SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3497-15T2

MOHAMMED HOSSAIN,

Petitioner-Appellant,

v.

NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS, SANDY RECOVERY DIVISION,

Respondent-Respondent.

NEW JERSEY DEPARTMENT OF COMMUNITY AFFAIRS, SANDY RECOVERY DIVISION,

Petitioner-Respondent,

v.

MOHAMMED HOSSAIN,

Respondent-Appellant.

Submitted August 8, 2017 – Decided August 15, 2017

Before Judges Sabatino and O'Connor.

On appeal from the New Jersey Department of Community Affairs, Sandy Recovery Division, Docket Nos. RRE0022673 and RSP0022615.

Chad M. Sherwood, attorney for appellant.

Christopher S. Porrino, Attorney General, attorney for respondent (Melissa Dutton Schaffer, Assistant Attorney General, of counsel; Valentina M. DiPippo, Deputy Attorney general, on the brief).

PER CURIAM

This appeal arises from a March 14, 2016 consolidated final agency decision of the Department of Community Affairs ("DCA") to recoup previously-allocated grant funds from a residential property owner and deny him access to additional funds from the Sandy Recovery Division. In particular, we mainly consider whether DCA, which adopted an initial decision of an Administrative Law Judge ("the ALJ"), had a sufficient basis in the record to deny the owner access to Superstorm Sandy relief funds because he failed to meet the $8,000 threshold in storm-related damages needed to qualify for the grants.

For the reasons that follow, we vacate DCA's decision and remand for additional proceedings and factual findings. Among other things, on remand DCA shall seek a FEMA inspection that was not performed, and also shall calculate and take into account permit fees and construction costs that, when added to appellant's other expenses, potentially could lead to a repair estimate of over $8,000.

We derive the following background from the record. Superstorm Sandy devastated large portions of coastal New Jersey on October 29, 2012. Following the storm, the United States Department of Housing and Urban Development allocated Community Block Grant Disaster Recovery funds to aid in the relief effort for property owners who sustained damage from the storm. Allocations, Common Application, Waivers, and Alternative Requirements for Grantees Receiving Community Development Block Grant (CDBG) Disaster Recovery Funds in Response to Hurricane Sandy, 78 Fed. Req. 14329, 14335 (March 5, 2013). DCA administers the program in New Jersey.

In administering the federal funding, DCA created the Superstorm Sandy Housing Intake Program, which is divided into several types of grants. In this appeal, appellant Mohammed Hossain challenges denials of his claims under two Sandy-related programs: the Homeowner Resettlement Program ("HRP"), and the Renovation, Reconstruction, Elevation and Mitigation Program ("RREMP").

HRP offers grants for "any non-constructive purpose that assists the homeowner to remain in the county in which they lived at the time of the storm." Department of Community Affairs, Disaster Recovery Division, Resettlement Program Policy: Version

3 4 (July 29, 2013). To receive an HRP grant of up to $10,000, an applicant must demonstrate he:

> 1. Resided in one of the nine distressed counties;
>
> 2. Lived in the property as a primary residence at the time of the storm;
>
> 3. Registered with FEMA by May 1, 2013; and
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> 4. Sustained Sandy-related damages with a fully verified loss ("FVL") of at least $8,000 or experienced one foot of water on the first floor of the property.
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> [Id. at 5.]

Additionally, DCA administers aid through RREMP, which assists impacted Sandy homeowners to "complete the necessary work to make their homes livable and compliant with flood plain, environmental, and other State and local requirements." Department of Community Affairs, Sandy Recovery Division, Reconstruction, Rehabilitation, Elevation and Mitigation (RREM) Program: Policies and Procedures 16 (October 2014). The qualifications for this program are nearly identical to HRP, with the added requirement that a recipient have an adjusted household gross annual income of less than $250,000. Id. at 18.

Appellant owned, and continues to own, a building at 3001 Fairmount Avenue in Atlantic City. The property consists of three units: a first-floor commercial space used as a convenience store,

a second-floor residence that appellant lives in with his wife and children, and a third-floor apartment that he rents out.

DCA does not contest that appellant lived in the second-floor residence during Sandy. DCA stipulated that appellant would meet nearly all other qualifications of both grant programs, but disputes that he sustained a FVL on the second floor of at least the minimum eligibility threshold of $8,000.

Appellant applied to the DCA for both a HRP and RREM grant through separate online applications in June 2013. He noted that the property was damaged during Sandy, and he had registered with FEMA.

