

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

IN RE: Antonelli Plating
Notice of Violation No. 89-23-AP

DECISION AND ORDER

This matter came before the Department of Environmental Management Administrative Adjudication Division on a request for a hearing of a Notice of Violation and Order issued on November 27, 1989 by the Division of Air and Hazardous Materials ("DAHM").

The within matter is properly before the Hearing Officer pursuant to the Clean Air Act (R.I.G.L. § 23-23-1 et seq.), Chapter 17.6 of Title 42, R.I.G.L. § 42-17.1-2, statutes governing the Administrative Adjudication Division (R.I.G.L. § 42-17.7-1 et seq.), the Administrative Procedures Act (R.I.G.L. § 42-35-1 et seq.), the Rules and Regulations for Assessment of Administrative Penalties, and the Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters. The proceedings were conducted in accordance with the above-noted statutes and regulations.

Background

On September 13, 1989 employees of the Division of Air and Hazardous Materials of the Department of Environmental Management ("DEM") conducted an inspection of Antonelli Plating Company ("Antonelli"). Approximately two weeks later, on

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September 25, 1989, Edward J. Burns, Jr., Senior Engineer of the Division of Air and Hazardous Materials sent Christopher Antonelli, President of Antonelli Plating Company, a "Letter of Deficiency" which required that modifications to address the deficiencies set forth therein be completed by November 1, 1989. The Letter further indicated that if the requirements of Air Pollution Control Regulation No. 18 entitled "Control of Emissions from Organic Solvent Cleaning" were not achieved by the November first deadline, then a Notice of Violation with potential monetary penalties would be issued.

The reinspection was conducted on November 6, 1989 and on November 27, 1989 the Notice of Violation and Order ("NOVAO"), citing uncorrected deficiencies, was issued.

Submission Without a Hearing

On June 3, 1991, the first day scheduled for hearing of the within matter, Mark Siegars, legal counsel for the Division of Air and Hazardous Materials, and Anthony A. Giannini, Jr., attorney for the Respondent, elected to waive the hearing and submit the case to the Hearing Officer on the record. Pursuant to Rule 15.00 (b) of the Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters, the election was allowed.

The parties agreed that the record would consist of all exhibits previously submitted which would be marked as full exhibits. Memoranda of Law were subsequently filed by both counsel.

The parties stipulated that the within matter was properly before the Administrative Adjudication Division and further agreed that no facts were in dispute. Mr. Giannini did question, however, the method of assessing the penalties: whether individual violations were moderate or minor; whether certain counts listed as single violations should be considered in their composite; and whether DAHM had properly calculated the number of days Antonelli was in violation of Air Pollution Control Regulation No. 18.

Mr. Giannini also questioned whether DAHM had followed proper procedure under § 23-23-6 and § 23-23-8, an issue which he argues at some length in his Memorandum of Law.

Full Exhibits

The exhibits produced for the record have been marked by the Hearing Officer as follows:

- JT. 1 Notice of Violation and Order No. 89-23-AP, dated November 27, 1989.
- JT. 2 Inspection Report dated March 29, 1990.
- JT. 3 Telephone Discussion Record dated November 6, 1989.
- JT. 4 Interoffice Memo from Richard Evans to Antonelli Plating File, dated October 10, 1989.

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- JT. 5 Letter of Deficiency dated September 25, 1989.
- JT. 6 Handwritten notes, unsigned.
- JT. 7 Resume of Barbara Morin.
- JT. 8 Letter from Chris Antonelli to Hearing Officer Byrnes, dated February 27, 1991.
- JT. 9 List of Witnesses submitted by Antonelli Plating Company.
- JT. 10 Letter from Christopher Antonelli, Jr., to Edward Burns, dated February 26, 1991.
- JT. 11 Letter from Christopher Antonelli, Jr., to Edward Burns, dated March 30, 1990.
- JT. 12 Letter from Christopher Antonelli, Jr., to Richard Evans, dated June 28, 1990, with attached blueprint.
- JT. 13 Letter from Christopher Antonelli to Kendra Beaver containing progress report with expenditures.
- JT. 14 Letter from Chris Antonelli to Edward J. Burns, Jr., dated February 20, 1991.
- JT. 15 Installation and Operation Instructions for Automatic Vapor Recovery System for Antonelli Plating Providence, Rhode Island, dated November 17, 1977.

At the request of attorney Mark Siegars and without objection, the Hearing Officer took administrative notice of the following documents: "Toxicological Profile for Trichoroethylene", published by the U.S. Public Health Service; and "Control of Volatile Organic Emissions from Solvent Metal Cleaning", published by the U.S. Environmental Protection Agency.

