

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

RE: HAROUTIOUN G. JEREJIAN AAD NO. 93-076/GWE
NOTICE OF VIOLATION NO. UST #02157

DECISION ON DIVISION'S MOTION TO DISMISS

This matter came before Hearing Officer McMahon on January 28, 1994 for oral argument on the Motion to Dismiss Respondent's Request for Hearing filed by the Division of Waste Management, Underground Storage Tank Program ("Division") on December 22, 1993. Said Motion represented that Respondent's request for hearing was untimely and asserted that the Department of Environmental Management, Administrative Adjudication Division, ("AAD") lacked subject matter jurisdiction as a result.

Respondent filed an objection on December 29, 1993 but did not submit any supporting memorandum.

Following oral argument, the parties were given the opportunity to file post-hearing memoranda on the specific issue of the existence of any legal precedent which recognized the tolling of the AAD appeal period due to a party's illness or incompetence. Respondent filed Haroutioun G. Jerejian's Memorandum on February 11, 1994. The Division filed its Objection and Response to Haroutioun G. Jerejian's Memorandum on February 25, 1994.

DECISION AND ORDER

The Notice of Violation herein was issued to Haroutioun G. Jerejian, Harry's Service Station, UST Facility #02157, on March 8, 1993 and received by Certified Mail on March 17,

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1993. Pursuant to R.I.G.L. §42-17.1-2(u), Respondent had ten (10) days from receipt of the NOV within which to request a hearing or the NOV, by operation of law, would automatically become a compliance order enforceable in Superior Court. According to the Division, an untimely request for hearing denies the AAD subject matter jurisdiction to hear and decide the allegations set forth in the NOV. Division's Motion to Dismiss Respondent's Request for Hearing, p. 2.

By the Division's calculation, and due to the deadline falling on a weekend, the hearing request should have been filed with the AAD on or before March 29, 1993. The AAD received Respondent's hearing request, dated December 15, 1993, on December 16, 1993.

Respondent has not disputed the dates of receipt of the NOV, nor of the request for hearing, except to say that his wife signed the "green card" for the certified mail. Respondent argues that that should not be considered notice to him and more importantly, that the period in which to request a hearing should be extended due to incapacity during the statutory appeal period caused by prolonged hospitalization.

A review of the provision which sets forth the requirements of a request for hearing on an NOV, and of the section which provides for hearing on assessments of administrative penalties, reveals the following:

§42-17.1-2(u)...

- (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 upon 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.

§42-17.6-4...

(a) A person shall be deemed to have waived his or her right to an adjudicatory hearing unless, within ten (10) days of the date of the director's notice that he or she seeks to assess an administrative penalty, the person files with the director or the clerk of the administrative adjudication division a written statement denying the occurrence of any of the acts or omissions alleged by the director in the notice, or asserting that the money amount of the proposed administrative penalty is excessive...

(b) If a person waives his or her right to an adjudicatory hearing, the proposed administrative penalty shall be final immediately upon the waiver.

Section 42-17.1-2(u) clearly indicates that service of the NOV was properly made upon Respondent as it was sent certified mail to his last known address. The other provisions of the above statutes confirm the lack of AAD jurisdiction over this NOV, absent a tolling of the appeal period.

Respondent, in his post-hearing memorandum, cites R.I.G.L. §9-1-19 for the proposition that the running of a statute of limitation "is postponed for a disability until such disability or impediment is removed." Haroutioun G. Jerejian's Memorandum, p. 2. He urges that this provision be applied to the statutory appeal period for NOV's and that Mr. Jerejian's illness effectuate an extension of the filing deadline.

Section 9-1-19 provides:

9-1-19. Disability postponing running of statute.
- If any person at the time any such cause of action shall accrue to him or her shall be within the age of eighteen (18) years, or of unsound mind, or imprisoned, or beyond the limits of the United States, such person may bring the same, within such time as hereinbefore limited, after such impediment is removed.

The Division strongly argues that the above provision is inapplicable to the present matter and contends that §9-1-19 concerns the right of a plaintiff to file a civil complaint and does not protect a defendant or, "in an administrative context, a respondent from having to answer or otherwise respond to an action that has been filed against him." Division's Objection and Response to Haroutioun G. Jerejian's Memorandum, p. 7 (emphasis deleted).

If §9-1-19 is applicable to administrative actions and to notices of violation issued under §42-17.1-2 and §42-17.6-4, Respondent would have to show that his illness constituted the "unsound mind" contemplated by the statute and that he had

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timely filed his request for hearing once the disability had been removed. Assuming as fact the circumstances presented in Respondent's Memorandum, I conclude that even were I to find that §9-1-19 applied herein and that Respondent had been of unsound mind, his request for hearing was still not timely filed once he had recovered.

