

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Risingson Farm, :
Petitioner :
 :
v. : No. 1041 C.D. 2008
 : Submitted: September 12, 2008
Department of Environmental Protection, :
Respondent :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE McCLOSKEY

FILED: October 23, 2008

Risingson Farm (Petitioner) petitions for review of an order of the Environmental Hearing Board (EHB) denying its appeal from the Department of Environmental Protection's revocation of permit-by-rule approvals for the operation of a yard waste composting and land application of yard waste facility. We now affirm.

Petitioner is a Pennsylvania corporation that operated a yard waste composting and land application of yard waste facility within North Whitehall and Washington Townships, Lehigh County, Pennsylvania. Dennis Atiyeh is the president of the corporation and operator of the facility. Mr. Atiyeh submitted a general permit application for an on-farm organic waste composting facility to the Department of Protection (DEP) on September 29, 2005, pursuant to the Solid Waste Management Act

(the Act), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §§ 6018.11 – 6018.1003.¹ DEP returned the general permit application and indicated that the proper application was a permit-by-rule authorization because the facility was only designating five acres for composting yard waste.² Petitioner submitted the proper application and DEP subsequently issued approvals for both the five acre composting facility and the ninety-two acre land application of yard waste facility on November 15, 2005.³ DEP's approvals were subject to its "Leaf and Yard Waste Guidelines" as well as numerous other general and specific conditions.

On June 21, 2006, DEP visited the site and conducted an inspection after it received complaints about off-site odors, the burning of garbage and an excessive

¹ DEP is the agency with the duty and authority to administer and enforce the Act and the rules and regulations promulgated thereunder.

² Pursuant to Section 271.103(h) of DEP's regulations, a person that operates a yard waste composting facility of less than five acres shall be issued a municipal waste processing permit-by-rule if the person meets certain requirements of the Code and the facility is operated in accordance with DEP's guidelines. 25 Pa. Code § 271.103(h). A "yard waste composting facility" is defined as follows:

A facility that is used to compost leaf waste, or leaf waste and grass clippings, garden residue, tree trimmings, chipped shrubbery and other vegetative material. The term includes land affected during the lifetime of the operation, including, but not limited to, areas where composting actually occurs, support facilities, borrow areas, offices, equipment sheds, air and water pollution control and treatment systems, access roads, associated onsite or contiguous collection and transportation activities, and other activities in which the natural surface has been disturbed as a result of or incidental to operation of the facility.

25 Pa. Code § 271.1.

³ Petitioner supplemented the application on November 3, 2005 and November 7, 2005. A site visit was conducted by DEP on November 7, 2005.

quantity of biting flies at Petitioner's facility. Following the inspection, DEP issued a report which indicated that no odors were detected off-site, no garbage was noted in the burn pile and no biting flies were found. (R.R. at 289a). Although it did not cite any violations, DEP did point out to Mr. Atiyeh that there was work that he needed to do to eliminate potential violations including removing materials that had been deposited onto the site but were not suitable to be spread into the fields, adjusting the size of the windrows and removing litter including plastic materials that were found in both the composting and land application area.

A second follow-up inspection by DEP took place approximately one month later, on July 20, 2006. An inspection report, generated after the site inspection, indicated that Petitioner's facility was in "non-compliance" with DEP's guidelines. The report indicated that the specific areas of Petitioner's noncompliance were: 1) the acceptance of non-approved waste material such as trees, tree limbs and stumps; 2) the operation of the facility in a manner that did not result in the active biological decomposition of the material received; 3) ineffective vector control implementation; and 4) public nuisances were not being prevented.⁴

The report indicated that certain special conditions that had been imposed by DEP on Petitioner's facility were not being met, including the following: grass clippings were not being debugged and incorporated into windrows within twenty-four hours; the windrows were not properly constructed and maintained; there was insufficient distance between the windrows and compost piles; certain emergency response conditions were not being maintained and yard waste was being improperly

⁴ Section 601 of the Solid Waste Act, 35 P.S. § 6018.601, provides that any violation of a regulation is considered a public nuisance.

stockpiled. Additionally, the report indicated that the composting area exceeded the five acres permitted by the permit-by-rule approval.