On July 28, 2013, DCA issued appellant a $10,000 grant agreement and promissory note for the 3001 Fairmount property under the HRP grant. Under the terms of the grant, appellant attested that he met the HRP requirements, and agreed to continue to reside in the property for three years in order to be forgiven the $10,000. The funds were accordingly disbursed to appellant.

After a delay of nearly two years not explained in the record, DCA acted on appellant's RREM application. Laura Shea, an assistant commissioner for DCA, issued appellant a denial letter for this RREM application on April 27, 2015. Shea wrote that, in reviewing his application, DCA determined he did not sustain the $8,000 minimum amount of FVL.

Additionally, Shea wrote appellant was not "legally authorized to receive" the HRP grant money he had been given nearly two years earlier, because he failed to meet the $8,000 threshold for that grant, as well. Consequently, Shea demanded that appellant reimburse DCA the $10,000 HRD grant if he had already spent the disbursement.

Appellant challenged both the RREM denial and the HRP reimbursement demand. He submitted numerous invoices and construction quotes to the agency to demonstrate his eligibility. DCA transmitted the case to the Office of Administrative Law, and an ALJ conducted a hearing on December 10, 2015. A representative appeared for DCA, and appellant was self-represented. No witnesses other than appellant testified.

At the hearing, DCA argued that appellant had improperly certified he had met the $8,000 threshold, and therefore the agency could request a refund. In support of its position, DCA submitted construction estimates that do reflect that more than $8,000 worth of damages occurred at the property. However, the record is not clear as to how much damage was associated with the residential second floor – the only part of the property eligible for the grants. Although appellant lives on the second floor, the electrical panel for the entire property, for example, is on the

first floor. These and other facts about the premises made a floor-by-floor analysis of the costs challenging.

The property had two heating boilers that were replaced. The costs of these boilers and what parts of each boiler serviced which floor or floors were vital issues at the hearing.

Customarily, DCA relies on FEMA inspectors to determine the FVL. However, in the present case FEMA mistakenly inspected a different building appellant owned as a landlord, 44 South Trenton Avenue, instead of his subject residence at 3001 Fairmount Avenue. Because appellant failed to correct FEMA's error, as DCA argued he was obligated to do, DCA never received a valid FVL estimate from FEMA for 3001 Fairmount Avenue.

As the hearing transcript reflects, appellant testified that a FEMA inspector mistakenly came to his Trenton Avenue property.

> ALJ: Did you have a meeting with an inspector and tell him you lived at Trenton Avenue?
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> APPELLANT: No. The inspector came and — he came in Trenton Avenue. . . . He said ["]this is your house?["] I said yes. So he did the inspection and then . . . he left.
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> . . . .
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> ALJ: [W]hy did he come to Trenton Avenue and not Fairmount Avenue?
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> APPELLANT: I don't — I don't know.

Given the evidence that appellant has lived at his Fairmount residence since 2005 and voted in that precinct, the ALJ noted that it made him "uncomfortable" that a FEMA inspector would show up instead at appellant's Trenton Avenue rental property. Appellant testified that his children attended a school near the Fairmount property. The ALJ commented that "it makes it hard for me to be a fact-finder without having both sides of the story" and that a representative from FEMA should have been at the hearing.

In explaining why DCA approved appellant's grant initially, the agency's representative told the ALJ that the Trenton Avenue property had sustained at least one foot of water, so the $8,000 threshold would not be applicable. Further, she remarked that FEMA and applicants often made errors inspecting incorrect properties if a property had a different mailing address from its physical location. The ALJ also noted that the errors in this matter may have been the result of a language barrier.

Lacking the typical FEMA estimate in this case, DCA conducted its own damage assessment. DCA summarized the documents it considered: a November 2012 insurance adjuster's report, which singled-out no damages for the second floor but reflected a total furnace bill at $4,917; a report from Bangla Trade, Inc. and the City of Atlantic City from April 2013 certifying $44,164 worth of damage, without specifying what part of the property was damaged;

and a $3,050 chimney sweep and masonry invoice for the entire Fairmount property. Additionally, appellant presented a quote for $107,390.65 in repairs for the entire property by NK Construction, which was conducted on October 5, 2015, several years after Sandy.

