

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

In Re: North American Broadcasting
ERB No. 91-11

DECISION AND ORDER

This matter is before the Hearing Officer on the Motion for Hearing filed by Respondent in the above-entitled matter, on May 20, 1991. The Respondent requested oral argument which was heard on June 14, 1991.

The facts leading to Respondent's request were stipulated to orally on the record. Briefly, they are as follows:

On April 16, 1991, the Division of Air and Hazardous Materials ("Division") issued a Notice of Violation and Order to North American Broadcasting, Inc. citing the company with certain alleged violations of Division Regulations. The Notice of Violation ("NOV") is part of the record. Respondent signed for the NOV on April 18, 1991. Almost immediately after receipt of the NOV, the Respondent contacted the Division and commenced a series of communications to address the NOV. On May 9, 1991 Barbara Cesaro of the Division received a request for hearing. Shortly thereafter Respondent obtained counsel and on May 14, 1991 a request for hearing was filed by counsel with the Administrative Adjudication Division. On May 15, 1991 the Clerk of the Administrative Adjudication Division advised the Respondent that the requests for hearing were untimely and that the matter would not be docketed since Respondent had waived its right to a hearing. Thereafter, counsel for Respondent filed his Request for Hearing on the Waiver determination which resulted in oral argument. The Notice of

Violation and Order are part of the Administrative Hearing file. The parties agreed to the admission of seven (7) exhibits offered by the North American Broadcasting which are as follows:

- NAB 1 Correspondence dated April 23, 1991 from Warren Angell to Chris Trudeau.
- NAB 2 Correspondence dated April 29, 1991 from Francis Battaglia to Barbara Cesaro.
- NAB 3 Correspondence dated April 16, 1991 from Getz to Potter.
- NAB 4 Correspondence dated April 16, 1991 from Getz to Novack.
- NAB 5 Correspondence dated April 30, 1991 from Angell to Battaglia.
- NAB 6 Correspondence dated May 3, 1991 from Cesaro to North American Broadcasting.
- NAB 7 Waiver notice from Bonnie L. Stewart dated May 5, 1991 to North American Broadcasting.

Respondent raises three issues:

1. The NOV failed to adequately inform Respondent of his right to a hearing as required by R.I.G.L. § 42-35-9 (2) because it improperly referenced sections of the General Laws.
2. That the request for hearing was timely, and
3. That the actions of the Division, as evidenced by exhibits NAB 1 - 7, equitably estop them from contesting the timeliness of the hearing request.

R.I.G.L. § 42-17.1-2 can be found in the 1990 cumulative supplement to the Rhode Island General Laws of 1956 (1988 Reenactment). Chapter 17.1 is marked "effective until February 1, 1991". The purpose of the date limitation was that on February 1, 1991 P.L. 1990 Ch. 461 was to become effective thereby

creating the Department of Environment. However, R.I.G.L. § 42-17.1-40 empowers the Governor to delay the implementation of P.L. 1990 Ch. 461. The Governor, on February 1, 1991 and May 1, 1991 issued such orders ultimately delaying the effective date to July 1, 1991. By operation of those Orders the functions and authorities of the Department of Environmental Management remain unaffected by P.L. 1990 Ch. 461 until the transfer of functions is accomplished. As a result, R.I.G.L. § 42-17.1-2 (u) as contained in the 1990 Cumulative Supplement remains in full force and effect. It authorizes the Director:

(u) To give notice of an alleged violation of law to the person responsible therefor whenever the director determines that there are reasonable grounds to believe that there is a violation of any provision of law within his or her jurisdiction or of any rule or regulation adopted pursuant to authority granted to him or her, unless other notice and hearing procedure is specifically provided by that law. Nothing in this chapter shall limit the authority of the attorney general to prosecute offenders as required by law.

(1) The notice shall provide for a time within which the alleged violation shall be remedied, and shall inform the person to whom it is directed that a written request for a hearing on the alleged violation may be filed with the director within ten (10) days after service of the notice. The notice will be deemed properly served upon a person if a copy thereof is served him or her personally, or sent by registered or certified mail to his or her last known address, or if he or she is served with notice by any other method of service now or hereafter authorized in a civil action under the laws of this state, If no written request for a hearing is made to the director within ten (10) days of the service of notice, the notice shall automatically become a compliance order.

Page five of the Notice of Violation and Order issued on April 12, 1991 provides:

"Pursuant to § 42-17.1-2 (u), and Chapter 42-35 of the General Laws of Rhode Island, 1956, (1984 Reenactment), as amended, North American Broadcasting Company Inc. is entitled to request a hearing, in writing, before the Director or her designee within 10 days of receipt of this Notice of Violation and Order to show cause why this finding of violation should not stand and why this Order should not be enforced. North American Broadcasting Company, Inc. is also entitled, as with all meetings regarding this order, to representation by council [sic]. Any request for a hearing should, as required by R.I.G.L. 42-17.6-4, indicate whether North American Broadcasting Company Inc. denies the alleged violations. If North American Broadcasting Company Inc. fails to request a hearing within the aforesaid period of time, it is hereby notified that this Notice will automatically become a compliance order.

