

Department of Environmental Management  
Administrative Adjudication Division  
State of Rhode Island  
Re: Sylvan Vaicaitis  
AAD NO. 08-001/CRA  
Berthing Permit  
2008

**DECISION AND ORDER**

This matter came on to be heard before Hearing Officer David Kerins on April 16, 2008 on Motion to Dismiss filed by the Rhode Island Department of Environmental Management Division of Coastal Resources (the "Division"). The Division's Motion to Dismiss was filed under Rule 12 (b)(1) of the Superior Court Rules of Civil Procedure and requests that the matter be dismissed due to AAD's lack of jurisdiction over the subject matter. The Hearing Officer indicated that he considered this to be more properly a Motion for Summary Judgment under Rule 56 of the Superior Court Rule of Civil Procedure. Upon further consideration and in light of cases such as Blackstone Realty LLC v. FDIC, 244 F3d 193, 195 (1<sup>st</sup> Cir. 2001), which allows the consideration of documents outside the pleadings which are integral to or relied upon in the complaint, this matter will be decided as a Motion to Dismiss under Rule 12 (b) (1). This matter was initiated by a Motion to Stay/Reverse/Appeal Department Action filed by the Appellant on February 4, 2008. The motion was filed to appeal the action taken by the Division denying the renewal of Appellant's berthing permit for his vessel at the Port of Galilee State Piers. The denial of berthing permit was contained in a letter from Associate Director Larry Mouradjian dated August 20, 2007. A hearing was held on the Motion on April 16, 2008 at which time the attorneys for the parties agreed to the admission of the following exhibits:

Division #1 Full:

Letter dated August 20, 2007 from Associate Director Larry Mouradjian to Appellant Re: Vessel White Rose - Denial of Application For Renewal of Berthing Permit.

Division # 2 Full:

Search results from United States Postal Service.

Appellant's #1 Full:

Letter dated January 31, 2007 from Associate Director Larry Mouradjian to Sylvan Vaicaitis.

**POSTION OF PARTIES**

Division's Position

The Division takes the position that the Appellant was notified of the denial of renewal of berthing permit by letter dated August 20, 2008 (Division's Exhibit #1) and the Appellant failed to file his appeal within 30 days after receipt and therefore the AAD is without jurisdiction to consider the appeal.

Appellant's Position

The Appellant's position is that the Letter of Denial from the Division was a defective notice because it was ambiguous and confusing. This ambiguity was caused in part by the Division's letter to Appellant dated January 31, 2007 (Appellant's Exhibit #1).

**ISSUES**

Division's Issues

1. The Division contends that the Appellant's Appeal was filed beyond the established appeal period and therefore should be dismissed due to lack of subject matter jurisdiction.

#### Appellant's Issues

1. The Appellant contends that the Letter of Denial dated August 20, 2007 was defective and confusing in light of previous correspondence dated January 31, 2007.
2. If the Appeal is dismissed as being untimely the Appellant requests that the Hearing Officer direct the Division to charge Appellant for occupancy at his previous rate rather than a transient rate.

#### ANALYSIS

The Division presented a Motion to Dismiss the subject appeal pursuant to Rule 12 (B)(1) of the Superior Court Rules of Civil Procedure on February 5, 2008. Appellant filed his Objection to Division's Motion to Dismiss on February 8, 2008. On February 15, 2008 an Order was issued indicating that the Division's Motion to Dismiss was "Denied Without Prejudice". The matter was set down for Prehearing Conference and Hearing on April 21, 2008. On April 11, 2008 a telephone conference was held with the parties and it was Ordered, with the agreement of the parties, that a hearing would be held on April 16, 2008 to address the issue of timeliness of appeal and jurisdiction. On April 16, 2008 counsel for the parties appeared to be heard on the Motion to Dismiss. Appellant's counsel advised that Appellant was not present due to illness. The Division has taken the position that the Appellant failed to file his appeal in a timely manner after the Letter of Denial dated August 20, 2007 (Division's Exhibit #1). Division's Exhibit #2 indicates that the Division's Letter of Denial was delivered on "8/24/07 @ 8:43 a.m." Division alleges that Appellant did not file his appeal until 110 days after the Letter of Denial.

Appellant argues that he received the Letter of Denial but when read in connection with a previous letter from the Division dated January 31, 2007 (Appellant's Exhibit #1), the Letter of Denial was defectively confusing. Appellant has taken the position that due to the language of Appellant's Exhibit #1, he interpreted Division's Exhibit #1 as applying to a permit effective July 1, 2009. Appellant argues that he was reasonable in relying on the assurances contained in Appellant's Exhibit #1 as approving the Birthing Permit which was scheduled to begin on July 1, 2008.

R.I.G.L. § 42-17.7-9 "uniform appeal period established" provides that "All license and permit appeals must be filed with the clerk of the administrative adjudication division for environmental matters within thirty (30) days of the receipt of the contested agency action." The Division argues that the Appellant had thirty (30) days from the receipt of the Letter of Denial to file his request for appeal with the clerk of the AAD. R.I.G.L. § 42-17.7-9 was amended by the Legislature in 2000 at which time they added the following language:

"The time and manner of filing established in this chapter are mandatory and jurisdictional." (emphasis added) If the appeal was not filed within the statutory period then the AAD is without jurisdiction to consider the appeal.