Next, as a result of the July 20, 2006, inspection and subsequent report detailing Petitioner's areas of noncompliance, DEP issued a notice of violation (NOV). The NOV, dated August 8, 2006, indicated, *inter alia*, that Petitioner failed to properly operate the compost facility by accepting unapproved waste and having no method of chipping or shredding the material on site. The NOV also incorporated each of the above-mentioned noncompliance issues that were found by DEP during the July 20, 2006, inspection. The NOV indicated that Petitioner was to prepare and submit a plan that would demonstrate how it intended to comply with DEP's regulations and that the plan "should also include information on how these violations will be prevented from reoccurring in the future." (R.R. at 314a). Petitioner's proposed plan was to be submitted within fifteen days of the receipt of the NOV. The NOV further provided that Petitioner should immediately make arrangements to collect and dispose of any non-compostable municipal waste found on its site on a weekly basis. Finally, the NOV indicated that DEP had concluded that Petitioner's facility had engaged in unlawful conduct and "continues to engage in unlawful conduct" which has not been corrected. Id. DEP noted that, by law, any person engaging in such conduct shall be denied a permit to operate until the unlawful conduct has been corrected. Id.

By email dated September 8, 2006, Petitioner informed DEP that it had terminated its contract with a trucking company for "dumping out of order and bringing bagged leaves" to the facility without its knowledge. (R.R. at 317a). Petitioner indicated that it had contacted another company with regard to bringing in a horizontal grinder to apply the yard waste waiting to be processed. Petitioner also noted that it hoped that DEP would "keep in mind" that it was a small farm with limited resources

and that it was considering a private research grant to move the facility in the right direction. Id.

A report generated by DEP, after an inspection on September 28, 2006, indicated that Petitioner's facility had not resolved or remedied all of the noncompliance issues. The report indicated that proper barriers were not installed to limit access to the facility when there was no attendant on the site, access to the facility was permitted when an attendant was not present, several large piles of tree limbs and stumps were present in the compost area, non-approved wastes were being accepted, non-compostable residues or solid wastes were accumulating at the facility, open burning of paint cans, mattress springs and other metallic substances was occurring, grass clippings were not debugged within twenty four hours and were not incorporated into windrows within three days of delivery, windrows were improperly constructed and maintained and the compost area exceeded the five-acre limitation.

In response to that report, by email dated October 13, 2006, Petitioner informed DEP that it had requested that the inspection for September 28, 2006, be rescheduled for family reasons and that it understood that it had been rescheduled for another day. Thus, Petitioner argued that the inspector made "false claims which [were] potentially harmful" in his report because he should not have been at the facility that particular day. (R.R. at 330a).

With regard to the specific noncompliance issues in the report itself, Petitioner alleged that there were proper barriers at the facility and that an attendant was always present at the site. It asserted that there was a chipper in the barn, the material was being processed, separated and applied properly and the facility was permitted by the township to openly burn materials. Petitioner also argued that the windrows were properly constructed and maintained. Finally, Petitioner requested that a different

inspector be assigned to do the inspections as it was “doing everything possible within [its] resources to maintain a successful, responsible site,” but because of the “false accusations” in the report by that particular inspector, it was “considering discontinuing the project as a means of organically enhancing the soil.” (R.R. at 331a).

Subsequently, on October 16, 2006, DEP issued a compliance order. The compliance order indicated that Petitioner had violated the guidelines for yard waste composting and land application of yard waste by: accepting unapproved waste which was not later shredded or chipped because the facility had no method of doing so; accepting yard waste which was not in bulk form, was contained in plastic bags and was not rejected or removed; exceeding the required height and width requirements for compost piles; not placing yard waste into windrows/compost piles within one week of receipt; allowing a public nuisance to occur by not incorporating grass clippings into windrows within three days of delivery; failing to maintain adequate space between compost piles; failing to incorporate yard waste onto the land application area within one week of receipt; failing to control access to the site; constructing composting windrows beyond the five acre approval limit; and conducting the open burning of solid waste at the site.⁵ DEP directed Petitioner to immediately cease accepting additional waste and stop the burning of solid wastes. It also directed Petitioner to arrange all yard waste in windrows and remove all non-compostable wastes within one week of the compliance order. DEP also required Petitioner to submit receipts showing that the non-compostable wastes had been properly removed and disposed of within five days of their removal.