Burden of Proof

Pursuant to § 42-17.6-4, DAHM has the burden of proving the occurrence of each act or omission alleged by a preponderance of the evidence.

DECISION AND ORDER

Since the Findings of Fact set forth in the Notice of Violation and Order have been accepted by stipulation of the parties, the issues to be addressed are those raised in Respondent's Memorandum of Law and a determination of the appropriate administrative penalty to be assessed.

Issues

Respondent contends that an administrative penalty cannot be assessed in this case because the DAHM has elected to prematurely pursue a civil penalty which is only available upon violation of a compliance order. This conclusion, however, is premised upon a misinterpretation of the pertinent statutes and misconstrues the manner in which the Notice of Violation and Order applies the law.

In the NOVAO, the DAHM seeks an administrative penalty pursuant to R.I.G.L. § 42-17.6-2 and not under § 23-23-14 as Respondent suggests. Under § 42-17.6-3 and § 42-17.6-7 it is clear that the proposed administrative penalty correlates to the period in which the Respondent was allegedly in violation of the law, rule, regulation, order or permit until such time as the

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notice of intent to assess an administrative penalty was issued. Each day of violation thereafter, according to the final sentence of both statutes, constitutes a separate, i.e., additional, offense which may be subject to a separate administrative penalty.

The penalty sought by the DAHM is clearly distinct from the one contemplated in R.I.G.L. § 23-23-14, which statute provides fine and/or imprisonment for violation of a compliance order. It would indeed be premature for the DAHM to seek such a fine at this stage of the proceedings, nor would the Administrative Adjudication Division be the forum for such relief.

The DAHM, in the proposed order set forth in the NOVAO, also seeks to have Antonelli Plating ordered to correct its equipment and operating deficiencies to achieve compliance with Regulation No. 18. This "correct the deficiencies" section is the compliance portion of the NOVAO and is sought by the DAHM pursuant to R.I.G.L. § 42-17.1-2 (u) and the Clean Air Act, specifically § 23-23-5 et seq.

In effect, the NOVAO contains two separate notices: the notice of intent to assess an administrative penalty pursuant to § 42-17.6-3 and a notice of an alleged violation of law pursuant to § 42-17.1-2 (u).

Respondent's counsel is correct that Antonelli Plating is under no obligation to remedy the violations alleged by the DAHM (the compliance portion) until after a hearing on the matter (which was waived by the parties and submitted to the Hearing Officer on the record), submission of proposed findings of fact and conclusions of law to the director, and issuance of a final agency decision by the director which sustains or modifies the notice of violation. § 42-17.1-2 (u)(3). But this does not mean that the administrative penalty cannot be assessed for the period that Respondent was not in compliance with the appropriate law, rule, regulation, order or permit. As discussed above, § 42-17.6-3 and § 42-17.6-7 clearly contemplates that it can be so assessed.

Therefore, in reviewing the pertinent statutory provisions, the Notice of Violation and Order, and the memoranda of law filed by the parties, I find that the action of the Division of Air and Hazardous Materials was consistent with applicable law. Accordingly, having determined that the DAHM has properly sought administrative penalties against Respondent, I will now address the Division's and Respondent's arguments regarding calculation of those penalties.

Administrative Penalties

The Findings of Fact set forth in the NOVAO, which has been adopted by stipulation of the parties, itemizes a number of areas in which Degreasers No. 1, No. 2, No. 3 and No. 4 were not in conformance with the requirements of Air Pollution Control Regulation No. 18.

Respondent presents several arguments in support of his contention that the penalty amount should be reduced: two of the open top vapor degreasers (No. 1 and No. 3) were taken off line immediately following the DAHM inspection on September 13, 1989; the plant was closed November 4 and 5, 1989, two of the five days for which the penalties were calculated; the NOVAO lists multiple violations of the same regulation; and that Antonelli Plating attempted to promptly comply with the requirements of Regulation No. 18.

Contrary to the argument of the DAHM that any evidence which would warrant a reduction in the penalty amount is appropriate to settlement negotiations and becomes irrelevant "and arguably outside the scope of review" once the matter has been reached for hearing (Memorandum of DAHM in Support of Entry of Judgment in the Full Penalty Amount, p. 6), R.I.G.L.

§ 42-17.6-6 sets forth factors which can be considered in determining the amount of the administrative penalty as does Section 9 of the Rules and Regulations for Assessment of

Administrative Penalties. Though the determination is specifically delegated to the director, this Decision and Order, as a recommendation of specific findings of fact and conclusions of law to the director, may also consider such factors.

