

testimony adverse to the Jains, accepted hearsay testimony, and evidently took testimony in a prearranged “show trial” orchestrated to cast blame upon the Jains, who were not participants in that proceeding. That hearing, ostensibly scheduled to ascertain Mr. Sida-Perez’s financial capacity to pay a fine, resulted in a “Jain bashing” orchestrated event, culminating in a dismissal of the substantive charges against Mr. Sida-Perez after concluding that the Jains were responsible for his conduct. Moreover, the foregoing was all done without any jurisdiction whatsoever over the Sida-Perez case.¹ One of the main themes of the ACHD’s brief and argument in this matter is that the testimony of VJ and RJ is not credible (ACHD Brief at pages 4, 6, 10, 11). As was raised before, much of the testimony and filings in the Sida-Perez hearing directly attacked the credibility of VJ and RJ. Mr. Slater was tasked with weighing Sida-Perez’s credibility and concluded, in a hearing to which the Jains were not privy, that he was credible.

As a matter of fact, the ACHD could have simply either not fined Mr. Sida-Perez or reversed its order; thus, the need for a “hearing” was conjured up solely for show.

The penalty against Sida-Perez was ultimately dismissed upon his motion which went unopposed by the ACHD. Thus, Mr. Slater found the allegations in the “Motion to Dismiss the Enforcement Order Directed to Pintura Construction, LLC, and Raymond Sida, Incorrectly Identified as Ramon Perez (sic), Issued on June 2, 2017” credible and true.

The ACHD also argues that Churchill (and the Jains) either made misrepresentations in their grant application or in their testimony because Churchill would have had to demonstrate that it secured half of the grant funds it applied for. In his order denying the Jains’ Motion to Seal the Hearing Record, Mr. Slater found as fact, prior to any testimony or evidence, that the Jains were required to “demonstrate that at least 50% of the required non-state funds necessary to complete the project are secured” when applying for the RACP grant. The ACHD cites the same

¹ The Jains fully incorporate their Renewed Motion Requesting Recusal of Hearing Officer Max Slater.

language in its brief without introducing any evidence aside from a reference in its brief to the application handbook which is not a part of the record. There is nothing on the record related to this, but, Mr. Slater has already made it a finding of fact.

Mr. Slater should recuse.

II. The Prepayment Requirement and ACHD Hearing Process is Unconstitutional:

A. The ACHD Penalty Hearing Procedure Does Not Provide Due Process:

1. The Due Process Standards:

Fuentes v. Shevin, 407 U.S. 67, (S. Ct. 1983), enunciated the broad principle that any significant taking of property within the protection of the Fourteenth Amendment, however brief or temporary, must be preceded by notice and opportunity for a prior hearing, "the only truly effective safeguard against arbitrary deprivation of property." 407 U.S. at 83. The majority opinion, written by Mr. Justice Stewart, was unequivocal in its holding that Due Process requires a hearing prior to the deprivation of any significant property interest. Cited by *In re Oronoka*, 393 F. Supp. 1311, (1975 U.S. Dist. Northern Maine). The requirement for a pre-deprivation hearing is fact-specific, as due process is flexible and calls for such procedural protections as the particular situation demands. *Ciambriello v. County of Nassau*, 292 F.3d 307, (2002 U.S. App. 2nd Cir.) citing *Mathews v. Eldridge*, 424 U.S. 319, (S. Ct. 1996).

The ACHD cites *Boyle Land & Fuel Co. v. Com., Envtl. Hearing Bd.*, 475 A.2d 928 (Pa. Cmwlth 1984) and *Tracy Min. Co. v. Com.*, 544 A.2d 1075 (Pa. Cmwlth. 1988) as authority for the ACHD requirement of a prepayment of a penalty prior to a hearing on the merits of a penalty. The ACHD cites the same for the proposition that absent the bond or prepayment, no hearing on the merits is warranted.

Boyle is similar to this case in that it was an appeal of a penalty, but it was a penalty pursuant to the Surface Mining Control and Reclamation Act of 1977, and the Court noted that "We are also satisfied that DER's regulations have provided Petitioner" with due process of law. And, pursuant to 25 Pa. Code 86.201(b), DER "may upon its own motion, or shall upon written request of the person to whom the assessment was issued, arrange for a conference to review the assessment." There is no similar opportunity under ACHD regulations for the Jains and, where *Boyle* dealt with a \$27,000 penalty, here, the size of the penalty and the closing of the Jains' buildings would call for more than a simple conference (whether formal or informal).