With respect specifically to the replacement of boilers, DCA reviewed an installation estimate from a contractor, Broadley's of Marmora, of $6,889 for a 175,000 BTU boiler "for home" on November 10, 2012. This estimate noted that a "permit is extra" and that appellant also "must have [a] chimney inspection." This quote also estimated a 100,000 BTU unit for what is delineated as "home-apartment" at a cost of $6,071, excluding permitting and chimney inspection expenses. Additionally, Broadley's provided a $7,843 estimate on January 28, 2013 for a 100,000 BTU unit boiler "for apartment." Again, this quote did not include a chimney inspection or permit expenses.

With respect to the residential boiler quote, the ALJ noted at the hearing:

> If this is true and this was paid, [appellant] could probably get to the $8,000 threshold . . . with incidentals that . . . are related to this, you know. . . . The permit fee, if there's an inspection fee . . . . Because it says [on the quote] "permit is extra. Build at cost. Must . . . have chimney inspected."

Tellingly, the ALJ perceived a fundamental problem with DCA's position:

> [Appellant] has extensive damages. I mean, he has at least $50,000 worth of damage [to the total property], close to it. And, you know, he's — he's a smidge below the $8,000, if you look at just based upon heating.
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> . . . .
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> I'm not a contractor, you're not a contractor, so . . . that's why we need that inspector to go out there, to say how much is this, was it attributable to -- or allocatable to commercial, residential. And if he went to the wrong address, maybe [appellant] is entitled to have an inspector go back out again.

At the close of the hearing, the ALJ directed DCA to request more information from FEMA and to ascertain whether appellant was entitled to an additional FEMA inspection at the Fairmount property. The record is unclear if DCA carried out this request.

The ALJ also asked appellant to provide him with receipts of what appellant paid for the repairs. Specifically, he asked appellant to break out storm-related repairs isolated to the second floor. The ALJ recognized that appellant was "very close on the estimates, but [was] not close on the . . . bank or the adjuster's calculations. Now, they may have lowballed it, they may have depreciated it[.]"

After the hearing, appellant presented to the ALJ an invoice dated March 22, 2013 from Broadley's, which reflected that it performed $13,285 worth of repairs to appellant's second-floor heating and hot water units on March 18, 2013. The invoice listed the installation of a 175,000 BTU boiler for the second floor. In addition to the boiler installation, the invoice noted "additional gas piping/water piping repairs." The invoice detailed $3,620 for parts, and an installation price of $9,665.

After the record closed, the ALJ issued a seven-page initial decision on January 28, 2016. The ALJ framed the core issue as whether the boiler used for the second floor sustained $8,000 in damages.

The ALJ first cited the adjuster's assessment for the entire furnace repair of $4,917. He contrasted that estimate with the $6,071 and $7,843 higher estimates appellant presented for the second and third-floor boiler repairs total. Last, the ALJ referenced the $13,285 invoice that appellant had submitted post-hearing. The ALJ stated it was "unclear if this invoice is for the second and third floor units or just petitioner's second floor residential unit, because it is so much higher than all of the previous estimates." He described the $4,917 and $7,843 quotes as "making the $13,286 post-hearing paid invoice appear very high."

Additionally, the ALJ again underscored that FEMA never inspected the Fairmount property, remarking that the "tribunal could have benefitted from the FEMA inspection." Even so, the ALJ found it significant that an "independent adjuster" who is a "third party outsider[] and [is] considered reliable" provided the $4,917 quote. Comparing that figure to the $6,071 to $7,843 estimates presented by appellant pre-hearing, the ALJ concluded the adjuster's figure was reasonable, and therefore appellant fell below the $8,000 FVL threshold.

The DCA Commissioner adopted the ALJ's decision as final on March 14, 2016. Now represented by counsel, appellant seeks to overturn that determination.

Appellant contends that this court should rely on the proofs to reach its own conclusions, which he argues demonstrate his eligibility for either grant. Additionally, he argues that the ALJ failed to consider chimney repair costs and the post-hearing invoice, and instead relied on an estimate for a different boiler unit to reach his conclusion. DCA counters that the ALJ relied on credible proofs in the record, and did not reach his decision arbitrarily or capriciously to deny appellant's grant eligibility.

We are cognizant that appellate courts generally must afford agency determinations' deference for orders based on the credible

evidence. Our role as an appellate court is restricted to four inquiries:

> (1) whether the agency's decision offends the State or Federal Constitution; (2) whether the agency's action violates express or implied legislative policies; (3) whether the record contains substantial evidence to support the findings on which the agency based its action; and (4) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.
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> [George Harms Constr. Co. v. N.J. Tpk. Auth., 137 N.J. 8, 27 (1994) (citations omitted).]

