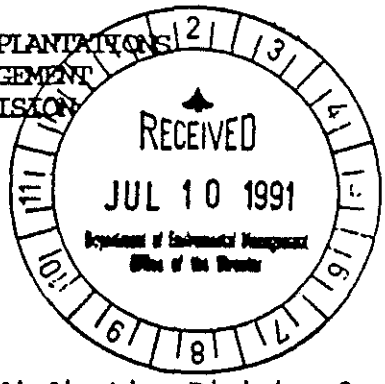
STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION



IN RE: Truk-Away of R.I., Inc.
Division of Air and Hazardous Materials

DECISION AND ORDER

This matter was heard before the Administrative Adjudication Division for Environmental Matters (AAD) of the Department of Environmental Management (DEM), Hearing Officer Patricia Byrnes presiding, on January 7 and 31, 1991, at the Administration Building, One Capitol Hill, Providence, Rhode Island. This action is the result of a timely appeal taken on March 18, 1987 by Truk-Away of R.I., Inc. from a Notice of Violation and Penalty issued by the Division of Air and Hazardous Materials (DAHM) on March 9, 1987.

Authority

Said appeal is properly before the Hearing Officer pursuant to the Hazardous Waste Management Act R.I.G.L. § 23-19.1-1 et seq. as amended; statutes governing the Department of Environment Management R.I.G.L. § 42-17.1 et seq. as amended and the Administrative Adjudication Division statutes R.I.G.L. § 42-17.7-1 et. seq. as amended; Rules and Regulations for Hazardous Waste Generator, Transportation, Treatment, Storage and Disposal promulgated September 15, 1987 and the Administrative Adjudication Division Rules of Practice and Procedure effective July 10, 1990.

Representation

Richard C. Galli, Esq. represented the respondent and Mark Siegars, Esq. appeared on behalf of the Division of Air and Hazardous Materials.

Burden of Proof

The burden of proof and persuasion as set forth in R.I.G.L. § 42-17.6-4 falls upon the Department to show by a preponderance of the evidence that the occurrence of each act or omission alleged in the notice of violation and penalty.

Preliminary Matters

A Status Conference was held on August 9, 1990 and a Prehearing Conference took place on December 13, 1990. At the prehearing the Hearing Officer granted the parties until January 2, 1991 to submit exhibits and prehearing motions. (see administrative order dated December 14, 1990).

Respondent submitted:

Preliminary submission of Truk-Away (12/11/90).
Pre-trial memorandum (1/2/90).
Consolidated motions pursuant to the Prehearing Order (1/2/90).

DEM provided:

Preliminary statement of DAHM (12/13/90).
Witness list and exhibits of the Division (12/20/90).
Prehearing statement (1/2/91).

Exhibits

Both parties submitted exhibits at the prehearing. These exhibits were admitted as full during the hearing (transc.1, p.44).

Respondent's Exhibits

1. Truk-Away contract between Truk-Away and Stanley-Bostitch dated January 1, 1985.

2. Climatological Date for January 1987.

3. RCRA penalty amount and Rationale for Stanley-Bostitch from James C. McCaughey, dated February 18, 1987.

4. Notice of Violation and Penalty issued to Stanley-Bostitch, dated March 9, 1987.

5. Letter to David Dorocz, R.I. Solid Waste Management Corporation from John Hartley, Goldberg Zoino & Assoc., dated May 19, 1987.

6. Letter to Tom Getz from Thomas E. Wright, Solid Waste Management Corporation.

7. Letter to Thomas Getz from Ken Wenger, dated June 19, 1987.

8. Letter to Thomas Wright from Tom Getz, dated June 29, 1987.

9. Memo to Charles McKinley to Thomas Getz, relating to reassessment of NOV's related to cyanide disposal incident at the Central Landfill, dated June 30, 1987.

10. DEM News release dated July 8, 1987.

11. Letter to Robert Wieck from Claude Cote, legal counsel, dated October 28, 1987.

12. Letter to Robert Wieck from Thomas Epstein, dated February 5, 1988.

13. "Environmental and Public Health Risks posed by the Stanley-Bostitch Furnace Residue in the Central Landfill" prepared by Environ.

14. "Cyanide Waste Disposal Assessment" prepared for R.I. Solid Waste Management Corporation, Providence, Rhode Island by Goldberg Zoino and Assoc., dated May 1987.