The issue to be determined is whether the Letter of Denial is defective due to its language alone or when read in light of Appellant's Exhibit #1 so as to render it unable to trigger the statutory appeal period.

The Letter of Denial (Division's Exhibit #1) states in part

"On the basis of the above, the division is forced to deny the renewal of your birthing privileges at the state facilities and you are instructed to remove the subject vessel from the Port of Galilee State Piers within forty (40) days of the receipt of this letter."

Later in Division's Exhibit #1 the Appellant is advised

"If you feel aggrieved by this Notice, you have the option of requesting an appeal to the Administrative Adjudication Division. Such a request must be submitted in writing and received by the following within thirty (30) days of your receipt of this letter."

The language of the Letter of Denial clearly states that the Appellant must "remove the subject vessel from the Port of Galilee State Piers within forty (40) days of the receipt of this letter". The Letter of Denial also advises the Appellant of his rights to appeal "within thirty (30) days of your receipt of this letter". (emphasis added)

The evidence shows that the Letter of Denial was received by the Appellant on August 24, 2007. The Appellant had thirty (30) days from August 24, 2007 to file his appeal. The filing of the appeal within the statutory period is "mandatory and jurisdictional".

In the instant matter, the failure to file an appeal with AAD renders the tribunal without subject matter jurisdiction to consider the merits of an administrative appeal. see *Haroutioun G. Jerejian v. Rhode Island Department of Environmental Management*. C.A. No 94-2910 Rescript Opinion filed September 1995, citing *Wood v. Ford* 525 A2d 901 (R.I. 1987).

The allegations and representation of Appellant that he was confused by the prior correspondence from DEM does not overcome the clear meaning contained in the Letter of Denial. The filing of a timely appeal is analogous to the tolling of a Statute of Limitations.

The Appellant makes a further request that if the Hearing Officer elects to find in favor of the Division that he will enter an Order requiring the Division to charge the Appellant at the rate under his berthing permit and not the higher transient rate. In granting the Division's Motion to Dismiss the AAD is acknowledging that it is without subject matter jurisdiction to consider the appeal or any part thereof. The Hearing Officer will not therefore enter an Order on the issue of the berthing fee.

### **FINDINGS OF FACT**

After a review of the evidence and arguments of the parties the following findings of fact are made:

1. The Division mailed the Appellant a Letter of Denial dated August 20, 2007 advising that the berthing permit for the vessel White Rose would not be renewed.
2. The Letter of Denial advised the Appellant that the Vessel must be removed within forty (40) days of the receipt of the letter.
3. The Letter of Denial properly advised the Appellant of the period and method of filing an appeal.
4. The Letter of Denial was received by Appellant on August 24, 2007.
5. The Letter of Denial was not defective or confusing even in light of the previous correspondence from the Division dated January 30, 2007.
6. The Appellant filed a Motion to Stay/Reverse/Appeal Department Action on February 4, 2008.
7. The Appellant did not file his appeal within the time period specified in R.I.G.L. § 42-17.7-9.
8. Due to the untimely filing of his appeal the AAD is without subject matter jurisdiction to consider the subject appeal.

### **CONCLUSIONS OF LAW**

After due consideration of the above findings of fact and the legal arguments of the parties, I conclude the following as a matter of law:

1. That the Administrative Adjudication Division for Environmental Matters (AAD) has jurisdiction over these matters pursuant to R.I.G.L. § 42-17.7 and the Regulations entitled "Galilee Port Operations Regulations and Berthing Management System, January 9, 2004".
2. The Appellant was properly notified of the fact that his berthing privileges were not being renewed by certified letter dated August 20, 2007 (Division #1 Full) which was received on August 24, 2007.
3. The Letter of Denial properly advised the Appellant of his rights to appeal the denial and the method of perfecting said appeal.
4. Appellant did not file an appeal within the time required by R.I.G.L. § 42-17.7-9.
5. The AAD is without subject matter jurisdiction to hear Appellant's appeal.
6. Division's Motion to Dismiss is appropriate and should be granted.

Wherefore, based on the Findings of Fact and Conclusions of Law, it is hereby

### **ORDERED**

1. Division's Motion to Dismiss is GRANTED.
2. Appellant's Appeal is DISMISSED.

Entered as an Administrative Order this \_\_\_\_\_ day of May, 2008 and herewith recommended to the Director for issuance as a Final Agency Order.

David Kerins  
Hearing Officer

Entered as a Final Agency Decision and Order this \_\_\_\_\_ day of \_\_\_\_\_, 2008.  
W. Michael Sullivan Ph.D.  
Director

**NOTICE OF APPELLATE RIGHTS**

This Final Order constitutes a final order of the Department of Environmental Management pursuant to RI general Laws § 42-35-12. Pursuant to R.I. Gen. Laws § 42-35-15, a final order may be appealed to the Superior Court sitting in and for the County of Providence within thirty (30) days of the mailing date of this decision. Such appeal, if taken, must be completed by filing a petition for review in Superior Court. The filing of the complaint does not itself stay enforcement of this order. The agency may grant, or the reviewing court may order, a stay upon the appropriate terms