

STATE OF NORTH CAROLINA
COUNTY OF SURRY

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
22 EHR 01759

<p>Bottomley Evergreens & Farms and Bottomley Properties NC LLC Petitioner,</p> <p>v.</p> <p>NC Department of Environmental Quality Division of Water Resources Respondent.</p>	<p style="text-align: center;">AMENDED FINAL DECISION</p>
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Pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(a), the Undersigned hereby **amends** the Final Decision issued on May 3, 2023, to correct a clerical mistake in the disposition paragraph “**Final Decision.**” The remainder of the Final Decision issued on May 3, 2023 shall remain in full force and effect.

THIS MATTER came before the undersigned Administrative Law Judge John C. Evans upon Petitioner’s Motion for Summary Judgement filed in the Office of Administrative Hearings on January 13, 2023. A hearing on this motion was held on March 14, 2023 at the North Carolian Office of Administrative Hearings in Raleigh, NC. The Undersigned, having considered the record in this matter, finds that the Motion is ripe for disposition.

APPEARANCES

For Petitioner: Joseph A. Ponzi
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For Respondent: Asher P. Spiller, Special Deputy Attorney General
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BACKGROUND

On April 11, 2022, the Respondent issued a civil penalty assessment (CPA) in the amount of \$263,348.02 to the Petitioner for alleged violations of 15A N.C.A.C 02B .0211 and .0231, and 15A N.C.A.C. 02H .0501 and 0502.

On January 13, 2023, the Petitioner filed a Motion for Summary Judgement, and brief in support thereof, requesting summary judgment based on several arguments, including that the

Respondent's issuance of the CPA was signed by a person not authorized by law to assess this civil penalty. More specifically, Petitioner argued that N.C. Gen. Stat. 143-215B.6A vests the Secretary of Department of Environmental Quality (DEQ) with the authority to assess civil penalties and that N.C. Gen. Stat. 143B-10 authorizes the Secretary to "assign or reassign any function vested in him or in his department to any subordinate officer or employee of his department." However, the Petitioner argued there was no currently effective delegation of the authority to assess civil penalties because the delegation memo produced by the Respondent during discovery was March 4, 2020, a delegation from former DEQ Secretary Michael S. Regan to "administer the regulatory provisions of the Water Use Act of 1967" , which was not at issue in this case.

On February 3, 2023, the Respondent filed a response to the Petitioner's Motion for Summary Judgment. Included in that response was an acknowledgement that the delegation produced in discovery for the Water Use Act of 1967 was the incorrect delegation document. The Respondent then provided the relevant delegation document, which is a 2020 delegation wherein the DEQ Secretary delegated the authority to assess civil penalties to the Director of Division of Water Resources (DWR). Respondent further noted that the 2020 Regan Delegation included the following statement: "the Division Director can subdelegate those functions in writing." The Respondent provided a May 11, 2021, memorandum from the Director of DWR delegating numerous functions to numerous positions – including the subdelegation of the authority to assess civil penalties. The issue of subdelegation was raised for the first time by the Respondent and, "thereby hangs a tale."

UNCONTESTED FACTS

1. On April 11, 2022, Respondent issued a civil penalty assessment (CPA) in the amount of \$263,348.02 to the Petitioner for alleged violations of 15A N.C.A.C 02B .0211 and .0231, and 15A N.C.A.C. 02H .0501 and 0502.

2. The CPA was signed by Jeffrey O. Poupart who, on the date of the issuance of the CPA, held the position of Section Chief of the Water Quality Permitting Section within the North Carolina Department of Environment Quality's (DEQ) Division of Water Resources (DWR).

3. In an October 22, 2020, document entitled "Delegation of Authority," then DEQ Secretary, Michael S. Regan, pursuant to N.C. Gen. Stat §143B-10, delegated the authority vested in him under N.C. Gen. Stat. § 143-215.6A to assess civil penalties, to the "Director, Division of Water Resources" ("2020 Regan Delegation"). In addition to delegating this authority to the DWR Director, the 2020 Regan Delegation also contained the statement "Elements of this [delegated] authority may be subdelegated, except that a copy of the subdelegation shall be furnished to the Office of General Counsel."

