vehicle displaying a CH logo leaving the PTCTS on July 25 because he was unable to locate any solid waste hauler permit numbers on the truck and the numbers are usually located on the sides or the back of the truck. Tr. at p. 96. (A-60).

"(2) The driver of the truck was unable to supply a copy of the waste haulers' permit and his check

with DNREC verified the lack of permit. Tr. at p. 99. (A-63).

"On cross-examination, Officer Austin acknowledged that:

"(1) He did not observe any issues with respect to trash coming out of the vehicles, improper tarping or other environmental concerns. Tr. at p. 101. (A-65).

"(2) No one directed him to go to the PTCTS on the date of the stop. Tr. at p. 104. (A-67).

"Tara Grazier testified that:

"(1) She is employed by DNREC as a Senior Environmental Compliance Specialist and that in that role she reviews all solid and hazardous waste transfer applications. Tr. at p. 111. (A-70).

"(2) She first because aware that CH was transporting waste without a permit on July 25 when so informed by Officer Austin. Tr. at p. 111. (A-70.

"(3) She 'believed' that CH called DNREC once but had no specific recollection of any conversation. She had further communications via e-mail with CH after receipt of their application which she deemed incomplete. No one ever affirmatively told her that CH was actively transporting waste but if they had, she would have told them to immediately cease. Tr. at p. 112. (A-71).

"On cross-examination, Ms. Grazier testified that:

"(1) Section 7.1.1 of the Solid Waste Regulations provides that the person holding the permit is not allowed to use unpermitted subcontractors. Tr. at p. 114. (A-72).

"(2) DNREC does no independent investigation into the integrity of the vehicles or driver training instead relying on the representations of the applicant. Absent unusual circumstances at the end of the public comment period a permit is issued. Tr. at p. 122. (A-73).

"(3) Greggo & Ferrara could have amended its permit by simply adding the vehicles that it was using. Tr. at p. 123. (A-74).

"In their case-in-chief, appellants Greggo & Ferrara and Contractors Hauling presented evidence of four witnesses: Charles Howarth, Peter Criscuolo, Nicholas Ferrara, III, and Nicholas Ferrara, Jr.

"Mr. Howarth testified that:

"(1) He is employed by G&F and has been the supervisor of Pine Tree Transfer Station for eighteen months overseeing daily operations and employee affairs. Tr. at p. 133. (A-76).

"(2) He was present at the facility for a DNREC walk through inspection conducted on March 23, 2018. At that time, there were 14 vehicles with Contractors Hauling identifications on the tractors. Tr. at p. 137. (A-77).

"(3) G&F were using vehicles owned by CH to transport waste. Tr. at p. 142. (A-85).

"(4) After the July 25, 2018 stop F&G used licensed contractors to transport waste. Tr. at p. 146. (A-89).

"Mr. Criscuolo testified that:

"(1) He has been employed by CH for 25 years. He received a call from Mr. Howarth on or about June 14, 2018 when it was brought to his attention that CH may not have a necessary permit from DNREC. He called DNREC and left a message. While waiting for a return call he downloaded the transporter application and sent it to DNREC. Tr. at p. 148. (A-91).

"(2) After he received a call from Mr. Howarth on July 25, 2018 describing Officer Austin's stop of the CH driver, 'we stopped the trucks' and hired licensed transporters. Tr. at p. 149. (A-92).

"On cross-examination, Mr. Criscuolo testified that:

"(1) He was not aware of anyone from G&F or CH informing DNREC that they were transporting waste but that no one from DNREC instructed him to stop until the 25th. Tr. at p. 153. (A-96).

"(2) The G&F drivers and the CH drivers interchange all the time and the two entities operate like a family business. Tr. at p. 159. (A-103).

"Mr. Ferrara, III testified that:

"(1) He is Vice President with G&F and has worked there full time since 1986. Tr. at p. 166. (A-109).

"(2) When he found out that CH was in violation for not having a permit he called Ms. Grazier to ask how he could expedite the permit to get into compliance. He was told he could not lease his trucks to G&F. Tr. at p. 167. (A-110).

