

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

IN RE: Bruce T. Cunard/ROW Acquisition, Inc., dba Reliable Shellfish
Suspension of License to Barter/Trade in Shellfish

DECISION AND ORDER ON RESPONDENT'S
MOTION TO RECUSE AND MOTION TO DISMISS

This matter is before the Hearing Officer on the Motion to Recuse filed by Respondent in the above-entitled matter and upon Respondent's Motion to Dismiss for failure to comply with the Prehearing Order.

Respondent raises two reasons for disqualification of the Hearing Officer. First, respondent contends that the Hearing Officer is biased or potentially biased solely by virtue of her employment within the Department of Environmental Management. Secondly, the respondent contends that a Hearing Officer employed by a Division of the Department to hear cases instituted by another Division of the Department, violates its guarantee of due process provided by the Fourteenth Amendment to the Constitution.

I turn first to respondent's contention that the Hearing Officer is or may be personally biased by virtue of being an employee of the Department of Environmental Management. Respondent presents no basis for its suggestion of unfairness or bias. Clearly respondent's assertions fail to meet the threshold requirement of demonstrating actual bias.

The Rhode Island Supreme Court has previously addressed the issue of bias in the administrative process. In the case of La Petite Auberge v. R.I. Commission for Human Rights, R.I., 419 A.2d 274 (1980) the Court held that in order for a respondent to successfully assert a claim of bias or prejudgment he "must overcome a presumption of honesty and integrity in those serving

as adjudicators". Id., citing Withrow v. Larkin, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed. 2d 712, 724 (1975). It is the obligation of the respondent to demonstrate that special circumstances exist which make the risk of unfairness intolerably high. In the absence of such a showing, respondent's assertion of bias or prejudgment is without merit. Id.

In 1981 the Rhode Island Supreme Court again addressed the issues of bias and prejudgment as they specifically relate to administrative Hearing Officers of the Department of Environmental Management. Davis v. Wood, R.I. 427, A.2d 332 (1981). In Davis the Court considered the propriety of a Hearing Officer who was aware of forthcoming testimony by the DEM. In reviewing the Hearing Officer's prior knowledge the Court stated that "...mere exposure to evidence presented in non-adversary investigative procedures is insufficient in itself to impugn the fairness of administrative board members at a later adversary hearing". Id., at 337, citing Withrow, 421 U.S. at 55, 95 S.Ct at 1468, 43 L.Ed.2d at 728. The Court continued, "Agency officials are presumed to be capable of judging a particular controversy fairly on the basis of its own circumstances". Davis, 427 A.2d, at 337 citing, Central Arkansas Auction Sale, Inc. v. Bergland, 570 F.2d 724, 731 (8th Cir. 1978). In the instant matter the only ground cited by respondent to support recusal is the employment relationship.

In a footnote to the La Petite Auberge v. R.I. Commission for Human Rights the Court cites a particularly germane discussion by Kenneth Culp Davis in his treatise on administrative law. The Court noted,

Professor Kenneth Culp Davis, a leading authority in the field of administrative law, has furnished the instructive analogy that "it is not improper even in a criminal case for a large institution, the state, to prosecute through one officer, the prosecuting attorney, and to decide through another, the judge." Davis, Administrative Law Text 255 (3d ed. 1972). Thus, although it is possible to show improper bias in favor of the prosecution on the part of the judge, such bias will most certainly not be inferred from the fact that the two, in a sense, serve the same master.

Id., footnote 9 at p. 285.

I will next address respondent's constitutional argument. The Administrative Adjudication Division for Environmental Matters was created by statute in the 1989 session of the general assembly. R.I.G.L. § 42-17.7 et seq. establishes the Administrative Adjudication Division as a separate adjudicatory division within the Department of Environmental Management. Although not specifically stated, the essence of respondent's argument is that the adjudicatory process created by the legislature and embodied in R.I.G.L. § 42-17.7 et seq. is unconstitutional. Although an administrative Hearing Officer is empowered to review, interpret and adjudicate matters concerning statutes and regulations under his/her jurisdiction, an administrative Hearing Officer's expertise does not extend to the determination of issues of constitutional law. Bowen v. Hackett, 361 F. Supp. 854, (D.C.R.I. 1973).

