

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
OF THE STATE OF DELAWARE**

**DELAWARE SOLID WASTE
AUTHORITY,**)
)
)
 Appellant,)
)
 v.)
)
DELAWARE DEPARTMENT)
OF NATURAL RESOURCES AND)
ENVIRONMENTAL CONTROL,)
)
 Appellee.)

EAB Appeal No. 2018-08

GREGGO AND FERRARA, INC.,)
)
 Appellant,)
)
 v.)
)
DELAWARE DEPARTMENT)
OF NATURAL RESOURCES AND)
ENVIRONMENTAL CONTROL,)
)
 Appellee.)

EAB Appeal No. 2018-09

CONTRACTORS HAULING, LLC,)
)
 Appellant,)
)
 v.)
)
DELAWARE DEPARTMENT)
OF NATURAL RESOURCES AND)
ENVIRONMENTAL CONTROL,)
)
 Appellee.)

EAB Appeal No. 2018-10

DECISION AND FINAL ORDER

Pursuant to due and proper notice of time and place of hearing served on all parties in interest, and to the public, the three above-stated causes of action came before the Environmental Appeals Board (“Board”) on February 12, 2019, in the Auditorium of the Richardson & Robbins Building, located at 89 Kings Highway, Dover, Kent County, Delaware.

Members of the Board present and constituting a quorum were: Dean Holden (Chair), Michael Horsey, Robert Mulrooney, Sebastian LaRocca, and Frances Riddle. No Board Members disqualified themselves or were otherwise disqualified. Deputy Attorney General Kevin P. Maloney represented the Board.

Michael W. Teichman, Esquire and Elio Battista, Jr., Esquire represented Appellant Delaware Solid Waste Authority (“DSWA”). Jeffrey M. Weiner, Esquire represented Appellants Greggo and Ferrara (“G&F”) and Contractors Hauling (“CH”). Deputy Attorney General William J. Kassab represented Appellee Delaware Department of Natural Resources and Environmental Control (“DNREC”).

STATEMENT OF THE CASE AND PROCEEDINGS

Secretary’s Order No. 2018-WH-0066

On December 4, 2018, DNREC issued Secretary’s Order No. 2018-WH-0066 (the “DSWA Order”) which imposed an administrative penalty of \$18,174.80 on DSWA for three violations. The alleged violations arose out of DNREC’s conclusion that DSWA failed to ensure that vehicles transporting waste from the DSWA Pine Tree Corners Transfer Station (“PTCTS”) to the DSWA Central Solid Waste Management Center (“CSWMC”) landfill had a valid waste transporters permit. On December 19, 2018, Appellant DSWA filed a Notice of Appeal of the DSWA Order, pursuant to 7 *Del. C.* §§ 6008 and 6009 (the “DSWA Appeal”).

Secretary's Order No. 2018-WH-0067

On December 4, 2018, DNREC issued Secretary's Order No. 2018-WH-0067 (the "G&F Order") which imposed an administrative penalty of \$14,800.00 on G&F for violations occurring over multiple days from September 2017 through July 2018. The alleged violations arose out of DNREC's conclusion that G&F used an agent or subcontractor that did not possess a permit to transport solid waste in violation of *7 Del. Admin. C. § 1301-7.1.7*. On or about December 19, 2018, Appellant G&F filed a Notice of Appeal of the G&F Order, pursuant to *7 Del. C. §§ 6008 and 6009* (the "G&F Appeal").

Secretary's Order No. 2018-WH-0068

On December 4, 2018, DNREC issued Secretary's Order No. 2018-WH-0068 (the "CH Order") which imposed an administrative penalty of \$16,630.00 on CH for violations occurring over multiple days from September 2017 through July 2018. The alleged violations arose out of DNREC's conclusion that CH transported solid waste without a permit in violation of *7 Del. C. § 6003* and *7 Del. Admin. C. §1301-7.1.7*. On or about December 19, 2018, Appellant CH filed a Notice of Appeal of the CH Order, pursuant to *7 Del. C. §§ 6008 and 6009* (the "CH Appeal").

At a January 18, 2019, prehearing conference it was agreed by all parties that these three appeals be consolidated and considered by the Board in one proceeding due to their common underlying factual situations.

POSITIONS OF THE PARTIES

DNREC contends that the evidence of record supports the Secretary's decision that DSWA violated its permits by 1) allowing unpermitted vehicles to transfer waste from DSWA's transfer station, and 2) failing to identify CH in its Annual Reports. DNREC also contends the

administrative penalty imposed on DSWA is reasonable and that the Board lacks jurisdiction to review the cost recovery assessed.