R.I.G.L. § 42-17.6-6 provides in pertinent part:

42-17.6-6. Determination of administrative penalty.--

In determining the amount of each administrative penalty, the director shall include, but not be limited to, the following to the extent practicable in his or her considerations:

(a) The actual and potential impact on public health, safety and welfare and the environment of the failure to comply;

(b) The actual and potential damages suffered, and actual or potential costs incurred, by the director, or by any other person;

(c) Whether the person being assessed the administrative penalty took steps to prevent noncompliance, to promptly come into compliance and to remedy and mitigate whatever harm might have been done as a result of such noncompliance;

(d) Whether the person being assessed the administrative penalty has previously failed to comply with any rule, regulation, order, permit, license, or approval issued or adopted by the director, or any law which the director has the authority or responsibility to enforce;

(e) Making compliance less costly than noncompliance;

(f) Deterring future noncompliance . . .

The fact that two of the degreasers were taken out of operation "immediately following the inspection of September 13, 1989, until all violations were corrected" (Antonelli Plating Company's Memorandum of Law, p. 8), is supported by Joint Exhibits 8 and 14 and has not been disputed

by the DAHM. It should be noted that this action was taken prior to the time period calculated in the NOVAO for the assessment of the administrative penalty.

Nothing in the record indicates that the plant closure on November 4 and 5, 1989 (Saturday and Sunday) was a result of attempts to mitigate and correct deficiencies and, therefore, the mere fact that equipment was not operating on those two days cannot be a consideration in abating the penalty. Nonuse, in and of itself, does not remove the equipment from the requirements of the Regulation. See 18.2.1(b), (d), 18.3.2(a), etc. The DAHM therefore properly included November 4 and 5 in its determination of the penalty.

Respondent also contends that several of the deficiencies should be considered a single violation and not multiple violations of the same regulation. (Antonelli Plating Company's Memorandum of Law, p. 9). He argues that three of the six violations for Degreaser No. 2 pertain to the cover, as with Degreaser No. 4, but were still counted as separate violations.

I have reviewed each deficiency listed in the NOVAO and the applicable section of Air Pollution Control Regulation No. 18 and conclude that the DAHM properly found that each deficiency constitutes a separate violation according to the provisions of Section 10(b)(1) or (3) of the Rules and Regulations for Assessment of Administrative Penalties.

Lastly, Respondent reasons that his attempts to comply promptly with Regulation No. 18 should be considered in the determination of an appropriate penalty. Through both statute and regulation, consideration of whether steps were taken to promptly achieve compliance is not only encouraged but required. §42-17.6-6. Section 9 of the Rules and Regulations for Assessment of Administrative Penalties.

While the record is devoid of evidence that Respondent proceeded with repairs after the DAHM inspection but prior to issuance of the NOVAO, the record is clear that, following receipt of the NOVAO, Respondent did indeed proceed with a flurry of installations, adjustments and replacements. JT 8, JT 10, JT 14.

Conclusion

As a result of the above, I have reviewed the NOVAO in conjunction with the Rules and Regulations for Assessment of Administrative Penalties, and specifically with reference to Section 11 thereof and the Penalty Matrix for miscellaneous violations, and find that, because Degreaser No. 1 and Degreaser No. 3 were removed from operations prior to the period used for calculation of the administrative penalty, the DAHM's determination that the deficiencies found in Degreasers No. 1 and No. 3 represented a minor and/or moderate potential for

harm is not substantiated. Accordingly, I have determined that no penalty is warranted for the deficiencies found on Degreasers No. 1 and No. 3.

In addition, both statute and regulation provide that efforts to "promptly come into compliance and to remedy and mitigate whatever harm might have been done as a result of such noncompliance" are considerations in determining the penalty. I have therefore reduced the administrative penalty otherwise assessed by five percent.

As a result of the stipulations of the parties and the documentary evidence presented, I make the following:

FINDINGS OF FACT

1. On September 13, 1989 an inspection was conducted of Antonelli Plating Company of Providence, Rhode Island by members of the Division of Air and Hazardous Materials.

2. A Letter of Deficiency was issued by the DAHM on September 25, 1989 which required Antonelli Plating Company to correct deficiencies by November 1, 1989.

3. A followup inspection by DAHM was made on November 6, 1989 and the following deficiencies had not been corrected:

Degreaser No. 1, Open Top Vapor Degreaser 42" x 22"

1. There is no spray safety switch (18.3.2(b)(3)).
2. Cover does not make a tight seal (18.2.1(f)).
3. Cover is not attached to degreaser (18.3.2(a)).

4. Cover cannot be easily operated without disturbing vapor zone (18.3.2(a)).
5. A summary of proper operating procedures is not conspicuously posted (18.2.1(c)).