"On cross-examination Mr. Ferrara, III testified that:

"(1) He never contacted DNREC to confirm that the G&F Transporters Permit covered the CH vehicles. Tr. at p. 171. (A-114).

"On re-cross examination Mr. Ferrara, III acknowledged that:

"(1) It was an oversight that the CH equipment was not added to the existing G&F Transporters Permit. Tr. at p. 177. (A-120).

"Mr. Ferrara Jr. testified that:

"(1) He is the President of F&G and they have been hauling waste since the 1980s. The $350 permit that is the subject of this appeal 'slipped through the cracks.' Tr. at p. 178. (A-121).

"(2) We never thought that the permit that we had under G&F had to be transferred to CH since we own them. 'We screwed up' but we didn't 'try to be surreptitious about it ... the minute we found out we applied for the permit.' 'It was an honest mistake.'" Tr. at p. 182. (A-125).

ARGUMENT

I. THE BOARD APPLIED THE PROPER LEVEL OF DEFERENCE TO THE SECRETARY'S DECISION

A. Questions Presented

Did the Board apply the proper level of deference to the Secretary's decision?

B. Scope of Review

"This Court reviews a Superior Court ruling that, in turn, has reviewed a ruling of an administrative agency, by examining directly the decision of the agency." ***United Parcel Service v. Ryan Tibbits*, 93 A.3d 655, at *2 (Del. 2014)**. The Board decision is reviewed to determine if it is supported by substantial evidence and free from legal error. ***Id.*** "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." ***Id.*** "On appeal, this Court [does] not weigh the evidence, determine questions of credibility, or make its own factual findings." ***Id.*** Questions of law are reviewed *de novo*. ***Id.*** "Absent an error of law, [] review of a Board decision is for abuse of discretion. The Board will be found to have abused its discretion where, in the circumstances, its decision has exceeded the bounds of reason." ***Id.*** ***See also, Christman, M.D. v. State of Delaware Dept. of Health and Social***

***Services*, 99 A.3d 226, at *2 (Del. 2014).** "Substantial evidence is more than a scintilla and less than a preponderance." ***Richardson v. Board of Pension Trustees*, 170 A.3d 778, at *2 (Del. 2017)** (citation omitted). Issues of statutory construction and interpretation are reviewed *de novo*. ***CML V, LLC v. Bax*, 28 A.3d 1037, 1040 (Del. 2011)** (citation omitted).

C. <u>Merits of Argument</u>

The Superior Court properly held that because the initial adversarial hearing was before the Board, the "Board was not required to provide 'explicit deference to the Secretary's expertise' and the Board did not commit an error of law in reviewing the Secretary's decision that DSWA had violated Conditions III.B.2 and V.B.3." Opinion @ *8. The Superior Court relied upon language in ***Tulou v. Raytheon Service Co.*** which held that the Board may give less deference to the Secretary "when the initial full adversarial hearing is before the Board." *Id.* [citing ***Tulou*, 659 A.2d 796, 805(Del. Super. 1995)**].

Under 7 *Del. C.* §6008(b), the Board may substitute its judgment for that of the Secretary's. §6008(b) authorizes the Board to "affirm, reverse or remand with instructions any appeal of a case decision of the Secretary" with no indication of the amount of deference the Board must give to the Secretary's decision.

Contrastingly, when an appeal is under §6008(c), the Board is required to "take due account of the Secretary's experience and specialized competence and of the purposes of this chapter in making its determination." §6008(b) contains no such language, therefore it is logical to conclude that the absence of the deferential language in §6008(b) is purposeful and means that the Board is not explicitly required to give deference to the Secretary's decision when considering an appeal under §6008(b).