DNREC contends that the evidence of record supports the Secretary's decision that G&F violated §7.1.7 of the Solid Waste Regulations by using an agent or subcontractor who does not hold a transporter's permit. DNREC also contends the administrative penalty imposed on G&F is reasonable and that the Board lacks jurisdiction to review the cost recovery assessed.

DNREC contends that the evidence of record supports the Secretary's decision that CH violated 7 Del. C. §6003 and §7.1.7 of the Solid Waste Regulations by transporting solid waste without a transporter's permit. DNREC also contends the administrative penalty imposed on CH is reasonable and that the Board lacks jurisdiction to review the cost recovery assessed.

DSWA argues that DNREC's requirement, found in PTCTS's Solid Waste facility Permit, SW-06/04, requiring that DSWA investigate and assure the existence and validity of DNREC transporter permits is unlawful because DSWA has no authority to monitor or enforce DNREC permits. Nevertheless, DSWA requires in its operation contracts that transporters obtain the necessary DNREC transporter permits. Additionally DSWA argues that it could not report that G&F was using vehicles owned by an affiliate in its Annual Report because it had no knowledge until after the Reports were filed. Finally, DSWA argues that the assessed penalty is grossly disproportionate to any offense especially where no environmental harm has occurred.

G&F and CH argue that CH routinely performs the hauling activities for all G&F-related entities and since G&F had a permit it was reasonable for CH to assume that it did not need to have its own separate permit. G&F and CH also argue that the assessed penalty by DNREC is grossly disproportionate to any offense, especially where no environmental harm has occurred.

SUMMARY OF THE EVIDENCE

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

Mr. Parkowski testified that:

- (1) He is Chief of Business and Governmental Services at the DSWA. Tr. at p. 49.¹
- (2) He has worked at the 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.
- (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.
- (4) A contract was awarded to Greggo and Ferrara to operate the PTCTS. Tr. at p. 53.
- (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.
- (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.

On cross-examination, Mr. Parkowski acknowledged that:

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

Mr. Wagner testified that:

¹ The abbreviation "Tr." is used throughout this Order 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.
- (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.
- (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.
- (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.
- (5) He had no knowledge of CH on March 1, 2018 when the Annual Report was required to be submitted. Tr. at p. 74.

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.
- (2) The driver of the truck was unable to supply a copy of a waste haulers’ permit and his check with DNREC verified the lack of permit. Tr. at p. 99.

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

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

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

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.
- (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 identification on the tractors. Tr. at p. 137.
- (3) G&F were using vehicles owned by CH to transport waste. Tr. at p. 142.
- (4) After the July 25, 2018 stop G&F used licensed contractors to transport waste.

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.
- (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.

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.
- (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.

Mr. Ferrara, III testified that:

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

(2) When he found out that CH was in violation for not having a permit he called Ms. Graizer 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.

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.

On redirect examination Mr. Ferrara, III testified that:

(1) CH bought all new trailers for the PTCTS job. Tr. at p. 174.

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.

Mr. Ferrara Jr. testified that:

(1) He is the President of G&F 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.

(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.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Prior to the February 12, 2019 hearing and in accordance with the Board's Regulations, DNREC provided the Board the Chronology consisting of the record before the Secretary with respect to each of the three Orders. In deciding these appeals, in addition to considering the Chronologies, the Board considered the written submissions of the Parties, the testimony of all witnesses and the oral argument from the Parties. Following the presentation of evidence and closing arguments by each of the Parties, the Board entered into executive session as permitted by 7 Del. C. § 6008(a) to deliberate.

After deliberation and careful review of Parties' respective arguments and evidence, the Board, for the reasons that follow, (1) by a vote of 5 to 0, reverses the Secretary's decision in EAB Appeal 2018-08; (2) by a vote of 5-0, remands the Secretary's decision to the Secretary with instructions to uphold the violation and rescind all assessed penalties and cost recovery in EAB Appeal 2018-09; and (3) by a vote of 5-0, remands the Secretary's decision to the Secretary with instructions to uphold the violation and rescind all assessed penalties and cost recovery in EAB Appeal 2018-10.

