

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

RE: KOZA, RUSSELL  
PERMIT REVOCATION 253426

AAD No. 05-001/CRE

DECISION AND ORDER

This matter came before the Administrative Adjudication Division for Environmental Matters ("ADD") of the Department of Environmental Management ("Department" or "DEM") pursuant to Respondent's request for hearing on the Letter of Revocation of Berthing Permit F/V Reo Sado, Documentation No. 253426 ("Subject Vessel") issued by the DEM Division of Coastal Resources ("Division") on July 5, 2005 ("Letter of Revocation").

The hearing was conducted on March 20, 2006. Following the conclusion of testimony, the Hearing Officer ordered post-hearing memoranda to be filed on or before March 27, 2006, and response memoranda to be filed on March 31, 2006. Both memoranda were filed, and the Division's response memorandum was filed on March 31, 2006. The hearing was deemed concluded on March 31, 2006. Gary Powers Esq. represented Division and Christopher T. Millea, Esq. represented Respondent.

The within proceeding was conducted in accordance with the statutes governing the AAD (R.I. GEN. Laws § 42-17.7-1 *et seq.*); the Administrative Procedures Act (R.I. GEN. Laws § 42-35-1 *et seq.*); R.I. GEN. Laws § 42-17.1-1 *et seq.*; the Administrative Rules of Practice and Procedure for the AAD ("AAD Rules"); and the Galilee Port Operations and Berthing Management System Rules and Regulations. ("Galilee Port Operations Regulations")

PREHEARING CONFERENCE

A prehearing conference was conducted on January 20, 2006, and the following stipulation was agreed upon by the parties:

- I. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Respondent.

HEARING SUMMARY

At the hearing, the Division called one (1) witness: ROSE-ANNE DAIGNAULT, of the DEM office of Management Services.

Respondent called two (2) witnesses: LARRY MOURADJIAN, Acting Associate Director of the DEM Bureau of Natural Resources; and the Respondent, RUSSELL KOZA.

1. THE LETTER OF REVOCATION

The Letter of Revocation issued by the Division on July 5, 2005 notified the Respondent that pursuant to Part II Section 4 of the Galilee Port Operations Regulations, the Division revoked the Respondent's berthing permit for the Respondent's vessel, the F/V Reo Sado, Documentation No. 253426 at the Galilee State Pier due to the fact that Respondent was in arrears of dockage fees for fifteen (15) days or more on June 30, 2005.

The Respondent by letter dated July 25, 2005 requested an administrative hearing at the AAD regarding the aforesaid Letter of Revocation.

II. WITNESS TESTIMONY

The Division called ROSE-ANNE DAIGNAULT, of the DEM Office of Management Services, as its sole witness. Ms. Daignault testified that she is now, and was at the time of the revocation of the subject berthing permit, responsible for accounts receivable relative to berthing fees at the State Pier involved in the instant matter.

It was the testimony of Ms. Daignault that she oversees the payments of berthing permit fees: that she is familiar with the account for the Respondent Russell Koza's vessel, the F/V Reo Sado; that as of June 30, 2005, the Respondent's berthing fees were in arrears for fifteen (15) days or longer; and that on said date, the Respondent was behind in payments for berthing fees for approximately four (4) months.

It was elicited in cross examination of Ms. Daignault that the monthly dockage fee for the F/V Reo Sado was \$206.62; and that more accurately the Respondent was in arrears for fifteen (15) days or more for only three (3) months according to the invoice that was sent Respondent for the amount due July 15, 2005 (since the fourth month that was due according to said invoice was not actually overdue for over fifteen (15) days as of said date).

Ms. Daignault was cross-examined somewhat at length regarding the Letter of Revocation, and also about the procedures concerning the check that was returned for insufficient funds on June 24, 2005 (and she was shown a copy

of said check). However, it was this witness's testimony that she had no part in the preparation of the Letter of Revocation, and that she had not seen said Letter of Revocation until the date of the hearing.

The Respondent called LARRY MOURADJIAN, acting Associate Director of the Bureau of Natural Resources of DEM with DEM, as his first witness. It was elicited from Mr. Mouradjian that in his position with DEM he monitors Berthing Permits relative to State Piers; and that as such he relies on the various departmental employees assigned responsibilities concerning the calculation and collection of berthing fees as well as other aspects of pier operation.

