

2. Has Respondent properly complied with the requirements of the Setoff Debt Collection Act such that the Petitioner's debt, if any, may be sent to the North Carolina Department of Revenue for collection?

WITNESSES

For Petitioner: Darrell Janezic

For Respondent: Bobby Blake
Clarence Torain
Robert Willis
Richard McNeal

EXHIBITS

For Petitioners: Exhibits 1 through 10 were admitted.

For Respondent: Exhibits A through K were admitted.

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, and exhibits received and admitted into evidence, and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following Findings of Fact. In making these Findings of Fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to the demeanor of the witnesses, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. Petitioner Janezic Building Group LLC is a North Carolina corporation with its principal place of business located at 1912 Bowling Green Trail, Raleigh, North Carolina 27613. Respondent Orange County, is a political subdivision of the State of North Carolina, organized and operating as a county government, pursuant to North Carolina General Statute §153A-10 and § 153A-11.

2. Orange County Solid Waste's Policy regarding construction and demolition waste allows for dumping at no cost provided the materials are clean. Clean materials include only

those items that can be reused by Solid Waste as roadbeds. Clean concrete and brick are accepted free of charge provided they are not too large. Objects such as rebar, wood, buckets, or lunch bag trash mixed in with otherwise clean materials disqualify a load for free dumping. If the materials are not clean, the hauler is told that they are contaminated. The hauler then determines if he wants to dump the materials at the Landfill. If he does, the hauler of the waste receives a receipt for charges made to the appropriate account, which indicates the particulars of the load.

3. The Respondent agreed that clean loads with brick, mortar and concrete coming from demolition performed by Petitioner at the University of North Carolina at Chapel Hill (UNC) would be accepted by Respondent at no charge. In the past the parties had made a similar arrangement with regard to certain debris that the Petitioner had hauled to the Respondent from an unrelated demolition project, namely, brick and block from houses being demolished for the North Carolina Department of Transportation (NCDOT).

4. The demolition debris which is the subject of this case was generated by two phases of renovation and construction at the UNC Dental School at Manning Drive and Columbia Street in Chapel Hill. Most of the Petitioner's work and debris that its work generated was from existing buildings at the Dental School on Manning Drive. This work would have generated waste that would have been "unclean" and not subject to the parties' no-charge arrangement, but the Petitioner's demolition work on this phase occurred almost a year and a half before its work in the project's phase just across Manning Drive, which generated the waste in issue in this case. The demolition work that generated the waste at issue in this case was of brick pavers, concrete stair risers and planters from the Thurston-Bowles building area.

5. Janezic Building Group contracted with Waste Industries USA, Inc. (Waste Industries) to transport its demolition waste during the period of October 1 through October 11, 2010. Waste Industries transported over 115 tons of demolition waste to the Orange County Landfill during this time which included loads on October 1, 4, 5, 6, 7, and 11.

6. Darrell Janezic with the Janezic Building Group testified that he visited and was on site every day of the first week of the Thurston-Bowles building area demolition project. He stated the waste container area was fenced off and that he opened up the container while he was there to see if it was clean. Mr. Janezic stated that concrete and bricks were the only materials he observed in the container. He stated that a supervisor was on site and coordinated with Waste Industries when the dumpster was full. No supervisor reported any contaminants to Mr. Janezic.

7. Mr. Janezic felt that with the work area in question being fenced, the waste container being inside the fence, and the construction work in progress at the time behind another fence, it was unlikely that third-parties would have been tossing any significant amount of trash into the container.

8. Petitioner provided photographs (Petitioner's Exhibits 2-5) of the work site. There is no plywood in any of the relevant photographs. There were no photographs taken of the loads that were billed as unclean.

9. Mr. Janezic stated that arrangements had been made with Waste Industries that if there were any issues, Janezic Building Group would be called. He did not receive any calls regarding any contaminated loads.

10. Bobby Blake, Weigh Master with the Orange County Landfill, stated he knew the Waste Industries driver, Richard McNeal, who drove the Janezic Building Group loads in October 2010 to the Landfill because "Richard came in all the time". Clarence Torain, Weigh Master with the Orange County Landfill has known Richard McNeal for 10 to 15 years. Both Mr. Blake and Mr. Torain provided specific testimony about their recollections of Petitioner's loads in October 2010. These two weigh masters testified that the hauler of these loads, Richard McNeal, informed them that the loads were not clean.

11. Robert Willis is the Orange County Landfill Supervisor. He stated that if a concrete load has steel in it then it is not clean. He recalled seeing one of the loads brought to the Landfill by Petitioner's driver and it was contaminated with wood and lunch bags.

12. Richard McNeal is a driver with Waste Industries. He has made a hundred or more trips to the Orange County Landfill. Mr. McNeal explained that he had been assigned as the exclusive driver to transport loads from the Petitioner's worksite to the Landfill. He described details of the worksite, his process for gaining entry to the worksite and for retrieving the full roll off and for replacing it with an empty one. He stated that he never saw Mr. Janezic at the worksite when he came for the loads and in fact did not talk to anyone from the site. No employees of Petitioner appeared to testify about the loads that were taken to the Landfill. Other than the witnesses for the County, no witnesses were present at the Landfill when the loads were dumped.

13. Mr. McNeal, the hauler, recounted seeing buckets, planks, rebar, workers' lunch trash, and other non-construction and demolition materials in the loads he transported. The testimony at the hearing showed that Mr. McNeal either communicated to the weigh masters that the loads were not clean and/or an inspector from Orange County Solid Waste determined the loads were contaminated. Contaminants found in the loads included, among other items, buckets, rebar, wood, and assorted trash. As a result, all loads that arrived to the Landfill from Janezic were ineligible for free dumping.

