STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 13, Title 3 of the Environmental Conservation Law (ECL) of the State of New York, and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

RULING

-by-

DEC Case No.
CO1-20190213-51

JOSEPH MAGADINO

Respondent.

Staff of the New York State Department of Environmental Conservation (Department) served respondent Joseph Magadino (respondent) with a notice of hearing and complaint, dated April 4, 2019, alleging violations of ECL 13-0342 and its implementing regulations, 6 NYCRR 40.1(c)(1) and 44.4(a)(1), for failing to timely submit eight vessel trip reports (VTRs) or reports stating that no trips were made relating to respondent's marine commercial food fish license and commercial crab permit. The complaint seeks an order of the Commissioner: (i) finding respondent in violation of 6 NYCRR 40.1(c) and 44.4(a); (ii) assessing a civil penalty in the amount of two thousand dollars ($2,000); and (iii) granting such other relief as the Commissioner may deem appropriate.

Respondent answered the complaint by letter dated April 8, 2019 (Answer). Respondent's Answer acknowledged receipt of the complaint. The Answer denies the violations based on respondent's alleged filing of federal VTRs and claims that the Department does not have jurisdiction over "federally documented fishing operations holding federally limited acces[s] permits that didn't even fish during the time frame stated in the complaint" (*see* Answer ¶ 10). The Answer also demands discovery of documents related to other similar enforcement matters, proof of the mailing of documents to respondent, an explanation of why Department staff is pursuing this matter, and a request to be provided an attorney due to respondent's income level. Respondent also seeks damages because Department staff allegedly withheld the issuance of respondent's 2019 food fish license, and demands a dismissal of staff's complaint.

By letter dated April 10, 2019 (Motion), respondent moved to have the venue of the matter changed to the federal court system because respondent is a "federally documented fishing operation" (*see* Motion ¶¶ 3, 4 and 6). Respondent claims the plaintiff, complainant and judge are one and the same, and share the same office and same department, therefore respondent cannot be given a fair and just hearing (*id.* ¶ 1). Respondent claims that any outcome

would be biased against him and repeats his request to be assigned counsel to represent him in this matter (*id.* ¶¶ 7 and 9).

By motion dated April 15, 2019, Department staff opposed respondent's motion and moved for clarification or dismissal of respondent's affirmative defenses (Cross-Motion). Department staff filed a memorandum of law in opposition to respondent's Motion and in support of staff's Cross-Motion, dated April 15, 2019 (Memorandum). Staff attached seven exhibits to the Memorandum.[1]

By letter dated April 18, 2019 (Response), respondent opposed Department staff's cross-motion and repeated his request to be appointed an attorney because he cannot afford one. The Response also contained counter-claims against the Department. The first counter-claim seeks $250,000 in damages because the Department allegedly refused to issue respondent's 2019 license and permit. The second counter-claim seeks $1,000,000 in damages for the Department's "bullying actions and negligence to [respondent's] civil rights and orchestrated demands" (see Response ¶¶ 10 and 16). Respondent attached five exhibits to the Response. (S*ee* Appendix A, attached hereto [listing documents submitted on motions].)

Discussion

I. Respondent's request for an attorney

Respondent requests an attorney be provided to represent him in this matter. Respondent bases this request on his limited income. Respondent, however, does not provide any legal authority in support of his request. The right to counsel found in the Sixth Amendment to the Constitution of the United States and New York Constitution article 1 section 6 does not extend to administrative proceedings. "Aside from certain narrow exceptions, the right to counsel does not extend to civil actions or administrative proceedings. Due process considerations in such cases require only that a party to an administrative hearing be afforded the opportunity to be represented by counsel." (*See Matter of Baywood Elec. Corp. v New York State Dept. of Labor*, 232 AD2d 553, 554 [2d Dept 1996] [internal citations omitted]). None of the narrow exceptions provided by case law are present here.

Respondent has the right to be represented by counsel, but counsel will not be provided. Therefore, respondent's request to have counsel assigned to represent him is denied.

II. Respondent's motion to dismiss

Respondent's motion to dismiss Department staff's complaint appears to be based on subject matter jurisdiction because respondent argues that he is the holder of federal licenses subject to federal laws. Therefore, respondent requests that the matter be dismissed and moved

[1] Although it is irregular for a party to reference exhibits that have not been introduced through an affirmation or affidavit, there has been no objection from respondent.

to federal court. Respondent also argues that he cannot receive a fair hearing due to bias because this administrative hearing is conducted by, and any final decision is rendered by, members of the same agency. Respondent requests that the matter be dismissed and moved to federal court based on alleged bias.