The Board was not explicitly required to give any deference to the Secretary's decision when considering an appeal under §6008(b) because no full adversarial hearing had taken place yet. That hearing took place before the Board only. As stated by the Superior Court in ***Tulou v. Raytheon Service Co, supra***:

> "Since § 6008(b), as currently written, encompasses circumstances where the initial full adversarial hearing is before the Board, it is readily evident why the Board must be allowed to receive additional evidence. Also, in situations where the Board provides the first hearing, there is less apparent need for explicit deference to the Secretary's expertise.
>
> "Section 6008(c) involving appeals to the Board of regulation decisions of the Secretary necessarily contemplates appeals after the Secretary has held full hearings. Since regulations can often involve technical matters and since the Board is holding a second hearing, it is more apparent why § 6008(c) explicitly requires the Board to defer to the Secretary's expertise and does not contain the broader discretion found in § 6008(b) to receive and consider additional evidence." 659 A.2d at 805 (emphasis added). At *8.

The record before the Board is the entire record before the Secretary and any "competent evidence" produced by the parties. §6008(b). Further, the "Board may exclude any evidence which is plainly irrelevant, immaterial, insubstantial, cumulative or unduly repetitive, and may limit unduly repetitive proof, rebuttal and cross-examination." §6008(b). The Superior Court has held that "it is a denial of an appellant's due process rights for the Board to limit the evidence before it to that considered by the Secretary." *Tulou*, 659 A.2d at 803 (citation omitted). It is evident that the Legislature intended that the Board have these additional powers and that full adversarial hearing take place before the Board. In this case, a full adversarial hearing took place at the Board level, not before the Secretary. Under §6008(b), the Board is not explicitly required under the statutory scheme to show any deference to the Secretary's decision.

II. THE SUPERIOR COURT CONFLATES STRICT LIABILITY AS TO THE VIOLATION OF 7 *DEL C.* §6005 WITH STRICT LIABILITY FOR ADMINISTRATIVE PENALTIES UNDER §6005(B)(3)

A. Questions Presented

Did the Superior Court conflate strict liability as to the violation of 7 *Del.C.* §6005 with strict liability for administrative penalties under 7 *Del.C.*§6005(B)(3)?

B. Scope of Review

These Appellants respectfully submit that the scope of review is identical to that set forth in Argument I.B.

C. Merits of Argument

As to Secretary's Order 2018-WH-0067, the Board held that, with regard to G&F, the violation was a result of "understandable oversight" and, "[s]uch oversight, combined with the fact that no environmental harm or damage occurred, leads the Board to conclude that no penalty or cost recovery is appropriate." EAB Opin., p. 11.

With regard to Secretary's Order 2018-WH-0067 pertaining to CH, the Board considered the "innocent nature of CH's mistake, combined with the fact that no environmental harm or damage occurred" and held that no penalty or cost recovery is appropriate. EAB Opin., p. 12.

The Board reversed the Secretary's administrative penalties and costs based on these findings and substantial evidence in the record.

The Board rescinded the administrative penalties assessed in Secretary's Orders 2018-WH-0067 and 2018-WH-0068, however, the Superior Court reversed the Board's decision, holding that GF/CH are "strictly liable for their violations of the applicable regulatory and statutory provisions connected with CH's transport of solid wastes without a permit." Opinion @ *10. The Superior Court construed 7 *Del. C.* §6005(b) as a strict liability statute under the reasoning in ***Olney v. Dover Products*, 1980 WL 332956, at *1 (Del. Super. Aug. 13, 1980), *rev'd* 428 A.2d 18 (Del. 1981)**. The Superior Court then held that the Board's decision was not "well considered" because Section 6005(b) states that violations of that subsection "shall be punishable" by subsections (1) through (3). Opinion @ 10.

