STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

SUNSHINE ENVIRONMENTAL SERVICES, INC.

Petitioner,

-against-

M. PATRICIA SMITH, as Commissioner of the NEW YORK STATE DEPARTMENT OF LABOR; LOUIS CARROCK; and GERALD LEAHY as representatives thereof,

Respondents.

For A Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

Supreme Court Albany County Article 78 Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI #01-08-ST8995 Index No. 5341-08

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DECISION/ORDER/JUDGMENT

George B. Ceresia, Jr., Justice

The petitioner is engaged in the business of asbestos abatement and disposal. On November 14, 2007 it entered into a contract to remove asbestos from a building owned by

the Rome City School District located at 500 Turin Road, City of Rome, New York. The building is the former Rome Free Academy. On January 14, 2008 the petitioner obtained from the respondent Commissioner of Labor a variance[1] with respect to the asbestos removal process, so that it was not required to strictly adhere to Department of Labor Regulations (see 12 NYCRR Part 56). On April 18, 2008 the Department of Labor issued a stop-order with respect to the project. On April 25, 2008, respondent's Deputy Counsel, Joan A. Connell, issued a notice terminating the variance pursuant to Labor Law § 30 (5). The petitioner has commenced the above-captioned CPLR Article 78 proceeding to review the April 25, 2008 determination, and for other relief. The petition raises a number of issues, not only with regard to the revocation of the variance, but also with regard to the methods and manner in which state inspectors have overseen the asbestos removal project.

It is alleged that prior to the project involving the Rome Free Academy, the petitioner had been involved, as asbestos abatement contractor, in an asbestos removal project in Binghamton, New York at the Broome County Harvey Smith Office Building. According to the petitioner, a New York State Department of Labor employee, respondent Gerald Leahy acted as inspector on the project in Binghamton, and at the Rome Free Academy. The petitioner complains that during performance of the project in Binghamton, Mr. Leahy spent unusual amounts of time at the work site and issued various notices of violation. It is further alleged that Mr. Leahy's oversight of the Binghamton project was improper by reason that one of petitioner's employees, Jason Lupole, had a familial relationship with Mr. Leahy. It

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[1]The variance is identified as Site Specific Variance 07-1060.

is indicated that Jason Lupole was injured during his employment with the petitioner, and that he filed a claim for Workers' Compensation benefits. The petitioner alleges that on the same day that Jason Lupole's claim for Workers' Compensation benefits was denied, the petitioner was issued a notice of violation by Mr. Leahy concerning inspections which had been performed five months earlier. In addition, it is indicated that Mr. Leahy, while an employee of the Department of Labor, had attempted to establish a business as an asbestos abatement contractor, and, in connection with the foregoing, had approached petitioner's president, Russell Buell, concerning a business proposal.

With regard to the Rome Free Academy project, the petitioner maintains that Department of Labor employee inspector Louis Carrock prematurely (on December 11, 2007) visited the work site before an asbestos notification was made to the Department of Labor. It is indicated that at an on-site meeting on December 21, 2007 there was a confrontation between Mr. Carrock and petitioner's employee, Pat Hughes. The petitioner alleges that inspector Carrock took the position that workers from other trades were permitted to work in areas contaminated with asbestos without proper protective clothing and equipment. The petitioner complains that during site visits from December 24 through December 28, 2007 Mr. Carrock informed employees of another contractor on site that the petitioner did not have enough money to complete the project. By letter dated January 9, 2008 the petitioner informed Department of Labor employee Daniel Coyle that the Department of Labor inspector was permitting unprotected workers in other trades to work in contaminated areas of the building. As alleged in the petition, Mr. Carrock placed a "hold" on petitioner's application for a variance; and intentionally interfered with petitioner's

work at the Rome Free Academy by requiring information, reports and services which were not usually required. It is alleged that after an internal review, on March 19, 2008, the Department of Labor's Office of Employee Relations determined that no action was warranted regarding petitioner's complaints.

