

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

IN RE: Henry Palazzo  
Notice of Violation No. C90-0031

Decision and Order on Respondent's Motions to Dismiss

Respondent has filed various motions to dismiss to which the State has objected. Four of the Respondent's motions will be addressed in this decision. These motions are as follows: one motion challenging the Administrative Adjudication Division's (AAD) jurisdiction to hear this matter; two motions questioning the constitutionality of the applicable statutes and proceedings and one motion contending the Notice of Violation (NOV) issued by the Department of Environmental Management (DEM) assesses a criminal penalty and is bound by a statute of limitations.

Respondent's Motion to Dismiss for Lack of Subject Matter Jurisdiction.

The movant argues that the NOV issued by DEM was issued prior to the inception of AAD and, as such, this tribunal lacks jurisdiction over the violation. The Administrative Adjudication Division is a separate division within the Department of Environmental Management established during the 1989 legislative session and which began operations on June 18, 1990. Pursuant to R.I.G.L. § 42-17.7-2 AAD Hearing Officers are empowered to hear all contested enforcement, licensing and adjudicatory proceedings for environmental matters

pursuant to the rules and regulations promulgated by the Director of the Department of Environmental Management (DEM). The authority to promulgate rules and regulations by the Director has been found to be a proper delegation. J.M. Mills, Inc. v. Murphy 116 RI 54, 352 A2d 661 (RI 1976).

This violation was issued after the establishment of AAD by the legislature in 1989 but before this tribunal began operations on June 18, 1990. Assuming, in arguendo that the term "establishment of AAD" set forth in the statute relates to the date AAD began operations, Respondent would be correct in arguing that his violation issued on February 16, 1990 was issued prior to the creation of this division. However, the statute requires that for a matter to be excluded from the jurisdiction of AAD, the case must be "in hearing" prior to the establishment of AAD. Respondent cannot meet this requirement since his violation has yet to be adjudicated. Therefore, the Hearing Officer finds this violation is properly before the Administration Adjudication Division for hearing. Respondent's motion to dismiss is denied.

Motions to Dismiss This Action Due to the Unconstitutionality of Various DEM Statutes.

Respondent has moved to dismiss the pending NOV on constitutional grounds which are, in essence, that (1) the definition of wetlands is unconstitutionally vague; (2) the Act

(assumed to be the Freshwater Wetlands Act) is unconstitutional since it does not delineate a statute of limitations; (3) AAD enabling statute R.I.G.L. § 42-17.1 is unconstitutional.

Enabling legislation for the Administrative Adjudication Division (R.I.G.L. § 42-17.1-1, § 42-17.7-2) specifically define the functions and duties of the Director and the adjudicatory Hearing Officers. This tribunal is empowered to adjudicate all contested enforcement proceedings, all contested licensing proceedings and all adjudicatory proceedings arising from regulatory rules and regulations promulgated by the Director of DEM. These statutes and rules are devoid of any language which could be construed as a grant of authority to decide constitutional issues. Further, the administrative process has previously addressed this issue and has determined that the AAD does not have the requisite statutory authority to adjudicate due process claims. (In Re: Richard & Anita Ally, FWWL NOV No. C-1915, Administrative Order, November 5, 1991; In Re: Bruce T. Cunard, Final Administrative Order, June 17, 1991; In Re: Fairlawn Oil Services, Inc., NOV No. GW-9-513, AAD No. 91-001/GWE, Final Administrative Order, November 29, 1991; In Re: Richard Conti, FWWL Application No. 89-025F4, Final Decision & Order, December 24, 1990; In Re: Dennis Grillo, FWWL Application

Henry Palazzo  
Notice of Violation No. C90-0031  
Page 4

No. 87-0527F, Final Administrative Decision, June 20, 1991; In  
Re: Profile Const. Co., FWFL Application No. 89-055F, Final  
Decision & Order, April 3, 1991.)

In addition, the Rhode Island District Court has ruled on  
this issue in the matter of Bowen v. Hackett 361 F. Supp. 654,  
860 (D.R.I. 1973). In Bowen a Respondent challenged the  
constitutionality of administrative procedures of Rhode Island's  
unemployment compensation and temporary disability laws. The  
Court determined it is inappropriate to require a Respondent to  
exhaust all administrative remedies before presenting a  
challenge to the statute on constitutional grounds finding "the  
expertise of state administrative agencies does not extend to  
issues of constitutional law" Supra at 860.

Ineluctably, neither this tribunal nor the Director has the  
authority to adjudicate constitutional issues. Therefore, the  
Hearing Officer lacks the required jurisdiction to address the  
issues raised in Respondent's Motion to Dismiss.

Therefore, Respondent's motion to dismiss is denied.

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Respondent's Motion to Dismiss for Lack of a Statute of Limitations.

Respondent next argues that no statute of limitation for prosecuting the NOV is delineated in the applicable statutes and as such the actions taken by DEM are unconstitutional. As previously stated, the constitutionality of the State's or the Department's actions cannot be addressed by this forum.

The Respondent further contends that the penalty assessed in the NOV is a criminal sanction analogous to a misdemeanor for which a three-year statute of limitations would apply.

Hearings held by the Administrative Adjudication Division are adjudicatory proceedings arising from the regulatory rules and regulations promulgated by the Director of DEM. These proceedings are conducted pursuant to the Administrative Procedures Act (APA) (R.I.G.L. § 42-35 et seq.) and the Rhode Island Superior Court Rules of Civil Procedure. These proceedings are quasi-judicial, administrative hearings which are civil in nature. Aniello v. Marcello 162 A.2d 270 1960, In Re: Richard & Anita Ally, FWL NOV No. C-1915, Administration Order 1/15/92.

This tribunal is not authorized by statute to make final determinations. Subsequent to a hearing, the AAD Hearing Officer makes recommended findings of fact and conclusions of law which may include a recommendation for an administrative

penalty. The Director after reviewing the Hearing Officer's findings and conclusions issues a final agency decision (R.I.G.L. § 42-17.7-6).

The Department of Environmental Management in its capacity as a regulatory agency has the authority pursuant to R.I.G.L. § 42-17.6-2 to assess an administrative penalty. This penalty in accordance with R.I.G.L. § 42-17.6-7 shall not be more than \$1,000.00 per violation unless a different amount is authorized by statute as a civil penalty for the subject violation. Clearly, this penalty is not a criminal sanction.

For the reasons stated above, the Respondent's motion to dismiss is denied.

Entered as an Administrative Order this 29<sup>th</sup> day of May, 1992.

  
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Patricia Byrnes  
Hearing Officer  
Department of Environmental Management  
Administrative Adjudication Division  
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Henry Palazzo  
Notice of Violation No. C90-0031  
Page 7

CERTIFICATION

I hereby certify that I caused a true copy of the within Decision and Order to be forwarded via regular mail, postage prepaid to Paul DiMaio, Esq., 215 Broadway, Providence, RI 02903 and via interoffice mail to Patricia C. Solomon, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this 29<sup>th</sup> day of May, 1992.

Tracy Shields