The Superior Court's analysis misconstrues the language set forth in 7 *Del. C.* §6005(b)(3), and misapplies *Olney* to that statute. The Court conflated strict liability as to the violation with strict liability as to the penalty provision. Even assuming that the word "shall" in §6005(b)(1) rendered a party strictly liable for violations of that subsection, the administrative penalty provision in §6005(b)(3) is permissive and discretionary. Any other reading of the statute violates principles of

statutory construction and would render §6005(b)(3) nugatory and mere surplusage. This Court "ascribe[s] a purpose to the General Assembly's use of particular statutory language and construe[s] it against surplusage if reasonably possible." ***CML V, LLC v. Bax*, 28 A.3d 1037, 1041 (Del. 2011).**

The assessment of administrative penalties under in §6005(b)(3) is entirely discretionary, as indicated by the words "may" and "discretion." Section 6005(b)(3) states that, "[i]n his or her discretion, the Secretary may impose an administrative penalty of not more than $10,000 for each day of violation." (emphasis added). The Secretary imposed an administrative penalty of $16,630.00 against Contractors in Order No. 2018-WH-0068 and administrative penalty of $14,800.00 against G&F in Order No. 2018-WH-0067. The Secretary can find a party culpable for the "violation" but choose in his/her discretion not to impose an administrative penalty under §6005(b)(3).

7 *Del. C.* §6005(b)(1) requires a penalty between $1000 and $10,000 for each completed violation; however, the Secretary did not impose penalties under that subsection. One's state of mind, in other words, their culpability, is a statutory factor that is required to be considered, making the assessment of an administrative penalty under Subsection (b)(3) entirely

discretionary. Subsection (b)(3) states that, "[a]ssessment of an administrative penalty shall be determined by the nature, circumstances, extent and gravity of the violation, or violations, ability of the violator to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation and such other matters as justice may require." (emphasis added). Culpability is defined as "[b]lameworthiness; the quality of being culpable. Except in cases of absolute liability, criminal culpability requires a showing that the person acted purposely, knowingly, recklessly or negligently with respect to each material element of the offense." *Black's Law Dictionary* (8th Edition). Strict liability is defined as "[l]iability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty to make something safe." *Black's Law Dictionary* (8th Edition).

Chapter 60 of Title 7 of the Delaware Code provides the Secretary with high level of discretion in enforcement actions, as recognized by the Superior Court in ***Breslin v. Richard,*** **[1994 WL 1892113 (Del.Super)]**. As stated by the Court in ***Richard***:

> Several sections of Chapter 60 shed light on how much latitude the General Assembly intended to give the Secretary in his enforcement decisions. First, the Secretary bears responsibility for enforcing the provisions of this Chapter. 'The Secretary shall enforce this chapter.' 7 *Del. C.* § 6005(a). Second, most of the statutes authorizing the Secretary to take specific enforcement action use the permissive

> "may" rather than the mandatory 'shall.' See 7 *Del. C.* §§ 6003(e) and (f), 6004(b), **6005(b)(3)**, 6606(5), 6010(a), (c), (d), and 6011(a) and (b). Third, the chapter is to be "'liberally construed in order to preserve the land, air and water resources of the State.' 7 *Del. C.* § 6020. The Court finds that the collective import of these code sections is that the Secretary has considerable discretion in how he chooses to enforce the provisions of Chapter 60. (emphasis added). At 4.

The Superior Court's decision completely overlooked the level of flexibility provided to the Secretary under Chapter 60 and the clear language of §6005(b)(3) giving the Secretary total discretion in terms of imposing an administrative penalty. The Superior Court erroneously held that because a party is strictly liable for a violation under Chapter 60, that the imposition of an administrative penalty under §6005(b)(3) is required despite the clear statutory mandate giving the Secretary the discretion whether to impose an administrative penalty when a violation has occurred. As stated by this Court in ***Richard***:

> The Court notes that it was also within the Secretary's discretion at the conclusion of the hearing to impose penalties on Richard. For completed or ongoing violations, the Secretary may seek a civil penalty in this Court "of not less than $1000 nor more than $10,000 for each completed violation." 7 *Del. C.* § 6005(b)(2). The Secretary "may impose an administrative penalty of not more than $10,000 for each day of violation." 7 Del.C. § 6005(b)(3). The Secretary chose not to seek any of these penalties. Footnote 8 @ *12

The administrative penalty provision found in §6005(b)(3) is permissive. Civil penalties are often permissive, rather than mandatory. ***Ryan's Party Store, Inc. v. U.S. Dept. of Ag.*, [2011 WL 1812663, at *2**