RUSSELL KOZA, Respondent, was the second witness called by Respondent. He testified that he is self-employed as a commercial fisherman; and that he is the owner of several fishing vessels, the largest of which is the Reo Sado.

It was Mr. Koza's testimony that a Fiona Hayes takes care of his books; and that she was the maker of the "check in the amount of the arrearage dated May 16, 2005" which was referenced in the July 5, 2005 Letter of Revocation. Mr. Koza denied that he was in arrears in the amount of \$4013.26 on June 30, 2005; and he stated that he was never notified that the check for \$413.26 was returned for insufficient funds.

### III. REVOCATION OF BERTHING PERMIT

The Letter of Revocation dated July 5, 2006 stated that Respondent's Berthing Permit for the Respondent's vessel, the F/V Reo Sado, at the State

RE: KOZA, RUSSELL  
PERMIT REVOCATION 253426

AAD No. 05-001/CRE

Page 5

Pier at the Port of Galilee, Rhode Island, was revoked because the Respondent's dockage fees for said vessel were in arrears for 15 days or more on June 30, 2005, pursuant to Part II Section 4 of the Galilee Port Operations Regulations.

It is the Division's contention that it has established by a preponderance of evidence that the berthing permit fees at the State Pier at the Port of Galilee incurred by the Respondent Russell Koza's vessel, the F/V Reo Sado, Documentation No. 253426, were in arrears for 15 days or more on June 30, 2005; and that pursuant to Part II Section 4 of the Galilee Port Operations Regulations the Division was clearly authorized to revoke the Berthing Permit for the Subject Vessel.

Respondent contends that the Division has failed to meet any standard or burden of proof in their submission of evidence. It is argued by Respondent that: (1) Respondent was not in arrears in the amount of \$4013.26 on July 5, 2005 as stated in the Division's only notice to Respondent; (2) the letter dated July 5, 2005 is the only exhibit by which the Division has moved against Respondent, wherefore the Respondent did not receive the notice and hearing to which he was entitled; and (3) the Division has failed to move against any other permit holder in 2005 (which the Respondent contends is indicated by the caption number in the instant matter); wherefore Respondent claims that the Division is acting "arbitrarily and capriciously" against Mr. Koza.

CONCLUSION

Part II – Section 4 of the Galilee Port Operations Regulations provides in pertinent part:

“A boat owner who holds a berthing permit and who is not in arrears on any payments to the State, shall have his permit automatically renewed for the following year. Dockage fees in arrears for 15 days or more after the due date shall be considered caused for revocation of berth permits...”

The only factual dispute raised by Respondent was whether the amount in arrears was “only” three (3) months (as suggested by Respondent in cross examination and oral argument), or an arrearage in a larger amount. The Division acknowledges that the Respondent was not in arrears in berthing fees in the amount of \$4,014.26 (which Division points out was a typographical error in the Letter of Revocation). As elicited by Respondent in cross examination of Ms. Daignault, the monthly dockage fee for the F/V Reo Sado was \$206.62; and that more accurately the Respondent was only in in arrears for fifteen (15) days or more for three (3) months according to the invoice that was sent to Respondent for the amount due July 15, 2005 (since the fourth month that was due according to said invoice was not overdue for over fifteen (15) days as of said date.

The Respondent testified that the F/V Reo Sado was not in arrears in berthing fees in the amount of \$4,013.26 as indicated in the Letter of Revocation. However, the Respondent did not testify or claim that the Subject Vessel was current relative to its berthing fees or that it was current as to the

**RE: KOZA, RUSSELL  
PERMIT REVOCATION 253426**

**AAD No. 05-001/CRE**

**Page 7**

\$413.26 figure (which represents the arrearage sought to be covered in the May 16, 2005 check referenced in the Letter of Revocation).

Neither the typographical error in the Letter of Revocation (which revealed the stated amount to be inconsistent with the third party check drawn by a Fiona S. Hays on May 16, 2005) nor the claim that the arrearage was "only" three (3) months, provides a valid defense sufficient to defeat the Division's showing that the Respondent's berthing permit fees were in fact in arrears for fifteen (15) days or more on June 30, 2005.