⁵ DEP indicated that the specific provisions of the regulation, statute or permit that were violated were: 25 Pa. Code 271.103(h); 35 P.S. §§ 6018.610 (2), (3), (4), (6) and (9). (R.R. at 335a).

Next, Petitioner, by email dated October 18, 2006, informed DEP that it was addressing “all necessary issues in question.” (R.R. at 340a). Petitioner stated that it had received a commitment from the county for a grinder but that commitment “fell through” and that it believed that “[a]t all times a verbal commitment was in place by the county which never materialized.” Id. Petitioner asserted that three other companies had visited the site in response to its requests for equipment and a chipper was present on site. Petitioner argued that it was permitted to receive materials in plastic bags, and that non-compostable solid wastes had been rejected, held for recycling and then been removed from the facility. Petitioner also indicated that it believed that the windrows were properly constructed and maintained. Finally, Petitioner asserted that the township had allowed it to openly burn materials and that the burning was not taking place on the facility’s site but in an adjacent area.

Another site inspection was conducted by DEP on October 30, 2006. On the same day as the inspection, Petitioner emailed DEP and indicated that all composting was being confined to the five acre approved area and that the existing material on the land application area was going to be leveled and cleaned.

A second visit, on October 31, 2006, was prompted in response to complaints received by DEP concerning the open burning of yard waste at the facility. At that second visit, DEP noted that piles of material adjacent to the barn were being burned. Petitioner identified the piles as off-site materials that had been viewed by a township representative who did not object to the burning as long as it occurred during the morning to dusk hours.

By letter dated November 1, 2006, DEP informed Petitioner that it had made several observations during its October 30, 2006, inspection, including that the windrows had been turned, repositioned, had adequate aisle space and the size

“appeared to generally meet the requirements.” (R.R. at 354a). DEP indicated that no bulk piles of grass clippings were observed and grass clippings were incorporated into the windrows at an appropriate ratio. Also, the composting area had been restricted to the five-acre limitation.

However, DEP acknowledged that Petitioner was still noncompliant with some requirements as it was still accepting non-approved wastes including tree branches, tree roots and tree stumps. It noted that Petitioner still had vegetative material that was not shredded or chipped and piles of yard waste were observed in the land application area. DEP noted that litter and other wastes needed to be removed from the land application area as well as the windrows on a weekly basis. Finally, DEP indicated that it was quite “disturbed” to learn that Petitioner had burned materials one day after a discussion between the parties took place in which DEP informed Petitioner that such burning of off-site materials was in violation of the compliance order. (R.R. at 356a). DEP indicated that because of the “violations noted during the Department’s [October 30, 2006 and October 31, 2006] inspections” and the inspector’s observations of operations as a “willful violation of the Department’s October 16, 2006 Compliance Order”, it could not allow Petitioner’s operation to resume accepting shipments of waste. (R.R. at 356a).

Petitioner, by letter dated November 3, 2006, indicated to DEP that all materials on the land application were being incorporated as a bulldozer was being used to spread the material while staff was separating the wood and waste. Petitioner indicated that a worker had burned the wrong pile of waste on October 31, 2006, but that it did not occur as a result of its instruction and was a “simple, yet unfortunate, mistake.” (R.R. at 358a). Petitioner indicated that it was important to operate the compost section as a source of revitalization of the soil and as a source of income as one

of the companies it initially received materials from had “cheated” it for \$30,000. Id. Petitioner admitted that one reason that it had fallen behind on bringing the facility into compliance was because the county had promised to lend it equipment but never followed through on the promise.

Next, on November 9, 2006, Petitioner, through counsel, sent DEP a letter in which it informed DEP that the burning incident had occurred while Mr. Atiyeh was away from the site and that it was by mistake. The letter asserted that it would have been “absurd” and “incredibly stupid” for Mr. Atiyeh to advise his employees to burn on the site when he knew that it was improper. (R.R. at 360a). Therefore, Petitioner requested that an effort be made by DEP to resolve the matter of noncompliance in an amicable matter and that it be allowed to resolve the outstanding compliance issues.