The petitioner alleges that soon thereafter inspector Carrock returned to the work site with inspector Robert Perez, the latter of which is said to have intimidated petitioner's personnel. According to the petition, inspector Perez telephoned Mr. Buell, but then hung up on him. During the same incident, inspector Carrock allegedly threatened petitioner's supervisor, Jeremy Buell, resulting in a telephone call to the Rome Police Department. In addition, it is alleged that inspector Carrock intentionally contaminated petitioner's clean room and waste area in order to bring the petitioner into violation of applicable asbestos handling and transport regulations. The petitioner alleges that at other times, inspector Carrock has indicated that he was "going to get Sunshine's license".

It is further alleged that Department of Labor inspectors have failed to follow proper protective procedures when entering and exiting a contaminated area at the Rome Free Academy project. The petitioner alleges that during an inspection on April 15, 2008, inspector Carrock removed a sample of material from the work site without properly entering or exiting the contaminated area. The petitioner alleges that approximately one week later, a Department of Labor spokesperson issued a statement to local newspapers that an excessive amount of dry debris was observed by inspectors on the floor of the premises, and that said dry debris could have resulted in asbestos disbursement into the air. The petitioner disputes this statement in that the petitioner indicates that the material was tested and found not to

have sufficient quantities of asbestos; and that the area was wet, not dry, which would have minimized air disbursal of any such contaminants.

The petitioner alleges that the Department of Labor denied approval for a variance to use a wet abrasive blasting unit, although the unit had been approved by the Department for the same project in the past. It is alleged that inspectors Carrock and Leahy have failed and refused to wear hard hats during their inspections, although required under OSHA regulations. It is also alleged that on May 22, 2008 inspectors arrived at the Rome Free Academy work site with an investigator from the Department's Prevailing Wage Enforcement Unit to review petitioner's pay records "in another move to intimidate and harass petitioner".

In addition to annulment of the April 25, 2008 letter which vacated petitioner's variance, the petitioner requests an order granting the following relief: enjoining respondents from continuing violation of asbestos containment entry protocols and regulations; enjoining respondents from continuing violations of asbestos containment exit protocols and regulations; enjoining respondents from intimidation of workers by threat or blocking of lawful activities, including the audio and/or video recording of respondents' inspections; removal of any inspector or employees of respondent Department that is in competition with petitioner from review, inspection or any other oversight of petitioner's work; restitution to the petitioner in an amount exceeding one million two hundred thousand dollars.

The respondents, in their answer, have interposed an objection in point of law in which they allege that the petitioner failed to exhaust its administrative remedies. "It is hornbook law that one who objects to the act of an administrative agency must exhaust

available administrative remedies before being permitted to litigate in a court of law" (Watergate v Buffalo Sewer, 46 NY2d 52, 57 [1978], citing, Young Men's Christian Assn. v Rochester Pure Waters Dist., 37 NY2d 371, 375). "This doctrine furthers the salutory goals of relieving the courts of the burden of deciding questions entrusted to an agency (see, 1 NY Jur, Administrative Law, §5 pp 303-304), preventing premature judicial interference with the administrators' efforts to develop, even by some trial and error, a co-ordinated, consistent and legally enforceable scheme of regulation and affording the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its 'expertise and judgement'" (Watergate v Buffalo Sewer, supra, citing, Matter of Fisher [Levine], 36 NY2d 146, 150, and 24 Carmody-Wait 2d, NY Prac, §145:346). As stated in Watergate v Buffalo Sewer (supra), the exhaustion rule need not be followed in certain limited circumstances, such as where an agency's action is challenged as either unconstitutional or wholly beyond its grant of power, where resort to an administrative remedy would be futile, or where its pursuit would cause irreparable injury (see, id.).

The issuance and termination of a variance is governed by Labor Law § 30 which recites, in part as follows:

> "1. If there shall be practical difficulties or unnecessary hardship in carrying out the provisions of this chapter relating to safety or health standards, or an order requiring compliance with such provisions of this chapter, or in carrying out an order of the commissioner requiring compliance with the state building construction code, the commissioner may make a variation from such requirements or order if the spirit of the provision, rule or code shall be observed and public safety secured. Applications for permanent variations shall be accompanied by a non-refundable fee of three hundred fifty dollars payable to the commissioner. . .

