U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street
New York, New York 10007

By ECF

May 15, 2014

The Honorable Loretta A. Preska
United States District Judge
United States Courthouse
500 Pearl Street
New York, New York 10007

Re: *Brodsky v. Nuclear Regulatory Commission*, 09 Civ. 10594 (LAP)

Dear Judge Preska:

This Office represents the Nuclear Regulatory Commission (the "NRC" or the "government") in the above-named case. I write respectfully to clarify the procedural posture of this case, in light of certain assertions in plaintiffs' overlength reply memorandum of law.

As the Court is aware, a memo-endorsed order of November 26, 2013 (ECF no. 37) directed that plaintiffs submit opening papers by February 14, 2014; the government submit responsive papers by March 14, 2014; and plaintiffs submit a reply by March 28, 2014. Plaintiffs submitted papers, entitled "Brief on Remand," as scheduled, but unaccompanied by a motion. After obtaining an extension of time from the Court (ECF no. 40), the government adhered to the previously ordered structure for responding, by submitting its response on April 11, 2014 (ECF nos. 41-43). On April 29, 2014 (two weeks after the government's deadline, consistent with the Court's original scheduling order), plaintiffs submitted a 21-page "Reply Brief," in which they assert certain procedural improprieties by the government.

Because Federal Rule of Civil Procedure 7(b)(1) provides that "[a] request for a court order must be made by motion," the government submitted a "Notice of Motion for Summary Judgment" (ECF no. 41) along with its memorandum of law. The government requested summary judgment because nearly all cases brought under the Administrative Procedure Act, or otherwise seeking review of federal agency action, are resolved by summary judgment. *E.g.*, *Girling Health Care, Inc. v. Shalala*, 85 F.3d 211, 214-15 (5th Cir. 1996) (approving "use of summary judgment as a mechanism for review of agency decisions"); *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA*, __ F. Supp. 2d ___, No. 08 Civ. 5606 (KMK), 2014 WL 1284544, at *13 (S.D.N.Y. Mar. 28, 2014) (collecting cases; "[w]here a court reviews agency action under the APA, summary judgment serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review" (quotation marks and alterations omitted)); Charles Alan Wright et al., 10B *Federal Practice and Procedure* § 2733 (3d ed.) ("Summary judgment is particularly appropriate in cases in which the court is asked to review or enforce a decision of a federal administrative

agency."). And the government did not submit a statement of undisputed facts under Local Civil Rule 56.1, because such statements are generally neither necessary nor appropriate in APA cases. *E.g.*, *Just Bagels Mfg., Inc. v. Mayorkas*, 900 F. Supp. 2d 363, 372 n.7 (S.D.N.Y. 2012) (citing cases). As courts in APA cases are generally to consider only the record before the agency, *see Camp v. Pitts*, 411 U.S. 138, 142 (1973), the only questions are questions of law, *see American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C.Cir.2001); Wright et al. § 2733 ("[T]he administrative agency is the 'fact finder.' Judicial review has the function of determining whether the administrative action is consistent with law—that and no more." (quotation marks omitted)), making a Rule 56.1 statement inappropriate.

Plaintiffs' assertion that the government's submission "is not properly before this Court" (Reply 3) is, accordingly, unfounded. Plaintiffs claim that the government has violated the Court's individual practices by not seeking a pre-motion conference, but counsel for the parties conferred by telephone with the Court in advance of this motion (on November 26, 2013, at 10:00 a.m.), and the Court endorsed the parties' proposed schedule for submissions (ECF no. 37). Plaintiffs allege that the government violated Local Civil Rule 56.1 (Reply 4), which is incorrect for the reasons stated above. They assert that they have "raise[d] both legal and factual issues" (Reply 4), but as noted in the prior paragraph, in an APA case this Court sits as a tribunal of law, not a factfinder; any issue of fact was to be determined by the NRC, subject to judicial review on the record compiled by the agency. *American Bioscience*, 269 F.3d at 1083 ("The entire case on review is a question of law." (quotation marks omitted)); *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996) (rejecting characterization of arguments in agency-review case as questions of fact, as courts in APA actions do not resolve fact issues but consider legal questions); *Richards v. INS*, 554 F.2d 1173, 1177 & n.28 (D.C. Cir. 1977) (plaintiff cannot defeat summary judgment in case seeking review of agency action by purporting to raise issues of fact).

Plaintiffs further contend that the government did not conform to the scheduling order (Reply 4-5), when in fact the government complied with it fully by submitting its response as scheduled. Nothing in the government's papers suggests that the NRC was seeking, or intended to submit, an additional round of papers (*contra* Reply 5); to the contrary, the government's notice of motion specified that plaintiff's reply papers were to be submitted two weeks after the government's deadline, and set forth no further schedule of submissions—consistent with this Court's scheduling orders. That that notice stated the deadline for plaintiffs' reply papers makes plaintiffs' assertion that the government's papers "threaten[] to deprive Plaintiffs of their right to a reply brief" (Reply 5) simply incomprehensible. And equally baffling is plaintiffs' complaint that the NRC's submission "fails to assert its status as a response brief and does not formally recognize the existence of the [plaintiffs'] Brief on Remand" (Reply 5)—the government is unaware of any requirement that litigation papers assert their own identity or "formally recognize" opposing papers, but in any event the government's memorandum of law was plainly a response to the "brief on remand," as it responded to and cited that submission in many instances.

The government seeks no relief by this letter, but respectfully requests that the Court consider it as an explanation of the procedural posture of the case, and as a rebuttal to plaintiffs' baseless allegations that the government violated this Court's orders and rules. Thank you for your consideration.

Respectfully,

PREET BHARARA
United States Attorney

By: /s/ Benjamin H. Torrance
BENJAMIN H. TORRANCE
Assistant United States Attorney
Telephone: 212.637.2703
Fax: 212.637.2702
E-mail: benjamin.torrance@usdoj.gov

cc: Richard Brodsky, Esq. (by e-mail)