DEM Exhibits

1. Letter from Ed Szymanski to Dennis Bishop, dated August 16, 1989.

2. Letter from James McCaughey to Kevin Vidmar, dated December 21, 1988.

3. Letter from Kevin Vidmar to Terri Gray, Hazardous Waste Engineer, dated December 7, 1987.

4. Letter from Thomas Getz to Kenneth Wenger, dated June 15, 1987.

5. Letter from Robert D. Wieck to Tom Getz, dated May 4, 1987.

6. Letter from Robert D. Wieck to Tom Epstein, dated February 2, 1988.

7. Letter from Russell H. Valley to Department of Air and Hazardous Materials, dated November 30, 1979.

8. Summary of activities at Bostitch plant by Alicia Good, dated February 16, 1987.

9. Letter from Thomas A. Epstein to Robert D. Wieck, dated February 4, 1988.

10. Signed consent agreement between Stanley-Bostitch and DEM, dated March, 9, 1987.

11. Letter from James C. McCaughey to David Wilson, dated July 25, 1988.

12. "Study Plan Cyanide Waste Disposal Assessment", prepared for R.I. Solid Waste Management Corporation by Goldberg Zoino and Assoc., Inc., dated February 1987.

Trial Exhibits:

Respondent submitted pictures of Truk-Away roll-off containers. These items were admitted as full exhibits on January 7, 1991, as resp. 15 A, B, C.

Respondent submitted five flyers depicting various types of roll-off containers which were admitted as full exhibits on January 31, 1991, as resp. 16 A, B, C, D, E.

Witnesses

The Department presented two (2) DEM employees as witnesses, Allan Gates, DEM Sanitation Engineer and Thomas Epstein, Supervisoring Engineer in the Division of Air and Hazardous Materials. The Respondent called one (1) witness, David Wilson, President and owner of Truk-Away of Rhode Island, Inc.

No factual agreements were made before the hearing and no witnesses were stipulated to as experts.

Prehearing Motions

Prior to the hearing Respondent submitted a motion to dismiss which contained ten reasons to dismiss the violation. After reviewing the motion and the generic objections from the Department, the Hearing Officer ruled on each count prior to the hearing (transc. 1, p. 5-6). In essence counts three, four, five and nine were denied as being premature, counts two and six were denied, count ten was withdrawn by respondent, count one was deemed moot by the Hearing Officer and count seven was granted.

Count seven requested the Hearing Officer "to bar introduction of any evidence concerning transportation or disposal of any material other than "waste cyanide" as specifically referred to in the Notice of Violation". The Notice of Violation alleges the transportation of "hazardous waste cyanide" and does not list any other type of hazardous material. Since the Notice of Violation presented clear and unambiguous terms and the state did not amend the violation, the Hearing Officer ruled that hazardous waste cyanide is the only violation which must be proven by the state (transc. 1, p. 6).

Penalty Waived

To avoid a ruling by the Hearing Officer on the authority of the state to request an administrative penalty prior to the promulgation of DEM Rules and Regulations authorizing the state to assess such a penalty the state withdrew its request for an administrative penalty ((transc. 1, p. 11-12) and elected to proceed on the issue of liability (transc. 1, p. 15). In lieu of the $ 10,000 penalty the agency requested as a judgement a one-day seminar for

Truk-Away haulers on identifying classes of waste which may be in the containers (transc. 1, p. 13).

Official Notice

The Notice of Violation dated March 9, 1987 was not introduced as an exhibit by either party. In accordance with Administrative Procedures Act (APA) R.I.G.L. § 42-31-10 (a) and Rhode Island Rules of Evidence 201, the Hearing Officer takes notice of this violation sua sponte.

Involuntary Dismissal Motion

After DEM concluded its case-in-chief respondent made an oral motion to dismiss the violation arguing the state has not construed a prima facie case to prove Truk-Away transported waste cyanide to the Central Landfill, as alleged in the Notice of Violation. (transc.2 p. 67). The agency orally objected. Both parties presented fully articulated reasons for their perspective positions (transc. 1, p. 68-74). To give the Hearing Officer time to review the applicable standard and transcript, the hearing was adjourned until January 30, 1991. Both parties submitted memoranda on January 25, 1991.

The motion request by the respondent is analogues to Superior Court Rule 41 (b)(2) which states in pertinent part:

> "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and

> the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff the court shall make findings as provided in Rule 52(a)".