> "5. Any variation may be amended or terminated by the commissioner for any of the following reasons:
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> a. The variation or any of its conditions was or is not wholly complied with;
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> b. The variation does not continue to secure public safety;
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> c. The difficulties or hardship prevailing at the time of the making of the variation have ceased to exist;
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> d. The labor law provision or rule from which the variation was made has been amended, or a new rule governing the subject has been adopted; or
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> e. A finding by the commissioner that other substantial grounds exist warranting the amendment or termination of the variation." (Labor Law § 30, ¶¶ 1,5)

With respect to the termination of a variance involving asbestos, § 56-12.2 of the rules and regulations of the Department of Labor recites as follows:

> "The failure by any person or entity performing work on or in connection with an asbestos project, to comply with the terms and conditions of any general or specific variance issued pursuant to article 2, section 30 of the Labor Law, from this Part, article 30 of the Labor Law, or any other applicable statutes, rules or regulations, shall constitute a violation of this section and shall render the variance itself null and void in regard to such project." (12 NYCRR § 56-12.2)

Labor Law § 101, entitled "Review by industrial board of appeals", recites as follows:

> "1. Except where otherwise prescribed by law, any person in interest or his duly authorized agent may petition the board for a review of the validity or reasonableness of any rule, regulation or *order* made by the commissioner under the provisions of this chapter. Such petition shall be filed with the board no later than

sixty days after the issuance of such rule, regulation or *order*.

"2. The petition shall be filed with the board in accordance with such rules as the board shall prescribe, and shall state the rule, regulation, or *order* proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections to the rule, regulation or *order* not raised in such appeal shall be deemed waived. The board may join in one proceeding all petitions alleging invalidity or unreasonableness of substantially similar rules, regulations or *orders*. Except as otherwise prescribed by any provision of this chapter or any other law, the filing of such petition may, in the discretion of the board, operate to stay all proceedings against the petitioner under such rule, regulation or *order* until the determination of such petition.

"3. If the board finds that the rule, regulation or *order*, or any part thereof, is invalid or unreasonable it shall revoke, amend or modify the same." (Labor Law § 101, emphasis supplied)

Part 66 of the Rules and Regulations of the Department of Labor sets forth the procedure for seeking review of an order of the Commissioner of Labor. It is indicated that "the board's procedure in these matters approximates that of a judicial proceeding" and "the hearing is *de novo* (original) in nature and is in no sense an appeal" (see 12 NYCRR § 66.1 [c]). Review is commenced through the filing of a written petition (see 12 NYCRR § 66.2).

In this instance, there is no evidence that the petitioner attempted to avail itself of the review procedure set forth above. Thus, in this respect, the petitioner clearly failed to exhaust its administrative remedies. While failure to exhaust one's administrative remedies may be excused where agency action is challenged on constitutional grounds (see Watergate v Buffalo Sewer, supra), this is not the case where the constitutional issues require resolution of factual issues reviewable at the administrative level (see Schultz v State of New York, 86 NY2d 225, 232 [1995]; Patterson v Smith, 53 NY2d 98, 103-104 [1981] (involving due

process claim); Matter of Tasadfoy v Town of Wappinger, 22 AD3d 592, 592 [2d Dept., 2005] (involving due process claim); Matter of Finch, Pruyn & Company v Kearns, 282 AD2d 858, 859-860 [3d Dept., 2001]; Johnson v Markman, 288 AD2d 165 [1st Dept., 2001]).

