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ORDER DENYING APPELLATE REVIEW, SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS (JANUARY 16, 2025)

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

JAMES J. DECOULOS

v.

BOARD OF REGISTRATION OF HAZARDOUS WASTE SITE CLEANUP PROFESSIONALS

RE: Docket No. FAR-30133

Middlesex Superior Court No. 1981CV00663
AC. No. 2023-P-0663

NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW

Please take note that on January 16, 2025, the application for further appellate review was denied. (Dewar, J., recused)

Very truly yours,
The Clerk's Office

Dated: January 16, 2025

To: James J. Decoulos
Christine Fimognari, A.A.G.

DOCKET ENTRIES	
1/16/2025 #4	DENIAL of FAR application

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0, COMMONWEALTH OF MASSACHUSETTS APPEALS COURT (NOVEMBER 13, 2024)

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

JAMES J. DECOULOS

v.

BOARD OF REGISTRATION OF HAZARDOUS WASTE SITE CLEANUP PROFESSIONALS

2023-P-0663

Before: MASSING, HAND & SMYTH, JJ.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, James J. Decoulos, appeals from a Superior Court judgment affirming the decision of the Board of Registration of Hazardous Waste Site Cleanup Professionals (board) to suspend Decoulos's licensed site professional (LSP) license for one year.[1] After investigation and a hearing before a presiding officer

[1] The Commissioner of the Massachusetts Department of Environmental Protection was also named as a defendant in this action, but the claims against him were dismissed by a Superior Court judge and Decoulos does not challenge that decision on appeal.

from the Office of Appeals and Dispute Resolution (OADR), the board determined that Decoulos had violated the rules of professional conduct for LSPs, 309 Code Mass. Regs. §§ 4.00 (1999), and ordered that Decoulos's license be suspended for one year and that he complete additional continuing education credit. On appeal, Decoulos contends that (1) the board's decision was arbitrary and capricious and (2) his constitutional rights were violated during the disciplinary proceedings against him. We affirm.

Background.[2]

LSPs are "hazardous waste site cleanup professionals" authorized to oversee assessment and remediation of hazardous waste under G. L. c. 21E. G. L. c. 21A, § 19C. The board licenses and regulates LSPs under G. L. c. 21A, § 19C. The Massachusetts Department of Environmental Protection (MassDEP) oversees site cleanups under G. L. c. 21E, and the implementing regulations known as the Massachusetts Contingency Plan (MCP), 310 Code Mass. Regs. §§ 40.0000 (2014). The discipline imposed by the board arose from Decoulos's actions at two hazardous waste cleanup sites.

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[2] We recount the facts primarily as found in the board's final findings of fact and rulings of law, and the presiding officer's recommended decision, *See Olde Towne Liquor Store, Inc. v. Alcoholic Beverages Control Comm'n*, 372 Mass. 152, 154 (1977) ("It is not for this court to substitute its judgment on questions of fact for that of the agency"). On appeal, Decoulos does not challenge the board's factual findings.

1. Site A: Eagle gas station, 131 Main Street, Carver.

On January 21, 2003, Eagle gas station (Eagle) hired Decoulos as the LSP to address a light nonaqueous phase liquid (LNAPL)[3] release on the property, Site A. Decoulos submitted his first proposal to the MassDEP to address the contamination on January 27, 2003. On May 16, 2003, Decoulos discovered a sheen indicating diesel contamination on South Meadow Brook where it passes under Main Street and notified the MassDEP.

From March 2003 to May 2005, Decoulos and the MassDEP exchanged proposals on how to address the contamination and determine its source. The MassDEP repeatedly approved proposals for an active LNAPL recovery system, but Decoulos only used a passive LNAPL recovery system and proposed further passive methods. Decoulos claimed that the contamination came from stormwater surface runoff but did not address the MassDEP's requests for further information to support this claim. The MassDEP denied several systems proposed by Decoulos to treat the brook contamination because it found Decoulos did not provide sufficient information to support his proposals and failed to investigate the possibility of a subsurface diesel leak from the gas station. It was not until May 2005 that Decoulos first acknowledged the possibility of subsurface contamination. After Decoulos submit-

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[3] Light nonaqueous phase liquid is defined as "oil and/or hazardous material that is present in the environment as a separate phase liquid" and is lighter than water. 310 Code Mass. Regs. § 40.0006.

ted an update to the MassDEP in July 2005, Eagle hired a different LSP.

2. Site B: Speedy Lube, 633 North Main Street, Randolph.

In 1998, a prior LSP reported gasoline contamination at Site B, which had been a gas station and auto repair shop since 1935. In or around May 2002, the site owner, Speedy Lube, retained Decoulos as the LSP to respond to the contamination. After assessing the contamination on June 4, 2002, by using two rounds of groundwater sampling, Decoulos filed a response action outcome (RAO) statement, indicating that the site had achieved a level of no significant risk. The MassDEP issued a notice of noncompliance on November 6, 2003, stating that Decoulos's RAO was not valid. The MassDEP determined that Decoulos incorrectly applied the MCP and the MassDEP guidelines by using improper calculations and incorrectly applying MCP risk assessment practices. The incorrect calculations resulted in Decoulos's incorrect determination that there was "no significant risk" at the site, despite data showing increasing levels of contamination.

3. Procedural history.

On December 15, 2005, the board received a complaint regarding Decoulos's work at Site A; a complaint response team reviewed Decoulos's audit history and uncovered potential violations at Site B. As a result of the investigation into both sites, the complaint response team recommended a one-year suspension of Decoulos's LSP license. In a January 8, 2010, order to show cause, the board alleged that Decoulos failed to act with reasonable care and diligence in violation of LSP

professional competency standards, 309 Code Mass. Regs. § 4.02(1), and that he failed to meet the requirements of the MCP in violation of the LSP rules of professional responsibility, 309 Code Mass. Regs. § 4.03(3)(b). Decoulos filed an answer to the show cause order and requested an adjudicatory hearing. The board delegated the hearing to a presiding officer from the OADR. On September 7, 2012, after conducting an administrative hearing with the presentation of witnesses and evidence, the presiding officer issued a recommended decision finding that the board had proved Decoulos's violations by an "overwhelming preponderance of the evidence." The board voted to affirm and adopt the presiding officer's recommended decision on March 20, 2014. After Decoulos and the board attempted unsuccessfully to reach a settlement, the board issued final findings of fact and rulings of law, concluding that Decoulos had violated the LSP rules of professional conduct. The prosecuting attorney recommended discipline of a one-year license suspension and continuing education hours. Decoulos filed his opposition to the board's ruling and, on January 16, 2019, after hearing oral argument, the board issued a final order imposing the disciplinary sanctions as recommended by the prosecuting attorney.

Decoulos appealed from the final order by filing a complaint in the Superior Court under G. L. c. 30A, § 14, arguing, inter alia, that his constitutional rights had been violated, the board exceeded its statutory authorization, there were clear errors of law, the board's findings were unsupported by substantial evidence, and the board's and presiding officer's actions were arbitrary and capricious. Decoulos filed a motion for judgment on the pleadings, and the board filed a

cross motion. Noting the "limited and highly deferential standard of review," the Superior Court judge ordered judgment for the board. This appeal followed.

Discussion.

1. Standard of review.

"We review de novo a judge's order allowing a motion for judgment on the pleadings under Mass. R. Civ. P. 12 (c), 365 Mass. 754 (1974)." *Merriam v. Demoulas Super Mkts., Inc.*, 464 Mass. 721, 726 (2013), citing *Wheatley v. Massachusetts Insurers Insolvency Fund*, 456 Mass. 594, 600 (2010). In reviewing a Superior Court judge's ruling under G. L. c. 30A, § 14, an appellate court "conduct[s] an analysis of the same agency record, and there is no reason why the view of the Superior Court should be given any special weight." *Southern Worcester County Regional Vocational Sch. Dist. v. Labor Relations Comm'n*, 377 Mass. 897, 903 (1979). We review the entirety of an administrative record. G. L. c. 30A, § 14 (7). *See Chief Justice for Admin. & Mgt. of the Trial Court v. Commonwealth Employee Relations Bd.*, 79 Mass. App. Ct. 374, 380 (2011).

This court may set aside an agency decision "if it determines that the substantial rights of any party may have been prejudiced because the agency decision is . . . [i]n violation of constitutional provisions; or . . . [a]rbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law." G. L. c. 30A, § 14 (7). This standard of review is highly deferential. *Friends & Fishers of the Edgartown Great Pond, Inc. v. Department of Envtl. Protection,* 446 Mass. 830, 836 (2006). We give "due weight to the experience, technical competence, and specialized knowledge of the agency,

as well as to the discretionary authority conferred upon it." *Flint v. Commissioner of Pub. Welfare*, 412 Mass. 416, 420 (1992), quoting G. L. c. 30A, § 14 (7). We also afford deference to the agency's determinations on issues of credibility and the weight of the evidence, *School Comm. of Wellesley v. Labor Relations Comm'n*, 376 Mass. 112, 120 (1978), and the inferences drawn therefrom. *School Comm. of Brookline v. Bureau of Special Educ. Appeals*, 389 Mass. 705, 716 (1983). *See* G. L. c. 30A, § 14.

2. Arbitrary and capricious.[4]

During the administrative proceedings against Decoulos, the board and presiding officer made decisions that Decoulos now challenges as arbitrary and capricious under G. L. c. 30A, § 14 (7). We cannot say that the board's decisions "lack[] any rational explanation that reasonable persons might support" (citation omitted), *Frawley v. Police Comm'r of Cambridge*, 473 Mass. 716, 729 (2016), or that the decisions were "legally erroneous or so devoid of factual support as to be arbitrary and capricious." *MacLaurin v. Holyoke*, 475 Mass. 231, 238 (2016).