DEP responded to Petitioner by letter dated November 21, 2006. In the letter, DEP advised Petitioner that it would be contacting it to arrange an inspection of the facility. It advised Petitioner that “*all* activities at the site should be in compliance with [the] November 15, 2005 Yard Waste Composting Facility Approval and November 15, 2005 Land Application of Yard Waste Facility Approval.” (R.R. at 364a). The letter further advised Petitioner that “*all* activities at the site should be in compliance with the Department’s Guidelines for the Yard Waste Composting Facilities and the rules and regulations of the Department.” (R.R. at 364a). DEP indicated that some of the specific areas of its concern were: the dimensions of the windrows, the volume of yard waste being stockpiled, the specific sources of the yard waste, the amount of litter that had not been removed, the shredding or chipping of all woody materials and the removal of wood for use as fuel.

In response, Petitioner informed DEP by letter dated November 28, 2006, that the core area of the windrows was as required by the guidelines. The letter

indicated, *inter alia*, that the sources of the materials had been identified, that the unacceptable woody materials had been removed from the area and that additional records were going to be faxed that would indicate its efforts to comply with DEP.

Subsequently, DEP responded by letter dated December 5, 2006, and noted that certain information was still missing from Petitioner's response. Specifically, DEP had required that Petitioner answer questions regarding the length of the windrows, whether or not the materials were incorporated into the field, whether or not the litter had been removed in its entirety, whether the woody materials were chipped or shredded and necessary contact information for the individuals obtaining the woody materials for fuel. DEP alleged that Petitioner had not provided complete answers to all of these questions.

Next, on December 14, 2006, Petitioner requested an inspection of its facility by DEP as it asserted that it was "sufficiently in compliance to resume operations." (R.R. at 404a). Petitioner noted that it was requesting an inspection at "the earliest possible date" because it was a matter of some urgency. *Id.* DEP scheduled an inspection for January 2, 2007. After that inspection, DEP issued a report that indicated that the composting area exceeded five acres and needed to be reduced, that litter and plastic bags needed to be removed from the compost area and that litter and non-compostable woody materials had to be removed from the land application area.

Petitioner responded to the report and asserted that it never approved the receipt of bagged grass and that it was screening the windrows and removing the material. It renewed its assertion that it had a chipper on site but had depended on the county to chip and grind the material. Petitioner asserted that all it had tried to do was "help the poor with work, try to bring in organic fertilizer, [and] try to farm organically so the environment, farm and community would benefit." (R.R. at 426a). Petitioner

requested that DEP prepare a consent order so it could move forward and also requested an additional thirty days to come into compliance. DEP approved its request for the additional time.

A follow-up inspection of Petitioner's facility by DEP was made on January 18, 2007, more than thirty days since the prior inspection. A resulting report indicated that no working equipment such as a backhoe, shredder or screener was present at the facility, but that there was evidence of some widening of the spacing between the windrows. DEP noted that there was litter, including plastic bags, household waste, wood debris, bags of grass and tree stumps present in the lower section of the composting area, but also noted that there were several trash cans present which contained plastics and other waste which had been hand-picked from the windrows. DEP also noted that the entrance was unprotected and accessible to the public despite the presence of some deterrents such as a pile of soil, a backhoe and a parked car. Several additional correspondences between DEP and Petitioner took place between January 19, 2007, and January 31, 2007, in an effort to bring the site into compliance.

On February 2, 2007, DEP made a final inspection. A report was issued which indicated that the composting area had been reduced to the required five acres and that bulky wood materials had been stockpiled on neighboring land to be used for alternate fuel by the neighbors. The report noted that Mr. Atiyeh had agreed to have the bulky wood materials removed within four weeks of the date of the inspection. However, the composting area still contained waste and plastic bags filled with yard waste. The land application area had woody materials which required removal. DEP concluded that both areas, the composting area and the land application area, were "still in violation." (R.R. at 121a).

On February 8, 2007, DEP revoked Petitioner's yard waste composting and land application approvals. DEP indicated that it had "given [Petitioner] ample opportunity to comply with the [Compliance] Order" which had been issued on October 16, 2006. It noted that it had made several inspections after that compliance order was issued, including one following the Petitioner's representation that the site was in full compliance and each violation had been remedied, yet each inspection revealed that the site continued to be in violation of the order, permit-by-rule regulations, guidelines and approvals.