EAB Appeal 2018-08

The Board agrees with Appellant DSWA's contention that its PTCTS's facility permit condition requiring that DSWA investigate and assure the existence and validity of DNREC transporter permits is unlawful. The Board concludes as a matter of law that DSWA has no authority to monitor or enforce DNREC permits and that DNREC has no authority to impose such a condition. The Board also agrees with DSWA's contention that it could not report that G&F was using vehicles owned by an affiliate in its Annual Report because it had no knowledge until after the Report was filed. The Board expressly rejects DNREC's contention that it lacks jurisdiction

to address the assessment of cost recovery in a DNREC enforcement action. Seven Del. C. § 6008 contains no such limitation on the Board's jurisdiction. In light of these factual findings and conclusions of law, the Board finds no basis for the imposition of monetary penalties or cost recovery against DSWA.

EAB Appeal 2018-09

The Board finds as a matter of fact that G&F utilized an affiliated entity, CH, to transport waste from DSWA's PTCTS to DSWA's CSWMC under a contract with DSWA. Seven *Del. Admin. C.* §1301-7.1.7 provides: "Permitted solid waste transporters shall not use agents or subcontractors who do not hold permits for transporting solid waste." The Board finds as a matter of fact that CH applied for the needed permit before DNREC was aware that CH was transporting waste without it. The Board finds as a matter of fact that CH did not possess a transporters permit from September 2017 through July 2018 when it transported waste from PTCTS to CSWMC on behalf of G&F. Thus, the Board concludes as a matter of law that G&F used an agent or subcontractor (CH) who did not hold a permit to transport solid waste in violation of 7 *Del. Admin. C.* §1301-7.1.7. The Board finds, however, that such violation was the result of understandable oversight. Such oversight, combined with the fact that no environment harm or damage occurred, leads the Board to conclude that no penalty or cost recovery is appropriate.

EAB Appeal 2018-10

The Board also finds as a matter of fact that CH transported waste from DSWA's PTCTS to DSWA's CSWMC under a contract with DSWA. Seven *Del. Admin. C.* §1301-7.1.7 provides: "Permitted solid waste transporters shall not use agents or subcontractors who do not hold permits for transporting solid waste." The Board finds as a matter of fact that CH applied for the needed permit before DNREC was aware that CH was transporting waste without it. The Board finds as a matter of fact that CH did not possess a transporters permit from September 2017 through July

2018 when it transported waste from PTCTS to CSWMC on behalf of G&F. Thus, the Board concludes as a matter of law that CH transported solid waste without a permit in violation of 7 *Del. C.* § 6003. The Board finds, however, that such violation was the result of an innocent lack of communication between G&F and CH. The innocent nature of CH's mistake, combined with the fact that no environment harm or damage occurred, leads the Board to conclude that no penalty or cost recovery is appropriate.

After deliberate and careful review of Parties' respective arguments and evidence, (1) the Board, by a vote of 5 to 0, reverses the Secretary's decision in EAB Appeal 2018-08; (2) by a vote of 5-0, the Board votes to remand the Secretary's decision to the Secretary with instructions to uphold the violation and rescind all assessed penalties and cost recovery in EAB Appeal 2018-09; and (3) by a vote of 5-0, the Board votes to remand the Secretary's decision to the Secretary with instructions to uphold the violation and rescind all assessed penalties and cost recovery in EAB Appeal 2018-10.

IT IS SO ORDERED, this 8TH day of May, 2019.

Dean Holden, Chairperson

The following four Board members concur in this decision:

Date: _____

Robert Mulrooney
Board Member

Date: _____

Michael Horsey
Board Member

Date: _____

Frances Riddle
Board Member

Date: _____

Sebastian LaRocca
Board Member

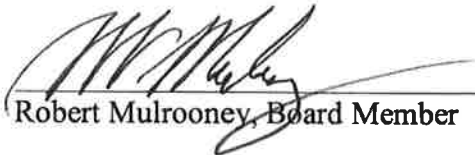
EAB Appeal Nos. 2018-08; 2018-09; 2018-10 Decision and Final Order

Date: 5/8/2019



Dean Holden, Chairperson

Date: 5/8/2019


Robert Mulrooney, Board Member

EAB Appeal Nos. 2018-08; 2018-09; 2018-10 Decision and Final Order

Date: 5/11/19


Michael Horsey, Board Member

EAB Appeal Nos. 2018-08; 2018-09; 2018-10 Decision and Final Order

Date: 5/2/19


Frances Riddle, Board Member

EAB Appeal Nos. 2018-08; 2018-09; 2018-10 Decision and Final Order

Date: May 6, 2019


Sebastian LaRocca, Board Member