With respect to the petitioner's due process argument, in Parratt v Taylor (451 US 527, supra), the United States Supreme Court observed that prior decisions of that Court "recognize that either the necessity of quick action by the State or the impracticality of providing any meaningful predeprivation process, when coupled with the availability of some meaningful means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process" (id., at 539; see also Burtnieks v New York, 716 F2d 982 [2d Cir, 1983]; Catanzaro v Weiden, 188 F3d 56, 61-64 [2d Cir., 1999]; Kshel Realty Corp. v City of New York, 2008 US App LEXIS 16618 [2d Cir., August 5, 2008]). Had the petitioner availed itself of its administrative remedies, a *de novo* hearing would have been conducted to address the underlying factual issues with respect to termination of the variance, as well as the other myriad issues raised in the petition[2]. The factual issues which could have been explored at such a hearing include the nature and extent of petitioner's alleged rules violations; whether a dangerous condition existed at the work site; whether, under all of the circumstances, there was a need for quick action to stop petitioner's alleged improper work practices; and whether, in view of all of the foregoing, termination of the variance was warranted. For this reason, notwithstanding the

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[2] At the same time, the petitioner could have immediately petitioned for a stay of the April 25, 2008 order of Deputy Counsel Connell under § 66.9 of said Rules, which application was required to be decided within seventy-two hours (see 12 NYCRR § 66.9).

presence of constitutional issue, the Court finds that petitioner's claims, as they relate to revocation of the variance, are barred by reason of petitioner's failure to exhaust its administrative remedies.

With respect to other relief requested in the petition, the respondents have submitted the affidavit of Louis Carrock, Senior Industrial Hygienist for the Asbestos Control Bureau of the New York State Department of Labor, Division of Safety and Health. Mr. Carrock indicates that in several inspections involving the petitioner he (Carrock) had been concerned that once he arrived at the work site, that all work of the petitioner's employees would immediately cease. Mr. Carrock indicates that while he went through the normal, time-consuming entry procedures (donning protective suits), the workers inside the building would commence to wet down the dry asbestos material. According to Mr. Carrock, removal of dry asbestos is much easier and quicker than wet removal, but dry removal is strictly prohibited by Department of Labor regulations. In order to thwart what he believed to be an attempt by petitioner's employees to cover-up the use of the dry removal process, he and other Department of Labor inspectors adopted a "quick entry" technique to enable them to enter the work site much faster. Upon arriving at the work site, they donned a waterproof Tychem personal protective suit over street clothes, and then a Tyvek personal protective suit over the Tychem suit. They would also put on respirators. They would then enter the asbestos removal area. Upon exiting the asbestos removal area they would shed the outer Tyvek suit and then shower vigorously while wearing the inner Tychem suit. After the decontamination procedure, they would take off the Tychem suit, safely dispose of it, and then exit the work area in street clothes. Mr. Carrock maintains that this is a perfectly safe technique, which

was approved by Robert Perez, his Program Manager.

Mr. Carrock indicates that when he and Inspector Rick Heffernan arrived at the work site on April 15, 2008 petitioner's employees yelled a warning to fellow employees inside the work area. He indicates that the workers stopped all relevant work and commenced hosing down the area. He acknowledges that he grabbed some of the debris that was not yet wet so that he would have a sample to demonstrate that it was dry. He also indicates that he observed a cloud of dust in the work area which, in his view, was evidence that the petitioner's employees had engaged in the dry removal technique. As a consequence of the April 15, 2008 inspection, Mr. Carrock issued six Notices of Violations and Orders to Comply. With respect to a meeting on March 20, 2008, Mr. Carrock denies that he ever threatened Jeremy Buell (who, Mr. Carrock maintains, had become threatening towards him). He denies that he contaminated petitioner's clean room. With regard to the December 21, 2007 meeting, while Mr. Carrock concedes that there was an argument, he denies that there was a physical confrontation. He also denies that he ever stated that the petitioner did not have enough money to complete the project, or that he was "going to get Sunshine's license". Mr. Carrock also denies that he was lenient and/or inconsistent with respect to issuance of notices of violations with respect to other asbestos removal contractors.

