IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Metal Services LLC d/b/a Phoenix Services LLC, Petitioner	:	
v.	:	No. 982 C.D. 2014
	:	Argued: February 9, 2015
Department of Transportation, Respondent	:	

BEFORE: HONORABLE DAN PELLEGRINI, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED: March 9, 2015**

Metal Services, LLC d/b/a Phoenix Services LLC (Phoenix) petitions for review of an order of the Secretary of the Department of Transportation (Secretary) adopting, as clarified, a proposed report by a Department of Transportation (PennDOT) Hearing Officer. In so doing, the Secretary affirmed Phoenix's 90-day suspension and implemented a three-year debarment from participation in state and federally funded projects, as well as preclusion from Publication 34, Bulletin 14 (Bulletin 14), which is an approved list of aggregate producers. For the reasons discussed below, we affirm.

PennDOT maintains Bulletin 14, which allows aggregate purchasers, such as PennDOT, its maintenance contractors, and its suppliers, to determine whether or not the listed producer's aggregate meets PennDOT's specifications.

Producers seek to be listed in Bulletin 14 because it encourages customers and government entities to purchase aggregate material from them.

Aggregate producers, such as Phoenix, can have multiple sources approved for various types of aggregate. A source, as defined in Bulletin 14, "is a single, specific quarry, pit or bank location." (Reproduced Record (R.R.) 234a.) An aggregate producer wishing to have a new source approved for a specific type of aggregate must request a test from the PennDOT district materials unit responsible for the source location. A representative sample of the aggregate the producer wishes to have approved is then compiled and sent for testing to PennDOT. If the aggregate meets PennDOT's specifications, then the source and the type of aggregate approved from the source are listed in Bulletin 14.

Phoenix maintains three sources that are approved and listed in Bulletin 14: (1) Mingo Junction, Ohio; (2) Johnstown, Pennsylvania; and (3) Weirton, West Virginia. Phoenix's Johnstown location is approved to produce type 2 and 2A anti-skid aggregate. Phoenix sought to have the Johnstown location approved for A57SL concrete aggregate as well and contacted PennDOT in May of 2012 to begin the process. PennDOT and Phoenix personnel met on July 25, 2012, at the Johnstown location to create the sample pile and take the sample for testing (July sample). The July sample failed to meet the requirements for A57SL aggregate, because it had a unit weight of 69.99 pounds per cubic foot, as opposed to the 70 pounds per cubic foot required for A57SL aggregate, and because it contained steel slag, which is prohibited in concrete cement.

After receiving notification that the July sample failed, Phoenix contacted PennDOT to discuss the situation. PennDOT offered Phoenix the opportunity to submit a second sample from the Johnstown source for retesting.

Phoenix accepted the offer and arranged for the second sample to be taken at the Johnstown location on January 30, 2013 (January sample). The January sample met PennDOT's specifications for A57SL aggregate, and PennDOT communicated the passing result to Phoenix. PennDOT also noted, however, that there were material differences between the properties of the July and January samples, and asked Phoenix to submit a modification/addendum to its quality control plan that identified the reasons for the differences and how they would be monitored and controlled during production. In response, Phoenix requested a meeting.

The requested meeting took place on June 6, 2013. At the meeting, PennDOT asked Phoenix to explain the differences between the samples. Terry Wagaman (Wagaman), Executive Vice President of Phoenix, informed PennDOT that the samples were different because the January sample consisted of material Phoenix had shipped to its Johnstown location from Warren, Ohio. Wagaman stated that Phoenix felt it was being targeted by PennDOT and submitted the January sample as a check on PennDOT's test procedures. After seeking clarification from Phoenix to establish that the January sample, although submitted from Johnstown, had actually originated in Warren, PennDOT took a brief recess. Resuming the meeting, PennDOT informed Phoenix that it considered Phoenix's actions to be an intentional falsification of the information regarding the January sample, and stated that legal action might be taken. PennDOT then asked Phoenix if it had any other information it wished to provide. Phoenix declined to provide any more information at that time, and the meeting ended.