14. Per Waste Industries policy, a hauler is prohibited from cleaning any loads. As a result, a charge for each load in this case was assessed and a receipt was generated and given to the hauler, providing Janezic with notice of the occasions that the materials were not clean.

15. As of the filing of this case, Petitioner disputed the Landfill bill of \$5,855.03 and has not rendered payment. Respondent's Exhibit G shows a charge of \$950.84 for a load taken to the Orange County Landfill on October 5, 2010. The ticket however is to Waste Industries with a Durham address and not to Janezic Building Group as are the other tickets in the Respondent's exhibits. The amount in Exhibit G is not however part of the total bill cited above.

16. On or about December 13, 2011, the County sent written notices to Petitioner, informing Petitioner that it intended to submit the debt owed to collection by setoff as provided

by Chapter 105A of the NC General Statutes, the Setoff Debt Act. The notice informed the Petitioners of a collection assistance fee, the debtor's right to contest the matter, the procedure for requesting a hearing to do so, and that failure to request a hearing will result in setoff of the debt.

17. Petitioner exercised its right to request a hearing to contest the setoff. A hearing was scheduled and occurred on Wednesday, February 8, 2012. Petitioner, accompanied by counsel, attended the hearing. The County sent Petitioner a letter on February 14, 2012, providing notice that the debt had been upheld. This notice informed Petitioner of its right to file a petition for a contested case if it disagreed with the decision of the Hearing Officer.

BASED UPON the foregoing findings of fact and upon the preponderance or greater weight of the evidence in the whole record, the Undersigned makes the following:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case. To the extent that the findings of fact contain conclusions of law, or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels.

2. "The North Carolina courts have generally allocated the burden of proof in any dispute on the party attempting to show the existence of a claim or cause of action, and if proof of his claim includes proof of negative allegations, it is incumbent on him to do so." *Peace v. Empl. Sec. Com'n of N.C.*, 349 N.C. 315, 507 S.E.2d 272 (1998) citing *Johnson v. Johnson*, 229 N.C. 541, 50 S.E.2d 569 (1948). Petitioners in this case carry the burden of proof. To meet this burden, Petitioner must show that Respondent substantially prejudiced its rights and exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule. "The party with the burden of proof in a contested case must establish the facts required by G.S. 150B-23(a) by a preponderance of the evidence." *Britthaven v. N.C. Dept. of Human Resources*, 118 N.C. App. 379, 455 S.E. 2d 455, rev. den., 341 N.C. 418, 461 S.E. 2d 754 (1995).

3. In accordance with *Painter v. Wake County Bd of Ed.*, 217 S.E.2d 650, 288 N.C. 165 (1975), absent evidence to the contrary, it will be presumed that "public officials will discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law. Every reasonable intendment will be made in support of the presumption." See also *Huntley v. Potter*, 122 S.E.2d 681, 255 N.C. 619 (1961). The burden is upon the party asserting the contrary to overcome the presumption by competent and substantial evidence. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to

support a conclusion.” *Rusher v. Tomlinson*, 119 N.C. App. 458, 465, 459 S. E. 2d 285, 289 (1995), *aff’d*, 343 N.C. 119, 468 S.E. 2d 57 (1996); *Comm’r of Insurance v. Fire Insurance Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). In weighing evidence which detracts from the agency decision, “[i]f, after all of the record has been reviewed, substantial competent evidence is found which would support the agency ruling, the ruling must stand” *Little v. Bd. of Dental Examiners*, 64 N.C. App. 67, 69, 306 S.E.2d 534, 536 (1983)(citations omitted).

4. The testimony and evidence at this hearing, particularly the testimony of the actual Waste Industries hauler of the Janezic Building Group’s loads to the Orange County Landfill, show that the Petitioner did not deliver clean loads to the Landfill between October 1, 2010 and October 11, 2010; and, as the loads delivered were contaminated the Respondent is owed \$5,855.03 by Petitioner for costs and late payment interest for use of the Landfill.

5. The testimony and evidence at the hearing show that the Respondent complied with the statutory requirements of the Setoff Debt Collection Act. A valid debt has been established. The County sent written notice to the Petitioner of its intention to setoff the debt, a hearing was held at the request of the Petitioner to contest the proposed setoff, and the decision of the hearing officer was sent to the Petitioner, which included information detailing Petitioner’s right to file a petition for a contested case.

BASED UPON the foregoing Findings of Fact and Conclusions of Law the Undersigned makes the following:

DECISION

The Undersigned finds and holds that there is sufficient evidence in the record to properly and lawfully support the Conclusions of Law cited above.

Based on those conclusions and the facts in this case, the Undersigned holds that the Petitioner has failed to carry its burden of proof by a greater weight of the evidence that Respondent erred in its assessment of a Landfill debt and did not properly comply with the requirements of the Setoff Debt Collection Act. The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbear, in some degree, the weight upon the other side. Petitioner’s evidence does not overbear in that degree required by law the weight of evidence of Respondent.

NOTICE

This is a Final Decision issued under the authority of N.C. GEN. STAT. § 150B-34.

UNDER the provisions of NORTH CAROLINA GENERAL STATUTES Chapter 150B, Article 4, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision. In conformity with the Office of Administrative Hearings' rule, 26 N.C. Admin. Code 03.012, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision. N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

IT IS SO ORDERED.

This the 30th day of November, 2012.

Augustus B. Elkins II
Administrative Law Judge