Tracy Min Co., supra was a case pursuant to the Surface Mining Conservation and Reclamation Act and followed *Boyle* using the same rationale. Though, this case involved a petition for injunctive relief against instituting new regulations. The rationale is that without a bond, all new regulations would be challenged and frivolity would prevail (the bond is also small). It did not deal with a penalty.

B & M Coal Corp. v. Office of Surface Mining Reclamation & Enforcement, 699 F.2d 381, (1983 U.S. App.) also deals with the Surface Mining Conservation and Reclamation Act. It is relied upon by the *Boyle* court. In it, the Court upholds a bond requirement because, following the notice of violation, the mine operator had a full administrative hearing to contest the violation without making a deposit. After a \$2,900 penalty was assessed, the mine operator had an informal assessment conference, which resulted in a reduced fine. The mine operator was not required to deposit the proposed penalty until after the assessment conference to secure further review. *B & M, supra* held that due process was afforded because the mine operator had a hearing to contest the violation (pursuant to the regulations). And, that due process requires consideration of three distinct factors; first, the private interest that will be affected by the

official action; second, the risk of an erroneous deprivation of such interest through the procedure used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. Citing *Mathews v. Eldridge*, 424 U.S. 319 (1976). Here, the penalty is \$1,471,000, not \$2,900 as in *B & M*, and there has been no opportunity for a hearing to contest the violation and no opportunity to contest the amount of the penalty. The only formal proceedings offered without payment is the inability to pay proceeding and, if unsuccessful, the Jains must either prepay the penalty/obtain a bond, or, lose their property right by default, both resulting in a taking of property without due process.

2. The ACHD Procedure Does Not Meet Due Process Requirements:

The common theme for the cases relied upon by the ACHD is that the statutory scheme afforded plaintiffs with preliminary access to the courts without a deprivation of property. *Graham v. Office of Surface Mining Reclamation & Enforcement*, 722 F.2d 1106, (1983 U.S. App). Here there is no preliminary access. And, the substantial property interest is 1000 times greater in this case than in those cited by the ACHD.

The factors laid out in *B & M*, *supra* are not satisfied by the ACHD regulations which provide for no pre-deprivation hearing absent prepayment or bond. The ACHD requirement of prepayment is especially troubling in light of the size of the fine at issue, \$1,471,000. This is no small amount and represents a significant private property interest.

Second, there is large risk of erroneous deprivation of the Jains' interest using this procedure. The Jains requested that the hearing officer recuse himself on multiple occasions.

Here, it is the ACHD, its director, and the hearing officer that makes the decision on both whether the Jains can afford to prepay the penalty, and the merits of the case.² Mr. Slater could have recused and had the ACHD director appoint a disinterested hearing officer or panel, but chose not to. (See ACHD Regulations Article 11). In fact in rejecting the original recusal motion, Mr. Slater contended that he, being the only hearing officer, could not recuse; as though expedience trumps due process. It also calls into question, his independence. See *Abramovich v. Pennsylvania Liquor Control Bd.*, 416 A.2d 474, (Pa. 1980). If it is determined that the Jains can prepay the penalty, the Jains will either be deprived of their property immediately by lien if they do not pay, or be deprived of their funds if they do pay, without any determination if they are actually liable for the alleged actions.

Further, the ACHD's own witness, DeLuca testified that he found the Jains could borrow the funds utilizing their assets. Even assuming that is true, the Jains would be deprived not only of the funds, but be liable for loans, interest, and possible loss of their underlying assets (even if successful upon appeal) if they were even able to take such loans.

There are no other safeguards for the Jains under ACHD Regulations. They are necessarily deprived of their property if they desire to appeal the penalty. And, while if they pay the penalty they are entitled to a hearing, if they do not, the ACHD essentially obtains a default judgment and a lien on all property owned by the Jains.

