

NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Article 27 of the Environmental Conservation Law of the State of New York and Part 360 of Title 6 of the Official Compilation of Codes, Rules, and Regulations of the State of New York, by

Brian F. Conlon, and
BCD Tire Chip Manufacturing, Inc.

Respondents.

Memorandum and Ruling
concerning
Respondents' Recusal Motion

DEC Case No.:
CO4-20150520-119

December 12, 2016

Proceedings

In a motion dated September 9, 2016, Mr. Conlon sought the following relief: (1) the Commissioner's recusal as the final decision maker for the captioned matter; (2) the recusal of all administrative law judges (ALJs) in the State of New York; and (3) the transfer of this State administrative proceeding to a federal venue. Mr. Conlon filed a supplement dated September 25, 2016. With a cover letter dated September 30, 2016, Department staff timely filed a memorandum of law opposing Mr. Conlon's motions.

I issued a ruling dated October 19, 2016. Consistent with my direction, I noted in the October 19, 2016 ruling (at 5) that the Commissioner received copies of the parties' papers. Consequently, the Commissioner would consider that portion of Mr. Conlon's September 9, 2016 motion concerning the Commissioner's recusal.

For the reasons outlined in the October 19, 2016 ruling (at 5-6), I denied Mr. Conlon's request for my recusal. In the October 19, 2016 ruling, I also denied Mr. Conlon's request for recusal of all New York State ALJs on that ground that the request was premature. To date, I am the only ALJ who has been assigned to this matter.

With respect to the transfer of this State administrative matter to a federal venue, I noted that I had addressed this request in my ruling dated September 8, 2016 (at 8) (*see* October 19, 2016 ruling at 6).

Consistent with the schedule outlined in the October 19, 2016 ruling, Mr. Conlon filed an appeal dated November 9, 2016. With a cover letter dated November 23, 2016, the Department replied with a memorandum of law.

By email dated December 8, 2016 (10:33 AM), Mr. Conlon advised the following. After conferring with Mr. Jeffrey, it was the parties' understanding that Mr. Conlon's November 9, 2016 appeal from my ruling dated October 19, 2016 concerning the recusal motion also included a motion to dismiss the charges alleged in the Department's July 6, 2016 complaint. Furthermore, the parties understood that the motion to dismiss, as stated in the November 9, 2016 appeal, is pending before me.

Discussion and Ruling

During the course of a proceeding, it is the ALJ's responsibility to maintain the administrative file. Therefore, when filing any appeals with the Commissioner, the parties must file copies of the papers related to the appeal with the ALJ who is presiding over the case. The ALJ is not responsible for reviewing the papers associated with an appeal from that ALJ's ruling, but to maintain a copy of them in the file. Accordingly, I did not thoroughly review the November 9, 2016 appeal with the expectation of finding any new motions that required my consideration. Furthermore, I note that Mr. Conlon did not request permission to expand the scope of the November 9, 2016 appeal to include any new motions.

On page one of Mr. Conlon's November 9, 2016 appeal,¹ Item No. 4 states, in full, as follows:

4. Motion to dismiss Complaint Case No. CO4-20150520-119 and to reverse Commissioner Martens' DEC File No. R4-2011-0505-53, Decision and Order made March 26, 2013. #4 to be addressed by Commissioner Seggos. Judge O'Connell has stated he does not have the authority to reverse a previous ruling.

The discussion in the November 9, 2016 appeal concerning Item No. 4 begins on page six, under the statement, "[m]y arguments for dismissal and for a reversal of BCD's 2013 ruling," and continues to the top of page eight. In this section of the November 9, 2016 appeal, Mr. Conlon discusses, among other things, the Commissioner's Decision and Order dated March 26, 2013, and argues for its reversal.