After carefully reviewing the transcript, oral and written arguments of counsel and the applicable case law, Judd Realty, Inc. v. Tedeco 400 A2d 952 (1979), JK Social Club v. JK Realty, Corp. 448 A2d 130 (1982), Abbey Medical/ Abbey Rental, Inc. v. Mignacca 471 A2d 189 (1984), the Hearing Officer elected to reserve decision on the issues raised in Respondent's motion until after the completion of all the evidence (transc. 2, p. 9). Not to give both parties an opportunity to present all pertinent information would be an injustice to the fact-finding process.

Background

In late October or early November of 1986, a crack developed in a cyanide heat treating vat at the Stanley-Bostitch manufacturing facility in East Greenwich, Rhode Island. This crack leaked case hardening bath into the furnace which allegedly contained sodium cyanide, a hazardous waste. The vat consisted of an outer metal vessel lined with fire brick and situated inside this tub was an inner steel pot containing molten liquid cyanide. The operation was stopped and the liquid was removed from the production line. Due to the size of the leak, the molten liquid was not removed from the vat and was allowed to harden in place (DEM 8).

In January 1987 Stanley-Bostitch contracted with McDonald Watson Waste Oil Co. to decontaminate and decommission the affected unit. The entire unit was moved to a garage behind the plant. This company separated the vat residue, the refractory bricks and the scrapings from the pot into contaminated and uncontaminated waste and placed all material into various metal drums and asbestos bags (DEM 8).

Allan Gates, a professional registered engineer in the State of Rhode Island, employed by DEM as a sanitation engineer, worked for Stanley Bostitch in 1987 as an environmental safety engineer and was in charge of overseeing the furnace leak clean up (transc. 1, p. 19). On January 16, 1987 he gave a work order that the contaminated material was to be taken from the garage to the Bostitch on-site waste treatment facility and the uncontaminated refractory bricks were to be disposed in a commercial dumpster (transc. 1, pp. 20-22). Contrary to his instructions, only 4-5 barrels of contaminated waste were taken to the treatment facility and the remaining material was dumped into the commercial trash sometime between January 24 and January 29, 1987. The material was then inadvertently transported to the Central Landfill, Johnston, Rhode Island.

On February 10, 1987 a Bostitch employee discovered the waste was missing (DEM 8) and Allen Gates notified the Department of Environmental Management of the mistake on February 12, 1987. Jim McCaughey, Senior Engineer and Alicia Good, Supervising Engineer from the Division of Air and Hazardous Materials inspected the Bostitch plant on that day. As a result of their inspection, DEM served upon Stanley-Bostitch and Truk-Away separate Notices

of Violation and Penalty. Stanley-Bostitch was cited for disposing of sodium cyanide as well as other storage violations which are not a part of this hearing (Resp. 5). Stanley-Bostitch entered into a consent agreement with DEM which was entered June 21, 1988 (DEM 10).

Truk-Away was violated for allegedly transporting hazardous waste cyanide. The waste hauler did not enter into a consent agreement and provided the State with a timely notice of appeal on March 18, 1987 disputing each and every allegation listed in the Notice of Violation and Penalty.

Hearing Summary

After both parties completed their case presentations, the Hearing Officer requested the parties provide post hearing memoranda, discussing pertinent questions not yet addressed by the administrative hearing process or articulated in case law. Counsel were given three specific issues to brief, which are:

1. Does the Rhode Island Hazardous Waste Management Act and the DEM Rules that govern the enforcement of hazardous waste purport a strict liability standard and is that standard an absolute liability standard;

2. Is the Hearing Officer empowered by statute or regulation to issue injunctive relief;

3. Was Truk-Away acting as an agent of Stanley-Bostitch, Co..

Post-memoranda briefs were received on March 8, 1991, reply briefs on March 15, 1991.[1]

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1 The brief submitted by counsel for the state did not include any discussion on the issue of agency.

Before analysis the issues discussed in counsel's memoranda, two preliminary and potentially dispositive questions must be addressed, specifically:

1. Did a Truk-Away container transport material from Stanley-Bostitch to the Central Landfill? and,

2. Did that material contain hazardous waste?

Uncontroverted documentary and testimonial evidence clearly showed that Truk-Away had contracted with Stanley-Bostitch to haul commercial trash from the Bostitch plant to the Central Landfill for disposal (Resp. 1). This was an active contract which was in effect during the time period of the leak in the cyanide heat treating vat. This contract explicitly excluded the hauling of hazardous waste (Resp. 1).