By letter dated June 12, 2013, PennDOT notified Phoenix that it was initiating procedures to remove Phoenix from Bulletin 14 and suspend and debar

Phoenix in accordance with Section 531 of the Procurement Code (Code).[1] The letter gave Phoenix 21 days to respond with information in opposition to the proposed removal, suspension, and debarment.

Phoenix responded by letter on June 27, 2013, in which it requested PennDOT terminate the proposed actions or, in the alternative, hold a formal hearing before taking any action. In the letter, Phoenix offered the following explanation:

> While the sample material came from a source in Warren, Ohio, at the time the sample was submitted in January[,] Phoenix was acting under the belief that an entire stockpile of slag at that Warren, Ohio location (where the sample originated) was going to come into Phoenix's legal possession and be moved to the Johnstown plant for processing and sale. The slag pile at issue was the subject of litigation in an adversary proceeding in a Bankruptcy matter and it was Phoenix's belief the ultimate result of this litigation would be the declaration of Phoenix's ownership of the slag pile and its movement to Johnstown. Phoenix's rationale behind providing the sample from Warren was to obtain approval of material that was ultimately going to be located, processed and sold from the Johnstown plant. The June 6, 2013 meeting ended prior to Phoenix explaining this situation to the PennDOT officials present.
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> Furthermore, by the time the June 6, 2013 meeting occurred, the previously mentioned litigation ended by way of a Confidential Settlement Agreement whereby the slag pile located in Warren, Ohio[,] would not ultimately be relocated to Johnstown.

(R.R. 15a.)

[1] 62 Pa. C.S. § 531.

By letter dated August 22, 2013, PennDOT notified Phoenix that it was the subject of a suspension and initiation of debarment proceedings. The basis for the suspension was a probable cause determination that Phoenix falsified information about the January sample. The suspension took effect 21 days after the date of the letter, during which the investigation and debarment proceedings continued. During the suspension, Phoenix was barred from participating in State supervised and funded projects, as well as federally funded contracts and subcontracts. Phoenix was also removed from Bulletin 14. Phoenix appealed the suspension and proposed debarment on September 11, 2013, arguing that substantial evidence did not support the decision to suspend Phoenix and that Phoenix's due process rights were violated by imposing the suspension prior to holding a hearing. PennDOT held a hearing on October 23, 2013.

Various PennDOT and Phoenix personnel testified during the hearing. Patricia Miller, a unit lab manager with PennDOT whose duties include maintaining Bulletin 14, testified about the procedures for getting a particular source or aggregate product approved. During her testimony, Ms. Miller defined an aggregate source as "basically a pit or quarry, someplace that specifically [sic] material is produced at that location." (R.R. 44a.)

Wagaman testified that at the time of the January sample, Phoenix was "still in negotiation at that point whether we were going to own the material [in Warren] or not. But we had to make sure we pushed the sample in." (R.R. 155a.) He testified that the sample needed to be rushed in because Phoenix was planning to move roughly 200,000 tons of slag from the Warren location to Johnstown. (R.R. 141a.) Wagaman further testified that Phoenix did not tell PennDOT the January sample was from Warren, because he did not think it would

be a problem: "[W]e moved material from Warren, Ohio, over to Johnstown, and processed it in Johnstown. I believe processing it in Johnstown means that the source is Johnstown." (R.R. 146a.) When asked to explain why he told PennDOT officials at the June 6, 2013 meeting that Phoenix had submitted the January sample as a check on the labs, Wagaman said "it was my clumsy way of saying that because petrographic tests failed on the sample from July, we had to push the sample into the lab to get it approved so that once the material did move in from Warren, we could start selling it -- process it and sell it." (R.R. 159a.)

