

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

RE: COTOIA & CLEAN CUT LANDSCAPING, INC. AAD No. 04-005/MM
NOTICE OF VIOLATION OC&I/SW 04-004, OC&I/RCRA 04-060 & OC&I/FW
03-0104

ORDER OF DISMISSAL

This matter came before Hearing Officer Mary F. McMahon for consideration of the Motion to Dismiss filed by the Office of Compliance and Inspection ("OCI") on November 18, 2004. Following the filing of the motion, the parties attempted to negotiate a settlement to resolve the Amended Notice of Violation. When those efforts were ultimately unsuccessful, the motion was scheduled for oral argument on April 18, 2005.

Respondent's counsel Michael Tarro failed to appear for oral argument and, by subsequent telephone conference, waived oral argument and agreed to file a memorandum of law in support of the previously filed Respondent's Objection.

The essential facts dealing with receipt of the Amended Notice of Violation and the filing of the request for hearing are not in dispute. This decision involves questions of law concerning the jurisdiction of the Administrative Adjudication Division ("AAD").

Based upon the documents filed at the AAD, the original Notice of Violation was issued to the Respondent on June 15, 2004. An Amended Notice of Violation was issued to the Respondent on June 21, 2004 to correct a

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typographical error in the penalty calculation. On July 20, 2004, Respondent, through its attorney, filed a request for hearing on the Amended Notice of Violation at the AAD.

In support of its Motion to Dismiss, the OCI has filed a *Memorandum of Law* ("First Memorandum") and a *Supplemental Memorandum of Law* ("Second Memorandum"). The OCI has also provided a copy of the signed Return Receipt (Exhibit 2, attached to the *First Memorandum*) that indicates that the Amended Notice of Violation was received by certified mail on June 23, 2004. Citing R.I. GEN LAWS § 42-17.7-9¹, the OCI states that Respondent was required to file its request for hearing within twenty (20) days of receipt of the Notice of Violation. According to the statute, "[t]he time and manner of filing ... are mandatory and jurisdictional." Pursuant to the provisions of R.I. GEN LAWS § 42-17.6-4, if the request for hearing has not been filed within the prescribed time period, then the person is deemed to have waived the right to an adjudicatory hearing and the proposed administrative penalty shall be final immediately upon the waiver. *First Memorandum* at 2.

In moving for dismissal of this matter, the OCI has argued that Respondent's request for hearing was untimely filed. As a result, the Amended Notice of Violation has automatically become a compliance order, and as such, is jurisdictional in Superior Court. According to the OCI, the AAD no longer has

¹ This statute, effective January 1, 2001, sets forth a Uniform Appeal Period that supersedes

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any jurisdiction to hear this matter. *First Memorandum* at 1.

Respondent has filed two (2) separate documents entitled *Memorandum of Law in Support of Respondent's Objection to Petitioner's Motion to Dismiss*: one on April 18, 2005 and the second on April 19, 2005. Although the signature placement is slightly different, the text of the memoranda appear to be identical; therefore the single document is hereinafter referred to as "*Respondent's Memorandum*".

Respondent acknowledges that the Amended Notice of Violation was served on June 23, 2004 "to one, J Claudino, believed to be a member of the receptionist staff in the office of Edward J. DiMartino, Jr., the registered agent of the Rhode Island corporation, Cotoia & Clean-Cut Landscaping, Inc..." Respondent states that a written request for hearing was placed in the US Mail on July 14, 2004. *Respondent's Memorandum* at 1.

Respondent's arguments are twofold: that service of the Amended Notice of Violation was defective and that the request for hearing, being filed one day past the deadline, was due to excusable neglect. For the first argument, Respondent cites R.I. GEN LAWS § 42-17.1-2(u)(1):

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.

any other statutory provisions to the contrary.

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Respondent contends that the Amended Notice of Violation was not served personally on the president or registered agent of the corporation, it was not sent by certified mail to the corporation's last known address, and it was not served in accordance with the rules of civil procedure employed by the Rhode Island court system. According to the Respondent, the rules of civil procedure "does not allow mailing to Rhode Island residents, including resident corporations." *Respondent's Memorandum* at 1. Respondent does not dispute that Mr. DiMartino was the registered agent, but rather that the Amended Notice of Violation, delivered by certified mail to the registered agent, was not served in accordance with R.I. GEN LAWS § 42-17.1-2(u).