According to the testimony of respondent's only witness David Wilson, Vice-President and owner of the company, Truk-Away regularly hauled commercial trash from Bostitch to the landfill in a 30 yard open top roll off back up tilt frame container, weighing between 2,000 and 30,000 lbs and standing approximately 6 feet high (Exhibit 5), (transc. 2, p. 21). The usual commercial trash hauled by the container consisted of bricks, nails, wood, pallets, cardboard, metal and glass.

Allan Gates testified that uncontaminated and contaminated material from the defective vat was placed in a commercial dumpster owned by Truk-Away (transc. 1, p. 21).

Documentary evidence specifically a memorandum from Alicia Good dated February 16, 1987 (DEM 8) and the Goldberg-Zoino May 1987 report (Resp. 14), affirms the material was placed in a Truk-Away dumpster between January 24, 1987 and January 29, 1987.

The Goldberg-Zoino report (p.3) states that a review of Truk-Away, Stanley-Bostitch and Rhode Island Solid Waste Management Corporation (RISWMC) records indicate a roll-off container owned by Truk-Away deposited a Bostitch load on January 29, 1987. Their records included the haulers name, license number and a brief catalogue of the waste deposited.

The evidence is overwhelming that a Truk-Away hauler dumped waste from the Stanley-Bostitch plant at the Central Landfill. There is no evidence that any other company contracted with Bostitch to haul waste or that any other Bostitch load was deposited between January 24, 1987 and February 12, 1987.

In light of the above information this Hearing Officer concludes that material from the Bostitch heat-treating vat leak was inadvertently placed in the Truk-Away commercial dumpster located at the plant and transported by a Truk-Away hauler to the landfill.

Determining if the material trucked to the landfill contained hazardous waste is a more difficult issue. The Notice of Violation and Penalty received by the Respondent on March 9, 1987 alleged the company was not in compliance in the Hazardous Waste Management Act of 1978, R.I.G.L. § 23-19.1-1 et. seq. as amended and the Regulations adopted pertaining thereto.

The violation specifies that Truk-Away transported hazardous waste cyanide to the Central Landfill in violation of the following laws and regulations:

1. The company transported hazardous waste cyanide from Stanley-Bostitch in East Greenwich without a manifest (R.I.G.L. § 23-19.1-7, Hazardous Waste Rule 6.04).

2. The company transported hazardous waste cyanide from Stanley-Bostitch

in an non-permitted vehicle (Hazardous Waste Rule 6.01).

3. The company delivered hazardous waste cyanide to a non-permitted facility i.e. Central Landfill, Johnston (R.I.G.L. 23-19.1-20).

Exactly what was transported to the dump is unclear. Mr. Gates testified that in his opinion some material placed in the dumpster was hazardous waste because it contained some cyanide containing materials (transc. 1, p. 25-26). He did not know how much contaminated material went into the container or exactly what substances were transported to the landfill (transc. p.33-34).

Thomas Epstein, Supervising Engineer at DEM in charge of regulation, licensing and enforcement (transc. 1, p. 55) was unable to identify the chemical composition of the substance that went into the landfill from the Bostitch accident (transc. 1, p. 64).

The inspection of the material when the hauler reached the landfill is not illuminating. The Central Landfill inspection log indicates the landfill inspector noted only paper and wood when examining the suspect load (Resp. 14, p.5).

The most helpful evidence as to what Truk-Away transferred to the dump comes from two reports which contain test results specifying what was contained in the material that went to the landfill. Goldberg-Zoino and Associates, Inc. (GZA) (Resp.14, and 5) (DEM 12), an independent consulting firm hired by the Rhode Island Solid Waste Management Corporation (RISWMC) and Environ Corporation (Resp. 13), employed by Stanley-Bostitch conducted separate laboratory simulation experiments to determine what material went into the landfill and what, if any, was the health risks from the furnace

residue (transc. 1, p. 39-41).

The Golderg-Zoino experiments determined that at a minimum 70% of the material lost to the fire box was converted to a gaseous product and released through the stack. Based on lab tests the remaining material contained less than 0.5 pounds of sodium cyanide and the material suspected to be disposed in the landfill contained less than 0.4 pounds sodium cyanide and less than 0.2 pounds of cyanide. The report further concluded that the cyanide bearing waste did not pose a significant incremental risk to current environmental conditions at the Central Landfill (p. 18).