Degreaser No. 2, Open Top Vapor Degreaser 48" x 28"

1. There is no spray safety switch (18.3.2(b)(3)).
2. Cover does not make tight seal (18.2.1(f)).
3. Cover is not attached to degreaser (18.3.2(a)).
4. Cover cannot be easily operated without disturbing vapor zone (18.3.2(a)).
5. Freeboard ratio is inadequate (18.3.2(d)(1)).
6. A summary of proper operating procedures is not conspicuously posted (18.2.1(c)).

Degreaser No. 3, Open Top Vapor Degreaser (modified conveyORIZED)

1. There is no spray safety switch (18.3.2(b)(3)).
2. Cover does not make tight seal and has holes (18.2.1(f)).
3. Cover is not attached to degreaser (18.3.2(a)).
4. Part of cover is composed of porous, absorbent material (wood) (18.2.1(f)).
5. Cover cannot be easily operated without disturbing vapor zone (18.3.2(a)).
6. A summary of operating procedures is not conspicuously posted (18.2.1(c)).
7. Workload occupies more than one half the open top area (18.4.2(c)).

Degreaser No. 4 ConveyORIZED

1. Unit does not have downtime covers (18.3.3(e)).
2. Part of degreaser (top) is constructed of porous, absorbent material (wood) (18.2.1(f)).
3. Degreaser top is not constructed to form a tight seal (18.2.1(f)).
4. Degreaser openings are not minimized to properly silhouette workloads (18.3.3(d)).
5. There is no condenser flow switch (18.3.3(c)(1)).
6. There is no spray safety switch (18.3.3(c)(3)).
7. A summary of operating procedures is not conspicuously posted (18.2.1(c)).

4. Degreaser No. 1 had been removed from operation prior to November 1, 1989.

5. Degreaser No. 3 had been removed from operation prior to November 1, 1989.

6. The Notice of Violation and Order was issued to Antonelli Plating (sic) on November 27, 1989.

7. Antonelli Plating Company made numerous efforts after November 6, 1989 to correct deficiencies leaving a minimum of remaining modifications to be completed as of March 29, 1990.

Based on the foregoing facts and the documentary evidence of record, I make the following:

CONCLUSIONS OF LAW

1. This matter is properly before the Administrative Adjudication Division pursuant to R.I.G.L. § 23-23-1 et seq., § 42-17.6-1 et seq., § 42-17.1-2, § 42-17.7-1 et seq. and § 42-35-1 et seq.

2. Notice of the hearing and prehearing conference was duly provided in accordance with the Administrative Procedures Act and the Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters.

3. The DAHM has sustained its burden of proving the occurrence of each act or omission alleged by a preponderance of the evidence.

4. The potential for harm was insignificant on Degreasers No. 1 and No. 3 for the period used for calculation of the administrative penalty.

5. Each of the deficiencies listed for Degreasers No. 2 and No. 4 constitutes a separate violation.

6. Violations of 18.2.1(c) on Degreasers No. 2 and No. 4 represent a minor potential for harm. All other violations on Degreasers No. 2 and No. 4 represent a moderate potential for harm.

7. Each day of noncompliance constitutes a separate violation.

8. Antonelli Plating Company made efforts to promptly come into compliance and to remedy and mitigate whatever harm might have been done as a result of noncompliance pursuant to R.I.G.L. § 42-17.6-6 and Section 9 of the Rules and Regulations for Assessment of Administrative Penalties.

Wherefore it is hereby

ORDERED

That the Notice of Violation and Order No. 89-23-AP is modified in the following manner:

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1. Antonelli Plating Company is hereby ordered to achieve compliance with Air Pollution Control Regulation No. 18 by correcting all equipment and operating deficiencies at the earliest practical date but in any event no later than August 1, 1992.

2. Degreasers No. 1 and No. 3 shall not be operated until all such deficiencies have been corrected.

3. Antonelli Plating Company shall remit to the Rhode Island Department of Environmental Management, Office of Business Affairs, 22 Hayes Street, Providence, RI 02908 by July 1, 1992, an administrative penalty in the amount of twenty-eight thousand five hundred dollars (\$28,500.00) payable by certified check to the order of the General Treasurer, State of Rhode Island, to be deposited in the Environmental Response Fund pursuant to R.I.G.L. § 23-19.1-23.

I hereby recommend the foregoing Decision and Order to the Director for issuance as a final Order.

May 15, 1992
Date


Mary F. McMahon
Hearing Officer

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The within Decision and Order is hereby adopted as a final agency Decision and Order.

May 20, 1992
Date

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

CERTIFICATION

I hereby certify that I caused a true copy of the within to be forwarded via regular mail, postage prepaid to Anthony A. Giannini, Jr., Esq., 128 Dorrance Street, Providence, RI 02903 and via interoffice mail to Mark Siegars, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this 20th day of May, 1992.

Anthony A. Giannini, Jr.