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[4] The board contends that Decoulos waived these arguments as to why the board's decision is arbitrary and capricious because he did not raise them before the Superior Court. He did, however, make substantially the same points in the Superior Court in arguing that the board's findings were not supported by substantial evidence. Because "some leniency is appropriate in determining whether pro se litigants have complied with rules of procedure," *Brown v. Chicopee Fire Fighters Ass'n, Local 1710, IAFF*, 408 Mass. 1003, 1004 n.4 (1990), we will address the substance of his arguments notwithstanding the label he applied to them.

First, it was not arbitrary and capricious for the presiding officer to deny Decoulos's requests to subpoena additional witnesses. The presiding officer properly applied the governing regulations, 309 Code Mass. Regs. § 7.08 (2004). Decoulos did not file written direct testimony as required by the regulation, nor did he show good cause to present the witness testimony by oral examination. 309 Code Mass. Regs. § 7.08 ("Good cause in this context includes . . . persuasive evidence that the witness is an adverse witness, hostile, or otherwise unwilling to prepare . . . direct testimony in writing"). In addition, the presiding officer reasonably found that Decoulos failed to show that "the desired testimony is necessary and relevant and not duplicative of other witnesses' testimony." Under G. L. c. 30A, § 11 (2), the presiding officer may "exclude unduly repetitious evidence," and under 801 Code Mass. Regs. § 1.01(8)(a) (1998), the presiding officer had discretion to make orders "which justice requires"–including limitations on the scope of discovery. The denial of Decoulos's request to subpoena witnesses was a rational application of the governing regulations and an appropriate exercise of discretion.[5]

Second, the board was not arbitrary and capricious in its objection to Decoulos's demands for documents from the MassDEP; neither was the presiding officer in his refusal to compel discovery. Decoulos requested

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[5] We need not address Decoulos's contention that the denial of his requested subpoenas to four witnesses violated his rights under article 12 of the Massachusetts Declaration of Rights because this right, secured to criminal defendants, is not applicable to civil proceedings. *See Covell v. Department of Social Servs.*, 439 Mass. 766, 788 (2003); *Adoption of Don*, 435 Mass. 158, 168 (2001); *Reading v. Murray*, 405 Mass. 415, 418 (1989).

that the board produce MassDEP documents such as e-mail messages between the MassDEP employees, and the board objected. The presiding officer denied Decoulos's request pertaining to those "documents and things that are solely within the possession, custody, or control of [the] MassDEP and not the [b]oard." Section 1.01(8)(b) of title 801 of the Massachusetts Code of Regulations provides that a party may request documents "which are in the possession, custody, or control of the . . . [a]gency requested to provide them." The presiding officer agreed with the board's statement that the MassDEP and the board are separate agencies with separate functions and responsibilities. *See* G. L. c. 21A, §§ 7 (establishing MassDEP) and 19A (establishing the board).[6] It was not legal error for the presiding officer to apply the discovery rules and recognize that the board is a separate agency from the MassDEP and could not be compelled to produce MassDEP documents.

Decoulos's challenge to the delay in proceedings[7] also fails. Regardless of whether the delay in these

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[6] For similar reasons, the MassDEP was not a necessary and indispensable party. The board and the MassDEP are separate agencies, and the board has no jurisdiction or control over the MassDEP. Complete relief may be awarded without the MassDEP, and the MassDEP does not claim an interest in the action or seek to intervene. *See* Mass. R. Civ. P. 19, 365 Mass. 765 (1974), and 801 Code Mass. Regs. § 1.01(9)(d) (permissive intervention for nonparties "likely to be substantially and specifically affected" by the proceeding).

[7] We are mindful of the fact that nearly fifteen years passed as Decoulos and the board litigated the complaints at issue here. Although the board has stayed suspension of Decoulos's license until the resolution of this appeal and Decoulos has continued to

proceedings was arbitrary and capricious, Decoulos has not shown that he was prejudiced by that delay. Decoulos argues that the board should have established a statute of limitations and emphasizes that the administrative action has taken more than thirteen years to complete. Despite this significant delay, we may set aside or modify the board's decision only if "the substantial rights of any party may have been prejudiced" as a result. G. L. c. 30A, § 14 (7). Decoulos asserts that he was prejudiced because the delay compromised the memory of one witness, Mark Jablonski, about events at Site A in May 2003. However, Jablonski testified that he remembered the events in question and was able to answer numerous questions about them. Even if Jablonski's memory of details was not "exact," Decoulos has "point[ed] to nothing in the record" to show that the Jablonski's memory of the relevant events had deteriorated over time, nor, indeed, that Jablonski's testimony would have been material (and thus its absence prejudicial) had he remembered more. *Fisch v. Board of Registration in Med.*, 437 Mass. 128, 133-134 (2002). Decoulos has not shown that substantial prejudice resulted from the delay as required by G. L. c. 30A, § 14 (7).

Decoulos also argues that the lengthy time span of these proceedings denied him procedural due process under article 11 of the Massachusetts Declaration of Rights. As with G. L. c. 30A, § 14, "to prevail on his constitutional due process argument, [Decoulos] must show that the delay, which was clearly inordinate, was significantly prejudicial." *Commonwealth v. Hudson*, 404 Mass. 282, 285 (1989), citing *Common-*

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practice "minimally" during that time, nothing in our decision should be read to endorse the delay in this case.

wealth v. Weichel, 403 Mass. 103, 109 (1988). *Cf. Matter of McBride*, 449 Mass. 154, 165-166 (2007) ("Mere delay in [attorney] disciplinary proceedings does not result in dismissal" without showing of prejudice). Decoulos has not shown such prejudice.[8]

Decoulos also argues that the board's decision was arbitrary and capricious because MassDEP failed to identify stormwater outfall contamination, made ineffective cleanup demands as compared to Decoulos's method, and wasted taxpayer funds with its methods. Whether Decoulos's science and cleanup methods were sound or even superior is not relevant to the challenged decision: at issue is the discipline imposed by the board–not the MassDEP–based on findings that Decoulos violated the MCP and LSP rules of professional conduct. We recognize, however, that the MassDEP's decisions during the cleanups at Sites A and B undergirded the board's decision to discipline Decoulos. The board's findings that Decoulos did not comply with the MassDEP's guidance led to the disciplinary action now being challenged. Were we to construe Decoulos's qualms with the MassDEP decisions as arguments that the board's implicit approval of those decisions was not supported by substantial evidence, we would not be persuaded.[9]

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[8] We also note that part of the delay was due to Decoulos's own requests for additional time to complete filings, and there is no evidence of deliberate delay by the board. *See Hudson*, 404 Mass. at 284-285; *Camoscio v. Board of Registration in Podiatry*, 394 Mass. 1006, 1006-1007 (1985).

[9] "Substantial evidence" is defined as "such evidence that a reasonable mind might accept as adequate to support a conclusion." G. L. c. 30A, § 1 (6). A decision does not meet the substantial evidence requirement if "the evidence points to no felt or appreciable

The board rationally found that Decoulos failed to act with reasonable care and diligence at Site A in violation of 309 Code Mass. Regs. § 4.02(1), "because he did not perform sufficient assessment activities to rule out a connection between the diesel release and the contamination at the outfall or to support his assertions that surface runoff, and not the diesel release, caused the contamination at the outfall." The board also found that Decoulos did not follow the requirements and procedures in G. L. c. 21E, and the MCP because he failed to implement the MassDEP's requirements at Site A, including the requirement to conduct active LNAPL recovery, instead using a passive system to address the LNAPL contamination without the MassDEP's approval. The board concluded that this violated 309 Code Mass. Regs. § 4.03(3)(b).

In addition, at Site B, the board found that Decoulos did not meet the standard of care in violation of 309 Code Mass. Regs. § 4.02(1), because he submitted the RAO without demonstrating that a "level of [n]o [s]ignificant [r]isk existed" even as the data showed increasing levels of contaminants. It found that Decoulos used incorrect calculations and did not perform risk assessment consistent with the practices published by the MassDEP, in violation of the MCP. The board determined that these actions violated 309 Code Mass. Regs. § 4.03(3)(b). All of these findings are amply supported by evidence in the record, and it was within the board's discretion to use its technical

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probability of the conclusion or points to an overwhelming probability of the contrary." *Doe, Sex Offender Registry Bd. No. 68549 v. Sex Offender Registry Bd.*, 470 Mass. 102, 109 (2014), citing *Cobble v. Commissioner of the Dep't of Social Servs.*, 430 Mass. 385, 390-391 (1999).

competence and specialized knowledge to credit the MassDEP's scientific decisions and determine that Decoulos had violated both the MCP and the LSP rules of professional conduct. *See* G. L. c. 30A, § 14 (7); *Arthurs v. Board of Registration in Med.*, 383 Mass. 299, 311 n.24 (1981).

3. Presiding officer.

Finally, Decoulos argues that his hearing before the presiding officer violated article 29 of the Massachusetts Declaration of Rights because a board member who testified against Decoulos was also part of the group that selected the presiding officer from the OADR. Article 29 extends beyond judges to hearing officers, *Police Comm'r of Boston v. Municipal Court of the W. Roxbury Dist.*, 368 Mass. 501, 507 (1975), but there is no evidence that Decoulos's right to a fair hearing was violated. Nothing in the record shows that board member in question discussed Decoulos's case with the presiding officer, nor does Decoulos allege any impropriety in the selection process. *See Goldstein v. Board of Registration of Chiropractors*, 426 Mass. 606, 615-616 (1998); *Varga v. Board of Registration of Chiropractors*, 411 Mass. 302, 306 (1991) (noting high bar for "alleged bias and interest" to violate article 29). The only alleged occasions of bias were the presiding officer's decisions to deny the issuance of subpoenas to witnesses and to prevent Decoulos from obtaining evidence from the MassDEP. We have already found that these decisions were made properly within the presiding officer's discretion. There was likewise nothing improper about the presiding officer's determination of credibility regarding the witnesses against Decoulos. "It is for the [agency] to determine the credibility of the witnesses and to resolve factual disputes." *D'Amour v. Board of*

Registration in Dentistry, 409 Mass. 572, 583 (1991), citing *Cherubino v. Board of Registration of Chiropractors*, 403 Mass. 350, 356 (1988).