Experiments conducted by Environ suggested that a minimal, if any, cyanide remained in the furnace residue and estimated less than 0.2 pounds of cyanide was disposed in the landfill (p. 2-3). This report also concluded that the furnace residue represented no environmental or public health risk (p. 5).

Thomas Epstein agreed with the Goldberg-Zoino and Environ reports (transc. 1, page 61) and asserted that the Department accepted those conclusions (transc. 1, p. 61).

The record established that there are different classifications of hazardous waste (transc. 1, p. 58). Hazardous waste is defined in R.I.G.L. § 23-19-1.7 in pertinent part as:

> "any waste or combination of waste of a solid, liquid, contained or semi-solid form which, because of its quantity, concentration or physical or chemical characteristics may cause or significantly contribute to an increase in mortality or an increase in serious, irreversible or incapacitating reversible illness, or pose a substantial presence or potential hazardous to human health or the environment..."

Hazardous waste may also be defined by Rule 3.25 of the Rules and Regulations Governing the Enforcement of Hazardous Waste Generation, Transportation, Treatment, Storage and Disposal which were promulgated by the Department on July 18, 1984. This rule states in pertinent part:

> "Hazardous waste shall also mean any hazardous waste as defined in 40 CFR 261.1 (c) and 261.3 as are or as amended, or is subject to Regulations under 40 CFR 261.7, as is or as amended..."

Section 40 CFR 261.1 (c) and 261.3 define a waste as hazardous if it appears on the list of waste adopted by the Environmental Protection Agency ("EPA"). State v. Hayes, 786 F2d 1499 (1986). There are four different types of listed waste (transc. 1, p. 58). This list contains a substance called "a spent solution". A solvent is spent when it has been used for its original purpose and is either discarded or can no longer be used again for that purpose State v. Uretek, 543 A2d 703, page 716 (1988). The State has alleged through Mr. Epstein's testimony that the material transported by Truk-Away is a spent material specifically spent cyanide from heat-treating baths (transc. 1, p. 59).

The pivotal question now becomes was the material which went to the landfill a nominal amount of sodium cyanide which poses no health risk or was the substance spent material and if the material was a spent solution, was the respondent given adequate notice of the state's intention to apply that theory to the notice of violation and penalty.

It is axiomatic that at administrative adjudicatory hearings an individual is entitled to a full statement of the issue to be addressed. This notice must be sufficient to apprise the person of the nature of the hearing and

afford him an opportunity to be heard in accordance with the due process principles.

The Administrative Procedures Act (APA) R.I.G.L. § 42-35-9 establishes the precise notice and hearing requirements in contested cases. Section 42-35-9 (b) (3) provides "in a contested case, all parties shall be afforded an opportunity for hearing after reasonable notice" and Section 42-35-9 (b) (4) requires "the notice shall include a short and plain statement of the matters inserted".

In Providence Gas Co. v. Burke 119 R.I. 497, pg. 502, (1977) 380 A2d 133, (1977) the Rhode Island Supreme Court granted certiorari to the gas company's petition to reverse the Public Utilities Commission (PUC) order that the company must grant refunds to customers and in that decision discussed the meaning of notice in contested cases, as set forth in R.I.G.L. § 42-35-9 (b) (4). The Supreme Court found that notice and hearing requirements are to be quite specific and detailed as to assure the parties have a fair opportunity to appear, present evidence and have a decision rendered on the evidence presented at the hearing Supra p.1342. The Court further stated that a party to a contested case shall receive notice which in plain terms draws the attention to, among other things, the subject matter to be considered at the hearing. Supra p.1342.

Due process in the administrative context requires the interested parties be given a reasonable opportunity to know the claims of adverse parties and an opportunity to meet them FCC v Pottsville Broadcasting Co. 309 US 134, 143 60 Sct 437 442, 84 Led 656 (1940).

Adequate notice should specify the nature of the facts and evidence on which the department proposes to take action. Such notice enables the affected party to prepare an informed response which places all relevant data before the agency Hess & Clark Division of Rhodia Inc. v. Food & Drug Administration 495 F2d 975, 983 (D.C. Cir. 1974).

Hess and Clark involved the procedures for withdrawal of approval of new animal drug applications. The applicant's requested a hearing and submitted evidence directed to the grounds listed in the notice. The FDA issued a summary judgement order denying a hearing based on a new test not specified in the notice. The court held that the FDA did not give the applicant notice of the specific reasons for the withdrawal and that the applicant had been denied an opportunity to controvert the alleged facts.