4. In a May 11, 2021, memorandum Subject Line "Delegation of Signature Authority,"(2021 Subdelegation Memo), the DWR Director delegated his authority for 60 non-civil penalty functions (e.g., permitting authority, application processing) and his authority to assess civil penalties to 13 different positions ranging from the DWR Deputy Director, Section Chiefs, and Branch Supervisors within those Sections. In addition to delegating these authorities, the 2021

Subdelegation Memo contained the following statement “Unless specifically prohibited in this delegation or in the Environmental Management Commission rules, these authorities may be re-delegated or sub-delegated when deemed appropriate.”

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over the parties and the subject matter of this contested case and there is no question as to misjoinder and nonjoinder.

2. To the extent the Uncontested Facts contain Conclusions of Law and the Conclusions of Law contain Findings of Fact, they should be so considered regardless of their given label. *See Westmoreland v. High Point Healthcare, Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012) (citations omitted); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011) (citations omitted).

3. This Tribunal is authorized to grant summary judgment. N.C. Gen. Stat. § 150B-34(e).

4. To succeed in a contested case before the Office of Administrative Hearings, Petitioner must demonstrate (1) that the respondent agency substantially prejudiced its rights; and (2) that the agency 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. N.C. Gen. Stat. § 150B-23(a).

Summary Judgment

5. Summary judgment is properly granted when the pleadings, depositions, answers to interrogatories, admissions, and affidavits show no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law. *Davis v. Town of Southern Pines*, 116 N.C. App. 663, 665, 449 S.E.2d 240, 242 (1994), *disc. rev. denied*, 339 N.C. 737, 454 S.E.2d 648 (1995). An issue is material only if its resolution would prevent the party against whom it is resolved from prevailing. *Bone International, Inc. v. Brooks*, 304 N.C. 371, 375, 283 S.E.2d 518, 520 (1981). The party moving for summary judgment has the burden of showing a lack of a triable issue of fact. *Pembee Mfg. Corp. v. Cape Fear Construction Co.*, 313 N.C. 448, 491, 329 S.E.2d 350, 353 (1985). The moving party may meet this burden by showing an essential element of the opposing party’s claim is nonexistent, or that the opposing party will be unable to produce evidence to support an essential element of the claim. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992).

6. Although findings of fact are not appropriate when the issue is a question of law, an order may employ a recitation of the undisputed facts to explain the resolution of the issue. *In re Estate of Pope*, 192 N.C. App. 321, 330, 666 S.E.2d 140, 147 (2008), *disc. review denied*, 363 N.C. 126, 673 S.E.2d 129 (2009); *Krueger v. N. Carolina Criminal Justice Educ. & Training Standards Comm’n*, 198 N.C. App. 569, 578, 680 S.E.2d 216, 222 (2009).

7. The purpose of summary judgment is to bring litigation to an expeditious and efficient conclusion on the merits where only a question of law on the indisputable facts is in controversy.

Summary judgment is proper under Rule 56 of the North Carolina Rules of Civil Procedure if “there is no genuine issue of material fact and . . . the moving party is entitled to judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56 and 26 N.C. Admin. Code 3 .0101(b).

8. Summary judgment “is an extreme remedy and should be awarded only where the truth is quite clear.” *Lee v. Shor*, 10 N.C. App. 231, 233, 178 S.E.2d 101, 103 (1970). “[A]ll inferences of fact . . . must be drawn against the movant and in favor of the party opposing the motion.” *Caldwell v. Deese*, 288 N.C. 375, 378, 218 S.E.2d 379, 381 (1975).

9. “[W]hen a moving party has met his burden of showing that he is entitled to an award of summary judgment in his favor, the non-moving party cannot rely on the allegations or denials set forth in her pleading, and must, instead, forecast sufficient evidence to show the existence of a genuine issue of material fact in order to preclude an award of summary judgment.” *Steele v. Bowden*, 238 N.C. App. 566, 577, 768 S.E.2d 47, 57 (2014) (internal citation omitted).

