SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
TAX DIVISION

HARRINGTON HOTEL CO., INC., Petitioner, v. DISTRICT OF COLUMBIA, Respondent.	DOCKET NO. 2010 CVT 9849

ORDER

Before the Court is Petitioner's Motion for Summary Judgment. For the reasons stated below, the petitioner's motion for summary judgment is **GRANTED**.

Background

The petition in this case involves the rental of "vault" space by the petitioner.[1] Petitioner operates a hotel; abutting the parcel of land owned by petitioner is a District-owned enclosure of space located beneath the surface of the publicly owned land. In 1969, Petitioner entered into a contract with the District to rent the vault space.

Vault rent is to be paid annually, in advance, for the period July 1 through June 30. D.C. Code § 10-1103.04(a). The rental bill at issue here in the one that was due and payable on June 30, 2007, for the period of July 1, 2007 through June 30, 2008.

Vault rent is calculated according to a statutorily created formula. D.C. Code § 10-1103.04(c) provides that vault rent shall be "computed on the basis of the assessed value." From 1969 (when the statute was enacted) until 2008, the term "assessed value"

[1] "Vault space" is publicly owned sub-surface space. Property owners will often use the vault space that is outside their property lines for parking, storage, or electrical equipment.

was not defined by statute. During this period, the District's tax authority, the Office of Tax and Revenue (OTR), interpreted the term so as to use a property's *current* assessment in calculating the vault bill. Effective July 1, 2008, "assessed value" acquired a statutory definition. "Assessed value" was now defined as "the estimated market value of the real property attributable to the land for purposes of real property taxation as of January 1 preceding the rent year." D.C. Code § 10-1101.01(1A). This means that from July 2008 forward, a property's *proposed* assessed value would be used to calculate vault rental charges, instead of the previous method using the property's *current* assessed value. This change took effect after the period covered by the vault rental bill at issue here, and was not made retroactive.

OTR employee Joyce Owens, the supervisor of the public space unit, confirmed in her testimony that OTR used current assessments up until 2007. Owens Tr. at 22-28, 57. Ms. Owens acknowledged, however, that for the 2008 vault bill that was due and owing on June 30, 2007, OTR changed the manner in which vault rent was calculated. For the first time, the vault bill was calculated by using the property's proposed assessment rather than the current assessment. *Id.* at 59.

Ms. Owens did not know why the process changed from using a property's current assessed land value to a property's proposed assessed land value. *Id.* at 58-59. Nor did Ms. Owens know how for 2008 the subject property's vault bill was suddenly based upon the proposed land value. *Id.* at 59. Ms. Owens agreed that whatever land value is entered into the computer, the vault bill will be calculated based upon that figure. *Id.* at 59-60. Ms. Owens further testified that she was unaware that the 2008 bills were not based upon the property's current (Tax Year 2007) assessment as would be normal

practice, but were instead based upon the property's proposed assessment (Tax Year 2008). *Id.* at 61-62. She eventually asked why this was done, but was given no explanation. *Id.* at 61-61. Ms.Owens admitted that she knew of no memorandum, change in the law, or change in the regulations that would explain the change in determining the property's vault bill for 2008. *Id.* at 64-65. Furthermore, while Ms. Owens did remember times that she had sent out notices to vault lessees notifying them of changes to the way vault bills were being calculated (due to changes in the utilization factor – also known as the vault rental rate or the law), she could recall no notice being sent to lessees informing them that the District was changing how the "assessed value" factor would be determined. *Id.* at 63, compare with 48-50.

Mr. Robert McKeon, OTR's deputy chief counsel, was provided by the District as its 30(b)(6) witness regarding sub-surface space rental practices (vault rent). *See* McKeon, Tr. at 4, 7-8, Exhibit 6. In preparation for his deposition, Mr. McKeon reviewed the D.C. Code, reviewed the vault bills for the subject property, read the lease agreement, looked at OTR regulations and Congressional Acts relating to the vault rental process, reviewed prior OTR notices to lessees regarding vault matters, studied OTR billing practices and spoke to Ms. Owens and to Zhanna Makarova. *Id.* at 7, 15, 18-22. Ms. Makarova's job was to put the land values into the computer system that generated tax bills. Owens Dep. Tr. at 7-8, 33.

Mr. McKeon acknowledged that up until the 2008 vault bills (with a due date of June 30, 2007) were issued, OTR had been using the property's current, assessed land value to calculate a property's annual vault rent. McKeon Tr.. at 12, 15, 37, 38, 42 and 43. Mr. McKeon also testified that, upon investigation, he never found any

memorandum, regulation, policy directive, law, notice or any other written record that indicated, prior to calendar year 2008, OTR had made a decision to change its practice of using a property's current assessed land value in determining its vault rent for the coming year (i.e., using a property's current assessed land value in determining its vault rent for the coming year (i.e., using a property's Tax Year 2006 land value in determining 2007 vault charges that were payable on June 30, 2006). *Id.* at 12, 15-16, 18 and 42. Further, despite Mr. McKeon's inquiry, he could not explain why OTR began issuing vault bills that were based upon a property's future, proposed assessed land value rather than continuing OTR's long-standing practice of using a property's current assessed land value. *Id.* at 18-19, 42; See District's Answers to Harrington's First Set of Interrogatories, Interrogatory #8(e), Exhibit 9. In addition, Mr. McKeon acknowledged that OTR had not informed vault lessees that OTR had changed the manner in which the "assessed value" factor was being interpreted. McKeon Tr. At 42, Exhibit 6.