The Respondent's argument that he did not receive the notice and hearing to which he was entitled lacks merit. Part II Section 4 of the Galilee Port Operations Regulations does not specify any notice requirement prior to the Division's exercising its right to revoke a berth permit when dockage fees are in arrears for 15 days or more after the due date. No statute, regulation or other authority was submitted by Respondent to support his argument that he was entitled to notice prior to Division's "moving to revoke his permit". Clearly the Letter of Revocation to the Respondent was in compliance with Part II Section 4 of the Galilee Port Operations Regulations; and the Respondent was not entitled to a notice or hearing prior to the Letter of Revocation as claimed by Respondent. Pursuant to the Administrative Procedures Act, the Respondent has been afforded notice and an opportunity to contest the Division's actions at this proceeding.

The Respondent submitted as an exhibit a copy of § 19-9-26 of the R.I. GEN. LAWS (Respondent's Exhibit A), which is entitled "Prima facie evidence of

RE: KOZA, RUSSELL  
PERMIT REVOCATION 253426  
Page 8

AAD No. 05-001/CRE

intent to defraud—Prosecutions." A review of said statute reveals that it deals with prosecutions against the maker or drawer of checks, etc. where the payment of same is refused by the drawee because of insufficient funds. Said statute does not pertain to the instant matter, and certainly it does not mandate that notice be given by certified mail prior to revocation of berth permits.

The Respondent's unsupported claim that the Division is acting "arbitrarily and capriciously" against Mr. Koza because the Division has failed to move against any other permit holder in 2005 (which the Respondent contends is indicated by the caption number in the instant matter) is also without merit. A review of the Prehearing Conference Record entered in this matter demonstrates that this was not listed by the Respondent as an issue to be considered at the hearing. Furthermore, the question of how many other permit holders the Division has moved against in 2005 is totally irrelevant as to whether the Division may proceed against the Respondent in the instant matter.

A claim analogous to the defense raised by the Respondent was addressed and dismissed by the Rhode Island Supreme Court in Board of Purification of Waters v. Town of East Providence, 47 R.I. 431 (1926). In that case, the Town of East Providence asserted a defense of "equal protection" because the Board of Purification of Waters was proceeding solely against East Providence and not taking action simultaneously against all of the other cities allegedly violating the waters of the Seekonk River. The Court dismissed the defense holding that:

RE: KOZA, RUSSELL  
PERMIT REVOCATION 253426  
Page 9

AAD No. 05-001/CRE

What other cities have done or are doing, however, is entirely immaterial as far as the present order to East Providence is concerned. Such a defense, if good, would effectually block all attempts of the state to preserve and protect public health. 47 R.I. at 437.

If the Respondent's claim to maintain such a defense was permitted, no action could be instituted unless all parties who were potentially liable were prosecuted simultaneously. Such a claim would certainly stymie the Division or any section of the Department from taking action to enforce a party's regulatory obligations without the insurmountable task of proceeding in tandem against all potentially liable parties.

It was clearly established by the evidence presented at the hearing that the berthing permit fees at the State Pier at the Port of Galilee incurred by the Respondent Russell Koza's vessel, the F/V Reo Sado, Documentation No. 253426 were in arrears for 15 days or more on June 30, 2005. The testimony of Ms. Daignault was clear, credible and most persuasive. The Division was therefore authorized pursuant to Part II Section 4 of the Galilee Port Operations regulations to revoke and refuse to renew the Respondent's berthing permit for the Subject Vessel from July 1, 2005.

FINDINGS OF FACT

After considering the stipulation of the parties and the testimonial and documentary evidence of record, I find as a fact the following:

1. The Division of Coastal Resources of DEM ("Division") by letter dated July 5, 2005 ("Letter of Revocation") notified Respondent, Russell Koza, that his berthing permit at the State Pier at the Port of Galilee for his vessel, the F/V Reo Sado, Documentation No. 253426 (the "Subject Vessel") had been revoked and would not be renewed (Division's Exhibit No. 1FULL).
2. The Letter of Revocation advised Respondent that the aforesaid action was taken pursuant to Part II Section 4 of the Galilee Port Operations and Berthing Management System Rules and Regulations due to the fact that the Respondent was in arrears to the State for fifteen (15) days or more on his berthing/dockage fees relative to the Subject Vessel.
3. The Letter of Revocation further stated that the Respondent had tendered a check dated May 16, 2005 in the amount of the arrearage; and that when the State attempted to negotiate it, said check was returned due to insufficient funds on June 24, 2005.
4. The Respondent was in arrears in excess of fifteen (15) days on his berthing fees for the Subject Vessel as of June 30, 2005.