Petitioner appealed the revocation to the EHB, but the EHB dismissed Petitioner's appeal on May 7, 2008. The EHB concluded that Petitioner had demonstrated that it was unable to or unwilling to comply with all of the applicable requirements. The EHB noted that Petitioner had "endeavored to obtain the equipment necessary to process the waste over the course of several months," but did not successfully obtain the equipment until January 2007. (EHB's Opinion at 5, Finding of Fact No. 14). The EHB noted that there was no dispute about certain essential facts, including that there was "no question that the violations occurred and ultimately were never completely resolved" as well as no dispute that DEP was authorized by statute to revoke the permit. (EHB's Opinion at 11).

The EHB further noted that Petitioner's sole contention was that DEP simply "acted too harshly" by revoking its permit before it had the opportunity to resolve all of the violations. Id. In response to that contention, the EHB indicated that DEP had visited Petitioner's facility no less than eight times between June 2006 and February 2007, and that DEP had gotten numerous complaints about the facility. It noted that DEP's inspections, and the reports resulting from those inspections, essentially addressed the same violations. The EHB recognized that although Petitioner

may have made “significant progress between January and February 2007,” that progress did not eliminate the fact that the problems **first** occurred in June, 2006, later became violations as of July, 2006, and were only partially remedied by early 2007. (EHB’s Opinion at 12). The EHB indicated that Petitioner’s assertion that it “diligently attempted but failed” to procure the required processing equipment “constitute[d] an admission of an inability to comply, which justify[ed] the revocation.” Id.

The EHB concluded that Petitioner’s assertion that DEP should have “warned it that the revocation *definitely* would occur if it did not bring the site into compliance” was a rather unusual claim and without merit. (EHB’s Opinion at 13). The EHB also discounted Petitioner’s claim that DEP “buckled” under public pressure from neighbors who filed complaints about odors, open burning and flies because it found that the record did not support this allegation. Id. Thus, the EHB upheld DEP’s revocation of both of Petitioner’s permit-by-rule approvals for the compost facility and the land application area.

On appeal,⁶ Petitioner argues that DEP’s revocation of its yard waste composting permit, as well as its land application permit, is a “manifest and flagrant

⁶ Our scope of review of the Board’s order is limited to determining whether the Board’s findings are supported by substantial evidence and whether constitutional violations or errors of law were committed. Westinghouse Electric Corporation v. Department of Environmental Protection, 745 A.2d 1277 (Pa. Cmwlth. 2000). Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Department of Environmental Protection v. Borough of Carlisle, 330 A.2d 293, 298 (Pa. Cmwlth. 1974). Moreover, an administrative agency has broad discretion in the performance of its administrative duties and functions and this court cannot overturn an agency’s exercise of its discretion absent proof of fraud, bad faith, or blatant abuse of discretion. Herzog v. Department of Environmental Resources, 645 A.2d 1381 (Pa. Cmwlth. 1994). In addition, we have held that the resolution of conflicts in testimony, the credibility of witnesses, and the weight given the evidence are within the province of the Board. Pawk v. Department of Environmental Resources, 395 A.2d 692 (Pa. Cmwlth. 1978).

abuse of discretion and/or a capricious action rendering it contrary to law.” (Petitioner’s Brief at 4). Petitioner also argues that the EHB’s Finding of Fact No. 34 is not based on substantial evidence. Finding of Fact No. 34 provides that on February 2, 2007, when DEP once again inspected the site, it found that “[a]lthough conditions at the site had improved, the site remained substantially out of compliance.” (EHB’s Opinion at 9, Finding of Fact No. 34). We disagree with each of these arguments by Petitioner.

First, Petitioner argues that the decision to revoke the permits is contrary to law, a “draconian remedy” and unduly harsh because it fails to consider the mitigating circumstances, such as the impossibility of obtaining the required equipment to remedy some of the violations within the composting area and its efforts to correct the violations during the time frame granted by DEP. (Petitioner’s Brief at 9). It also argues that there is no evidence that the violations caused any environmental hazards or nuisances. Petitioner does not argue that DEP acted fraudulently or in bad faith. Instead, it alleges that the revocation was a manifest and flagrant abuse of discretion and that it was arbitrary and capricious.