A. Jurisdiction

Respondent has not provided a legal or factual basis regarding his jurisdictional argument. Respondent may be the holder of federal licenses subject to federal laws, but as the holder of New York State licenses and permits to fish in New York's marine district, issued by the Department, respondent must comply with the Environmental Conservation Law and regulations promulgated pursuant thereto that authorize him to fish in New York. As Department staff points out, respondent has not demonstrated how federal courts have subject matter jurisdiction over the alleged violations of state law and state regulations in this matter.

To the extent that respondent has argued that he filed vessel trip reports with the federal databases, and therefore satisfied the Department's requirements, that is an issue of fact and law that will be taken up at hearing. As discussed below, respondent's counterclaims will not be addressed in this administrative proceeding, and therefore, will not be considered in support of respondent's jurisdictional argument.

I conclude that this administrative enforcement matter involves issues of state law. Therefore, respondent's requests to dismiss and to change the venue of this administrative enforcement proceeding to a federal court based on subject matter jurisdiction are denied.

B. Alleged Bias

Respondent argues that he cannot receive a fair hearing because the Department employs the prosecutors and decision makers. Respondent, however, has not identified any specific instances of bias that would preclude the Office of Hearings and Mediation Services (OHMS) from hearing this matter. State Administrative Procedure Act § 303 requires hearings to be conducted in an impartial manner. Furthermore, this proceeding is governed by 6 NYCRR part 622, which provides that the administrative law judge (ALJ) will conduct the hearing in a fair and impartial manner and any party may file a motion, together with supporting affidavits, requesting that the ALJ be recused on the basis of personal bias or other good cause (*see* 6 NYCRR 622.10[b][2][i] and [iii]).

Respondent's claim of institutional or agency bias is unsupported. At this point in the proceeding, respondent appears to be raising an argument that he will not be afforded due process by the Department. "In evaluating a claim of biased decisionmaking, the inquiry centers around whether 'the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" (*Matter of Bath Petroleum Storage, Inc.*, [*Bath Petroleum*] Ruling, December 10, 2004, at 4, *quoting Withrow v Larkin*, 421 US 35, 47 [1975]). To succeed on his motion, respondent must show "an unacceptable probability of actual bias on

the part of those who have demonstrable decisionmaking power in this matter." (*Bath Petroleum* at 4.) As discussed in *Bath Petroleum*, respondent cannot make such a showing, because the Office of General Counsel and Division of Marine Resources staff play no role in the deliberations in this proceeding and are on the same footing as any other party in a Department hearing. Department staff has the burden of proving the allegations of its complaint by a preponderance of the evidence and respondent has the burden of proving his affirmative defenses by a preponderance of the evidence.

Respondent also claims that the Department's attorneys and ALJs "have access to each other to discuss this case without his representation" (*see* Response ¶ 5). OHMS is a division separate and distinct from the Department's Office of General Counsel and program staff. The ALJs report to the Commissioner through the Deputy Commissioner for Hearings and Mediation Services. The ALJs do not communicate with the Office of General Counsel or program staff during the adjudicatory process. Therefore, the prosecutorial and adjudicatory functions are separate within the Department.

To further protect due process, State Administrative Procedure Act § 307(2) and 6 NYCRR 622.16 prohibit the ALJs, Deputy Commissioner of Hearings and Mediation Services and the Commissioner from communicating with any party or that party's representative in connection with any issue without providing proper notice to all parties. Contrary to respondent's argument, the undersigned ALJ does not have access to and cannot communicate (in writing or orally) with the Department's attorneys or program staff regarding this matter without providing notice to respondent and giving respondent the opportunity to be part of that communication.

I conclude that respondent has not identified any specific instances of bias. Respondent's requests to dismiss and to change the venue of this administrative enforcement proceeding to federal court based on alleged bias are denied.

III. Department staff's cross-motion for clarification or dismissal of respondent's affirmative defenses

A. Cross-Motion to Clarify Affirmative Defenses

"Department staff may move for clarification of affirmative defenses . . . on the grounds that the affirmative defenses [pleaded] in the answer are vague or ambiguous and that staff is not thereby placed on notice of the facts or legal theory upon which respondent's defense is based" (6 NYCRR 622.4[f]). Respondent is required to provide a statement of the facts which constitute the grounds for each of respondent's affirmative defenses (*see* 6 NYCRR 622.4[c]).