Following the hearing, the Hearing Officer entered a proposed report, which found that "Phoenix knowingly and intentionally submitted a sample for testing that was not from the source location in Johnstown, but from Warren, Ohio." (Finding of Fact No. 55, R.R. 318a.) The Hearing Officer concluded that this behavior "indicates a lack of business integrity and business honesty that seriously and directly effect's Phoenix's present responsibility in violation of [Section 531(b)(12) of the Code[2]]," and that a three-year debarment under Section 531(a) of the Code[3] was warranted, because Phoenix's behavior was "intentionally dishonest and misleading," the dishonesty was "perpetrated by senior-level management," and Phoenix "refused to acknowledge the seriousness of its conduct." (Conclusions of Law Nos. 9 & 11, R.R. 327a.) The Hearing Officer also concluded that Phoenix's due process rights had not been violated when PennDOT implemented the suspension prior to holding a hearing, because the facts were undisputed and Phoenix was given the opportunity to respond prior

[2] 62 Pa. C.S. § 531(b)(12).

[3] 62 Pa. C.S. § 531(a).

to the suspension being implemented. Thus, the Hearing officer affirmed the suspension and debarred Phoenix from Bulletin 14 for three years.

Phoenix submitted exceptions to the proposed report to the Secretary, arguing that the suspension and debarment were not supported by substantial evidence and that its due process rights were violated. The Secretary adopted the proposed report's findings of fact and conclusions of law, but clarified the due process ruling, saying that no pre-suspension hearing was necessary because the suspension was temporary and due process requires only a post-deprivation hearing. Thus, because the hearing took place post-suspension but pre-debarment, no due process violation took place. Furthermore, the Secretary stated that the three year debarment would run from the date the 90 day suspension started.

On appeal to this Court,[4] Phoenix argues that Findings of Fact Nos. 4 and 55 are not supported by substantial evidence, that the Secretary erred as a matter of law in concluding Phoenix's behavior warranted a three-year debarment, and that the Secretary erred as a matter of law in concluding due process did not require a pre-suspension hearing.

Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Peak v. Unemployment Comp. Bd. of Review*, 501 A.2d 1383, 1387 (Pa. 1985). This Court must view the evidence in the light most favorable to the prevailing party, and must make all reasonable inferences in favor of the prevailing party. *Fisler v. State Sys. of*

[4] "The Court's review is limited to determining whether the necessary findings of fact are supported by substantial evidence and whether there was a constitutional violation or an error of law." *Balfour Beatty Constr., Inc. v. Dep't of Transp.*, 783 A.2d 901, 905 (Pa. Cmwlth. 2001) (citing Section 704 of the Administrative Agency Law, 2 Pa. C.S. § 704).

Higher Educ., Cal. Univ. of Pa., 78 A.3d 30, 42 n.15 (Pa. Cmwlth. 2013). "[M]atters of credibility and evidentiary weight are within the exclusive discretion of the fact-finder below." *Carr v. State Bd. of Pharmacy*, 409 A.2d 941, 944 (Pa. Cmwlth. 1980). We may not "reweigh the evidence and substitute our judgment for that of the fact-finder." *Commonwealth v. Hoffman*, 938 A.2d 1157, 1160 n.10 (Pa. Cmwlth. 2007). "[T]he presence of conflicting evidence in the record does not mean that substantial evidence is lacking." *Allied Mech. & Elec., Inc. v. Pa. Prevailing Wage Appeals Bd.*, 923 A.2d 1220, 1228 (Pa. Cmwlth. 2007).