"An administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." In re Herrmann, 192 N.J. 19, 27-28 (2007) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)); see also Aqua Beach Condo. Ass'n v. Dep't of Cmty. Affairs, 186 N.J. 5, 16 (2006). "The burden of demonstrating that the agency's action was arbitrary, capricious or unreasonable rests upon the [party] challenging the administrative action." In re Arenas, 385 N.J. Super. 440, 443-44 (App. Div.), certif. denied, 188 N.J. 219 (2006) (citing McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002); Barone v. Dep't of Human Servs., 210 N.J. Super. 276, 285 (App. Div. 1986), aff'd, 107 N.J. 355 (1987)).

Despite that general policy of deference, we conclude that the agency's decision in this particular case lacks adequate support in the present record and, absent further development and clarification of the record, is arbitrary and capricious.

Throughout the hearing and his written decision, the ALJ voiced concerns with DCA's proofs. He never found appellant lacked credibility, and noted that any problem with his application may be attributed to "a language barrier." Further, DCA does not challenge appellant's residency, but instead blames appellant for FEMA's mistake in inspecting the wrong property. Indeed, the ALJ wrote his preference would be for FEMA to inspect the property itself to give a truly unbiased opinion, and he mused that, in fairness to appellant's application, FEMA should do so. Unfortunately, that did not occur.

The ALJ hypothesized during the hearing that the adjuster might have "low-balled" appellant in its $4,917 estimate. However, in his written decision, the ALJ placed substantial weight upon the adjuster's figure in determining that the $13,000 estimate was "very high." At the hearing's close, the ALJ orally noted that permit costs and other fees could very well vault the $6,071 and $7,843 estimates over the $8,000 threshold, but later declared in his written decision that he could not accept the $13,285 actual invoiced cost as valid.

Having considered this rather convoluted record as a whole, we are satisfied that the ALJ and the agency unreasonably concluded that appellant's damages were definitely under $8,000. For instance, taking the adjuster's furnace estimate of $4,917, and adding the chimney estimate[1] of $3,050, coupled with permitting costs and the chimney inspection[2], the $8,000 threshold is easily cleared. The same can be said if the higher boiler estimates of $6,071 or $7,843 were added to the chimney inspections and permit costs.

The ALJ did not explain sufficiently why the $13,285 invoice for repairs performed, which was generated before litigation, was unacceptable. Even if it is deemed unacceptable, the ALJ did not explain why permitting and chimney fees were not included in his final calculations. As the ALJ himself noted, certain documents in the record indicated appellant was "a smidge below" the $8,000 threshold. Hence, the permitting and chimney costs manifestly could have placed him over the required amount.

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[1] Neither the ALJ opinion nor DCA's brief on appeal challenge the chimney replacement estimate, nor do they factor that estimate into their calculation. Ultimately, the chimney costs may not factor into the second floor's FVL calculation in full or in part, but they must be addressed on remand.

[2] Similarly, the ALJ opinion and DCA brief neglect to factor in these added costs the contractor spotlighted as figures not included in the initial estimates.

DCA cites this court's opinion In re Adoption of Amendments to Northeast, Upper Raritan, Sussex County Water Quality Management Plans, 435 N.J. Super. 571, 582 (App. Div. 2014) to advocate deference to the administrative determinations. However, there the Appellate Division affirmed an agency decision that differed from an ALJ decision because the agency placed greater emphasis on an expert's report than the ALJ, but that decision was still based in the record. Id. at 585. Here, the ALJ did give greater weight to the $4,917 adjuster's estimate over the $13,286 invoice, but we note he also neglected to analyze the impact of the $3,500 chimney quote or the permitting and chimney inspection costs.

Construction costs in actuality often exceed estimates, due to a variety of reasons. Here, without making further inquiry into the reasons behind the price disparity between the estimates and the $13,280 invoiced sum, the ALJ improperly dismissed out of hand the very evidence he requested appellant present him post-hearing.

These facts of the case, coupled with the nearly two years that transpired between DCA issuing appellant a grant and demanding a refund, leads us to conclude that the agency's decision should be reconsidered on remand.

On remand, DCA must seek a FEMA inspection of appellant's property. Additionally, the remand proceeding should allow appellant to present clearer evidence about the actual construction work done, and the fact-finder should make associated credibility determinations on the record.

Vacated and remanded. We do not retain jurisdiction.