The first question that must be answered on a motion to clarify affirmative defenses is whether the defense pleaded is an affirmative defense or a denial labeled as a defense. If the defense is nothing more than a denial labeled as a defense, clarification is not authorized under part 622 (*see Matter of Truisi*, Ruling of the Chief ALJ, April 1, 2010, at 5). If the defense is an

affirmative defense, then it must be determined whether staff is placed on notice of the facts or legal theory upon which respondent's defense is based. In other words, is the affirmative defense specific enough to notify staff of the nature of the defense and the activities or incidents upon which it is based, and in so doing, does it provide staff with an opportunity to respond to the defense?

1. First affirmative defense – no prior provable method of service and requests were made in the timeframe mentioned in the complaint

Department staff argues that this statement lacks sufficient clarity to put staff on notice of the facts or legal authority upon which the defense is based. Respondent does not argue that the complaint was not properly served. Respondent's Answer states, in part, "In closing I hope you would take the information answered, alleged and demanded above and grant a motion to dismiss on the grounds that no prior provable method of service and requests were made in the timeframe mentioned in the complaint" (*see* Answer ¶ 10). The complaint does not contain any allegation regarding the service of any documents or requests. Staff's statement of readiness references the service of the complaint by certified mail on April 4, 2019. Respondent's Answer states that the complaint was received on April 8 at 4:00 p.m. (*see* Answer ¶ 5). Staff's cover letter, served with the complaint, states,

> "Previously, you received a Notice of Violation (NOV) notifying you of your failure to submit New York State Vessel Trip Reports (VTRs) for the 2018 fishing season . . . and requesting that you submit the missing reports by February 4, 2019. In addition, you received an Order on Consent constituting the Department's offer to settle the matter without litigation. The Order further notified you that the opportunity to settle the violations would expire on March 28, 2018. [2]
>
> "Due to your failure to respond within the time frame set out in the Order, enclosed is a Notice of Hearing and Complaint requiring you to file an Answer within twenty days of receipt of this notice and to appear at a hearing scheduled for June 4, 2019 at 12:00 PM." (Memorandum, Exhibit 5, cover letter, at 1)

Respondent's motion to dismiss states that respondent "had no knowledge nor were we available to receive prior notices of your requests or claims prior to the certified mail [of the complaint] we received" (*see* Respondent's Motion ¶ 5.) It appears from respondent's Answer and Motion that respondent is claiming he did not receive staff's reminders to file VTRs, the NOV or Department staff's settlement offer. Respondent, however, claims that he did submit VTRs to the Department (*see* Motion ¶ 2; Answer ¶ 10). The Answer is unclear whether respondent is claiming he submitted VTRs as a result of receiving notices, the NOV, order or

[2] Department staff's cover letter and memorandum reference the proposed order on consent providing respondent the opportunity to settle the matter by March 28, 2019. The order on consent attached to staff's memorandum as Exhibit 4, however, provides that respondent must file the missing VTRs and pay a penalty by April 18, 2019. Staff has not explained the discrepancy. As noted above, the complaint was received by respondent on April 8, 2019.

something else. Respondent's Response, however, demonstrates that respondent allegedly submitted the VTRs in March 2019 (*see* Response ¶ 6, Exhibits 1, 2, 3 and 5).

Because Department staff's complaint does not allege any requests or claims were sent to respondent, respondent's stated defense is not a denial of any of staff's allegations. Respondent's stated defense is an affirmative defense as it raises facts not appearing on the face of the complaint (*see* CPLR 3018[b]). Based on respondent's Answer, Motion and Response, I conclude that staff is placed on notice of the facts alleged by respondent. To the extent that respondent's stated defense lacks detail concerning the facts or legal theory upon which the defense is based, the motion to clarify should be denied and staff directed to utilize discovery to obtain the detail. Accordingly, Department staff's cross-motion to clarify respondent's first affirmative defense is denied.

2. Second affirmative defense - the claims stated in the complaint are barred in whole or part because respondent submitted VTRs to federal authorities

Department staff argues that respondent failed to meet his burden of proof or to place Department staff on notice of the facts or legal theory upon which this defense is stated. In past matters, staff has described how holders of commercial fishing licenses and permits may satisfy the Department's VTR requirements (*see e.g. Matter of Triton's Treasure Inc*., Order of the Commissioner, September 7, 2018, *adopting* Hearing Report at 2; *Matter of Offshore Harry Sportfishing & Outfitting, Inc.*, Order of the Commissioner, October 9, 2018, *adopting* Hearing Report at 2). The regulations also provide, in part,

> "Any New York license holder who is also the holder of a Federal fishing permit issued by NOAA Fisheries Service must instead satisfy the reporting requirements specified by NOAA Fisheries Service. If requested in writing by the department, New York license holders who also hold Federal fishing permits shall submit to the department the State (blue) copy of the fishing vessel trip report (NOAA Form No. 88-30) for the month or months identified in the written notification." (6 NYCRR 40.1[c][1] and 44.4[a][1].)

