Matter of Riverview E. Owners, Inc. v New York City Water Bd.
2018 NY Slip Op 31806(U)
July 30, 2018
Supreme Court, New York County
Docket Number: 154170/2017
Judge: John J. Kelley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 56

IN THE MATTER OF THE APPLICATION OF

RIVERVIEW EAST OWNERS, INC., AND MILFORD MANAGEMENT,

Petitioners,

FOR A JUDGMENT PURSUANT TO CPLR ARTICLE 78

-against-

NEW YORK CITY WATER BOARD AND NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondents.

Index No. 154170/2017

Decision and Order

HON. JOHN J. KELLEY

In this Article 8 proceeding, the petitioners seek to annul the respondents' determination denying their application for a retroactive cooling tower allowance for January 25, 2005 through April 1, 2016. Pursuant to a rate schedule set by the New York City Water Board, the New York City Department of Environmental Protection ("DEP") is authorized to grant wastewater allowances, including credits for the use of cooling towers, to a customer who qualifies for such credits and/or allowances. If the DEP determines that a customer is eligible in accordance with that schedule, it will grant prospective allowances within an allowed time.

In this case, the respondents denied the petitioners' application because (1) the petitioners were ineligible for a cooling tower allowance until April 2016 because they had failed to correct an outstanding prior violation for a non-compliant meter on their property; and (2) the respondents found that the petitioners' request for a retroactive cooling tower allowance prior to July 31, 2011 was time-barred by DEP regulations. The petitioners claim the respondents' refusal to grant allowance credits retroactively is arbitrary and capricious.

Pursuant to Public Authorities Law § 1045–f, the Water Board has the sole authority to set rates for water usage by New York City residents (*see* Public Authorities Law § 1045–f; *Matter of Village of Scarsdale v Jorling,* 91 NY2d 507 [1998]; *Perry Thompson Third Co. v City of New York*, 279 AD2d 108, 111-112

[1st Dept 2000]). Courts have the power to review the Water Board's determinations but may only overturn them if the action is arbitrary and capricious or lacks a rational basis (*see Westmoreland Apt. Corp. v New York City Water Bd.*, [2d Dept 2002]).

The Water Board has promogulated rate schedules, which allow for various credits and allowances to be credited to a property owner if certain conditions are met. The cooling tower allowance at issue here is a Wastewater Allowance. According to Part III Section 7A of the Rate Schedule:

> Water consumption that is exclusively used for a commercial or industrial purpose and separately metered, where the process is such that water supplied is not discharged entirely into the Wastewater System, may be eligible for a Wastewater Allowance in accordance with the provisions of this Section.
>
> A process is eligible for a Wastewater Allowance if the water supply to the process is fully metered to the satisfaction of DEP. DEP may require the installation of sampling or gauging instruments or approved wastewater discharge meters, if, in the opinion of the Commissioner, the equipment is necessary to verify or monitor flows or discharges for the purpose of determining actual charges or allowances. The owner is responsible for the cost of such meters or instrumentation, their installation and their maintenance. Owners shall maintain these meters to ensure that all meters or instrumentation are registering accurately within industry standards.

A customer seeking a Wastewater Allowance must file a completed application so that DEP can determine eligibility for a Wastewater Allowance. The application must include proof that the system is metered and that the meter is functioning properly. Significant to this case, the rate schedule provides that if DEP receives a completed application and determines that a customer is eligible for a Wastewater Allowance, it only will grant the allowance prospectively for a two-year period starting from the date that the completed application was filed with the DEP. Given this regulatory framework, the Water Board's determination that the petitioners were ineligible for a retroactive cooling tower allowance from January 25, 2005 through April 1, 2016 was rational and must be upheld. The

petitioners did not qualify for any cooling tower credits prior to April 1, 2016 because they were not in compliance with DEP's metering requirements.

The Court appreciates the petitioners' perception that it is unfair to bill them for services such as wastewater removal that they may have never received; however, they fail to appreciate that their failure to have a properly functioning and compliant meter on their property caused this perceived unfairness. The regulation clearly states that eligibility for a Wastewater Allowance is contingent on the property owner's installing and maintaining compliant meters. The petitioner's argument that the DEP should have accommodated them or found a work-around is an improper attempt to shift their obligation to the DEP. The petitioners failed to meet the requirements and their application was denied. The denial was neither arbitrary and capricious or irrational.

The Court also notes that the petitioners were precluded from challenging DEP bills that were older than four years. Pursuant to the Rate Schedule, DEP allows a customer to dispute a wastewater bill within four years of the bill date. The petitioners' first written complaint regarding the wastewater allowance for their account was made on July 31, 2015. Accordingly, any DEP bills issued prior to July 31, 2011 were time-barred from review by the DEP and the Water Board. [1] The petitioners cite to *Matter of Rochdale Village, Inc v New York City Water Board*, 18 AD3d 664 [2d Dept 2005], in support of their claim that they are entitled to retroactive credits for disputed bills more than four years old. The petitioners' reliance is unfounded because the regulations that were in effect at the time of the *Rochdale* decision are substantially different than the ones governing this action. In *Rochdale*, the Court granted a wastewater allowance of at least six years prior to the filing of the written complaint. That has no bearing here because the current Rate Schedule specifically sets forth a different time-period for challenging a DEP bill. The current regulation states that a written complaint must be filed within four years of the date of the challenge bill, in contradiction to the six-year review period that was in effect when the *Rochdale* decision was issued.

[1] The petitioners claim that the DEP has exercised discretion in the past to retroactively allow cooling tower credits; however, they offer no proof in support of that assertion.

The petition is hereby dismissed. The Clerk shall enter judgment accordingly.

Dated: July 30, 2018

ENTR

HON. JOHN J. KELLEY, J.S.C.

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