And, there is no post-deprivation procedure to protect the Jains, or anyone in their position, especially given the facts of this case and the size of the penalty (certainly if they convey liens or borrow money). The requirement to post a fine, which has been publicly identified by the ACHD as the largest in its history, as a condition of a post-penalty hearing,

² See ACHD Regulation 2109.03(d) which would allow the director to appoint a panel of three (3) individuals completely unrelated to ACHD, whereas here, the hearing officer is an employee of the ACHD.

when there has been no pre-penalty hearing, is an inherent due process violation. While the courts, in some cases, have permitted posting a fine as a condition of a hearing, they have not given carte blanche to permit states and their progeny to make that a custom. At a certain point a difference in degree evolves into a difference in kind. In this case, the property interest is significant. *B & M, supra*.

The ACHD has no significant interest in requiring the prepayment as any finding of liability creates a lien on all property owned by the violator. ACHD Regulation 2109.06(4).³

B. The Burden and Standard of Proof Utilized by Paul Lynch Investments, Inc. EHB Docket No. 2010-151-M (January 7, 2011) and Relied Upon by the ACHD is Unconstitutional and Deprives the Jains of Due Process both Inherently, and Given the Size of the Penalty Even if a Bond were Considered Constitutional:

1. Introduction/Burden of Proof/Penalty Determination:

The ACHD cites *Paul Lynch, supra* for the proposition that the Jains did not meet their burden because they did not present compelling evidence of their inability to pay (ACHD Brief at page 4). The ACHD cites *Paul Lynch, supra*, arguing that not only is it the Jains' burden, but that their burden is substantial (beyond the normal weight of the evidence) and that they must produce hard compelling demonstrable evidence which they did not (ACHD Brief at page 6 and pages 7-8).⁴

Importantly, the ACHD in determining penalties makes findings, including the size (assets and wealth) of the violator as well as any economic gain realized by the violation and any

³ This is not a case where a new ordinance is being challenged and a bond payment would deter frivolous challenges, this is a penalty assessed by the ACHD against the Jains.

⁴ The Jains did in fact produce a bond denial letter that ACHD objected to based upon hearsay and it was not admitted.

other factors “unique to the owners or the facility and any other relevant factors.” (ACHD Regulations 2109.06(b)(1) and (2) which also incorporate 35 P.S. 4009.1, Transcript “T”, T281-282).

The ACHD stated at the inability to pay hearing that it intended to put into evidence the basis of the penalty although it was not relevant to the Jains’ inability to pay. It did so over the Jains’ relevance objection (which was overruled), and declared that amount of the penalty and its basis are for the hearing on the merits not the inability to pay hearing (T279-280, T290-291).

Thus, the ACHD contends that what it has publically stated is the largest penalty it has ever issued, is based on the Jains assets, economic gain realized as well as the severity of the violations. And, that the Jains cannot challenge that the penalty was assessed, or that the amount is unreasonable or incorrectly calculated, without first paying the penalty, or satisfying an extreme burden of proof regarding an inability to pay.

2. Paul Lynch Investments, Inc. Facts:

The facts of *Paul Lynch, supra* are important as the case was less focused on the actual burden of proof and legal issues related to an ability to pay and more on admonishing Paul Lynch Investments, Inc. (“PLI”) and its owner (and witness in the case), Mr. Lynch.

The Environmental Hearing Board (“EHB”) did comment that Mr. Lynch did not produce evidence that paying the fine would cause financial hardship. However, EHB’s finding that PLI could prepay the penalty was based on testimony and evidence that affirmatively demonstrated that PLI could pay. (*Paul Lynch, supra* at 7). And, that PLI was unwilling to prepay the penalty, not unable. (*Paul Lynch, supra* at 8).

The EHB found specifically that PLI had a net value of \$7,000,000 and claimed it was unable to prepay a \$5,000 civil penalty. (*Paul Lynch, supra* at 1). The EHB found that the testimony of Mr. Lynch indicated that PLI was worth \$7,000,000 and had a net income of over \$400,000 in its most recent tax return. Finally, that Mr. Lynch testified that he was unwilling to prepay the penalty because he believed the Department was “picking on him” and that the “whole thing is a sham.” Mr. Lynch also admitted that he was “not willing to cooperate in any which way.” (*Paul Lynch, supra* at 8).

The EHB ultimately found that PLI was not unable, but instead unwilling to prepay the penalty, and thus it must prepay. The EHB decision was clearly an admonition of Mr. Lynch for making the ridiculous claim that PLI (worth \$7,000,000) and Mr. Lynch (worth \$10,000,000-\$20,000,000 liquid) were unable to prepay a \$5,000 penalty. The penalty against the Jains is significantly more, and the Jains are worth significantly less than PLI or Mr. Lynch. And, once hearsay and inadmissible evidence is excluded, the only relevant testimony was that of the Jains and their witnesses.