CONCLUSIONS OF LAW

After due consideration of the documentary and testimonial evidence of record and based upon the Findings of Fact as set forth herein, I conclude the following as a matter of law:

1. The Administrative Adjudication Division has subject matter jurisdiction over this action and personal jurisdiction over the Respondent.
2. Pursuant to Part II Section 4 of the Galilee Port Operations Regulations, the Division on July 5, 2005 was authorized to revoke the berthing permit of the Respondent Russell Koza for his vessel, the F/V Reo Sado, Documentation No. 253426, at the State Pier at the Port of Galilee for

being in arrears on his dockage fees for fifteen (15) days or more after the due date.

3. The Division has proved by a preponderance of the evidence that the berthing permit fees for the Respondent Russell Koza's vessel, the F/V Reo Sardo, Documentation No. 253426, were in arrears for fifteen (15) days or more on June 30, 2005.
4. The Division's revocation of the Respondent's berthing permit at the State Pier at the Port of Galilee was in accordance with the Galilee Port Operation Regulations and is valid.

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby

**ORDERED**

1. The Letter of Revocation issued by the Division to the Respondent, Russell Koza dated July 5, 2005 is SUSTAINED.
2. The Respondent's appeal is hereby DENIED.

Entered as an Administrative Order and herewith recommended to the Director for issuance as a Final Agency Decision and Order this 10<sup>th</sup> day July, 2006.

*Joseph F. Baffoni*

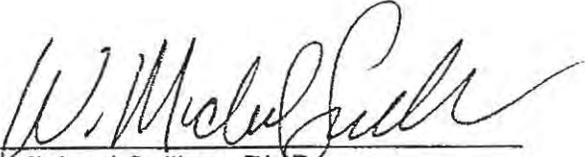
Joseph F. Baffoni  
Hearing Officer  
Administrative Adjudication Division  
235 Promenade Street, Third Floor  
Providence, RI 02908  
(401) 222-1357

RE: KOZA, RUSSELL  
PERMIT REVOCATION 253426  
Page 12

AAD No. 05-001/CRE

Entered as a Final Agency Decision and Order this 17<sup>th</sup> day of

July, 2006.



W. Michael Sullivan Ph.D.

Director

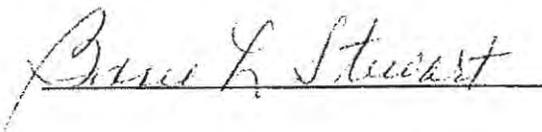
Department of Environmental Management

235 Promenade Street, Fourth Floor

Providence, Rhode Island 02908

#### CERTIFICATION

I hereby certify that I caused a true copy of the within Order to be forwarded, via regular mail, postage prepaid to: Christopher T. Millea, Esquire, McKiernan, Thompson & Millea, 243 North Main Street, Providence, RI 02903 and Gary Powers, Esquire, Oliver Stedman Government Center, 4808 Tower Hill Road, Wakefield, RI 02879; on this 17<sup>th</sup> day of July, 2006.



APPENDIX A

LIST OF EXHIBITS

FOR DIVISION

**DIVISION #1**  
Full

The Revocation Letter dated July 5, 2005 notifying Respondent that his berthing permit at the State Pier At the Port of Galilee for the subject vessel had been revoked and would not be renewed. 2 Pages (Copy).

**DIVISION#2**  
Full

The Respondent's letter dated July 25, 2005 requesting a hearing concerning the Division's Revocation Letter. 1 Page (Copy)

**DIVISION#3**  
For ID

Copy of State of Rhode Island Journal Entry dated June 20, 2005 (with photocopy of returned check number 155 of Fionna S. Hayes on Citizens Bank dated May 16, 2005 payable to the order of Rhode Island DEM in the amount of \$413.24).

FOR RESPONDENT:

**RESPONDENT A**  
Full

Copy of RIGL § 19-9-26

**RESPONDENT B**  
For ID

Copy of Citizens Bank Official Check No. 628893861-3 dated February 24, 2005 payable to the order of STATE OF RHODE ISLAND in the amount of \$7,313.42.