This conclusion is based upon representations of Respondent's counsel that Respondent

"did in fact attempt to request a hearing in writing within ten (10) days of the date that his disability was removed. [He] would have filed such a written request had he not been informed in bad faith by DEM that he was not entitled to a hearing and as a result could not request a hearing."
Haroutioun G. Jerejian's Memorandum, p. 3.

Respondent's admission that the hearing request was filed late was in furtherance of his argument to be equitably excused for its lateness due to the "tactics" of the Department and specifically, Division's counsel. (Tr.13) Yet even if Respondent were to prove all the elements necessary to obtain equitable estoppel against the Department, he could not bar the Department from raising the late filing as a jurisdictional issue and thus fatal to Respondent's appeal.

The Rhode Island Supreme Court has made it abundantly clear that subject matter jurisdiction is an "indispensable ingredient of any judicial proceeding, and the absence thereof can be raised by any party or by the court sua sponte at any time and can be neither waived nor conferred by consent of

the parties." Warwick School Com. v. Teacher's Union, 613 A2d, 1273, 1276 (RI 1992). (emphasis added). See also State v. Kenney, 523 A2d 853 (RI 1987); Petition of Loudin, 101 RI 35, 219 A2d 915 (1966). Thus, if the parties cannot by agreement extend the period for filing a request for hearing and confer subject matter jurisdiction upon the AAD, this tribunal can certainly not estop the Department from raising the issue and thereby act to extend the deadline.

Therefore, Respondent's late filing of his request for hearing is fatal to his appeal herein. Cumberland Homes, Inc., AAD No. 91-017/FWA, Final Agency Decision dated November 14, 1991; Itrot Realty, AAD No. N/A, Final Agency Decision date July 30, 1991; North American Broadcasting, AAD No. N/A, Final Agency Decision dated June 26, 1991.

Wherefore, after considering the documentary evidence of record, I make the following:

FINDINGS OF FACT

1. The Notice of Violation and Order (NOV) was issued by the Associate Director for Air, Solid Waste and Hazardous Materials to Haroutioun G. Jerejian, Harry's Service Station, UST Facility #02157, on March 8, 1993.
2. That service of the NOV was made by certified mail on March 17, 1993, the date upon which the Return Receipt ("green card") was signed.
3. That Respondent's hearing request was filed with the AAD on December 16, 1993.
4. That Respondent's hearing request is untimely.

Based upon the foregoing facts and the documentary evidence of record and having considered the pertinent statutory provisions and arguments of counsel, I make the following:

CONCLUSIONS OF LAW

1. That pursuant to §42-17.1-2(u), Respondent received service of the Notice of Violation and Order on March 17, 1993.
2. That Respondent failed to file a timely request for hearing as provided by statute.
3. That pursuant to §42-17.1-2, the Notice of Violation and Order automatically became a compliance order upon the expiration of the ten (10) day statutory period for requesting a hearing.
4. That pursuant to §42-17.6-4, Respondent waived his right to an adjudicatory hearing on the proposed administrative penalty upon the expiration of the ten (10) day statutory period for requesting a hearing.
5. That pursuant to §42-17.6-4, the proposed administrative penalty became final upon the waiver.
6. That pursuant to §42-17.1-2(u) and §42-17.6-4, this tribunal does not have the requisite subject matter jurisdiction to hear or consider Respondent's request for hearing.

Wherefore, it is hereby

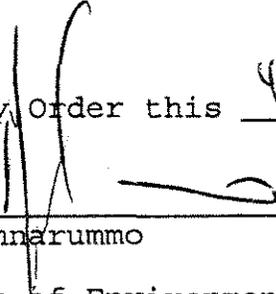
ORDERED

Respondent's request for hearing is herewith DISMISSED.

Entered as an Administrative Order this 29th day of April, 1994.


Mary F. McMahon
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, Third Floor
Providence, Rhode Island 02908

Adopted as a Final Agency Order this 4th day of May, 1994.


Michael Annarummo
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 Final Agency Order to be forwarded, via certified mail, postage prepaid to Jonathan F. Oster, Esq., 936 Smithfield Avenue, P. O. Box B, Lincoln, RI 02865; and certified mail to Haroutioun G. Jerejian, c/o Harry's Service Station, 169 Douglas Avenue, Providence, RI 02903 and via interoffice mail to Brian Wagner, Esq., Office Legal Services, 9 Hayes Street, Providence, RI 02908 on this 4th day of May, 1994.