Regulatory compliance hearings conducted under the Administrative Procedure Act do not require the procedures to adhere to strict notice provision required in a criminal proceeding or other formal courtroom proceedings, but the violation must be clear, so the respondent can prepare his defense and not be taken by surprise at the hearing, Zotos International, Inc. v. Donald Kennedy, Food and Drug Administration 460 Fed. Supp. 268, 269 (1978).

The Rhode Island Supreme Court found in Correia v. Norberg 391 A2d 94, 120 RI 793, page 801 (1978) quoting Davis Administrative Law Treatise, section 805, page 503 (1958) that notice requirements are obviously intended to assure that a party is appraised of the nature of the hearing so he can adequately prepare.

The necessity of adequate notice is codified by the United States Supreme Court in Mathews v. Eldridge 424 US 319, page 348, 96 Supreme Court 893, 909, 47 LEd2d (1976), a case involving the denial of social security benefits. Quoting Joint Anti-Facist Committee v. McGrath 341 US 123, 171-2 71 S.Ct 624, 649 95 Led 817 (1950), the justice found, "the essence of due process is a requirement that a person in jeopardy of serious loss (be given) notice of the case against him, an opportunity to meet it".

In the case of In Re Ruffalo 390 US 544, 88 S.Ct. 1222 20 Led 2d 117 (1968), the High Court reviewed a disbarment proceedings against an attorney accused of and noticed on thirteen different charges against him. The disbarment committee heard testimony on the thirteen charges and one other violation not listed in the original notice based on newly discovered evidence. The Supreme Court held that "the absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprives petitioner of procedural due process" 88 S.Ct. at 1226.

The Department of Environmental Management, as the moving party, has the burden of presenting evidence on the specific allegations listed within the Truk-Away violation. The state maintains that it has sustained its burden by establishing that the substance transported by Respondent's company to the dump is a listed hazardous waste and takes the position that Truk-Away is bound by the conditions set forth in the consent order signed by Stanley Bostitch and DEM (transc. p.67-71) (DEM 10). The state also inferred that an agency relationship existed between Truk-Away and Bostitch which would impinge any knowledge or conditions placed on the manufacturer to the waste hauler.

There is no documentary or testimonial evidence that Truk-Away was aware the state intended to rely on the theory that the waste was spent solution. The notices of violation issued to Truk-Away alerted the company it was being charged with unlawful transportation of hazardous waste cyanide. In pre-hearing rulings the Hearing Officer citing the precise terminology set forth in the violation limited the violation to be proved by the state to hazardous waste cyanide. No evidence was presented to show the company had any dialogue with the agency about the issues the state intended to prove, nor did the state ever attempt to amend or modify the violation.

The validity of the principles of notice and opportunity to be heard would be abrogated if the state were allowed the Stanley-Bostitch consent order submitted to Truk-Away during the discovery process as adequate notice. The state issued two separate distinct violations to Bostitch and Truk-Away (DEM 10). The Department did not copy Respondent on any correspondence it had with Bostitch nor did Truk-Away participate in the negotiations, resolution or signing of the Bostitch agreement.

In Rondale Press v. Federal Trade Commission 132 US App. DC 317, 407 F2d 1252, 1256 (1968), the FTC in its notice to Rondale that it intended to limit its advertising outlined the theory it intended to use to prosecute the case but employed a different theory during the hearing. The Supreme Court in finding for Rondale stated that notice of any change must be given during the hearing.

In a recent Rhode Island Superior Court decision James C. Egan v. Robert C. Bendick, Supreme Court # 88 - 5 m.p. C.A. No. 86-431, the Court overturned

a Department of Environment Management Hearing Officer's decision upholding the Department's denial of a Freshwater Wetlands permit on the grounds that the applicant was unduly prejudiced when the state presented evidence on the elements listed in the denial letter as well as one allegation inadvertently omitted from the notice. The Court, citing Correia v.Norberg Supra and Providence Gas Co. v. Burke Supra determined that the Hearing Officer was limited to reviewing those reasons listed in the denial letter despite the fact the applicant's expert admitted and documentary evidence showed the applicant had knowledge of the Department's intent to include the omitted ground in its case-in-chief.