CONCLUSION.

We affirm the Superior Court judgment denying the plaintiff's motion, and allowing the defendant's cross motion for judgment on the pleadings.

Judgment affirmed.

By the Court (Massing, Hand & Smyth, JJ.[10]),

/s/ Paul Tuttle
Clerk

Entered: November 13 2024

[10] The panelists are listed in order of seniority.

MEMORANDUM OF DECISION AND ORDER ON CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS, COMMONWEALTH OF MASSACHUSETTS COUNTY OF MIDDLESEX SUPERIOR COURT (APRIL 25, 2023)

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT

JAMES J. DECOULOS

v.

JAMES N. SMITH, ET AL., AS THEY ARE MEMBERS OF THE BOARD OF REGISTRATION OF HAZARDOUS WASTE SITE CLEANUP PROFESSIONALS AND MARTIN SUUBERG, AS HE IS THE COMMISSIONER OF THE MASSACHUSETTS DEPARTMENT OF ENVIRONMENTAL PROTECTION[1]

Civil Action No. 2019-00663

Before: Camille F. SARROUF, JR.,
Justice Superior Court.

[1] At hearing on January 31, 2023, the plaintiff agreed to dismiss the individual members of the Board from this action. Where the plaintiff is appealing the final decision of the Board, the Board is the only proper party to this action, and the case against the Department and its Commissioner is therefore dismissed as well.

MEMORANDUM OF DECISION AND ORDER ON CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS

The plaintiff, James J. Decoulos ("Decoulos"), appeals pursuant to G.L. c. 30A, § 14 and G.L. c. 21 A, § 19H, the final decision of the Board of Registration of Hazardous Waste Site Cleanup Professionals (the "Board") finding that Decoulos, a Licensed Site Professional ("LSP"), violated the Board's Rules of Professional Conduct,[2] and imposing disciplinary sanctions.[3] The matter is now before the court on the parties' cross motions for judgment on the pleadings. For the reasons that follow, Decoulos's motion is **DENIED** and the defendants' cross motion is **ALLOWED.** The Board's decision is **AFFIRMED.**

BACKGROUND

The following brief recitation of relevant facts and procedural history is taken from the corrected

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[2] The regulations state in relevant part: "In providing Professional Services, a licensed site professional shall act with reasonable care and diligence, and apply the knowledge and skill ordinarily exercised by licensed site professionals in good standing practicing in the Commonwealth at the time the services are performed." 309 Code Mass. Regs. § 4.02(1). Additionally, "in providing professional services, a licensed site professional shall: follow the requirements and procedures set forth in applicable provisions of G.L. c. 21E, and 310 CMR 40.0000." 309 Code Mass. Regs. § 4.03(3)(b).

[3] Notably, the discipline has been stayed by agreement of the parties pending judicial review of the Board's final decision. See Joint Motion to Cancel Hearing (Paper No. 5); Endorsement on Joint Motion to Cancel Hearing (Docket Entry Mar. 20, 2019).

administrative record.[4] The court reserves certain facts for discussion below.

This case involves a disciplinary action by the Board of Registration of Hazardous Waste Site Cleanup Professionals against Decoulos, who holds a license from the Board issued pursuant to G.L. c. 21 A, § 19C. The license holder is commonly referred to as a Licensed Site Professional or "LSP," which is defined as a "hazardous waste site cleanup professional" under G.L. c. 21 A, § 19. LSPs are responsible for assessing and overseeing the cleanup of oil and hazardous waste sites pursuant to G.L. c. 21E and regulated under the Massachusetts Contingency Plan, 310 Code Mass. Regs. § 40.0000 by the Massachusetts Department of Environmental Protection ("MassDEP").

On December 15, 2005, the Board received a complaint regarding Decoulos's professional work at a gas station and auto repair business located at 13 1 Main Street, Carver, Massachusetts ("Site A"). Decoulos filed responses to the complaint on January 20, 2006, August 31, 2007, and January 30, 2008. A Complaint Review Team ("CRT") was formed to investigate the matter. As part of its investigation, it reviewed Decoulos's audit history, which revealed potential violations at a Speedy Lube located at 633 North Main Street, Randolph, Massachusetts ("Site B"). Upon completion of its investigation, the CRT concluded that sufficient facts existed at Sites A and B to warrant discipline against Decoulos and recommended a one-year license suspension.

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[4] References to the corrected administrative record are denoted by the abbreviation "CAR," followed by the volume and page number.

Based on the CRT's findings, on January 8, 2010, the Board issued to Decoulos an Order to Show Cause and Proposed Order Finding Sufficient Grounds for Discipline and Notice of Noncompliance (the "Show Cause Order"), The Show Cause Order alleged that Decoulos violated 309 Code Mass. Regs. § 4.02(1) by failing to act with reasonable care and diligence. It further indicated that Decoulos failed to meet the requirements of 3 10 Code Mass. Regs. § 40.000, in violation of 309 Code Mass. Regs. § 4.03(3)(b). The Board contended that Decoulos failed to perform adequate assessments and to collect sufficient data to support his opinions. The Show Cause Order likewise outlined the facts on which it relied for its decision that Decoulos' s work at two hazardous waste disposal sites violated the Board's regulations, all pursuant to 309 Code Mass. Regs. § 7.07.

On February 10, 2010, Decoulos filed an answer to the Show Cause Order and requested an adjudicatory hearing on the findings that he had violated the Rules of Professional Conduct. Pursuant to G.L. c. 21 A, § 19A, the Board delegated the adjudicatory hearing to a hearing officer of the Office of Appeals and Dispute Resolution ("OADR"). Over the course of three days in January and February 2011, the hearing officer conducted an administrative hearing at which both sides presented witnesses and testimony. On September 7, 2012, the hearing officer issued a Recommended Final Decision which found that the Board proved Decoulos's violations by an overwhelming preponderance of the evidence.

Decoulos objected to the Recommended Final Decision and received multiple extensions to file his objections and responses. The Board held several

quasi-judicial sessions from June 2013 through March 2014 to rule on post-hearing motions. On March 20, 2014, the Board voted to wholly affirm and adopt the Recommended Final Decision. Thereafter, from October 2014 through May 2015, the Board and Decoulos attempted to reach a settlement, but were, unfortunately but not surprisingly, unsuccessful. After determining that a potential for settlement was not within reach, in June 2016, the Board issued its Final Findings of Fact and Rulings of Law. Therein, the Board ruled that the opinions that Decoulos rendered to MassDEP for the two contaminated properties at issue violated the Rules of Professional Conduct, and that sufficient grounds existed for the Board to take disciplinary action against him.

On July 6, 2016, the prosecuting attorney filed a memorandum recommending that the Board discipline Decoulos by suspending his LSP license for one year and requiring him to complete an additional thirty-two hours of continuing education. Decoulos's attorney was granted an extension to filed a response until August 15, 2016 or later, and then withdrew from the case on August 19, 2016. Decoulos proceeded pro se, and filed his opposition on October 21, 2016. The prosecuting attorney filed a reply on March 15, 2018. Oral argument on the disciplinary sanction was held before the Board on May 16, 2018.

On January 16, 2019, the Board issued its Final Order which concluded that Decoulos violated the Board's Rules of Professional Conduct and discipline was warranted. The Final Order adopted the prosecuting attorney's disciplinary recommendation and ordered that Decoulos' s LSP license be suspended for one year and that he complete thirty-two hours of continuing

education credit in addition to what is required to renew his license. The Board determined that the discipline imposed was consistent with its prior decisions involving similar fact patterns, and considered Decoulos's failure to acknowledge responsibility as an aggravating factor.

DISCUSSION

Decoulos, as the party appealing an administrative decision, bears a "heavy burden" to demonstrate the decision's invalidity. *Massachusetts Ass'n of Minority Law Enforcement Officers v. Abban,* 434 Mass. 256, 263-264 (2001). *See Fisch n. Board of Registration in Med.,* 437 Mass. 128, 131 (2002) (burden is on petitioner to demonstrate error). In reviewing the Board's decision, the court gives due weight to its experience, technical competence, specialized knowledge, and the discretionary authority conferred upon it by statute. *Flint v. Commissioner of Pub. Welfare,* 412 Mass. 416, 420 (1992). Moreover, the Board's determinations on issues of the credibility and weight of the evidence, as well as the inferences to be drawn therefrom, are afforded deference. *Silvia v. Securities Div.,* 61 Mass. App. Ct 350, 358 (2004). It is the function of the Board, not the court, to make findings of fact and weigh the credibility of witnesses.[5] *Catrone v. State Racing*

[5] Similarly, when reviewing a penalty imposed by an administrative body, an appellate court is not "free to substitute its own discretion as to the matter; nor can the reviewing court interfere with the imposition of a penalty by an administrative tribunal because in the court's own evaluation of the circumstances the penalty appears to be too harsh." *Levy v. Board of Registration in Med.,* 378 Mass. 519, 529 (1979). Interference "with a board's exercise of its [disciplinary powers] is only appropriate in the most extraordinary of circumstances." *Id.* at 528-529.

Comm'n, 17 Mass. App. Ct. 484, 486 (1984); G.L. c. 30A, § 14.

The court may modify or set aside the Board's decision, however, if the substantial rights of any party have been prejudiced because such decision was arbitrary or capricious, unsupported by substantial evidence, based upon an error of law, in violation of constitutional provisions, or otherwise not in accordance with the law. *See Boston Police Superior Officers Fed'n v. Labor Relations Comm'n,* 410 Mass. 890, 892 (1991). *See also* G.L. c. 30A, § 14(7). In his present appeal from the Board's decision, Decoulos focuses on three main issues. The court addresses each in turn below.