Phoenix argues that Finding of Fact No. 55 is not supported by substantial evidence. Finding of Fact No. 55 states: "Phoenix knowingly and intentionally submitted a sample for testing that was not from the source location in Johnstown, but from Warren, Ohio." (R.R. 318a.) There is not, and has never been, any dispute with regard to the following facts: the January sample was a re-submission in an effort to qualify Johnstown for A57SL aggregate (R.R. 15a-16a); the January sample was submitted as a Johnstown sample (R.R. 200a, 204a, 256a-57a); the material for the January sample came from Warren, not Johnstown (R.R. 99a, 120a); Phoenix specifically hauled the material in from Warren in order to submit it for the January sample (R.R. 120a); Phoenix knew when it submitted the January sample that the material was from Warren (R.R. 120a-21a, 142a); and Phoenix did not communicate the true source of the January sample until PennDOT officials raised questions concerning the differences between the July and January samples (R.R. 122a, 133a, 152a).

Phoenix nonetheless argues that this finding of fact is not supported by substantial evidence because the source of the January sample was, in fact, Johnstown. This is, essentially, an argument over the definition of a "source" and

a challenge to Finding of Fact No. 4, which states that "[a]n aggregate source 'is a *single*, specific quarry, pit, or bank location.'" (R.R. 311a (quoting Bulletin 14) (emphasis in original).) A source, according to Phoenix, is the location where a material is "produced." Phoenix cites the testimony of Ms. Miller, who stated that a source was "basically a pit or quarry, someplace that specifically [sic] material is produced at that location." (R.R. 44a.) Thus, Phoenix argues that "the source of the material was going to be Johnstown since it was to be 'produced' as [A57SL] there." (Pet'r Br. at 18-19.) Phoenix is, in essence, arguing that a source is the place aggregate is processed from the raw material to the finished product.

The Secretary, however, adopted the definition contained in Bulletin 14 and Finding of Fact No. 4, which defined a source as "a single, specific quarry, pit, or bank location." (R.R. 324a, 311a, 362a.) "What this means is that the aggregate source listed in [Bulletin] 14 corresponds to a specific physical site." (R.R. 320a.) In other words, a source is the location from which the aggregate originates, not the place it is processed. Because the definition of source adopted by the Hearing Officer and Secretary is the one contained in Bulletin 14, and is not contradicted by Ms. Miller's testimony that a source is "basically a pit or quarry," Finding of Fact No. 4 is supported by substantial evidence. Furthermore, to the extent Ms. Miller's testimony could be considered contradictory, we note that the Secretary, as the finder of fact, is empowered to choose between conflicting pieces of evidence and that the presence of contradictory evidence does not mean a finding is not supported by substantial evidence. *See Allied Mech. & Elec., Inc.*, 923 A.2d at 1228; *Carr*, 409 A.2d at 944.

We conclude, therefore, that because the underlying facts are undisputed and the definition of a source contained in Finding of Fact No. 4 is

supported by substantial evidence, Finding of Fact No. 55 is supported by substantial evidence.[5]

Next, Phoenix argues that the Secretary erred as a matter of law when he concluded that Phoenix's behavior warranted a suspension and three-year debarment.[6] Specifically, Phoenix argues that its behavior did not rise to the requisite level of seriousness under Section 531(a) of the Code and that the Secretary failed to properly consider the mitigating factors.[7]

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[5] We note that the definition of "source" adopted by the Secretary is not dispositive in this case. PennDOT's essential claim is that Phoenix acted with deliberate deception when it submitted the January sample as a resample of Johnstown material without disclosing that it was, in fact, not a resample of previously submitted aggregate, but rather, was a new and different sample of aggregate procured from a different location entirely. Thus, even if we were to adopt Phoenix's preferred definition, it would not change the outcome of this case, because Phoenix's behavior still evidenced a "lack of business integrity or business honesty" warranting debarment under Section 531(b)(12) of the Code, 62 Pa. C.S. § 531(b)(12).

[6] Phoenix states that its suspension and debarment were not supported by substantial evidence for the two reasons listed above. Phoenix does not actually argue, however, that the facts are unsupported, but rather that the Secretary erred in applying the law to the facts.