3. Paul Lynch Investments, Inc. Does Not Apply and The Burden of Proof and Prepayment Requirement Therein is Unconstitutional as Applied to the Jains:

First, as both the ACHD and the Jains have noted, the ACHD is not bound by EHB cases or decisions, and the burden of proof in inability to pay cases has not been tested by the Commonwealth Court or any Federal Court. This case is not a simple penalty case, but a case where the ACHD meticulously calculated the largest fine in its history by assessing the Jains’ size, assets, economic benefit from the alleged violations, the alleged violations themselves, and many other factors (T279-282). If the burden of proof is upon the Appellant to prove that he or

she cannot pay the fine assessed as a condition precedent to either pre or post penalty relief, then it is equivalent of denying the Jains any meaningful opportunity to challenge the penalty. *Jonnet v. Dollar Sav. Bank*, 392 F. Supp. 1385, (W.D. Pa. 1975) U.S. Dist. LEXIS 12982.⁵

In assessing the penalty, the ACHD has essentially made a predetermination of the Jains' wealth and assets (T288, T290-291 T329-331). And, now is requiring the Jains to prove that they cannot afford to prepay the penalty, in order to challenge the alleged violations, **AND**, the amount of the penalty assessed.

This case is not *Paul Lynch, supra*. The Jains have testified that they cannot prepay the penalty. The Jains have produced their tax returns and given testimony that they cannot obtain a loan or a bond (because a bond requires 125% of the amount sought in cash) (T57-58, T83 and T107). The Jains produced proof of their assets and their business operations. Nothing indicates they can afford to pay the penalty in thirty (30) days.⁶

Additionally, the ACHD's claims as to the Jains' assets and their value is flawed (this is what the penalty is based upon). The ACHD credits the Jains with the SJ Group Holdings property and loan proceeds, when those properties are not available because they are owned by VJ and his wife (ACHD Brief at 9-10 and D12). The ACHD credits the Jains with assets that it values based on assessments, when such are hearsay and excluded (D12 and DeLuca's testimony as described in the Jains Post Hearing Brief). Additionally, the ACHD made determinations as to the size of the Jains, their businesses, assets, number of employees, current projects etc. in determining the amount of the fine based on nothing but its "own belief" (T282, T329-331).⁷

⁵ Holding "due process is not served when one party to a dispute may, by mere unexamined application to an official whose function is solely ministerial, bring to bear the state's enormous confiscatory power on its behalf."

⁶ DeLuca, the ACHD's witness even testified that the Jains can only pay the penalty over five (5) years, which is not permitted.

⁷ Shannon Sandberg of the ACHD testified that the penalty is partially based upon "the size of the project or number of employees.....the size of the company as far as, I believe, employees and projects are buildings or assets..."

Shannon Sandberg (enforcement officer) for the ACHD testified that she was provided the information to make the determination by “Mr. Bailey”⁸ (T330).

This is not a \$5,000 fine. At some point, a difference in degree becomes important. If the ACHD is concerned about frivolous appeals, a small prepayment may make sense, but to require prepayment of a \$1,471,000 penalty for due process is obscene and deprives the Jains of a significant property interest. *Boyle, supra*. Further, even if a bond or prepayment of this size were deemed constitutional, to require the Jains to bear the burden (a substantial one) in proving they cannot afford to pay a penalty, that the ACHD has already determined based on their assets, violates due process and all standards of fairness. Especially considering the Jains, at this juncture, were not permitted to challenge the amount of the penalty or provided with the ACHD’s information used to calculate the penalty. The Jains put on their prima facie case and the ACHD’s evidence did not rebut the Jains; they have satisfied their burden.

Finally, Pennsylvania has yet to review the constitutionality of prepayment requirements where there is no due process prior to the deprivation (*Twelve Vein Coal Company v. PA DEP*, 561 A.2d 1317 (Pa. Commw. 1988). However, *Fuentes, Ciambriello, Matthews and Graham, supra* have all held that there must be some pre-deprivation due process on the merits. Here there is none, and given the size of the penalty, due process is required beyond an ability to pay hearing where the Jains are not even permitted to challenge the amount of the penalty.