I. Constitutional Violations

First, Decoulos argues that four aspects of the administrative proceeding violated his constitutional due process rights: (1) the hearing officer denied his request to subpoena four witnesses; (2) he did not receive all the evidence he sought from MassDEP; (3) he was prevented from gathering critical information during discovery because MassDEP was not a party to the adjudicatory proceeding; and (4) the time span of the controversy has been unfair. As set out below, none of these allegations amount to a constitutional violation.

The court "beginfs] by noting that administrative agencies have wide discretion in ruling on evidence, *Rate Setting Comm'n v. Baystate Med. Ctr.,* 422 Mass. 744, 752 (1996), and the strict rules of evidence do not apply in such proceedings unless otherwise provided by law or unless an agency elects to follow such rules. *See* G.L. c. 30A, § 1 1(2); Mass. G. Evid. § 1 101(c)(3) (2019)." *Jacobs v. Massachusetts Div. of Med. Assistance,*

97 Mass. App. Ct. 306, 3 14 (2020). General Laws c. 30A, § 1 1(3) provides that "[ejvery party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal evidence." However, this right is not unlimited—G.L. c. 30A, § 1 1(2) grants the hearing officer the power to "exclude unduly repetitious evidence."

With respect to Decoulos's first alleged due process violation—the hearing officer's denial of his request to subpoena four witnesses —the hearing officer appropriately applied the governing regulations to deny Decoulos's request to subpoena four witnesses and to allow his request to subpoena a fifth witness. As the hearing officer explained in his written ruling, 309 Code Mass. Regs. § 7.08 required Decoulos to "first make every reasonable effort to obtain Pre-Filed Direct Testimony [from his proposed witnesses]," and if he could not obtain such testimony, then under 801 Code Mass. Regs. § 1 .0 1(1 0)(g) he was required to "make a detailed showing: (1) that he has made every reasonable effort to obtain the Pre-Filed Direct testimony; (2) that the desired testimony could not reasonably be obtained through Pre-Filed Direct Testimony from another designated witness, from a witness who is not designated, or through cross-examination of the Board's witnesses; [and] (3) that the desired testimony is necessary and relevant and not duplicative of other witnesses' testimony." CAR Vol. 3D at 5355. In applying these principles, the hearing officer reasonably concluded that Decoulos failed to show that the proffered testimony of the four witnesses in question was relevant. *See* CAR Vol. 3D at 5386-5389.

Decoulos next asserts that his due process rights were violated because he did not receive all of the evidence he sought from MassDEP. The defendants counter that the Board properly objected to Decoulos's demand that it produce documents from a different state agency. They reason that, as the record shows, the Board raised this objection because "[t]he LSP Board is a separate agency from MassDEP and has no control over any documents in the possession, custody, or control of MassDEP or any MassDEP employee," and that this objection was entirely proper and comports with Mass. R. Civ. P. 34(a), under which only items "in the responding party's possession, custody, or control" can be properly requested for production. The court agrees that the Board was not required to produce documents from MassDEP that were outside of its possession, custody, or control, and, as such, there is no due process violation on this basis.

Decoulos further asserts that his due process rights were violated where he was prevented from gathering critical information during discovery because MassDEP was not a party to the adjudicatory proceeding. However, as the defendants indicate, the Board is an entity separate and distinct from MassDEP, *see* G.L. c. 21 A, §§ 7 (establishing MassDEP) and 19A (establishing the Board), and MassDEP could not be made a party to this action because the Board has no jurisdiction to render a ruling of law that would bind MassDEP. Indeed, as indicated above, the Board has no dominion, control, or jurisdiction over MassDEP operations or its records, and MassDEP similarly has no authority over the Board. As such, there is likewise no due process violation on this ground.

Lastly, Decoulos asserts that the time span of the controversy has been unfair, depriving him of his right to due process. First, as Decoulos himself acknowledges, "[t]here is no statute of limitations in the enabling legislation for the Board to pursue disciplinary actions." Plaintiff s Memorandum at p. 14. More importantly, however, as the Supreme Judicial Court has explained in the context of bar disciplinary proceedings, "[m]ere delay in disciplinary proceedings does not result in dismissal." *In re McBride,* 449 Mass. 154, 165-166 (2007), citing *Matter of Gross,* 435 Mass. 445, 450 (2001) and *Matter of London, MI* Mass. 477, 481 (1998). "The effect of a delay in disciplinary proceedings is considered as a mitigating factor only if [a plaintiff] is prejudiced by that delay." *In re McBride,* 449 Mass, at 165-166, citing *Matter of Grossman,* 448 Mass. 151, 159, & n.8 (2007). Here, the court finds that the delay that occurred in this case was unacceptably long, but that Decoulos has not demonstrated that he was substantially prejudiced therefrom, and, consequently, it cannot be said that a due process violation occurred.

Indeed, the only prejudicial result Decoulos claimed is the loss of memory of one of his witnesses, Mr. Jablonski. He argues that Mr. Jablonski could not remember specific actions and events that took place nearly eight years earlier, but he does not explain how anything Mr. Jablonski allegedly could not recall is material or impacted his case, and the transcript reflects that Mr. Jablonski testified that he remembered the events that took place at the site in question on the date in question (*i.e.*, Site A on May 16, 2003). See CAR Vol. 3D at 5908. Accordingly, while the court agrees with Decoulos that the actions of the Board

seem dilatory and that excessive delays implicate due process in certain circumstances, it cannot say that the delay in this case amounted to a constitutional violation.

II. Errors of Law

Decoulos further argues that the Board committed three errors of law in rendering its final decision. First, he argues that the Board improperly relied on the evidence and testimony from the Office of Appeals and Dispute Resolution adjudicatory proceeding, and did not apply its own expertise. However, the Board's regulations explicitly provide that "[t]he Board may affirm and adopt the presiding [hearing] officer's recommended decision in whole or in part" for its final findings of fact and conclusions of law. 309 Code Mass. Regs. § 7.10(2). *See Arthurs n. Board of Registration in Med,* 383 Mass. 299, 315 (1981) (holding that requirement of providing statement of reasons for decision was satisfied by adopting hearing officer's recommended decision in its entirety).

Second, Decoulos contends that the Board failed to explain "why active LNAPL[6] [light non-aqueous phase liquid] recovery and groundwater treatment was necessary or effective at [Site A]." Plaintiffs Memorandum at p. 21. In particular, he asserts that because the witnesses at the adjudicatory hearing did not explain why the required active LNAPL recovery was superior to his passive recovery approach at Site A,

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[6] LNAPL is defined as "oil and/or hazardous material that is present in the environment as a separate phase of liquid" with "a specific gravity equal to or less than one," and included substances such as gasoline, diesel, and oil. 310 Code Mass. Regs. § 40.0006.

their testimony constituted conjecture that should not have been considered. However, as the defendants point out, this argument is misguided where "the issue was whether Decoulos acted in accordance with the standards in place at the time or adequately explained at the time why a different approach was appropriate in that circumstance, not whether there was evidence proving the need for the requirements in place at the time." Defendants' Memorandum at p. 22-23.

Third, Decoulos argues that the hearing officer improperly applied the evidentiary standard of "overwhelming preponderance of the evidence." Plaintiffs Memorandum at p. 22. Such is not the case. The Board was required to establish its allegations by a "preponderance of the evidence." *See Craven v. State Ethics Comm'n,* 390 Mass. 191, 200 (1983). Through the hearing officer's use of the phrase "overwhelming preponderance of the evidence," it is clear that the hearing officer found the Board had met the preponderance of the evidence standard, and, if anything, had met an even higher standard than was required.

In sum, the Board's decision was free of legal error as it properly considered and adhered to the relevant LSP regulations and Rules of Professional Conduct in determining whether Decoulos' s work at Sites A and B met those requirements.[7]

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[7] In accordance with 310 Code Mass. Regs. § 40.0193, if Decoulos determined that the active LNAPL recovery approach MassDEP required was inappropriate for these sites, the proper approach would have been to submit a technical justification for his determination, rather than simply ignoring the approach.

III. Substantial Evidence

Finally, Decoulos argues that the Board's findings and conclusions were unsupported by the evidence. In reviewing Decoulos's challenge to the substantiality of the evidence, this court must uphold the decision of the Board as long as the Board's findings are supported by substantial evidence in the record considered as a whole. *Black Rose, Inc. v. Boston,* 433 Mass. 501, 503 (2001). Substantial evidence is "such evidence as a reasonable mind might accept as adequate to support a conclusion." G.L. c. 30 A, § 1(6). "If there is such evidence, [the court] affirm[s] the agency's action even though [the court] might have reached a different result if placed in the position of the agency." *Seagram Distillers Co. v. Alcoholic Beverages Control Comm'n,* 401 Mass. 713, 721 (1988). A finding will stand unless the evidence points to no felt or appreciable probability of the conclusion, or points to an overwhelming probability to the contrary. *Duggan v. Board of Registration in Nursing,* 456 Mass. 666, 674 (2010).