10. The North Carolina Administrative Procedure Act (“APA”) APA, provides that “[t]he Administrative Law Judge shall decide the case based upon a preponderance of the evidence, giving due regard to the demonstrated knowledge and expertise of the agency with respect to facts and inferences within the specialized knowledge of the agency.” N.C. Gen. Stat. § 150B-34(a).

11. “There is a rebuttable presumption that an administrative agency has properly performed its official duties.” *In re Appeal from Civil Penalty*, 92 N.C. App. 1, 6, 373 S.E.2d 572, 575 (1988) (citation omitted), *rev’d on other grounds*, 324 N.C. 373, 379 S.E.2d 30 (1989).

12. The burden is upon the party asserting the contrary to overcome the presumption by competent and substantial evidence. *Overcash v. N.C. Dep’t of Env’t & Natural Res.*, 179 N.C. App. 697, 703, 635 S.E.2d 442, 447 (2006), *disc. rev. denied*, 361 N.C. 220, 635 S.E.2d 442 (2007); *see also Styers v. Phillips*, 277 N.C. 460, 178 S.E.2d 583 (1971).

13. The burden is on Petitioner to show that, in issuing the CPA, the Respondent (1) exceeded its authority; (2) acted erroneously; (3) failed to use proper procedure; (4) acted arbitrarily or capriciously; or (5) failed to act as required by law or rule. N.C. Gen. Stat. § 150B-23(a) (in pertinent part).

14. N.C. Gen. Stat. § 143-215.6A states that a civil penalty “may be assessed by the Secretary.” This provision does not provide for delegation of this important function.

15. However, N.C. Gen. Stat §143B-10 provides that the Secretary “may assign or reassign any function vested in him.”

16. In an October 22, 2020, document entitled “Delegation of Authority,” the then DEQ Secretary, Michael S. Regan, pursuant to N.C. Gen. Stat §143B-10, delegated the authority vested in him under N.C. Gen. Stat. § 143-215.6A to assess civil penalties, to the “Director, Division of Water Resources [DWR].” (“2020 Regan Delegation”) R. Ex. 31. However, the 2020 Regan Delegation document goes beyond the delegation authority contained in N.C. Gen. Stat §143B-10 by declaring, with no authority, that “Elements of this [delegated] authority may be subdelegated,

except that a copy of that subdelegation shall be furnished to the Office of General Counsel.

17. In a May 11, 2021 memorandum, Subject Line “Delegation of Signature Authority,”(2021 Subdelegation Memo), the DWR delegated his authority for 60 non-civil penalty functions and 27 civil penalty types to 13 different positions ranging from the DWR Deputy Director, Section Chiefs, and Branch Supervisors within those Sections. In addition to delegating these authorities, the 2021 Subdelgation Memo contained the following statement “Unless specifically prohibited in this delegation or in the Environmental Management Commission rules, these authorities may be re-delegated or sub-delegated when deemed appropriate.”

18. While N.C. Gen. Stat §143B-10 authorized the Secretary to delegate the authority to assess civil penalties to the Director of the Division of Water Resources, this provision does not authorize the delegate to further subdelegate this authority (i.e., subdelegate). In the absence of express authority, the subdelegation statement contained in the 2020 Regan Delegation, standing alone, cannot in and of itself create the authority for the Secretary’s delegate to subdelegate.

19. The starting point for evaluating subdelegation is the is the long-standing principle "delegatus non potest delegare" that translates to "a delegate cannot delegate." *Blake v. Allen*, 221 N.C. 445. This principle refers to the concept that a person who has been delegated authority to perform a specific task or duty cannot further delegate that authority to another person unless expressly authorized by law to do so. In other words, a delegate does not have the power or authority to subdelegate their responsibilities to another individual. This principle underscores the accountability and limitations of delegated authority. *See e.g.*, 1979 N.C. AG LEXIS 43 (“Further, this point is described at greater length in *Mechem, A Treatise on the Law of Public Offices and Officers*, as follows: ‘In those cases in which the proper execution of the office requires, on the part of the officer, the exercise of judgment or discretion, the presumption is that he was chosen because he was deemed fit and competent to exercise that judgment and discretion, and, unless power to substitute another in his place has been given to him, he cannot delegate his duties to another . . .’