Staff's memorandum describes how staff will prove at hearing that staff could not confirm respondent's claim of fishing under federal permits and filing VTRs with the National Oceanic and Atmospheric Administration's (NOAA) Southeast Regional Office (SERO). Staff further describes how staff searched the Standard Atlantic Fisheries Information System (SAFIS) and NOAA's database to determine whether respondent submitted VTRs to those databases during 2018.

The fact that staff could search the various databases to determine whether there is any validity to respondent's claim demonstrates that the facts and legal theory contained in respondent's alleged defense were understood by staff. Respondent is not required to present proof of his alleged defense at the pleading stage, although he may have supported his motion to dismiss with such proof. Accordingly, Department staff's motion for clarification of the second affirmative defense is denied.

B. Cross-Motion to Dismiss Affirmative Defenses

In contrast to motions to clarify affirmative defenses, which address only the sufficiency of the notice provided by the affirmative defense, motions to dismiss affirmative defenses are addressed to the substance of the defense (*see Foley v D'Agostino*, 21 AD2d 60, 64-65 [1st Dept 1964]). Motions to dismiss may challenge the pleading on its face (fails to state a defense) or may seek to establish, with supporting evidence, that a claim or defense lacks merit as a matter of law (*see Matter of Truisi*, at 10).

When staff does not support its motion with evidentiary material, respondents' affirmative defenses will be examined to determine whether defenses are stated. The mere conclusory statement of a defense, however, is insufficient. Respondents must plead the elements of each of their affirmative defenses even though, on a motion to dismiss the defenses, respondents' Answer will be liberally construed, the facts alleged accepted as true, and respondents afforded every possible inference. (*See Matter of Truisi*, at 10 [citing *Leon v Martinez*, 84 NY2d at 87; *Butler v Catinella*, 58 AD3d 145, 148 (2d Dept 2008)]; *Matter of ExxonMobil Oil Corp.*, ALJ Ruling, Sept. 13, 2002, at 3.)[3] A motion to dismiss affirmative defenses will be denied if the answer, taken as a whole, alleges facts giving rise to a cognizable defense. (*See Matter of Truisi*, at 10 [citing *Foley v D'Agostino*, 21 AD2d 60, 64-65 (1st Dept 1964)].) Moreover, "if there is any doubt as to the availability of a defense, it should not be dismissed." (*See Matter of Truisi*, at 10 [internal citation omitted].) In addition, affidavits submitted in opposition to the motion may be used to save an inartfully pleaded, but potentially meritorious, defense (*see Faulkner v City of New York*, 47 AD3d 879, 881 [2d Dept 2008]).

Defenses that merely plead conclusions of law without supporting facts are insufficient to state a defense (*see Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75, 80, 84 [1st Dept 2015]; *see also* 6 NYCRR 622.4[c] [requiring respondent to explicitly assert any affirmative defense together with a statement of the facts which constitute the grounds of each defense asserted]). Lastly, motions to dismiss may not be used to strike denials (*see Rochester v Chiarella*, 65 NY2d 92, 101 [1985]).

1. First affirmative defense - no prior provable method of service and requests were made in the timeframe mentioned in the complaint

In the alternative, Department staff moves to dismiss the first affirmative defense that respondent did not receive any documents or notices before receiving the notice of hearing and complaint. As discussed above, that stated defense constitutes an affirmative defense and staff may seek details through discovery. At hearing, respondent bears the burden of demonstrating through a preponderance of the evidence that he did not receive any notices from the Department before receiving the notice of hearing and complaint. In addition, respondent will need to

[3] Section 622.4(c) of 6 NYCRR reads: "The respondent's answer must explicitly assert any affirmative defenses together with a statement of the facts which constitute the grounds for each affirmative defense asserted."

demonstrate whether this is a defense against the alleged violations (liability), a defense against the penalty requested by staff, or both.

I conclude that respondent sufficiently stated a cognizable defense. Accordingly, staff's motion to dismiss the first affirmative defense is denied.