[7] Phoenix argues that its behavior did not rise to the requisite level of seriousness and that its behavior had no impact on PennDOT or the public because it never sold any A57SL from Johnstown. Both Phoenix and PennDOT cite five factors used to determine whether a debarment is warranted under Section 531(a) of the Code: (1) the seriousness of the conduct that resulted in the debarment proceeding; (2) the culpability of the entity's management; (3) the prospect for rehabilitation for the entity; (4) the impact of the conduct on PennDOT, other interested parties, and the public; and (5) the existence of other aggravating or mitigating factors which bear on the integrity, responsibility, and competency of the entity. These factors, however, have never been adopted by this Court. For purposes of this case, it is easy enough to consider Phoenix's impact argument as part of its argument about the seriousness of its behavior. Thus, we are left with two arguments, the level of seriousness and the consideration of mitigating factors, both of which are factors outlined by Section 531(a), and we need not decide whether to adopt PennDOT's five factor test.

Section 531(a) of the Code provides:

> The decision to debar shall be based upon substantial evidence that a cause for debarment or suspension under subsection (b) has occurred. *In making the decision of whether to debar a person, the head of the purchasing agency shall take into consideration the seriousness of any violation and any mitigating factors*. A debarment may be for a period of not more than three years. The head of the purchasing agency may suspend a person from consideration for an award of contracts for a period of up to three months if there is probable cause for debarment.

62 Pa. C.S. § 531(a) (emphasis added). Under subsection (b), the causes for debarment or suspension include: "[u]nsatisfactory performance, including . . . [m]aking false statements or failing to provide information," 62 Pa. C.S. § 531(b)(11)(vi); and "[a]ny other act or omission indicating a lack of . . . business integrity or business honesty that seriously and directly affects the present responsibility of a person as determined by the purchasing agency," 62 Pa. C.S. § 531(b)(12).

Phoenix argues that its behavior was not serious enough to warrant suspension and debarment because it was not as serious as the behavior of other companies who had been debarred, and because Phoenix never actually sold any A57SL aggregate from the Johnstown location to PennDOT or anyone else. Phoenix relies on two cases from this Court to demonstrate that its conduct was not as serious as other companies' conduct, *Schuylkill Products, Inc. v. Department of Transportation*, 962 A.2d 1249 (Pa. Cmwlth. 2008), and *Durkee Lumber Company, Inc. v. Department of Conservation and Natural Resources*, 903 A.2d 593 (Pa. Cmwlth. 2006). Phoenix argues that the conduct complained of in these cases—taking kickbacks from minority businesses in *Schuylkill* and failure to

perform a contract in *Durkee*—is the kind of behavior "serious" enough to warrant debarment under Section 531(a) of the Code, and that Phoenix's behavior, in comparison, was really not that bad. Neither of these cases is on point, however, as neither addresses the question of whether the conduct of the companies was serious enough to warrant debarment, and Durkee Lumber Company was not even subject to a debarment proceeding. Instead, these cases both deal with other issues—*Schuylkill* with the question of whether PennDOT could rely on a management directive to debar a contractor, and *Durkee* with whether or not the Secretary was required to give a bid protestant a hearing. We, therefore, find Phoenix's argument unpersuasive.

Phoenix also argues that its behavior was not serious enough to warrant debarment, because it never sold any A57SL aggregate from Johnstown. What Phoenix apparently fails to comprehend is that this does not lessen the seriousness of its behavior; it merely means Phoenix did not make it worse. Furthermore, we note that PennDOT discovered the true source of the January sample during the testing and approval process, so Phoenix never had the opportunity to sell the Warren aggregate because PennDOT did not include Phoenix in Bulletin 14 for A57SL aggregate. Thus, this argument is also unpersuasive.