20. Notwithstanding this principle, there is a general implication that in the absence of express authority to subdelegate, certain ministerial functions may be subdelegated. Ministerial functions are the kind of duties that will most frequently be delegated to subordinates. The need to delegate ministerial duties can be reasonably implied from the impracticability of requiring an agency director himself or herself to perform all such duties for a department with hundreds of personnel. This authority is typically limited to specific tasks or actions that are considered routine, administrative, or operational in nature, and do not involve policymaking or matters of significant strategic importance. *See McCullough v. Scott*, 182 N.C. 865 (holding that examination of applicants for certificates as public accountants is a quasi-judicial power and is not delegable. The Supreme Court of North Carolina went on to define quasi-judicial functions as those which give the decision maker discretion, to be exerted or withheld according to his own view of what is necessary or proper.); *see also, Trustees of Rex Hospital v. Board of Com'rs of Wake County*, 239 N.C. 312, 331, 79 S.E.2d 892, 906 (1954) (county board of commissioners could not delegate its powers involving exercise of judgment and discretion); *Bowles v. Fayetteville Graded Schools*, 211 N.C. 36, 188 S.E. 615 (1936)(functions which partake of a judicial nature may not be delegated).

21. This case involves the assessment of a civil penalty for violation of environmental regulations. Not only is the decision to assess a civil penalty inherently discretionary, once a decision is made to assess the civil penalty, N.C. Gen. Stat. § 143B-282.1 requires findings of fact with respect to eight enumerated factors. *House of Raeford Farms, Inc. v. N.C. Dept. of Env't & Nat. Res.*, 224 N.C. App. 294, 308, 774 S.E.2d 911, 920 (2015) (“[W]e remand to the superior court with instructions to remand to the finder of fact, to make specific findings with regard to the eight statutory factors set forth (b) and to formulate the amount of any civil penalty to be imposed.”). Hence, the process of determining whether a civil penalty should be assessed, and the amount of the civil penalty, is the antithesis of a ministerial act and one that cannot be vested in literally any person “deemed appropriate” by any number of subdelegates.

22. Taken together, the statement contained in the 2020 Regan Delegation allowing his delegate to further subdelegate when combined with the 2021 Subdelegation Memo, creates a limitless delegation chain that allows literally anyone “deemed appropriate,” whether that person works for the Department or not, to perform virtually any agency function, including the authority to assess civil penalties. This decentralization of authority runs counter to the General Assembly’s specific delegation to the Secretary to issue civil penalties – a function that inherently involves the exercise of judgement and discretion.

23. Where there is no express authority for the delegate to subdelegate, an attempt to read into N.C. Gen. State §143B-10, such authority effectively abrogates the provision itself by collapsing the practical and legal distinction between ministerial acts which can be subdelegated, either expressly or impliedly, and discretionary acts for which subdelegation must be expressly authorized by law in either statute or regulation.

24. This Undersigned is cognizant that this decision granting summary judgement is based on what could be perceived as a procedural issue. However, this Undesigned is equally cognizant that the General Assembly has vested tremendous power in the DEQ Secretary, and concomitant with that grant of power, is the responsibility to act in accordance with the circumscribed limits of that power. The assessment of a civil penalty is a significant and highly discretionary action and therefore the official assessing a civil penalty must be authorized to do so. In this instance the official that assessed the civil penalty was not properly authorized to assess civil penalties and this Tribunal may not uphold this agency action.

25. The Undersigned, having found that the Respondent unlawfully assessed the civil penalty, takes no position on the remaining issues raised in the Petitioner’s Motion.

FINAL DECISION

BASED UPON the foregoing Uncontested Facts and Conclusions of Law, the Undersigned hereby GRANTS **Petitioner’s** Motion for Summary Judgement and vacates the assessed civil penalty.

NOTICE OF APPEAL

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

Under the provisions of North Carolina General Statute § 150B-45, 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 the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **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 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by 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 4th day of May, 2023.

A handwritten signature in blue ink that reads "John C Evans". The signature is written in a cursive style and is positioned above a solid blue horizontal line.

John C Evans
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service.

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This the 4th day of May, 2023.



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