Here, the Board concluded that Decoulos's work at Sites A and B involved several violations of the Massachusetts Contingency Plan and Rules of Professional Conduct, including:

(1) in violation of 309 Code Mass. Regs. § 4.02(1), he failed to act with reasonable care and diligence in assessing Site A because he did not perform sufficient assessment activities to rule out a connection between the diesel release and the contamination at the outfall or to support his assertion that surface runoff, not the diesel release, caused the contamination at the outfall;

(2) he failed to implement MassDEP's Immediate Response Action ("IRA") requirements at Site A to delineate the extent of the LNAPL release, mitigate the condition of Substantial Release Migration,[8] conduct an Imminent Hazard Evaluation, conduct active LNAPL recovery, and conduct a video survey of the storm drain system to address the condition of Substantial Release Migration;

(3) he placed passive skimmers in monitoring wells at Site A without MassDEP's approval, failing to meet the requirements for an IRA in violation of 309 Code Mass. Regs. § 4.03(3)(b);

(4) in violation of 309 Code Mass. Regs. § 4.02(1), he failed to act with reasonable care and diligence or apply the knowledge and skill ordinarily exercised by LSPs at the time the services were performed at Site B because he submitted the Site B Response Action Outcome Statement ("RAO") without demonstrating that a level of "No Significant Risk" had been achieved, and in fact the data showed increasing concentrations of LNAPL contaminants on Site B and in some cases was widely divergent;

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[8] A condition of Substantial Release Migration is defined as "a release of oil or hazardous material that is likely to be transported through environmental media where the mechanism, rate or extent of transport has resulted in or, if not promptly addressed, has the potential to result in: (a) health damage, safety hazards or environmental harm; or (b) a substantial increase in the extent or magnitude of the release, the degree or complexity of future response actions, or the amount of response costs." G.L. c. 21E, § 2.

(5) he used incorrect calculations, failed to follow published MassDEP guidance, and did not perform the Method 2 Risk Characterization at Site B in a manner consistent with scientifically acceptable risk assessment practices, in violation of 310 Code Mass. Regs. § 40.0901(4);

(6) he did not adequately define the horizontal and vertical extent of contamination at Site B, in violation of 310 Code Mass. Regs. § 40.0904(2);

(7) he did not identify a conservative estimate of contaminant concentrations to which receptors may be exposed at Site B, in violation of 3 10 Code Mass. Regs. § 40.0926(3)(b)(l);

(8) he filed the RAO at Site B without achieving a condition of "No Significant Risk" of harm, in violation of 310 Code Mass. Regs. § 40. 0973(7) and 310 Code Mass. Regs. § 40.1003 (1);

(9) by submitting the RAO at Site B when data showed increasing concentrations of contaminants in groundwater, he did not meet the general provisions of RAOs which require a showing that the source of contamination was eliminated or controlled, in violation of 310 Code Mass. Regs. § 40.1003(5);

(10) by not meeting the Massachusetts Contingency Plan requirements for a RAO and risk characterization at Site B, he failed to follow the requirements and procedures set forth in G.L. c. 21E and 310 Code Mass. Regs.

§ 40.0000, in violation of 309 Code Mass. Regs. § 4.03(3)(b).

See CAR Vol. 7 at 2942-2943.

Although the court finds the Board's treatment of Decoulos to be harsh and delayed, ultimately, as detailed below, the court concludes that, in accordance with the limited and highly deferential standard of review, there is substantial evidence in the record to support the Board's conclusions that Decoulos committed the alleged violations of the Board's Rules of Professional Conduct.

Both Robert Luhrs, a member of the LSP Board and Complaint Review Team that investigated the complaint against Decoulos, and Cynthia Baran, an Environmental Analyst in MassDEP's Bureau of Waste Site Cleanup who is responsible for "technical review of submittals by LSPs" for IRAs and RAOs to ensure compliance with the Massachusetts Contingency Plan, testified that at Site A, Decoulos failed to perform sufficient assessments to rule out a connection between the diesel release and the contamination, or to support his assertions that surface runoff, not subsurface diesel release, caused the contamination. CAR Vol. 3A at 2820-2834; Vol. 1 at 142-145. The evidence also showed that Decoulous did not implement MassDEP's IRA requirements to delineate the extent of the LNAPL release, mitigate the condition of Substantial Release Migration, conduct an Imminent Hazard Evaluation, or conduct active LNAPL recovery and video survey of the drain system to address the condition of Substantial Release Migration, and that Decoulos placed passive skimmers in monitoring wells without MassDEP's approval. CAR Vol. 3A at 2821-2824, 2866; Vol. 1 at 134-161; Vol. 2 at 1204-1205.

The evidence further showed that MassDEP required active LNAPL recovery, and that Decoulos failed to follow this approach without providing information to MassDEP at the time to explain why MassDEP's requirements were not the best approach and his own proposal was preferable. CAR Vol. 1 at 141, 626-627; Vol. 2 at 1074, 1076-1078; 1203-1204; Vol. 3A at 2821-2825, 2829. See footnote 6, *supra.* Additionally, another witness, Ian Phillips, an LSP since 1993, testified that Decoulos did not adequately support his conclusions that an intervening source caused the contamination in the brook, as well as that the presence of a significant quantity of LNAPL adjacent to the stormwater drainage pipe was the most likely source of contamination. CAR Vol. 3A at 2857-2859, 2864-2865, 2867-2868.

As set forth above, it is the function of the Board, not the court, to make determinations on issues of credibility and weight of the evidence, as well as the inferences to be drawn therefrom. *See Silvia,* 61 Mass. App. Ct. at 358; *Catrone,* 17 Mass. App. Ct. at 486. The Board has done so here, deeming credible the witness testimony establishing that Decoulos's conduct did not meet the standard of a reasonable LSP, and the court defers to the Board's expertise and experience in making that determination. On this record, the Board's conclusions with regard to Site A are supported by substantial evidence.

Substantial evidence, *i.e.*, that which "a reasonable mind might accept as adequate to support a conclusion," G. L. c. 30A, § 1(6), similarly existed for the Board's conclusions related to Site B. The Board's witnesses testified that Decoulos's actions at Site B were inadequate. Mr. Luhrs testified that Decoulos used inad-

equate and flawed testing procedures, excluded testing for carcinogens, and prematurely submitted an RAO. CAR Vol. 3 A at 2818, 2834-2838. Mr. Phillips testified that Decoulos failed to demonstrate that the source of contamination had been controlled or eliminated, only used two rounds of groundwater samples to support the Site B RAO, and failed to determine the horizontal extent and source of the contamination. CAR Vol. 3A at 28732878. Clearly, the testimony of the witnesses, if believed, amply supports the Board's findings, and, again, it is the function of the Board, not this court, to make determinations on issues of credibility and weight of the evidence. *See Silvia,* 61 Mass. App. Ct. at 358; *Catrone,* 17 Mass. App. Ct. at 486.

CONCLUSION AND ORDER

For the foregoing reasons, Decoulos's motion for judgment on the pleadings is **DENIED**, the defendants' cross motion for judgment on the pleadings is **ALLOWED**, and the Board's decision is **AFFIRMED**.

/s/ Camille F. Sarrouf, Jr.
Justice Superior Court

Dated: April 25, 2023

AGENCY FINAL ORDER, MASSACHUSETTS EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS BOARD OF REGISTRATION OF HAZARDOUS WASTE SITE CLEANUP PROFESSIONALS (JANUARY 16, 2019)

COMMONWEAL TH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS BOARD OF REGISTRATION OF HAZARDOUS WASTE SITE CLEANUP PROFESSIONALS

IN THE MATTER OF:
JAMES J. DECOULOS

Respondent.

LSP Board Complaint No. 05C-07

OADR Docket No. l0AP-01

FINAL ORDER

INTRODUCTION

1. This Final Order concerns the Board of Registration of Hazardous Waste Site Cleanup Professionals' ("the Board") regulations in a delicate area: determining the appropriate discipline for the respondent, James J. Decoulos, ("the respondent"), a Licensed Site Professional ("LSP"), License Number 9360.

2. The disciplinary action is the result of an investigation and determination by the Board that the respondent violated the following Rules of Professional Conduct while providing Professional Services as a LSP:

> 309 CMR 4.02(1) which requires a LSP to act with reasonable care and dilligence, and to apply the knowledge and skill ordinarily exercised by LSPs in good standing, practicing in the Commonwealth, when performing hazardous waste site cleanup activities.
>
> 309 CMR 4.03(3)(b) which requires a LSP to follow the requirements and procedures set forth in the applicable provisions of G.L. c. 21E and 310 CMR 40.0000 *et seq.*;

3. In the underlying proceeding, Presiding Officer Timothy Jones, ("the hearing officer") of the Office of Appeals and Dispute Resolution ("OADR"), conducted an administrative hearing. On September 7, 2012, the hearing officer issued a Recommended Final Decision ("RFD"), ruling that there was "persuasive evidence that the Board proved all of the violations by an overwhelming preponderance of the evidence." RFD at p. 43; *Craven v. State Ethics Comm'n,* 390 Mass 191, 196 (1983).

4. For the reasons that follow, the Board has the primary authority to impose discipline on its licensees consistent with its statutory responsibilities to administer a comprehensive hazardous waste site cleanup program.

JURISDICTION

5. The Board is authorized to issue this Final Order pursuant to the provisions of G.L. c. 21A, §§ 19A, 19C, and 19F. This means that the Board's clear objective here is protecting the public and promoting deterrence. Indeed, "the [B]oard is mandated to police the [waste site cleanup profession], and to take disciplinary action against those members of the profession 'who do not live up to the solemn nature of their public trust'." *Compare Levy v. Bd. of Registration & Discipline in Med.,* 378 Mass. 519, 528 (1979). Moreover, "the fact that [the proposed] discipline is painful does not alter the [B]oard's responsibility to consider a [LSP's] qualification to practice . . ." *Arthurs v. Bd. of Registration in Med.,* 383 Mass. 299, 317 (1981).

6. Above and beyond deterring misconduct or malfeasance by this respondent, prosecution of this matter serves a remedial purpose. It constitutes an attempt to remove from licensure an individual who has demonstrated an inability to comply with the Board's regulations, and hence may not be trusted to protect the public. Indeed, in the context of professional licensure, the Massachusetts Supreme Judicial Court has specified that 'The fact that a licensee of the Commonwealth . . . had knowingly failed to comply with the tax laws of the Commonwealth could be treated rationally as an anti-social act demonstrating unfitness to carry on a responsible profession *in which adherence to other laws is required." Walden v. Bd of Registration in Nursing,* 395 Mass 263, 272 (1985)(emphasis supplied).