2. Second affirmative defense - the claims stated in the complaint are barred in whole or part because respondent submitted VTRs to federal authorities

In the alternative, Department staff also moves to dismiss the second affirmative defense that respondent submitted VTRs for 2018 to the federal authorities (NOAA). As stated above, respondent has sufficiently stated a cognizable defense. Again, at hearing, respondent bears the burden of demonstrating through a preponderance of the evidence that he filed the VTRs with NOAA and the date(s) of those filings.

Respondent has sufficiently stated a cognizable defense. Accordingly, Department staff's cross-motion to dismiss respondent's second affirmative defense is denied.

IV. Respondent's counterclaims

Respondent asserts two counterclaims in his response to Department staff's cross-motion to clarify or dismiss affirmative defenses. The Environmental Conservation Law and the Department's administrative enforcement hearing regulations, 6 NYCRR part 622, make no provision for the assertion of a counterclaim in the administrative forum (*see* 6 NYCRR part 622; *see also, Matter of David E. Hansen*, Order of the Commissioner, January 3, 2000, *adopting* Hearing Report). Instead, these claims must be pursued in a court of competent jurisdiction (*see Matter of Edivane Franco*, Ruling on Pre-Hearing Motions, June 18, 2008, at 3).

Accordingly, respondent's counterclaims will not be considered in this administrative enforcement proceeding. Furthermore, to the extent respondent argues his alleged counterclaims support removing this matter to a federal court, that argument must also be pursued in a court of competent jurisdiction.

RULING

For the reasons stated above,

1. Respondent's motion to be assigned an attorney is denied.
2. Respondent's motion to dismiss the complaint is denied.
3. Respondent's motion to change the venue of the proceeding to federal court is denied.
4. Department staff's motion to clarify the first and second affirmative defenses is denied.

5. Department staff's motion to dismiss the first and second affirmative defenses is denied.

A conference call will be scheduled after the parties have been served with this ruling to discuss the hearing scheduled for June 4, 2019.

_____/s/_____
Michael S. Caruso
Administrative Law Judge

Dated: Albany, New York
May 1, 2019

Appendix A

Matter of Joseph Magadino
DEC Case No. CO1-20190213-51
Motion to Dismiss or Change of Venue

I. Respondent's letter motion to dismiss or change of venue to federal court, dated April 10, 2019

II. Cover letter from Anne Haas, Esq. to Chief Administrative Law Judge James McClymonds, dated April 15, 2019, attaching staff's opposition to respondent's motion, cross-motion and staff's response to discovery demands

III. Department Staff's Motion for Clarification or Dismissal of Affirmative Defenses and Memorandum of Law in Opposition to Respondent's Motion to Dismiss or for Change of Venue to Federal Court and Motion for Clarification or Dismissal of Affirmative Defenses, attaching exhibits 1-8

1. Undated postcard notices for Joseph Magadino Public ID 2290231 – noting missing fishing trip reports (address side of the postcards not provided)
2. Letter from Julia Socrates to Joseph Magadino, dated November 13, 2018, regarding failure to submit vessel trip reports for 2018
3. Notice of Violation from Julia Socrates to Joseph Magadino, dated January 4, 2019, regarding failure to submit vessel trip reports for 2018
4. In the Matter of Joseph Magadino, [proposed] Order on Consent, Index # CO1-20190213-51
5. Cover letter from Anne Haas, Esq. to Joseph Magadino, enclosing notice of hearing, complaint, and statement of readiness, all dated April 4, 2019
6. Letter from Joseph Magadino to James T. McClymonds, Anne Haas, Esq. and Phil Boyle NYS senator, dated April 8, 2019, answering complaint and containing discovery demands
7. Letter from Joseph Magadino to Anne Haas and Chief Administrative Law Judge James T. McClymonds, dated April 10, 2019, moving to dismiss and or change venue to federal court

IV. Department staff's Response to Respondent's Discovery Demands, dated April 15, 2019, with attachment A

V. Affidavit of Service of Lisa Kranick, sworn to April 15, 2019 (service of items II, III and IV above)

VI. Respondent's response to Department staff's motion, dated April 18, 2019, attaching exhibits 1-5

1. Fax log dated March 14, 2019, 9:59 a.m.

2. Fax log dated March 14, 2019, 10:03 a.m.
3. Fax log dated March 25, 2019, 1:34 p.m.
4. Letter from NYSDEC Office of General Counsel to Joseph Magadino, dated February 21, 2019 (first page only)
5. NYS Not Fishing Form – 2018, dated February 26, 2019