Phoenix's next argument is that the Secretary failed to take several mitigating factors into account. First, Phoenix argues that it made a "business decision" to move the Warren material to Johnstown, because it thought it would be declared the owner of the material. Phoenix fails to explain why a "business decision" to "quickly" move a stockpile of material—ownership of which was actively being litigated in another state—in order to "push" a sample through

PennDOT's approval process, should act as a mitigating factor. Second, Phoenix argues that Bulletin 14 contains no procedure for approving material removed from its source location and processed at another location, and that it, therefore, did not ignore the rules, as there were no rules addressing the situation. Perhaps Phoenix has a point and PennDOT should address the proper procedure for an aggregate producer to follow when it desires to move raw material from an unapproved source to be processed at an approved source location. That, however, does not explain why Phoenix, who has three locations approved by PennDOT for various aggregates and clearly maintains an ongoing relationship with PennDOT, did not simply ask PennDOT how to proceed. Phoenix's behavior is problematic not because it encountered a novel situation, but because it was deceptive and dishonest. Furthermore, as the Secretary concluded:

> It makes no difference why Phoenix did not disclose the actual origin of the second sample at the time of the testing or shortly thereafter when the results were confirmed; the fact that Phoenix misled the Department into believing the second sample came from the Johnstown source until questioned and forced to answer clearly rises to the level of seriousness required for a three-year debarment.

(R.R. 364a.) We, therefore, conclude that the Secretary properly considered and dismissed the offered mitigating factors.

Lastly, Phoenix argues that the Secretary erred as a matter of law in concluding *Balfour Beatty Construction, Inc. v. Department of Transportation*, 783 A.2d 901 (Pa. Cmwlth. 2001), did not require PennDOT to give Phoenix a pre-suspension hearing. In *Balfour Beatty*, Balfour was a PennDOT prequalified contractor who entered into a contract with PennDOT. Following some incidents occurring on the project, PennDOT sent Balfour notice that it was suspending

Balfour's prequalified status for three months pending an investigation. The letter provided Balfour 20 days in which to respond, but Balfour failed to do so. PennDOT then sent notice that it was initiating debarment proceedings against Balfour. Balfour filed a notice of appeal and requested a hearing for both the suspension and debarment. The hearing officer concluded that Balfour was not entitled to a hearing on the merits of the suspension because it failed to appeal the suspension within the 20-day timeframe. Balfour filed a petition for review with this Court, arguing, among other things, that its suspension without a hearing violated due process. PennDOT argued that under *Department of Public Welfare v. Eisenberg*, 454 A.2d 513 (Pa. 1982), and *Mathews v. Eldridge*, 424 U.S. 319 (1976), due process did not require a pre-suspension hearing.

This Court held that although Balfour was not entitled to a pre-suspension hearing, a post-suspension hearing was still required. *Balfour Beatty*, 783 A.2d at 909. The Court explained:

> In [*Eisenberg*] the court held that a pre-termination hearing was not required where the Department of Public Welfare notified a doctor of his suspension. The Court also stated, however, that "[t]his due process right has been met by a full administrative hearing accorded to appellees before the Hearing and Appeals Unit of [the Department]." [*Eisenberg*,] 454 A.2d at 516. *See also id.* at 517 (Roberts, J., concurring) (Section 504 [of the Administrative Agency Law[8]] "merely provides that a party subjected to [preliminary] action is entitled to reasonable notice and an opportunity to be heard on the permissibility of the action taken."). More recently, in *Squire v. Pennsylvania Department of Public Welfare*,

[8] 2 Pa. C.S. § 504.

> 696 A.2d 255, 259 (Pa. Cmwlth. 1997), this Court, citing *Callahan* [*v. Pennsylvania State Police*, 431 A.2d 946 (Pa. 1981)], noted that the Administrative Agency Law[9] "does not say that the agency should supply an aggrieved party the opportunity to request a hearing in order to receive notice and an opportunity to be heard." The Court concludes that procedures providing for notice of suspension and a "reply" but never an actual hearing violate due process and [Section 504 of the Administrative Agency Law,] 2 Pa. C.S. § 504.

Balfour Beatty, 783 A.2d at 909 (second, third and sixth alterations in original).