PARTIES

7. The Board is a duly authorized administrative agency of the Commonwealth of Massachusetts acting pursuant to the provisions of G.L. c. 21A, §§ 19-19J. The respondent, James J. Decoulos is an individual licensed by the Board as a LSP.

REQUIREMENTS OF LAW

8. In providing Professional Services, a licensed site professional shall act with reasonable care and diligence, and apply the knowledge and skill ordinarily exercised by licensed site professionals in good standing practicing in the Commonwealth at the time the services are performed 309 CMR 4.02(1). Additionally, a licensed site professional must follow the requirements and procedures set forth in applicable provisions of G.L. c. 21E, and 310 CMR 40.0000. *See* 309 CMR 4.03(3)(b).

PROCEDURAL HISTORY

9. On December 15, 2005, the Board received a complaint from Najib Badaoui regarding 131 Main Street, Carver, Massachusetts ("Site A"). On January 20, 2006; August 31, 2007 and January 30, 2008, the respondent filed responses to the complaint. A Complaint Review Team ("CRT") was formed to investigate the matter. As part of its investigation, the CRT retested the audit history of the respondent which revealed potential violations with 633 North Main Street, Randolph, Massachusetts ("Site B"). *See* CRT Report, July 15, 1999 at p. 2. The CRT held informal conferences with the respondent on December 12, 2007 and May 12, 2008. CRT Report, July 15, 1999 at p. 2; *see also* 309 CMR 7.05. Two members of the CRT visited the Carver site on June 26, 2008. *See* Luhrs Pre-filed

Testimony ("PFT") at pp. 3-4. The CRT concluded that sufficient facts existed to warrant discipline against the respondent. *See* CRT Report at p. 41. Finding that aggravating circumstances justified the penalty, the CRT recommended that the respondent's license be suspended for one year on July 21, 2009. *See* CRT Recommendation of Discipline at pp. 1-4.

10. On January 8, 2010, the Board issued an Order to Show Cause and Proposed Order Finding Sufficient Grounds for Discipline and Notice of Noncompliance ("Order") to the respondent, which outlined two specific findings of noncompliance. *See* Order at p. 14. As an initial matter, the Order alleged that the respondent violated 309 CMR 4.020), failing to act with reasonable care and diligence. *Id.* Next, the Order indicated that he failed to meet the requirements of 310 CMR 40.000, in violation of 309 CMR 4.03(3)(b). *Id.*

11. The Board contended that the respondent failed to both perform adequate assessments, and collect sufficient data to support his opinions. *Id.;* Luhrs Rebuttal Pre-filed Testimony ("PFT") at pp. 7-8; RFD at p. 11. The Order likewise outlined the facts on which it relied for its decision that his work at two hazardous waste disposal sites violated the Board's regulations, all pursuant to 309 CMR 7.07. *See* Order at p. 14. On February 2, 2010, the respondent filed Objections and Answer to Order to Show Cause, appealing the Order. He requested an adjudicatory hearing on the findings that he violated the Rules of Professional Conduct. *See generally,* Respondent's Objections and Answer to Order to Show Cause. Pursuant to 309 CMR 7.07 and adjudicatory hearing rules 309 CMR 7.07, the hearing officer scheduled the matter for a Pre-

Hearing Conference on April 13, 2010. *See* Scheduling Order, March 25, 2010 at p. 1.

12. On or about October 27, 2010 the hearing officer conducted an adjudicatory hearing. Cynthia Baran ("Baran"); Robert Luhrs ("Luhrs"); Ian Phillips ("Phillips"); and John Fitzgerald ("Fitzgerald") testified on behalf of the Board. The respondent testified and offered testimony from Theodore Bosen ("Rosen"); Paul Wright ("Wright"); and Richard Doherty ("Doherty"). The witnesses offered by the prosecuting attorney were present at the hearing to authenticate their pre-filed direct testimony and for cross-examination by the respondent's counsel. The respondent as well as his witnesses were similarly present at the hearing to authenticate their pre-filed direct testimony and to be cross-examined by the Board's prosecuting attorney.

13. On April 1, 2011 and April 29, 2011 respectively, the prosecuting attorney and the respondent filed post-hearing briefs, and on May 13, 2011, the prosecuting attorney filed a brief in rebuttal to the post-hearing brief of the respondent. On September 7, 2012, the hearing officer issued a Recommended Final Decision ("RFD"). Jones found "persuasive evidence that the Board proved all of the violations by an overwhelming preponderance of the evidence." RFD at p. 43; *Craven v. State Ethics Comm'n,* 390 Mass 191, 196 (1983).

14. The substantial and uncontroverted testimony at trial demonstrated that the respondent violated both the Board's Rules of Professional Conduct 309 CMR 4.00 *et seq.,* as well as the Massachusetts Contingency Plan by a preponderance of the evidence. *See generally,* Recommended Final Decision ("RFD"); Prosecuting Attorney's Memorandum Recommending

A Disciplinary Sanction; Prosecuting Attorney's Reply to Respondent's Oppositions to the Board's Final Findings of Fact and Rulings of Law and Recommendation for Disciplinary Sanctions; *Sch. Comm. of Brookline v. Bureau of Special Educ. Appeals et al.*, 389 Mass. 705, 716 (1983)(Massachusetts standard is more probably true than not).

15. The non-recused Board members voted to wholly affirm and adopt the RFD pursuant to 801 CMR 1.01(11)(b)-(d) on March 20, 2014. The respondent timely objected to the RFD, and moved to enlarge time to file objections/responses on November 2, 2012. That motion was allowed in a quasi-judicial session on November 16, 2012. Another extension was requested on December 4, 2012, which the Board granted in a December 6, 2012 quasi-judicial session. Subsequently, the Board convened Quasi-Judicial Sessions on June 20, 2013, August 20, August 29, 2013, September 18, 2013, October 7, 2013, October 21, 2013, November 12, 2013, November 21, 2013, and March 20, 2014 to rule on post-hearing motions.

16. In accordance with 801 CMR 1.01(11)(c) the Board decided as follows: The Respondent's Objections to the Decision were denied; the Prosecuting Counsel's Response to the Respondent's Objections to the Decision was rendered moot; the Respondent's Request for Oral Argument on his objection to the RFD was denied; the Prosecuting Counsel's Opposition to his Request for Oral Argument and Motion to Strike Late-Filed Exhibits moot. The Respondent's Motion to Allow Additional Exhibits to the Record was likewise denied. The Respondent's Opposition to Board's Motion to Strike Late-Filed Exhibits was also moot as was the Prosecuting Counsel's Opposition to Motion to Allow

Additional Exhibits to the Record and Reply to Opposition to Motion to Strike.

17. On or about October 10, 2014, the respondent's attorney initiated settlement discussions. He indicated that the respondent might accept a limited suspension and payment of fine, or a fine and additional Continuing Education requirements. However, if asked to surrender his license for any substantial period of time, he would appeal the matter to the Massachusetts Superior Court Department pursuant to G.L. c. 30A.

18. On October 22, 2014, the prosecuting attorney informed the respondent's legal counsel that she would recommend that the Board enter into an agreement for a suspension of 15 months plus 32 additional continuing education credits to settle both complaints against the respondent.[1] On October 29, 2014, the respondent through his legal counsel responded to the offer asserting that the comparable cases cited by the Board's prosecuting attorney were dissimilar to the present case; they were more egregious. Specifically, *In the Matter of Jaffe* 06C-08, the LSP failed to conduct an Imminent Hazard Evaluation, thereby creating a risk that people would inhale contaminant vapors. Conversely, the respondent here did not put anyone in imminent peril. A 15-month suspension is not appropriate, but the respondent would accept a fine of $5,000, 40 hours of additional Continuing Education credits, and a Private Censure, which he would have accepted before the hearing.

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[1] There is another matter pending against the respondent. In lieu of prosecution, the offer included settlement of both the instant case as well as the second proceeding.

19. Again, in early 2015, the Board decided to attempt to resolve the matter through settlement. Based on disciplinary precedent, the Board offered the respondent a fifteen month suspension of his license to practice and an additional thirty-two hours of continuing education.[2] The respondent made a counter offer of forty-five additional continuing education credits and payment of a monetary penalty in the amount of $7,500 on January 14, 2015 which the Board rejected at its January 15, 2015 meeting. The offer was made a second time on January 22, 2015. On May 19, 2015, the respondent again rejected the offer.

20. In June 2016, the Board issued its Final Findings of Fact and Rulings of Law. On July 6, 2016, the Prosecuting Attorney filed A Memorandum Recommending a Disciplinary Sanction, which was served on the respondent's attorney.

21. The respondent's attorney requested an extension of time to file a response until "August 15, 2016 or later," which was granted. The respondent's attorney served a Notice of Withdrawal of Appearance on August 19, 2016. The non-recused Board members granted the respondent a one-time extension until October 21, 2016 to file his opposition memoranda.

22. The respondent, pro se, filed his Opposition to the Board's Final Findings, and Opposition to Recommendation for Disciplinary Sanctions on October 21, 2016.

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[2] Pursuant to the Board's regulations, LSPs are required to earn forty-eight hours of continuing education credits every three years. *See* 309 CMR 309(3).

23. The respondent was notified on November 14, 2016, that the non-recused members of the Board voted to permit him to argue the Prosecuting Attorney's disciplinary recommendation orally pursuant to 309 CMR 7.10(3). Additionally, the Board voted to limit oral argument to the issue of the imposition of disciplinary sanctions.

24. The Prosecuting Attorney filed a reply to the respondent's Opposition to the Board's Final Findings, and Opposition to Recommendation for Disciplinary Sanctions oppositions on March 15, 2018.