The OCI has responded that Edward J. DiMartino, Jr. had been identified by the Secretary of State's Office as the Respondent's registered agent at the time the Amended Notice of Violation was issued and that, pursuant to R.I. GEN LAWS § 42-17.1-2(u), the Superior Court Rules of Civil Procedure section 4(e)(3) and R.I. GEN LAWS § 7-1.1-13, the Amended Notice of Violation was properly served by certified mail on the registered agent of the Respondent corporation. *Second Memorandum* at 1-2.

In its *Second Memorandum*, the OCI discusses delivering a copy of the summons and complaint to an agent of a corporation as constituting proper service on the corporation pursuant to section 4(e)(3) of the Superior Court

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Rules of Civil Procedure. *Second Memorandum* at 2. OCI's reliance on this Rule for providing service by certified mail on a registered agent is misplaced however. Rule 4(e) governs the manner in which *personal* service of the summons and complaint is made in civil actions. A preceding provision of Rule 4, in section (c), provides that all service of process shall be made by a sheriff or constable. The delivery of the summons and complaint provided for in Rule 4(e)(3), is to be accomplished by a sheriff or constable, not by certified mail. Section 4(e)(3) is therefore not the justification and authority for providing service by certified mail upon a registered agent of a corporation.

Pursuant to R.I. GEN LAWS § 42-17.1-2(u), the Amended Notice of Violation could have been served by a sheriff or constable personally on the registered agent of the corporation, been sent by registered or certified mail to Respondent's last known address, or been served by any other method of service allowed in civil actions in the State of Rhode Island. This last provision encompasses more than what is set forth in the Superior Court Rules of Civil Procedure because it contemplates that other statutory provisions may come into play. That Rule 4(e)(3)'s provision for service on an agent is not applicable to service by certified mail is not dispositive of the issue if another provision of law permits service by certified mail on Respondent's registered agent.

The OCI had also relied upon R.I. GEN LAWS § 7-1.1-13 in making service upon the Respondent's registered agent. That statute provides in

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pertinent part:

7-1.1-13. Service of process upon a corporation². -- (a) The registered agent appointed by a corporation is an agent of the corporation upon whom any process, notice, or demand required or permitted by law to be served upon the corporation may be served.

Since service of the "notice" was permitted by law to be made upon the corporation by certified mail, then pursuant to R.I. GEN LAWS § 7-1.1-13, service was permitted to be made upon the registered agent by certified mail. Service by certified mail of the Amended Notice of Violation upon Edward J. DiMartino, Jr. (or an agent in his office) was therefore in compliance with the statutory requirements.

Respondent's second argument, that the hearing request was filed one day past the deadline and that excusable neglect should operate to extend the deadline for filing the appeal, is neither factually correct nor legally persuasive. The deadline for filing the request for hearing was July 13, 2004, twenty (20) days following receipt of the Amended Notice of Violation. Respondent's hearing request, although dated July 14, 2004, was actually filed at the AAD on July 20, 2004. The hearing request was therefore filed seven (7) days late.

Even if the delayed filing of the hearing request was due to excusable neglect, however, it cannot serve to extend the deadline for filing the appeal. When the Uniform Appeal Period was enacted by the Rhode Island General

² This statute was in effect at the time of service in this matter but was repealed effective July 1, 2005; R.I. GEN LAWS § 7-1.1-13 was replaced by § 7-1.2-503, effective July 1, 2005, and contains the identical language.

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Assembly in 2000, it expanded the filing period on enforcement actions from ten (10) days to twenty (20) days and it also firmly closed the door on any arguments similar to the Respondent's. R.I. GEN LAWS § 42-17.7-9 provides in pertinent part: "The time and manner of filing established in this chapter are mandatory and jurisdictional." Pursuant to R.I. GEN LAWS § 42-17.1-2(u)(5), if the request for hearing has not been filed within the prescribed time period, then the Notice of Violation shall automatically become a compliance order. This same issue was discussed in In Re: Sembel Enterprises, Inc. / 75 Goff Avenue Realty Trust / Yohannes Bein / Simret Zemrht, AAD No. 03-002/WME, *Order of Dismissal*, entered as a Final Agency Order on September 8, 2003.