The Secretary concluded that the due process Phoenix received was "entirely consistent" with *Balfour Beatty*. (R.R. 366a.) The Secretary explained:

> Phoenix has taken one sentence in the *Balfour* [*Beatty*] opinion out of context; that sentence states "[t]he Court concludes that procedures providing for notice of suspension and a "reply" but never an actual hearing violate due process and 2 Pa. C.S. [§] 504." *Balfour* [*Beatty*], 783 A2d at 909. When read in a vacuum, one could interpret that statement as requiring a pre-suspension hearing, but when you consider the facts and circumstances of that case, the question the Court was presented with, and the case law the Court relied on heavily in its analysis, that interpretation is simply erroneous.
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> . . .
>
> *Balfour* [*Beatty*] and other cases addressing the issue do not require a pre-suspension hearing. They only require notice and an opportunity to be heard prior to suspension and a post-suspension hearing on termination. The flaw in *Balfour* [*Beatty*] and some of the other cases was the lack of any hearing, even post-suspension. Concluding otherwise would be illogical because it would nullify a

[9] 2 Pa. C.S. §§ 501-508, 701-704.

> pre-termination or debarment hearing — the very same facts and arguments would be presented in both a pre-suspension and pre-termination hearing. A temporary suspension does not require the same process as a termination/debarment.

(R.R. 366a-69a (second alteration in original).)

Phoenix argues, as it did below, that this Court's statement in *Balfour Beatty* that "procedures providing for notice of suspension and a 'reply' but never an actual hearing violate due process," means PennDOT was required to give Phoenix a pre-suspension hearing. We disagree. Due process in an administrative proceeding requires notice and an opportunity to be heard. *Soc'y Hill Civic Ass'n v. Philadelphia Zoning Bd. of Adjustment*, 42 A.3d 1178, 1190 (Pa. Cmwlth. 2012). "Due process is a flexible concept and imposes only those procedural safeguards as the situation warrants." *Pa. Bankers Ass'n v. Pa. Dep't of Banking*, 981 A.2d 975, 998 (Pa. Cmwlth. 2009). Thus, a due process challenge "reasonably involves an inquiry into the nature of the process actually provided." *Id.* Furthermore, due process is "non-technical, such that no particular form of notice or procedure is necessary." *Id.* Thus, while the courts have consistently held that "some form of hearing is required before an individual is finally deprived of a property interest," *Mathews*, 424 U.S. at 333, they have also recognized that the hearing may come after the deprivation begins, so long as it occurs before the deprivation becomes permanent. *Id.* at 349 (holding that post-deprivation hearing satisfied due process for termination of social security disability benefits); *Eisenberg*, 454 A.2d at 516 (concluding that "no pre-termination hearing is required" before the Department of Public Welfare suspended a doctor).

Given this framework and the case law relied upon by the *Balfour Beatty* court, we conclude that the Secretary was correct. The due process problem

identified in *Balfour Beatty* was not that Balfour was denied a pre-suspension hearing, but rather that the hearing officer denied Balfour a post-suspension hearing on the merits of the suspension. Thus, the statement by the *Balfour Beatty* court that "procedures providing for notice of suspension and a 'reply' but never a hearing violate due process," meant that while PennDOT could suspend Balfour prior to providing Balfour a hearing, PennDOT could not deny Balfour the opportunity to challenge the merits of the suspension post-implementation. In this case, Phoenix's due process rights were not violated because the post-suspension pre-debarment hearing provided to Phoenix dealt with the merits of both the suspension and debarment.

For the reasons discussed above, the order of the Secretary of Transportation is affirmed.

P. KEVIN BROBSON, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Metal Services LLC d/b/a Phoenix Services LLC, Petitioner	:	
v.	:	No. 982 C.D. 2014
Department of Transportation, Respondent	:	

O R D E R

AND NOW, this 9th day of March, 2015, the order of the Secretary of the Department of Transportation is AFFRIMED.

P. KEVIN BROBSON, Judge