Clearly the instant case is analogous to Egan. If an applicant is found to be prejudiced in an application hearing when the Department proceeds on a ground not specified in the official notice then a respondent engaged in an adversarial compliance hearing with that same department is prejudiced when the agency's prosecution includes an allegation not listed in the violation. Without specific notice the aggrieved party can not adequately respond to the state's allegations.

Agency according to the restatement on Agency (Restatement (S.2d Agency § (1) 1988) has been defined as "the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control and consent by the other to act".

As previously stated a contractual relationship existed between Truk-Away and Bostitch. However, the waste hauler and the manufacturer did not have an agreement to haul hazardous waste. The placement of the material from the

leak into the roll-off subsequent transportation to the dump was outside the bounds of the parties contractual relationship. Truk-Away had not agreed to dispose of the waste and was never made aware by Bostitch that the material in the roll-off contained suspected hazardous waste. The Hearing Officer finds Truk-Away was not acting on the manufacturer's behalf, therefore, no agency relationship existed between Truk-Away and Bostitch.

Conclusion

The Department of Environmental Management and the Division of Air and Hazardous Materials have a responsibility to protect public health by controlling hazardous waste. Within this noble and necessary pursuit is included an obligation to assure all parties are accorded procedural due process. During the hearing in this case no evidence was presented for a reasonable person to assume by preponderance of the evidence that because notice of violation read hazardous waste cyanide a fortiori the reference meant spent material.

The Hazardous Waste Management statutes R.I.G.L. § 23-9-1 et seq. does not require that the substance be a particular quality or quantity to be classified hazardous but does require the material pose a "substantial presence or potential hazard to human health or the environment". The evidence revealed no more than ½ pound of sodium cyanide was taken to the landfill and that substance did not pose a risk to human health or the environment. Therefore, the state failed to show by preponderance of the evidence any allegation listed in the notice of violation.

Having concluded that the Department has not met its burden it is now not necessary for the Hearing Officer to discuss if the Hazardous Waste Management Act proposes an absolute liability standard or if this Hearing Officer has the authority to issue the injunctive relief requested by the state.

After carefully reviewing the testimonial and documentary evidence and assessing the credibility of the witnesses, the Hearing Officer using independent judgement makes the following specific Findings of Fact and Conclusions of Law:

Findings of Fact

1. The Division of Air and Hazardous Materials issued a Notice of Violation and Penalty to Truk-Away of Rhode Island on March 9, 1987.

2. A timely notice of appeal was filed by the respondent on March 18, 1987.

3. This matter is properly before the Administrative Adjudication Division pursuant to the Hazardous Waste Management Act 23-19.1-1 et seq. as amended; statutes governing the Department of Environmental Management R.I.G.L. 42-17.1 et seq. as amended and the Administrative Adjudication Division statutes 42-17.7-1 et seq. as amended; Rules and Regulations for Hazardous Waste Generator, Transportation, Treatment, Storage and Disposal promulgated September 15, 1987 and the Administrative Adjudicatory Division Rules of Practice and Procedure effective July 10, 1990.

4. A Status Conference on this violation was held on August 6, 1990, at One Capitol Hill, Providence, Rhode Island.

5. The Prehearing Conference took place on December 13, 1990, at One Capitol Hill, Providence, Rhode Island.

6. A Hearing on this violation was conducted on January 7, and January 31, 1991, at One Capitol Hill, Providence, Rhode Island.

7. All exhibits were admitted as full.

8. No findings of fact were stipulated to by the parties and no witnesses were qualified as experts.

9. All stenographic notes were received by the Hearing Officer on February 24, 1991.

10. Post-hearing briefs and memoranda submissions were completed on March 15, 1991.

11. The hearing process was deemed closed by the Hearing Officer on March 15, 1991, the last day of memo submissions.

12. Prior to the hearing, the state withdrew its request of an administrative penalty of $10,000 and requested as a penalty the company engage in a 1 (one) day training session to identify waste.

13. The Department of Environmental Management issued separate and distinct violations to Stanley Bostitch and Truk-Away.

14. Stanley-Bostitch received a Notice of Violation and Penalty on March 9, 1987.

15. The Stanley-Bostitch's Notice of Violation alleged the company disposed and stored hazardous waste cyanide and committed other hazardous waste violations.

16. The Department of Environmental Management and Stanley-Bostitch Co.

entered into a consent agreement on June 21, 1988.

17. Truk-Away did not participate in any negotiations leading to the Bostitch consent agreement.

18. Between October and November 1987, a crack developed in Stanley-Bostitch heat treating vat and leaked sodium cyanide.