It should also be noted that other jurisdictions have held that even with relatively small fines, due process must be afforded. *St James v. Department of Environmental Protection and Energy*, 646 A.2d 447 (N.J. Super, 1994) held that the prepayment requirement of a \$6,750 penalty is unconstitutional unless there is some interim procedure offering the violator an

⁸ An ACHD Attorney who is not an investigator, but, who participated in the hearing and the prosecution of the case against the Jains and, troublingly, is apparently also acting as advisor to the ACHD related to the penalty which is a deprivation of due process. *Pittsburgh Bd. of Public Education v. MJN*, 524 A.2d 1385, (1987 Pa. Commw).

opportunity to be heard without posting security, as otherwise it would be a taking of property without due process. The Court based its decision on *Fuentes*, *Ciambriello*, *Matthews* and *Graham*, *supra*, which are binding on this tribunal.

Finally, the ACHD may argue that the ability to pay hearing satisfies due process. However, it does not, as it does not permit the Jains to be heard with regard to the merits of the penalty or to attack its calculation; only to assert that they cannot afford to pay it. *B & M*, *supra*.

C. Conclusion:

The prepayment requirement is unconstitutional on its face and as applied to the Jains. Further, given the facts of the case, the Jains have satisfied their burden and proven an inability to prepay the penalty.

Additionally, Mr. Bailey has acted as both prosecutor and advisor to the ACHD. Sandberg testified that he provided the information for her to calculate the penalty (T330). Mr. Bailey was prosecuting attorney at the hearing along with Mr. Willis. This creates a susceptibility that the proceedings are subject to prejudice and are therefore, improper. *Pittsburgh Bd. of Public Education v. MJN*, 524 A.2d 1385, (1987 Pa. Commw).⁹ Thus, the case should be dismissed.

III. RACP Grant:

The ACHD argues that Churchill was required to demonstrate, at the time of the grant application, that it had 50% of the amount of the grant secured. And thus, Churchill must have the funds, or the Jains misrepresented on the grant application or in their testimony (ACHD Brief at pages 10-12).

⁹ Holding that such commingling violates due process even absent proof of actual bias.

The ACHD cites the Commonwealth of Pennsylvania Application & Business Plan Handbook and 72 P.S. 3919.302 for this proposition. The handbook was not entered into evidence, but, even if accepted, it must be noted that cash is not required. The land itself can be utilized (p. 30 of the Handbook) and 72 P.S. 3919.302 (part 5, ii of the definition). Further, 72 P.S. 3919.318 which describes the administration of grant awards is silent on secured funding (thus it is not required by statute).

The ACHD bases its argument on conjecture, but the evidence is what is important. VJ testified that in order to tap the RACP grant “we would have to show funds of a million, which we’re not in that process at all right now” (T102). VJ also testified that the Jains did not have the matching funds at this time (T105).

Finally, the grant application was submitted in 2015. Even if Churchill declared it had funds at that time, the evidence is that there are no such funds now. The ACHD had access to the Jains bank account information and tax returns and did not submit evidence that Churchill has funds right now (because it does not) (T392).¹⁰ Thus, while the ACHD claims as a “logical necessity” that either VJ misrepresented the Jains on the grant application or to the hearing officer, this is not true, as VJ testified that funds are not available now (2 years later), which is logical (ACHD Brief 11-12).

IV. Loan Proceeds:

The evidence is that SJ Group Holdings received a \$5,000,000 loan (Exhibit A12, T108). Of those funds, \$784,000 remains and some of the funds were loaned from SJ Group Holdings to other Jain businesses (T109-110). SJ Group Holdings is owned by VJ and his wife, therefore the

¹⁰ The ACHD claims the Jains “proffered no bank statements” (ACHD Brief at 15), but the ACHD possessed the statements, DeLuca utilized them. The Jains chose not to enter them into evidence (so did ACHD).

properties and the funds are not available for judgment or to pay a penalty (Exhibit B to the Jains' Post Hearing Brief). VJ's wife is not involved in this litigation.

V. Bond:

The testimony was that in order to secure a bond, 125% of the bond amount was necessary in cash (T7-58). The evidence is that the Jains do not have funds to prepay the penalty and certainly do not have 125% thereof to secure a bond.

Respectfully Submitted,

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Date: November 20, 2017

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