Accordingly, I decline to entertain respondent's constitutional argument as it is not within an administrative Hearing Officer's jurisdiction to decide issues of constitutional import.

Finally I will address Respondent's Motion to Dismiss. Respondent seeks dismissal based upon the Division of Enforcement's failure to provide discovery to respondent in accordance with the Prehearing Order of April 18, 1991. The Division has filed a timely pro forma objection. Neither party requested oral argument.

The Prehearing Order required the parties to exchange by May 17, 1991 all documents to be introduced at the hearing and to provide the marked originals to the Hearing Officer at the Prehearing Conference. It also required all preliminary motions to be filed by the same date of May 17, 1991. At the Prehearing counsel for the Division indicated that he intended to introduce a series of documents but that they were not yet copied and marked for submission to the Hearing Officer. Concurrently, Respondent's Counsel indicated that he intended to file a preliminary Motion relating to recusal. The Hearing Officer informed both counsel that the documents and Motions were due at the time of the Prehearing but afforded each side an extension of time to May 24, 1991 to comply with the provisions of the Prehearing Order. Thereafter, Respondent filed its Motion to Recuse.

On June 7, 1991, Respondent filed its Motion to Dismiss based upon the fact that the Division had failed to comply with the Prehearing Order. To date, no documents have been filed with the AAD by the Division.

R.I.G.L. § 42-17.7-5 provides in pertinent part

42-17.7-5. Prehearing procedure - Depositions
- Exhibits - Formulating issues - Other
procedures. - (1) Prior to the commencement of
any hearing, the Hearing Officer may in his or
her discretion direct the parties or their
attorneys to appear before him or her for such
conferences as shall be necessary. At such
conferences the Hearing Officer may order any
party to file, prior to the commencement of any
formal hearing, such exhibits said party
intends to use in the hearing and the names and
addresses of witnesses such party intends to
produce in its direct case together with a
short statement of the testimony of each
witness. Following entry of such an order, a
party shall not be permitted, except in the
discretion of the Hearing Officer, to introduce
into evidence in said party's direct case
exhibits which are not filed in accordance with
the order. ...

(Emphasis added)

Clearly neither the original Prehearing Order nor the extension of time
was complied with by the Division. The refusal to later admit documents not
provided in accordance with the Prehearing Order is discretionary. In this
instance, however, the Division has filed a pro forma objection without any
reason for its clear failure to comply leaving this Hearing Officer with no
grounds upon which to exercise her discretion. Accordingly, the Division will
not be allowed to introduce into evidence in their direct case any exhibits
which were not filed in accordance with the Prehearing Order and subsequent

extension of time.

Dismissal is a drastic remedy and this Hearing Officer believes that the refusal to admit documents is more prudent and is clearly contemplated by the statute delineating prehearing procedures.

Based on the foregoing, it is hereby

ORDERED

1. That respondent's Motion to Recuse the Hearing Officer on the basis of bias is denied.
2. That the Hearing Officer is without jurisdiction to entertain respondent's constitutional claim that the Administrative framework established by the Legislature and embodied in R.I.G.L. § 42-17.7 et seq. violates his due process rights guaranteed by the Fourteenth Amendment to the Constitution.
3. That the Division is barred from introducing into evidence in their direct case any exhibits which were not filed in accordance with the Prehearing Order.

Entered as an Administrative Order this 14th day of June, 1991.

Kathleen M. Lanphear
Kathleen M. Lanphear
Chief Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, 4th Floor
Providence, RI 02908
(401) 277-1357

Entered as a Final Agency Order with regard to paragraph two (2) of the
Ordered portion of the recommended Decision and Order on this 17th day
of June, 1991.

June 17, 1991
Date

Louise Durfee
Louise Durfee
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 to be forwarded
regular mail, postage pre-paid to Louis B. Abilheira, Esq., 1052 Main Street,
Warren, Rhode Island 02885; and via inter-office mail to Claude Cote, Esq.,
Office of Legal Services, 9 Hayes Street, Providence, Rhode Island 02908 on
this 18th day of June, 1991.

Jacqueline Ballard