25. Pursuant to 309 CMR 7.10(3), the Board issued an Order on May 7, 2018 that scheduled oral argument before its Professional Conduct Committee meeting on May 16, 2018. The order set out rules that governed the procedure in oral arguments: The Co-chairperson of the Professional Conduct Committee will conduct the proceedings; the proceedings would be audio-recorded[3]; oral arguments were limited to twenty minutes on each side; the party that requested oral argument argued first; oral arguments were not permitted to go beyond the scope of the recommended disciplinary sanctions; physical exhibits or documents to be used at the oral argument had to be placed in the LSP Board meeting room before the meeting began on the date of the argument; no party was permitted to adduce testimony or call witnesses to take part in the oral argument; the Board did not entertain questions from the parties. The order also indicated that if in the progress of oral argument it becomes necessary that a pleading be filed or other step be taken so that the

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[3] The respondent engaged a stenographer to transcribe the proceedings.

case may proceed, and the issue is not covered by any provision of statute, regulation, or rule, the Board could make any appropriate order.

26. At oral argument, the respondent requested and was granted an additional two minutes for rebuttal. He also offered six exhibits into the record. *See* Professional Conduct Committee Hearing Transcript at p. 3. Legal counsel for the Board waived oral argument and rested on the papers filed with the Board. *See* Professional Conduct Committee Hearing Transcript at p. 32.

27. On June 19, 2018, the respondent filed a Motion to Supplement Oral Argument.[4]

28. The non-recused members of the Board deliberated in Quasi-Judicial session on May 16, 2018, and June 20, 2018.

29. On June 20, 2018, the non-recused members of the Board confirmed the vote taken on April 26, 2018 to impose discipline as originally set and approved which was a one (1) year suspension and completion of thirty-two hours of continuing education credit in

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[4] "Ordinarily, litigation is considered moot when the party who claimed to be aggrieved ceases to have a personal stake in its outcome." *Commonwealth v. Puleio,* 433 Mass. 39, 40 (2000) (quoting *Blake v. Massachusetts Parole Bd.,* 369, Mass. 701, 703 (1976)). The mootness doctrine applies with force here where this matter has been fully litigated. As pertains to discipline, the Board found that the respondent violated the Rules of Professional Conduct Further, the nonrecused members voted to impose discipline. Therefore, there is no live case or controversy before it. *Acting Supt. Of Bournewood Hosp. v. Baker,* 431 Mass. 101, 103 (2000)(quoting *Attorney Gen. v. Comm'r of Ins.,* 403 Mass. 370, 380 (1988). On that basis, it found that the respondent's Motion to Supplement Oral Argument was moot.

the areas of hydrogeology, conceptual site modeling, remediation of non-aqueous phase liquid, and risk characterization, in addition to what is required to renew his license pursuant to 309 CMR 3.09.

FINDINGS OF FACT

30. The Board issued Final Findings of Fact and Rulings of Law on June 16, 2016, that are attached to this Final Order. The Findings of Fact and Rulings of Law are incorporated herein by reference.

FINDINGS OF NONCOMPLIANCE

31. The Board has determined that the respondent failed to comply with the Rules of Professional Conduct 309 CMR 4.020) and 4.03(3)(b), by failing to act with reasonable care and diligence or apply the knowledge and skill ordinarily exercised by licensed site professionals at the time the services were performed, and failing to follow the requirements and procedures set forth in applicable provisions of G.L. c. 21E and 310 CMR 40.0000.

DICIPLINARY SANCTIONS

32. For the reasons stated in the Final Findings of Fact and Rulings of Law incorporated into this Final Order by reference, the Board concludes that the record of the adjudicatory hearing established that the respondent violated the Board's Rules of Professional Conduct and that discipline is warranted. The Board ORDERS that the respondent's license to practice as a Hazardous Waste Site Cleanup Professional, License No. 9360, be suspended for one (1) year and that he complete thirty-two hours of continuing education credit in the areas of hydrogeology, conceptual

site modeling, remediation of non-aqueous phase liquid, and risk characterization, in addition to what is required to renew his license, beginning thirty (30) days from the date that this Final Order is issued.

DICIPLINARY CONSIDERATIONS

33. The Board considers the following factors most relevant to its determination that the appropriate discipline in this matter is a one (1) year suspension in conjunction with additional Continuing Education course work above and beyond the regulatory requirements of 309 CMR 3.09.

34. The respondent's violations of the MCP and the Board's Rules of Professional Conduct were comparable to past cases where the Board imposed discipline. The deficiencies of the respondent's work are discussed in the Final Findings of Fact and Rulings of Law at pp. 14-31 and include:

35. The Board concluded that the respondent failed to act with reasonable care and diligence in assessing the site at 131 Main Street in Carver Massachusetts, (Site A) in violation of 309 CMR 4.020), because he did not perform sufficient assessment activities to rule out a connection between the diesel release and the contamination at the outfall or to support his assertions that surface runoff, and not the diesel release, caused the contamination at the outfall.

36. The Board found that the respondent failed to implement MassDEP's repeated Immediate Response Action ("IRA") requirements to delineate the extent of the LNAPL release, mitigate the condition of Substantial Release Migration, conduct an Imminent Hazard Evaluation, and conduct active Light Non-Aqueous

Phase Liquid ("LNAPL") recovery and a video survey of the storm drain system to address the condition of Substantial Release Migration.

37. The Board determined that the respondent placed passive skimmers in monitoring wells without MassDEP's approval. The Board concluded that by not meeting the requirements for an IRA, the respondent failed to follow the requirements and procedures set forth in applicable provisions of G.L. c. 21E and 310 CMR 40.0000, in violation of 309 CMR 4.03(3)(b).

38. The Board determined that the respondent did not meet the standard of care because he did not demonstrate that a level of No Significant Risk existed or had been achieved, because the data showed increasing concentrations of petroleum contaminants on the site and in some cases was widely divergent, in violation of 309 CMR 4.02(1). The Board also ruled that the respondent used incorrect calculations and failed to follow available guidance published by MassDEP. On that basis, the respondent did not perform the Method 2 Risk Characterization for 633 North Main Street, Randolph, Massachusetts in a manner consistent with scientifically acceptable risk assessment practices in violation of 310 CMR 40.0901(4).

39. The Board concluded that that the respondent did not adequately define the horizontal and vertical extent of contamination at 633 North Main Street, Randolph, Massachusetts in violation of 310 CMR 40.0904(2). By averaging widely divergent analytical results, the Board decided that the respondent did not identify a conservative estimate of contaminant concentrations to which receptors may be exposed, in violation of 310 CMR 40.0926(3)(b)(1).

40. The Board determined that the respondent filed the RAO without achieving a condition of No Significant Risk of harm to health, public welfare or the environment, in violation of 310 CMR 40.0973(7) and 310 CMR 40.10030). The Board noted that by submitting the RAO when data showed increasing concentrations of petroleum contaminants in groundwater, the respondent did not meet the general provisions of Response Action Outcomes by not showing that the source of contamination was eliminated or controlled, in violation of 310 CMR 40.1003(5). Finally, the Board concluded that by not meeting the MCP requirements for a Response Action Outcome and Risk Characterization, the respondent did not follow the requirements and procedures set forth in applicable provisions of G.L. c. 21E and 310 CMR 40.0000, in violation of 309 CMR 4.03(3)(b).

41. Throughout these proceedings, the respondent has maintained that his actions did not violate the Board's Rules of Professional Conduct.[5] *See* RFD at

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[5] To elaborate, the hearing officer relied on the evidence before him which lead him to conclude, "I find the vast majority of [the respondent's] evidence to be unpersuasive and nonresponsive to the above overwhelming evidence against him; much of the testimony is based upon conclusory and conjectural statements, unsupported by sufficient facts or scientific evidence. . . . Further the Board's testimony in rebuttal exposes numerous inconsistencies and statements that are unsupported by evidence in the record; it *easily* undermines [the respondent's] testimony and that of his witnesses, revealing fatal flaws with [the respondent's] approach at the site and undermining the credibility of [the respondent's] testimony. Much of [the respondent's] evidence ignores the well established facts, attempting to create a scenario that is not supported by sufficient factual evidence." *See* RFD at p. 32 (emphasis supplied).

pp. 11-32. In stark contrast however, the hearing officer found that the Board's allegations against the respondent were proven "by an overwhelming preponderance of the evidence." *See* RFD at p. 32.

42. The respondent also argued that the previous suspensions cases are not comparable precedent for his case. *See generally,* Respondent's Opposition to the Petitioner's Final Findings of Fact and Rulings of Law; Respondent's Opposition to the Prosecuting Attorney's Memorandum Recommending a Disciplinary Sanction. His opinions however, are not competent sources from which to determine the level of discipline that should be imposed.

43. The Board rejects any suggestion that its decision on discipline is inconsistent with its prior decisions. Each of those earlier cases dealt with fact patterns that resembled the scenarios that were alleged here. Moreover, in determining the level of discipline that the Board should impose after a finding of violations of its Rules of Professional Conduct, it is wholly appropriate for the Board to consider the failure of the respondent to acknowledge responsibility for his conduct. *Palmer v. Bd. of Registration in Med.,* 415 Mass. 121, 124-25 (1993).

44. The respondent's refusal to accept personal professional responsibility is an aggravating factor that warrants the suspension of his license and the additional Continuing Education credits.

45. The Board is persuaded that the respondent was not in compliance with the statutes and regulations applicable to hazardous waste cleanup professionals, as required G.L. c.21A, § 19C.

ORDERED

Upon consideration of the Final Findings of Fact and Rulings of Law incorporated into this Order, it is **ORDERED** and **ADJUDGED** that:

I. The respondent's license to practice as a Hazardous Waste Site Cleanup Professional, License No. 9360 shall be suspended for a period of one (1) year, beginning 30 days from the date this Final Order is issued, and that he complete thirty-two hours of continuing education credit in the areas of hydrogeology, conceptual site modeling, remediation of non-aqueous phase liquid, and risk characterization, in addition to what is required to renew his license pursuant to 309 CMR 3.09. So long as this suspension is in effect, the respondent shall not act as, advertise as, hold himself out to be, or represent himself to be a Hazardous Waste Site Cleanup Professional or "Licensed Site Professional" or "LSP".

