

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

IN RE: Taraco, Inc.
Notice of Violation and Order and Penalty
dated February 5, 1991
AAD No. 91-005/AHE

Taraco, Inc.
Notice of Intent to Revoke and Order
dated February 15, 1991
AAD No. 91-007/AHE

DECISION AND ORDER ON RESPONDENT'S
MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Hearing Officer on the Respondent's Motions for Summary Judgment in each of the above entitled matters. These matters were consolidated at the request of the Respondent prior to the hearing of said motions. Both of these matters involve the same questions of law and fact and accordingly this Decision and Order shall apply equally to both.

Respondent submitted a similar Memorandum of Law and accompanying Affidavit in support of its Motion for Summary Judgment in each of the subject matters. The Division of Air and Hazardous Materials ("DAHM") filed an objection to said Motions and submitted a Memorandum and accompanying Affidavit in support of its objection to the granting of said Motions.

The relevant undisputed facts may be briefly summarized as follows:

1. DAHM issued an earlier Notice of Violation and Order and Penalty against Respondent dated February 28, 1989 ("NOVAP 2/28/89").
2. DAHM subsequently issued the Notice of Violation dated February 5, 1991 ("NOVAP 2/5/91") which is the instant matter bearing AAD No. 91-005/AHE.
3. DAHM thereafter issued a Notice of Intent to Revoke Permit and Order to Respondent dated February 15, 1991 ("Notice of Intent 2/15/91") which is

the instant matter bearing AAD No. 91-007/AHE.

4. A Consent Agreement was entered into between the parties on March 20, 1991 ("Consent Agreement").

Respondent seeks Summary Judgment in its favor based upon its allegations that while NOVAP 2/28/89 was pending and in the process of negotiations DAHM issued NOVAP 2/5/91 citing the same basic violations that were contained in NOVAP 2/28/89; and that the Notice of Intent 2/15/91 cited, with the exception of one isolated incident, the same basic violations that were contained in both NOVAP 2/28/89 and NOVAP 2/5/91.

Respondent also contends that the Consent Agreement addressed all of the violations contained in NOVAP 2/28/91, NOVAP 2/5/91 and all but one of the violations cited in Notice of Intent 2/15/91. Respondent argues that there are no genuine issues as to any material fact, wherefore it maintains that Summary Judgment in its favor should be granted in both of the instant matters.

DAHM's opposition to Respondent's Motions for Summary Judgment is based essentially on the grounds that Respondent's affidavit makes a material misrepresentation of the facts. DAHM contends that the specific facts alleged in Respondent's affidavit are contradicted by DAHM's affidavit and that those facts in DAHM's affidavit combined with the other pleadings in this matter demonstrate that there are genuine issues of fact that remain unresolved.

DAHM contends that its affiant was personally involved, on DAHM's behalf, with the negotiations with Respondent that resulted in the execution of the

Consent Agreement; that the Consent Agreement was entered into solely to settle NOVAP 2/28/89 and further that Respondent has failed to fully comply with the terms of the Consent Agreement. DAHM maintains that although the later violations for which the Respondent was cited were of the same nature as those earlier cited, these later violations were a reoccurrence of the previous violations and as such constituted separated and distinct violations.

DAHM argues that NOVAP 2/5/91 and Notice of Intent 2/15/91 were not settled nor intended to be settled through the Consent Agreement and that Respondent's operational history requires the revocation of all permits issued to Respondent. Wherefore DAHM seeks denial of both of Respondents Motions for Summary Judgment.

The Administrative Rules of Practice and Procedure for the Administrative Adjudication Division for Environmental Matters, Section 8.00 (a) 1. provides that the types of motions that may be made shall be those which are permissible under its Rules and the Rhode Island Superior Court Civil Rules of Procedure ("Super. Ct. Civ. P.R.").

Super. Ct. Civ. P.R. 56 (b) provides that a party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for summary judgment in his or her favor as to all or any part thereof.

Super. Ct. Civ. P.R. 56 (c) provides that the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is

entitled to judgment as matter of law.

The Rhode Island Supreme Court has uniformly ruled that if the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits disclose no genuine issue of fact, judgment shall be entered for the moving party, if it is entitled to it as a matter of law. However, if the affidavits conflict, the motion for summary judgment should be denied as the hearing officer should not judge between conflicting affidavits. The purpose of summary judgment is issue finding, not issue determination. Saltzman v. Atlantic Realty Co., Inc., 434 A.2d 1343 (R.I. 1981).

When the pleadings, discovery materials and affidavits indicate a dispute as to the intent in a written agreement, then a genuine issue of material fact exists, which cannot be resolved upon a motion for summary judgment. Lennon v. MacGregor, 423 A.2d 820 (R.I. 1980).

An examination of the pleadings and affidavits clearly reveals that DAHM has set forth specific facts in its affidavit which contradict Respondent's affidavit showing that this constitutes a dispute of material fact. Therefore there exists a genuine issue of material fact requiring a hearing in both the instant matters.

The Respondent has failed to demonstrate that under no set of circumstances could DAHM prevail in either of the instant matters. Rather, a review of the facts, the affidavits submitted by the parties and other documents of record compels the conclusion that summary judgment for the Respondent is not appropriate and this matter should proceed to hearing.

Based on the foregoing, it is hereby

ORDERED

That Respondent's Motions for Summary Judgment both are denied.

Entered as an Administrative Order this 25th day of October, 1991.

Joseph F. Baffoni

Joseph F. Baffoni
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, 4th Floor
Providence, RI 02908
(401) 277-1357

CERTIFICATION

I hereby certify that I caused a true copy of the within to be forwarded regular mail, postage pre-paid to Philip W. Noel, Esq., McGovern, Noel, Falk, Pannone, Procaccini & O'Leary, Inc., 321 South Main Street, Providence, RI 02903; and via inter-office mail to Mark Siegars, Esq., Office of Legal Services, 9 Hayes Street, Providence, Rhode Island 02908; Barbara Nestingen, Office of Legal Services, 9 Hayes Street, Providence, Rhode Island 02908 on this 25th day of October, 1991.

Lita Pinto