The respondents have submitted the affidavit of Gerald Leahy who indicates that he is a Senior Safety and Health inspector for the Asbestos Control Bureau of the New York State Department of Labor, Division of Safety and Health. He, too, was concerned that upon arrival at the work site, petitioner's employees would stop asbestos removal procedures and commence to wet down the site. He indicates that for this reason, the inspectors adopted the

quick-entry procedure described by Mr. Carrock in his affidavit. He acknowledges having had a close personal relationship with Russell Buell "over the years". He acknowledges that he was legal guardian of Jason Lupole, an employee of the petitioner[3]. Jason Lupole was injured while in the petitioner's employment in 2007. On November 21, 2007 Jason Lupole's claim for workers' compensation was denied. On the same day that the Workers' Compensation claim was denied, Mr. Leahy issued a notice of violation to the petitioner. Mr. Leahy indicates that he was not aware of the Workers' Compensation determination at the time he issued the notice of violation, and that the notice of violation was issued at the direction of his Supervisor, Dan Coyle. Mr. Leahy denies that he has ever sought or held a license to remove asbestos, and indicates that he is not a competitor of the petitioner. He indicates that he did obtain a bid package for an asbestos abatement project in Binghamton, New York, but he did so to increase his knowledge of the project so that he would be better informed. He denies he ever discussed with petitioner the possibility of entering into business together. Mr. Leahy asserts that he does not inspect the motor vehicles of petitioner's employees. He mentions one incident where he observed empty beer cans in the vicinity of employees' cars shortly after lunch, and called this to the attention of an employee of the petitioner, out of concern that employees should not be under the influence of alcohol while handling asbestos.

The respondents submitted the affidavit of Dan Coyle, Associate Industrial Hygienist for the Asbestos Control Bureau of the New York State Department of Labor, Division of

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[3]He indicates that he took Jason into his home when Jason was fifteen years of age, where he remained until Jason was eighteen or nineteen years of age. Jason is now age thirty-three.

Safety and Health, who also mentioned the need for adopting the quick-entry procedure for entering the subject work site. Mr. Coyle indicates that he has approved this method of entry with regard to other contractors as well. With regard to the April 15, 2008 inspection, he indicates that the use of hard-hats may not have been required. He notes that while at the work site on prior occasions he had observed that some of petitioner's employees were not wearing hard-hats. Mr. Coyle indicates that he would not tolerate his employees' refusing to wear hard-hats where this was required. He points out that after petitioner's variance was revoked, the petitioner re-applied for a new variance, which was disapproved, because of concerns with regard to the method of asbestos removal. Mr. Coyle indicates that a new variance was granted to the petitioner, which permitted petitioner to continue working on the asbestos abatement project through safer, but more costly procedures. Mr. Coyle indicates that he has no knowledge whether Gerald Leahy ever applied for an asbestos abatement contractors' license in Pennsylvania or anywhere else, and that he has not discussed this matter with anyone.

The respondents also submitted the affidavit of Richard Heffernan, Senior Safety and Health Inspector for the Asbestos Control Bureau of the New York State Department of Labor, Division of Safety and Health. Mr. Heffernan described his concern, and that of other inspectors, with regard to the problem that when inspectors arrived at the subject work site, petitioner's employees would call in a warning to co-employees, who would then stop removing asbestos and commence hosing down the work area. He indicates that for this reason, they adopted the quick-entry procedure involving the Tychem suits and Tyvek suits. He indicates that this procedure has been used with regard to contractors other than

petitioner, as well. Mr. Heffernan avers that on January 29, 2008, February 7, 2008 and February 15, 2008 he observed a number of violations at the Rome Free Academy including the following: failure to containerize asbestos material with the required frequency; failure to follow required waste container transfer procedures; failure to seal the regulated work area properly, and failure to provide the required ventilation for power tools. He further avers that once the inspections commenced, the employees left the work area, thus impeding his ability to observe petitioner's asbestos removal practices. He mailed to the petitioner notices of violations and orders to comply on February 13, 2008 and April 4, 2008.