The cover letter (NAB 4) which accompanied the Notice of Violation stated in pertinent part:

Requests for a formal hearing on the enclosed should be made in writing to Bonnie Stewart at the following address:

Bonnie Stewart, Clerk
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, 4th Floor
Providence, Rhode Island 02908
Tel. (401) 277-1357

It is clear from a reading of the Notice of Violation and cover letter that the Respondent was adequately informed of its right to request a hearing, to whom the request should be directed, the time period allowed for the filing of such requests, and the implications of failing to request a hearing within the ten (10) day period. Regardless of Respondent's status as a layperson and his inability, as suggested by his counsel, to procure and understand R.I.G.L. § 42-17.1-2 (u) and the "effective date" issue, Respondent was advised in writing of all the requirements and consequences contained in the statute. Accordingly, I find that the Notice of Violation

and Order (NOV) and accompanying cover letter provided adequate notice to the Respondent of its right to appeal the NOV, how to accomplish such appeal, and the attendant consequences of failing to file a timely appeal.

Next, I address Respondent's claim that the request (s) for hearing were timely. Two requests for hearing were filed. The first request, dated May 9, 1991 was from the Respondent to Barbara Cesaro at the Division of Air and Hazardous Materials. The second request, dated May 14, 1991 filed with the Administrative Adjudication Division on May 14, 1991, was from Respondent's Counsel. The parties have stipulated that Respondent received the NOV on April 18, 1991 (as evidenced by NAB 7).

The R.I.G.L. § 42-17.1-2 (u) is clear and unambiguous. It provides that a person who wishes to request a hearing on a notice of violation may request such hearing within ten (10) days after service of the notice. The statute further provides that upon failure to request a hearing within ten (10) days of service, the notice shall automatically become a compliance order.

R.I.G.L. § 42-17.1-2 (u) (5) confers jurisdiction to the Superior Court with regard to compliance orders. The foregoing establishes the statutory and factual framework surrounding this matter.

Respondent's reliance on the case of Gryguc v. Bendick, 510 A.2d 937 (R.I. 1986) is misplaced. In Gryguc, the Court found it necessary to resort to legislative interpretation of the statute. That step is not necessary in the instant matter. R.I.G.L. § 42-17.1-2 (u) is clear and unambiguous. It provides a ten (10) day request period after which time a notice of violation automatically becomes a compliance order. Where the language of a statute is

clear and unambiguous and expresses a clear and sensible meaning there is no need for statutory construction or interpretive aids. Mauricio, et al v. Zoning Board of Review of the City of Pawtucket, No. 90-4-M.P., (R.I. 1991) issued May 16, 1991. Accordingly, the statute must be applied literally by giving words their plain and ordinary meaning. Id., citing, See e.g. O'Neil v. Code Commission for Occupational Safety and Health, 534 A.2d 606 (R.I. 1987); Moore v. Rhode Island Share and Deposit Indemnity Corp., 495 A.2d 1003 (R.I. 1985); Walsh v. Gowing, 494 A.2d 543 (R.I. 1985).

Assuming arguendo that the request for hearing dated May 9, 1991 is otherwise valid, it is clearly beyond the ten (10) day time period. The NOV was signed for on April 18, 1991. Twenty one (21) days elapsed before the request was sent to Ms. Cesaro. Similarly, the request filed with the AAD by counsel on May 14, 1991 exceeded the ten (10) day time limitation. That request was filed twenty six (26) days after the NOV was served.

I conclude that the ten day time limit is mandatory and jurisdictional. The timely filing of the request for hearing is an essential condition precedent to invoking the jurisdiction of the Administrative Adjudication Division to review action taken by a Division of the Department of Environmental Management. Mauricio v. City of Pawtucket, supra. If no request is filed within ten (10) days, the NOV by operation of law becomes a compliance order.

The forum for litigation involving compliance orders is, in the first instance, the Superior Court (R.I.G.L. § 42-17.1-2 (u)(5)).

The requests for hearing were beyond the ten (10) day filing period and

accordingly, the Administrative Adjudication Division is without jurisdiction to entertain the requests.

I find Respondent's argument that the Division should be estopped from contesting timeliness based on their repeated contacts with Respondent to be unsupported by the evidence. Exhibits NAB 1,2,3,5,6 clearly establish that a dialogue existed between the parties but fail to establish that the Division or its employees did anything to reasonably lead Respondent to believe that he was not required to request a hearing as set forth in the Notice of Violation and cover letter.

Based upon the foregoing, I conclude that the Administrative Adjudication Division for Environmental Matters is without jurisdiction to entertain and hear Respondent's request for hearing because it was not timely filed.

Entered as a Recommended Decision and Order this 25th day of June, 1991.

6/25/91
Date

Kathleen M. Lanphear
Kathleen M. Lanphear
Chief Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, 4th Floor
Providence, RI 02908
(401) 277-1357

Entered as a Final Agency Order this 26th day of June, 1991.

June 26, 1991
Date

Louise Durfee
Louise Durfee, Director
Department of Environmental Management
9 Hayes Street
Providence, Rhode Island 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within to be forwarded regular mail, postage pre-paid to George J. West, Esq., 1500 Hospital Trust Tower, Providence, Rhode Island 02903; and via inter-office mail to Claude Cote, Esq., Office of Legal Services, 9 Hayes Street, Providence, Rhode Island 02908 and Thomas D. Getz, Chief, Division of Air and Hazardous Materials, 291 Promenade Street, Providence, Rhode Island 02908 on this 27th day of June, 1991.

Jacqueline Ballard