Petitioner argues that although the EHB labeled its reasons for non-compliance as “excuses”, its reasons were valid and legitimate because it cooperated with DEP and “to the best of its ability at the time, remedied the violations within the composting area.” (Petitioner’s Brief at 15). Thus, Petitioner requests that this Court reverse the EHB’s decision and reinstate the permit-by-rule approvals, subject to the conditions imposed by DEP prior to the revocation of both approvals.

DEP is authorized to revoke Petitioner’s permit-by-rule approvals if it is found to have failed to comply with any provision of the Act. See Section 503 of the

Act, 35 P.S. § 6018.503.⁷ Section 503(c) of the Act further provides that “[i]n carrying out the provisions of the Act, DEP may suspend, modify, or revoke any permit if it finds that the...permittee...has failed or continues to fail to comply with any provision of this Act...or any other state or Federal statute relating to environmental protection or to the protection of the public health, safety and welfare; or any rule or regulation of the department; or any order of the department; or any condition of any permit or license issued by the department....” 35 P.S. § 6018.503(c).

Mr. Atiyeh admitted that he received at least four communications from DEP informing him that its permits could be revoked if the compost facility and land application area continued to remain in violation. (R.R. at 173a, 174a). However, he testified that he may not have read all of the contents of the letters as “when you have eight children and you’re trying to get by, sometimes you don’t read the whole letter,” but admitted that the information “was put in fine print at the bottom of each one.” (R.R. at 185a). Based upon our review of the evidence of record, which included the numerous pieces of correspondence between Petitioner and DEP identified in the lengthy recital of facts above as well as the inspection reports by DEP personnel, we cannot say that the EHB’s decision, affirming DEP’s revocation of Petitioner’s permit-by-rule approvals, was not supported by substantial evidence.

Second, Petitioner argues that the EHB’s Finding of Fact No. 34 is not based upon substantial evidence because a close review of the testimony of DEP inspector Dean Fisher and the substance of his report indicates that only the composting

⁷ This Section provides that DEP may suspend, modify or revoke any permit if the department finds that the permittee has shown a lack of ability or intention to comply with any provision of the act or any of the acts referred to in this subsection or any rule or regulation of the department or order of the department, or any condition of any permit or license issued by the department as indicated by past or continuing violations.

area of the facility, and not the land application area, was not in compliance. Petitioner asserts that all of the photographs used as evidence by DEP are of the composting area and not the land application area. Thus, alternatively, Petitioner requests that this Court re-instate the land application permit-by-rule approval.

To accept this argument by Petitioner would be to ignore the more significant portions of Mr. Fisher's testimony. Mr. Fisher testified that he was familiar with two inspection reports dated June, 2006, and July, 2006, in which DEP agents reported numerous incidents of noncompliance. (R.R. at 81a). Mr. Fisher testified that as of late 2006, in order to bring Petitioner's facility into compliance, all of the garbage had to be removed, including litter that was found "both in the composting area and the land application area." (R.R. at 92a). Mr. Fisher also testified that when he and others inspected the facility in January, 2007, there was "woody material, the reflections, small stumps, limbs" and solid waste in the "land application area." (R.R. at 107a). Contrary to Petitioner's assertion, Mr. Fisher identified and testified as to violations in both Petitioner's composting area and its land application area. Thus, we cannot say that the EHB's decision, insofar as it affirmed DEP's revocation of Petitioner's land application permit-by-rule approval, lacked substantial evidence

Accordingly, order of the EHB is affirmed.

JOSEPH F. McCLOSKEY, Senior Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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|---|---|--------------------|
| Risingson Farm, | : | |
| Petitioner | : | |
| | : | |
| v. | : | No. 1041 C.D. 2008 |
| | : | |
| Department of Environmental Protection, | : | |
| Respondent | : | |

ORDER

AND NOW, this 23rd day of October, 2008, the order of the Environmental Hearing Board is hereby affirmed.

JOSEPH F. McCLOSKEY, Senior Judge