The petitioner seeks an order enjoining state inspectors from violating Part 56 of the Rules of the Department of Labor with regard to entry and exit protocols when inspecting petitioner's projects. As pointed out by the respondents, while Part 56 applies to asbestos removal contractors, no mention is made with regard to its application to other parties, including state inspectors (see 12 NYCRR 56-1.3). Thus, even assuming petitioner's allegations to be true, the Court must find that petitioner has failed to demonstrate a violation of Part 56. Moreover, and apart from the foregoing, respondents have adequately demonstrated the reasonableness of the quick-entry procedures which they have adopted, both in terms of the need for rapidity in gaining entry to the work site, and in terms of protection from asbestos exposure. The petitioner has failed to demonstrate an abuse of discretion in adopting such a procedure.

The petitioner has presented insufficient evidence that state inspectors have violated safety regulations with regard to wearing of hard-hats, and/or that state inspectors have intimidated petitioner's employees and/or "blocked lawful activities". Most of the foregoing

allegations are factually unsupported and/or stated in conclusory terms. While the petitioner indicates that there has been, at times, strong disagreement (including arguments) between the petitioner and inspectors with regard to how the asbestos removal operation should be carried out, this, in and of it self, does not amount to intimidation of petitioner's employees. Statements made by state inspectors that they intend to enforce regulations with which the petitioner should lawfully and properly comply, in and of themselves, are not intimidation. Nor, on the facts presented, does the Court find any factual basis to support the contention of the petitioner that Gerald Leahy is in competition with the petitioner, and as a competitor, should be removed as an inspector from the oversight of the subject work site.

It is the Court's view that many, if not all of petitioner's complaints, including the alleged wrongful issuance of stop-work orders, could have been raised during an administrative hearing before the Industrial Board of Appeals as set forth in Labor Law § 101. In this respect the petitioner, again, failed to exhaust its administrative remedies. Moreover, and apart from the foregoing, to the extent that the petition seeks a permanent injunction, the petition fails to allege that the petitioner will suffer irreparable harm, or that there is no adequate remedy at law (see McNeary v Niagara Mohawk Power Corporation, 286 AD2d522, 525 [3d Dept., 2001]; McDermott v City of Albany, 309 AD2d 1004, 1005 [3d Dept., 2003]).

In sum, the Court finds that the petitioner has not demonstrated entitlement to any form of injunctive relief. In view of all of the foregoing, the Court further finds that the

petitioner has not demonstrated entitlement to any form of restitution[4].

For all of the foregoing reasons, the Court concludes that the petition must be dismissed.

Accordingly, it is

ORDERED and ADJUDGED,

This shall constitute the decision, order and judgment of the Court. All papers are returned to the attorney for the respondents who is directed to enter this Decision/Order/Judgment without notice and to serve all attorneys of record with a copy of this Decision/Order/Judgment with notice of entry.

ENTER

Dated: December 10, 2008
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Petition dated June 17, 2008, Petition and Exhibits
2. Answer of M. Patricia Smith dated August 21, 2008 and Exhibits

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[4]The Court has reviewed petitioner's equal protection argument and finds it to be without merit. The petitioner cites two instances where Mr. Carrock allegedly provided favorable or preferential treatment to an asbestos removal contractor other than the petitioner. In one instance, he allegedly overlooked a violation with regard to the presence of dry asbestos at the work site. In another instance, he allegedly took a coffee break with the employees of an asbestos removal contractor within the asbestos containment work site. No first hand evidence is provided with respect to either incident. Moreover, the petitioner has made no factual showing that the contractors on those projects were similarly situated to the Rome Free Academy project or that respondent's alleged unequal enforcement or selective enforcement was deliberately based upon impermissible factors (see Matter of Sour Mountain Realty Inc. v New York State Department of Environmental Conservation, 260 AD2d 920, 923-924 [3d Dept.1999], lv to app denied 93 NY2d 815 [1999]). Apart from the foregoing, once again, it is the Court's view that the claim of selective enforcement could have been raised at a hearing before the Board of Industrial Appeals.

3. Affidavit of Mark W. Couch, sworn to June 17, 2008