(E.D. Mich. 2011)] ("First, it must be noted that the authority to impose a civil money penalty is permissive, not mandatory."). ***Adams v. Stratton*, 831 So. 2d 290, 292 (La. App. 5th Cir. 2002)** ("[T]he language in the statute is all permissive. The statute provides that 'the claimant may be awarded penalties.'"); ***Abrams v. State, Dept. of Health, Bd. of Medicine*, 13 So. 3d 85, 89 (Fla. 4th Dist. App. 2009)** ("Subsection (2) states, in pertinent part: "When the board ... finds any person guilty of the grounds set forth in subsection (1) ... it may enter an order imposing one or more of the following penalties:...." Below and in their briefs, the parties wholly have ignored the Legislature's use of the permissive word "may" in subsection (1) regarding the taking of disciplinary actions, and in subsection (2) regarding the imposition of penalties. If the Board had construed the statute as permissive rather than mandatory, the outcome of this case may have been different.).

III. DNREC CANNOT RECOVER COSTS UNDER 7 *DEL. C.* §6005(C), AS THE SECRETARY NEVER SUBMITTED A DETAILED BILLING OF EXPENSES TO G&F AND CONTRACTORS, AS REQUIRED BY §6005(C)(1)

A. Questions Presented

Can DNREC recover costs when the Secretary did not submit a detailed billing of expenses?

B. Scope of Review

These Appellants respectfully submit that the scope of review is identical to that set forth in Argument I.B.

C. Merits of Argument

The Superior Court held that: (1) Section 6005(c) requires the Secretary to submit a detailed billing of expenses to the liable person; (2) that it is undisputed in this case that the Secretary never submitted the detailed billings for the costs assessed in the Secretary's Orders; (3) that DNREC concedes that it cannot recover costs in this case and that it is not seeking cost recovery; and (4) the Board did not have jurisdiction to review the Secretary's cost recovery decision. Opinion @ *11.

The Secretary never submitted a "detailed billing of expenses to the liable person," G&F and Contractors, as required by §6005(c)(1), therefore the process of appealing expenses as set forth therein, was never invoked.

§6005(c)(1) states that the "Secretary shall submit a detailed billing of expenses to the liable person." (emphasis added). Therefore, the appeal provision in §6005(c)(2) did not trigger. This exact scenario played out in a recently decided case on July 10, 2019, and the Superior Court ruled that DNREC cannot recover damages where the Secretary did not provide a detailed summary of expenses to the liable party under the Section at issue. ***Garvin, Secretary of DNREC v. Booth*, [2019 WL 3017419, at *6 (Del. Super.]** ("Section 6005(c) requires a Secretary seeking damages under that subsection to submit a detailed billing of expenses to the 'liable person.'). As stated by Judge Clark in *Booth*:

> "Admittedly, Section 6005(c)(1) provides the Secretary the discretion to bypass an administrative hearing and sue for the itemized expenses in Superior Court. Namely, that paragraph provides that in lieu of holding an administrative hearing on the detailed billing, ... the Secretary may initiate a civil action in any court of competent jurisdiction within the State of Delaware. Nevertheless, while this provision permits the Secretary to bypass an administrative hearing, it does not permit him to bypass his obligation to provide a detailed billing of expenses as a prerequisite to collecting those expenses. Rather, that paragraph creates a statutory notice requirement imposed at the administrative level of the process regardless of the Secretary's election of remedy. It provides that the Secretary can proceed directly to suit under that paragraph only after first providing a detailed billing of claimed expenses. Accordingly, because DNREC did not satisfy this condition, it may recover no damages in the instant suit under that paragraph. It further follows that discovery independently targeted at the expenses referenced in Section 6005(c)(1) will

not be appropriate." ***Id.*** (internal citations and quotations omitted) (emphasis added).

CONCLUSION

Based upon the reasons and authorities set forth herein, the Opinion of the Superior Court should be reversed and this case should be remanded for entry of an Order affirming the decision of the Environmental Appeals Board.

Respectfully submitted,

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