19. The Bostitch material from the leak was inadvertently placed in a 30 yard roll-off container owned by Truk-Away.

21. A Truk-Away hauler inadvertently took the Bostitch material to the Central Landfill, Johnston, Rhode Island between January 24 and January 29, 1987.

22. The disposal and transportation of the contaminated material was discovered by a Bostitch employee on February 10, 1987.

23. The company notified DEM on February 12, 1987.

24. The material disposed in the landfill was found to contain no more than 0.4 pounds of sodium cyanide and 0.2 pounds of cyanide.

25. Residue from the furnace leak represented no risk to human health or the environment.

26. Truk-Away was never notified by Bostitch of the placement of contaminated material into the roll-off.

27. Truk-Away cooperated with the DEM investigation.

28. A contractual agreement to haul commercial trash existed between Bostitch and Truk-Away.

29. This contract was active during the time of the leak in the Bostitch heat treating vat and subsequent investigation by DEM.

30. This contract explicitly excluded the hauling of hazardous waste.

31. An agency relationship did not exist between Stanley-Bostitch and Truk-Away.

32. Truk-Away is not bound by Stanley-Bostitch consent agreement.

33. Hazardous waste can be defined by state statute or as a listed hazardous waste codified by the Environmental Protection Agency.

34. The Respondent was not given adequate notice that the substance placed in the landfill was alleged to be spent material.

Conclusions of Law

1. This matter is properly before the Administrative Adjudication Division pursuant to the Hazardous Waste Management Act 23-19-1 et seq. as amended; statutes governing the Department of Environmental Management R.I.G.L. 42-17.1 et seq. as amended and the Administrative Adjudication Division statutes 42-17.7-1 et seq. as amended; Rules and Regulations for Hazardous Waste Generator, Transportation, Treatment, Storage and Disposal promulgated September 15, 1987 and the Administrative Adjudicatory Division Rules of Practice and Procedure effective July 1990.

2. The Hearing Officer took official notice of the Notice of Violation and penalty issued to Truk-Away by the Department of Environmental Management sua sponte. In accordance with Administrative Procedures Act R.I.G.L. 42-31-10(a) and Rhode Island Rules of Evidence 201.

3. Truk-Away filed a timely notice of appeal to the issue violation on March 18, 1987.

4. Pursuant to R.I.G.L. 42-17-6.4 the burden of proof and persuasion fall upon the Department of Environmental Management to show each and every allegation or admission alleged.

5. The Department of Environmental Management issued separate and distinct violations to Stanley Bostitch and Truk-Away.

6. The Notice of Violation and Penalty issued to Truk-Away on March 9, 1987 states the company transported hazardous waste cyanide.

7. The Hearing Officer granted the respondent's motion to limit the state's allegations to hazardous waste cyanide.

8. The Department did not modify or amend the violation.

9. The Hearing Officer denied respondent's motion to dismiss at the close of the state's prime facie case pursuant to Superior Court Rule 41 (b)(2).

10. No agency relationship existed between Truk-Away and Stanley-Bostitch (see Restatement 2nd Agency).

11. Truk-Away is not bound by the conditions set forth in the Bostitch consent agreement.

12. The sodium cyanide transported to the landfill did not qualify as hazardous waste as defined in the Hazardous Waste Management Act 23-19-1 et seq.

13. The state did not satisfy the due process requirements of notice and hearing in contested cases set forth in the Administrative Procedures Act 42-35-9 and applicable case law that the Agency intended to include in its prosecution the theory that the substance trucked to the landfill was a spent

material.

14. The Department of Environmental Management did not sustain its burden by preponderance of the evidence as set forth in R.I.G.L. 42-17-6.4 that:

i. Truk-Away, Inc. transported hazardous waste cyanide;

ii. that Truk-Away, Inc. transported hazardous waste cyanide without a manifest;

iii. that Truk-Away, Inc. transported hazardous waste cyanide in a non-permitted vehicle;

iv. that Truk-Away delivered hazardous waste cyanide to a non-permitted facility.

15. The state's request for injunctive relief, specifically a one day training session for Truk-Away drivers is moot.

16. Any discussion whether the Hazardous Waste Management Act purports absolute liability is moot.

It is therefore

ORDERED

That the Violation be dismissed.

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

7/8/91
Date

Patricia Byrnes
Hearing Officer

0155L