II. The Board will notify MassDEP of the beginning date of the suspension covered by this Order, within seven (7) days of that date, pursuant to EL. c. 21A, § 19C.

III. If, thirty (30) days from the date this Final Order is issued (the "Effective Date"), the respondent is engaged to provide any LSP Professional Services, as defined in 309 CMR 2.02, to clients, the respondent shall immediately cease providing any further LSP Professional Services, and within fourteen ("14") days shall notify each of these clients in

writing, by certified mail return receipt requested, that the respondent's LSP license has been suspended by the Board and that respondent cannot continue to act as LSP-of-Record for the client's site. Within 21 days after the Effective Date, the respondent shall submit a signed affidavit to the Board attesting that such clients have been notified as described in this paragraph. The respondent shall attach to the affidavit a copy of each notification sent to the respondent's remaining clients and all return receipts or returned mail received up to the date of the affidavit. The respondent shall file supplemental affidavits covering subsequently received return receipts and returned mail. If, as of the Effective Date, respondent has no clients for whom he is performing LSP Professional Services, as defined in 309 CMR 2.02, then Respondent shall submit a letter to that effect to the Board.

Failure to comply with this Order may subject the respondent to further action, including, but not limited to, further disciplinary action by the Board, the issuance of a civil administrative penalty, or referral to the Massachusetts Attorney General's Office for additional civil action and or criminal prosecution.

RIGHT TO APPEAL

Any person aggrieved by a final decision of the Board in an adjudicatory proceeding may obtain judicial review by filing a complaint with the appropriate court in accordance with General Laws chapter 30A.

EFFECTIVE DATES AND PARTIES BOUND

This Order remains effective unless modified by the Board. Issuance of this Order shall not preclude, and shall not be deemed an election to forego, any action to recover damages to interests of the Commonwealth or for civil or criminal fines or penalties.

Issued this 8th day of February 2019

The Board of Registration of Hazardous Waste Site Cleanup Professionals

By:

/s/ James N. Smith Date: 1/19/19

/s/ Kathleen Campbell Date: 1/16/19

Co-Chairperson Professional Conduct Committee

/s/ David Austin Date: 1/16/19

/s/ Marc J. Richards Date: 1/16/19

/s/ Farooq Siddique Date: 1/29/19

/s/ Dr. Gail L. Batchelder Date: 1/16/19

/s/ Gredd McBride Date: 1/29/19

DENIAL OF PRELIMINARY INJUNCTION, COMMONWEALTH OF MASSACHUSETTS COUNTY OF MIDDLESEX SUPERIOR COURT (JANUARY 25, 2011)

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF MIDDLESEX
THE SUPERIOR COURT

DECOULOS

v.

COMMERFORD, CHAIR PERSON OF THE BOARD OF REGISTRATION OF HAZARD ET AL.

Civil Docket#: MICV2011-00178-C

NOTICE OF DOCKET ENTRY

TO: James J. Decoulos
185 Alewife Brook Parkway
Cambridge, MA 02138

You are hereby notified that on 01/25/2011 the following entry was made on the above referenced docket:

> Complaint P#1, Plaintiff's request for a preliminary injunction is **DENIED**. Plaintiff has not demonstrated a likelihood of success in demonstrating that he suffered any actual prejudice as a result of the delay in issuing the order to show cause. Further, plaintiff

has not exhausted his administrative remedies. The proceedings which plaintiff seeks to enjoin are proceedings which may or may not result in discipline for the plaintiff. The Court should not intervene until the process has been completed. The Court does find it troublesome, however, that DEP witnesses may be unavailable to plaintiff to defend against positions supported by other DEP employees (Murtagh, J.). Dated 1/24/11. Notices mailed 1/25/11.

Dated at Woburn, Massachusetts this 25th day of January, 2011.

/s/ Michael A. Sullivan
Clerk of the Courts

BY: Arthur DeGuglielmo
Assistant Clerk

Telephone: 781-939-2757

STATUTORY PROVISIONS INVOLVED

Part I
ADMINISTRATION OF THE GOVERNMENT

Title III LAWS RELATING TO STATE OFFICERS

Chapter 30A
STATE ADMINISTRATIVE PROCEDURE

Section 11
ADJUDICATORY PROCEEDINGS; ADDITIONAL REQUIREMENTS

Section 11. In addition to other requirements imposed by law and subject to the provisions of section ten, agencies shall conduct adjudicatory proceedings in compliance with the following requirements:—

(1) Reasonable notice of the hearing shall be accorded all parties and shall include statements of the time and place of the hearing. Parties shall have sufficient notice of the issues involved to afford them reasonable opportunity to prepare and present evidence and argument. If the issues cannot be fully stated in advance of the hearing, they shall be fully stated as soon as practicable. In all cases of delayed statement, or where subsequent amendment of the issues is necessary, sufficient time shall be allowed after full statement or amendment to afford all parties reasonable opportunity to prepare and present evidence and argument respecting the issues.

(2) Unless otherwise provided by any law, agencies need not observe the rules of evidence

observed by courts, but shall observe the rules of privilege recognized by law. Evidence may be admitted and given probative effect only if it is the kind of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs. Agencies may exclude unduly repetitious evidence, whether offered on direct examination or cross-examination of witnesses.

(3) Every party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine witnesses who testify, and to submit rebuttal evidence.

[. . .]

. . .documents in the possession of the agency of which it desires to avail itself as evidence in making a decision, shall be offered and made a part of the record in the proceeding, and no other factual information or evidence shall be considered, except as provided in paragraph (5) of this section. Documentary evidence may be received in evidence in the form of copies or excerpts, or by incorporation by reference.

(5) Agencies may take notice of any fact which may be judicially noticed by the courts, and in addition, may take notice of general, technical or scientific facts within their specialized knowledge. Parties shall be notified of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence, and specialized

knowledge in the evaluation of the evidence presented to them.

(6) Agencies shall make available an official record, which shall include testimony and exhibits, and which may be in narrative form, but the agency need not arrange to transcribe shorthand notes or sound recordings unless requested by a party. If so requested, the agency may, unless otherwise provided by any law, require the party to pay the reasonable costs of the transcript before the agency makes the transcript available to the party.

(7) If a majority of the officials of the agency who are to render the final decision have neither heard nor read the evidence, such decision, if adverse to any party other than the agency, shall be made only after (a) a tentative or proposed decision is delivered or mailed to the parties containing a statement of reasons and including determination of each issue of fact or law necessary to the tentative or proposed decision; and (b) an opportunity is afforded each party adversely affected to file objections and to present argument, either orally or in writing as the agency may order, to a majority of the officials who are to render the final decision. The agency may by regulation provide that, unless parties make written request in advance for the tentative or proposed decision, the agency shall not be bound to comply with the procedures of this paragraph.

(8) Every agency decision shall be in writing or stated in the record. The decision shall be

accompanied by a statement of reasons for the decision, including determination of each issue of fact or law necessary to the . . . to the proceeding shall be notified in person or by mail of the decision; of their rights to review or appeal the decision within the agency or before the courts, as the case may be; and of the time limits on their rights to review or appeal. A copy of the decision and of the statement of reasons, if prepared, shall be delivered or mailed upon request to each party and to his attorney of record.

Part I
ADMINISTRATION OF THE GOVERNMENT

Title III LAWS RELATING TO STATE OFFICERS

Chapter 30A
STATE ADMINISTRATIVE PROCEDURE

Section 12
ADJUDICATORY PROCEEDINGS; SUBPOENAS

Section 12. In conducting adjudicatory proceedings, agencies shall issue, vacate, modify and enforce subpoenas in accordance with the following provisions:—

(1) Agencies shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence or documents, relating to any matter in question in the proceeding. Agencies may administer oaths and affirmations, examine witnesses, and receive evidence. The power to issue subpoenas may be exercised by any member of the agency or by any person or

persons designated by the agency for such purpose.

(2) The agency may prescribe the form of subpoena, but it shall adhere, in so far as practicable, to the form used in civil cases before the courts. Witnesses shall be summoned in the same manner as witnesses in civil cases before the courts, unless another manner is provided by any law. Witnesses summoned shall be paid the same fees for attendance and travel as in civil cases before the courts, unless otherwise provided by any law.

(3) Any party to an adjudicatory proceeding shall be entitled as of right to the issue of subpoenas in the name of the agency conducting the proceeding. The party may have such subpoenas issued by a notary public or justice of the peace, or he may make written application to the agency, which shall forthwith issue the subpoenas requested. However issued, the subpoena shall show on its face the name and address of the party at whose request the subpoena was issued. Unless otherwise provided by any law, the agency need not pay fees for attendance and travel to witnesses summoned by a party.

[. . .]

. . . subpoena issued in its name. The agency shall give prompt notice to the party, if any, who requested issuance of the subpoena. After such investigation as the agency considers appropriate it may grant the

petition in whole or part upon a finding that the testimony, or the evidence whose production is required, does not relate with reasonable directness to any matter in question, or that a subpoena for the attendance of a witness or the production of evidence is unreasonable or oppressive, or has not been issued a reasonable period in advance of the time when the evidence is requested.

(5) Upon the failure of any person to comply with a subpoena issued in the name of the agency and not revoked or modified by the agency as provided in this section, any justice of the superior court, upon application by the agency or by the party who requested that the subpoena be issued, may in his discretion issue an order requiring the attendance of such person before the agency and the giving of testimony or production of evidence. Any person failing to obey the court's order may be punished by the court for contempt.