Respondent's request for hearing on the Amended Notice of Violation was untimely. The Amended Notice of Violation automatically became a compliance order enforceable in the Superior Court when the twenty (20) day period had elapsed without the hearing request having been filed. The AAD therefore has no jurisdiction in this matter. Jurisdiction for enforcement of the Amended Notice of Violation lies in the Superior Court in accordance with R.I. GEN LAWS § 42-17.1-2(u)(5).

Wherefore, I make the following

FINDINGS OF FACT

1. A Notice of Violation was issued to the Respondent on June 15, 2004.
2. An Amended Notice of Violation was issued to the Respondent on June 21, 2004.

3. The Amended Notice of Violation, sent by certified mail, was received by the office of Edward J. DiMartino, Jr. on June 23, 2004.
4. Edward J. DiMartino, Jr. was the registered agent of Respondent Cotoia & Clean Cut Landscaping, Inc., a Rhode Island corporation.
5. Respondent's request for hearing was filed at the AAD on July 20, 2004.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, I conclude the following as a matter of law:

1. Pursuant to R.I. GEN LAWS § 42-17.1-2(u), a Notice of Violation is properly served when sent by certified mail to Respondent's last known address.
2. Pursuant to R.I. GEN LAWS § 7-1.1-13, a corporation's registered agent may be served in the same manner as permitted by law to be served upon the corporation.
3. The Amended Notice of Violation was properly served by certified mail to Respondent's registered agent.
4. R.I. GEN LAWS § 42-17.7-9 requires all requests for an adjudicatory hearing to be filed at the AAD within twenty (20) calendar days of receipt of the Notice of Violation.
5. The timeframe established in R.I. GEN LAWS § 42-17.7-9 is mandatory and jurisdictional.
6. Respondent's request for hearing on the Amended Notice of Violation was untimely filed.

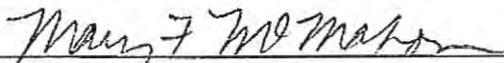
7. Pursuant to R.I. GEN LAWS § 42-17.1-2(u)(5), the Amended Notice of Violation automatically became a compliance order enforceable in the Superior Court when the twenty (20) day period had elapsed without the hearing request having been filed.
8. The AAD has no jurisdiction in this matter.

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

ORDERED

1. The OCI's Motion to Dismiss is GRANTED.
2. Respondent's request for hearing on the Amended Notice of Violation issued on June 21, 2004 is hereby DISMISSED.

Entered as an Administrative Order this 15th day of September, 2005
and herewith recommended to the Director for issuance as a Final Agency Order.



Mary F. McMahon
Hearing Officer
Administrative Adjudication Division
235 Promenade Street, Third Floor
Providence, RI 02908
(401) 222-1357

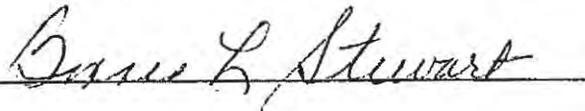
Entered as a Final Agency Order this 23rd day of September, 2005.



W. Michael Sullivan, Ph.D., Director
Department of Environmental Management
235 Promenade Street, 4th Floor
Providence, RI 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within Order of Dismissal to be forwarded by first-class mail, postage prepaid, to Michael A. Tarro, Esquire, 433 Broadway, Providence, RI 02909; and via interoffice mail to: Gerald McAvoy, Esquire, DEM Office of Legal Services, and Dean H. Albro, Chief, Office of Compliance and Inspection, 235 Promenade Street, Providence, RI 02908; on this 26th day of September, 2005.



Bruce L. Stewart

NOTICE OF APPELLATE RIGHTS

This Final Order constitutes a final order of the Department of Environmental Management pursuant to R.I. GEN 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.