The September 8, 2016 ruling addressed Mr. Conlon's initial motion for reconsideration of the Commissioner's March 26, 2013 Decision and Order (at 4-5), as well as Mr. Conlon's request for the Department to reimburse him for the civil penalties associated with the March 26, 2016 Decision and Order that he has already paid (at 5-6). Because the September 8, 2016 ruling addressed these topics previously considered by the ALJ, Mr. Conlon's choice to seek review of these rulings in the November 9, 2016 appeal is proper.

In pages six through eight of the November 9, 2016 appeal, Mr. Conlon discusses the potential environmental harm associated with the chipped tire aggregate. According to Mr. Conlon, no environmental harm exists. In addition, Mr. Conlon references a provision in the New York State Environmental Conservation Law (ECL), which he argues would provide an exemption applicable to this matter. In the November 9, 2016 appeal (at 7), Mr. Conlon cites the potentially applicable exemption as ECL IV.A.1. Also, in his December 8, 2016 email (10:33 AM), Mr. Conlon references a statute from the State of Ohio concerning the beneficial uses of scrap tires. Moreover, he asserts that his property, which is the subject of the captioned enforcement matter, has been designated an agricultural district pursuant to the New York State Agriculture and Markets Law. However, it is not clear from the discussion presented in the November 9, 2016 appeal (at 6-8) whether these arguments relate to the discussion concerning either the reconsideration of the March 26, 2016 Decision and Order, or the new motion to dismiss.

Nevertheless, the September 8, 2016 ruling (at 6) states that at the hearing, the respondents may show that the 4"x4" tire chips at the farm would not result in either any environmental harm, or adversely impact public health.

In addition, I rule here as follows. During the hearing, respondents may present legal arguments and any associated factual information to support the contention that an exemption may apply. Moreover,

¹ The pages of the November 9, 2016 appeal are not numbered. To provide references, I have numbered the pages of the November 9, 2016 appeal sequentially from 1 to 13, inclusive. After the thirteenth page, Mr. Conlon attaches Items 1 through 3.

designations made by the New York State Department of Agriculture and Markets, as they apply to the site where the alleged violations occurred, are also relevant. During the hearing, respondents are encouraged to present any proof demonstrating agricultural designations, and the rights that may be associated with such designations.

Finally, to the extent that Mr. Conlon's motion to dismiss, as presented in the November 9, 2016 appeal, is before me, I deny the motion based on the following. A fair reading of the July 6, 2016 complaint contains all of the elements required by State Administrative Procedure Act § 301(2) and 6 NYCRR 622.3(a), and is sufficiently specific to apprise respondents of the charges alleged against them. Furthermore, the complaint states the relevant regulatory provisions alleged to have been violated, and describes the alleged violations with sufficient particularity to allow respondents to prepare defenses. (See *Matter of Grout*, Ruling of the Chief Administrative Law Judge on Motions, dated December 12, 2014 at 6-7.)

Appeals

Pursuant to 6 NYCRR 622.10(d)(2), Mr. Conlon must obtain permission from the Commissioner to file an appeal from the ruling, as set forth above, denying his motion to dismiss the charges alleged in the Department's July 6, 2016 complaint. To obtain permission to file an appeal, Mr. Conlon should send a letter to Commissioner Basil Seggos, Attn: Louis A. Alexander, Assistant Commissioner for Hearings and Mediation Services, 625 Broadway, 14th Floor, Albany, New York 12233-1010. In the letter, Mr. Conlon will need to explain why not filing an appeal at this point in the proceeding would be unduly prejudicial, or would result in significant inefficiency in the hearing process (*see* 6 NYCRR 622.10[d][2][ii]).

Because this is a communication with the Commissioner, the letter must be in writing, and it must be received by December 22, 2016. If Mr. Conlon files a letter seeking permission to file an appeal, Department staff may respond, and the Department's response must be received by January 4, 2017. Subsequently, the Commissioner will advise the parties whether he will grant permission to consider an appeal. If granted, the Commissioner will provide a schedule for filing the appeal and response.

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
December 12, 2016