It is clear from both Mr. McKeon's and Ms. Owens' deposition testimony not only that OTR did not direct that a change be made in using a property's current assessed value in determining vault rent charges, but that OTR officials did not even know that a change had been made in interpreting what "assessed value" meant in the context of the vault rent formula. McKeon Tr. 17-19, Exhibit 6; Owens Tr. 61-62, Exhibit 5. Instead, the evidence shows that Ms. Makarova decided to have the OTR system use a property's assessed value rather than its current assessed value on her own accord, without instruction from anyone in authority at OTR, without having sought guidance or legal counsel, and without having reviewed the vault rent contract, old bills, or the applicable law. Makarova Tr. At 14, 16, 22-23, 30-35, Exhibit 10. Instead, Ms. Makarova simply

began supplying Ms. Owens with proposed land assessments to use in Ms. Owens' vault rental billing computations. *Id.* at 22-23; Owens Tr. At 33, 61-62, Exhibit 5. Ms. Makarova's only explanation for making this change was that she considered it logical to use a property's proposed land valuation since the vault bills were paid in advance of the period they covered. Makarova Tr. at 16, Exhibit 10.

Standard

A party moving for summary judgment bears the burden of showing that there are no material factual disputes and that the party is entitled to judgment as a matter of law. A motion for summary judgment must be granted if, taking all inferences in the light most favorable to the nonmoving party, a reasonable juror, acting reasonably, could not find for the nonmoving party, under the appropriate burden of proof. *Woodfield v. Providence Hosp.*, 779 A.2d 933, 936-37 (D.C. 2001); *Nader v. de Toledano*, 408 A.2d 31, 42 (D.C. 1979), *cert. denied*, 444 U.S. 1078 (1980).

Analysis

The question before the Court is whether OTR acted unreasonably when it used the proposed assessed value instead of adhering to its long standing policy of using the current assessed value to calculate vault rent for one tax year. A court will defer to an agency's interpretation of the statute it is in charge of administering if the agency's interpretation is reasonable, and if the agency's "explication is not inadequate, irrational, or arbitrary." *See Chelsea Indus. v. NLRB*, 285 F.3d 1073, 1075 (D.C. Cir. 2002) (citing *Allentown Mack Sales & Serv. v. NLRB*, 522 U.S. 359, 364 (1998)). An "agency acts

unreasonably if it departs from established policy without giving a reasoned explanation for the change." *Chelsea Indus.*, 285 F.3d at 1075-76. An agency is "at liberty to change its policies as long as it justifies the change with a reasoned explanation." *Id.* at 1076 (internal citation omitted). *See also Assoc. Builders & Contractors, Inc. v. Shiu*, No. 13-1806 (EGS), 2014 U.S. Dist. LEXIS 37106, at *30-31 (D.D.C. March 21, 2014) ("[W]hen an agency reverses a prior policy . . . [t]he agency must supply a reasoned analysis for its action, but if the agency adequately explains the reasons for a reversal of policy, change is not invalidating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency.") (internal citations omitted); *Draude v. D.C. Bd. of Zoning Adjustment*, 527 A.2d 1242, 1253 (D.C. 1987) ("[T]he agency must explain and justify its change of mind or its use of a different standard from one situation to the next."); *Hensley v. D.C. Dep't of Emp't Servs.*, 49 A.3d 1195, 1203 (D.C. 2012) ("[u]nexplained inconsistency in an agency's interpretation of its governing statute can be a reason for holding an interpretation to be an arbitrary and capricious change from agency practice") (citations omitted).

Here, the District's change in policy of using the proposed assessed value instead of the current assessed value in order to calculate vault rent is the very definition of an arbitrary and capricious change of policy. Ordinarily, the remedy for an unexplained change in policy is to remand the issue to the agency. *Hensley*, 49 A.3d at 1205. That assumes, however, that an agency's act merely lacked explanation, and agency expertise is needed to explicate it properly. Here, there is no need to defer to any expertise – the act was explained by the District's 30(b)(6) witness, Robert McKeon. Through his deposition testimony, Mr. McKeon testified that he did not know why the District moved

from using the current assessed value to the proposed assessed value, and that the change "just happened." McKeon Dep. 15:4-19:1, Nov. 8, 2011. Later in his testimony, again referring to the change in using the current assessed value versus the proposed assessed value, Mr. McKeon states that "[t]here is nothing that shows why it changed." *Id.* at 18:22-19:1.

Respondent has not given a reasoned explanation for OTR's shift in using the proposed assessed value instead of the current assessed value for the tax year in question. It is therefore appropriate to reverse the agency's decision and enter judgment for the petitioner.

Accordingly, it is this 31st day of January, 2017, hereby

ORDERED that the petitioner's *Motion for Summary Judgment* is **GRANTED**; and it is further

ORDERED that the petitioner's *Motion to Request Hearing Regarding Petitioner's Pending Motion for Summary Judgment* is **DENIED AS MOOT**; and it is further

ORDERED that petitioner's *Motion to Compel Answers to Interrogatories and Produce Documents* is **DENIED AS MOOT**.

John M. Campbell
Associate Judge

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