

Department of Environmental Management  
Administrative Adjudication Division  
State of Rhode Island

IN RE: FAIRLAWN OIL SERVICE, INC.

AAD No. 91-001/GWE  
Notice of Violation No. GW 91-5B  
November 29, 1991

**DECISION AND ORDER**

This matter is before the Hearing Officer on the Division of Groundwater Protection's ("Groundwater Protection") Motion to Dismiss the notice of appeal and request for hearing filed on behalf of the Respondent, Fairlawn Oil Service, Incorporated.

Groundwater Protection filed its Motion to Dismiss and Memorandum in support thereof on October 31, 1991 (per date stamp of the Administrative Adjudication Division ("AAD")).

The Respondent filed a written objection to said Motion to Dismiss (and accompanying Memorandum) which were dated November 8, 1991 and the envelope mailed to AAD containing same was U.S. Mail postage date stamped November 8, 1991. However, Respondent's Objection and Memorandum were received by the AAD on Tuesday, November 12, 1991 (per date stamp of the AAD). Neither party requested oral argument.

AAD Rule 8.00(a)2. provides that "Within seven (7) days after a written Motion is filed with the AAD or a Hearing Officer, a party opposing said motion must file a written objection to the allowance of the motion and shall, if desired, request oral argument ...". "Failure to file a written objection within the prescribed time period will be deemed a waiver of the objection".

AAD Rule 5.00(a)2. provides that "Papers deposited in the U.S. Mail shall be deemed filed on the date stamped by the Clerk of the AAD".

AAD Rule 5.00(b) provides that "Unless otherwise specifically provided by law or these rules computation of any time period referred to in these rules shall begin with the first day following the act which initiates the running of the time period. The last day of the time period so computed is to be included unless it is a Saturday, Sunday or legal holiday or any other day on which the AAD is closed, in which event the period shall run until the end of the regular business hours of the next following business day. When the time period is less than seven (7) days, intervening days when the AAD is closed shall be excluded in the computation".

Computing the "within seven (7) days" time period (after written motion is filed) from the following day, namely, November 1, 1991 the prescribed time period for filing of objections expired on Thursday, November 7, 1991. Respondent's Objection was received and date stamped by the AAD as having been filed on Tuesday, November 12, 1991. Accordingly, the objection was filed five (5) days after the time for filing objections had expired. Consequently, the Respondent's Objection was not duly and timely filed and Respondent failed to file an objection or response to said Motion to Dismiss pursuant to the Rules of AAD, and therefore the Respondent waived its right to object or respond to said Motion.

Assuming arguendo that Respondent had filed its Objection and Memorandum within the prescribed time period, Respondent would nevertheless not be entitled to any relief before the AAD concerning the immediate compliance Order issued to the Respondent by the Department of Environmental Management ("DEM") on April 22, 1991.

The facts necessary for a determination of Groundwater Protection's Motion to Dismiss are not in dispute and are contained in the Documents on file in this matter. Said facts are set forth in the following findings of fact:

1. The Director of the DEM caused to be issued an immediate compliance order to the Respondent dated April 22, 1991. Said order notified Respondent of the existence of certain violations by the Respondent of the laws, rules and regulations within the Director's jurisdiction which the Director has reason to believe constitute an immediate and substantial endangerment to the health of persons and the environment. Also that immediate action to protect the public health and environment is required. Said Order specified the Findings of Fact and the actions that the Director deemed necessary, and mandated that the compliance order shall become effective immediately upon service of said order.
2. George M. Prescott, Attorney for Respondent, by letter of April 29, 1991 addressed to Stephen G. Morin, Chief, DEM and copied to the Director and AAD, requested that the DEM consider this letter a notice of appeal and request for a hearing concerning said immediate compliance Order on behalf of Respondent.
3. A copy of Attorney Prescott's letter dated April 29, 1991 was received and date stamped by the AAD on May 1, 1991.
4. Respondent's attorney in said letter dated April 29, 1991, acknowledged receipt of the Immediate Compliance Order by Respondent on April 25, 1991.
5. Respondent's Attorney stated in said letter of April 25, 1991 that he realized § 42-17.1-2(u)(A)(1) of the R.I.G.L. precludes a request for a hearing, but he disputed the Findings of Fact contained in the Immediate Compliance Order and stated it was Respondent's position that it was entitled to a hearing by virtue of § 42-35-9 of the R.I.G.L. or that § 42-17.1-2(u)(A)(1) is unconstitutional by virtue of the Due Process clauses of the Fourteenth Amendment to the Constitution of the United States as well as Article 1 §§12 and 16 of the Constitution of Rhode Island. Respondent also demanded a trial by jury.

Respondent's Memorandum states that the non-existence of a factual predicate gives rise to a "contested case" and Respondent is therefore entitled to a hearing pursuant to R.I.G.L. § 42-35-9.

§ 42-35-9(a) provides that "In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice".

§ 42-35-1(c) defines "contested case" as meaning "a proceeding, including but not restricted to ratemaking, price fixing, and licensing, in which the legal rights, duties or privileges of a specific party are required by law to be determined by an agency after an opportunity for hearing" (emphasis added).

Chapter 42-17.1 establishes the Department of Environmental Management and specifies its powers and duties of the Director thereof. R.I.G.L. General Laws § 42-17.1-2(u)(2)(A) provides that: "Whenever the director determines that there exists a violation of any law, rule, or regulation within his or her jurisdiction which requires immediate action to protect the environment, he or she may, without prior notice of violation or hearing, issue an immediate compliance order stating the existence of the violation and the action he or she deems necessary. The compliance order shall become effective immediately upon service or within such time as is specified by the director in such order. No request for a hearing on an immediate compliance order may be made" (emphasis added).

Respondent's argument that the Administrative Proceedings Act (APA) entitles it to a hearing is faulty as not even a tortured reading of the APA supports that conclusion. The language of the Statutes involved in this matter leaves no room for such misinterpretation.

The language of the statutes leaves no doubt that the Director is empowered to take the subject immediate compliance action and that no request may be made for a hearing on the immediate compliance order.

The essence of Respondent's argument appears to be that the actions taken by the DEM should give rise to a

right to a hearing. However, the enabling statutes mandate otherwise, and the AAD is not the proper forum to entertain claims for relief based on unconstitutionality nor for a trial by jury.

Even if Respondent's claim that its due process rights had been violated were presented at a proper contested case before the AAD, it is well established that 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. The Director has so held in a number of Decisions, citing *Bowen v. Hackett*, 361 F.Supp. 854, (D.C.R.I.1973).

The language of the Administrative Procedures Act and the Statutes empowering the Director to issue immediate compliance orders and creating the AAD is clear on its face and the plain meaning thereof must be given effect. The pertinent Sections of the Statutes involved leave no question as to their meaning and they do not require a search for the discernment of legislative intent as the language is unambiguous. *Gilbane Co. v. Poulas*, 576 A.2d 1195 (R.I.1990).

I conclude therefore that (1) the AAD has no jurisdiction to hear the instant matter, (2) Respondent has no legal right to the relief requested by the DEM, and (3) no appeal or request for a hearing may be made on the immediate compliance order issued by the DEM.

Based on the foregoing, it is hereby

**ORDERED**

1. That the Respondent's notice of appeal and request for a hearing is denied and dismissed.
2. That the Hearing Officer is without jurisdiction to entertain Respondent's claim that the provisions of R.I.G.L. § 42-17.1-2(u)(2)(A) are unconstitutional in that they violate the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution and the due process clause of Article 1, Section 2, of the Rhode Island Constitution.

Entered as an Administrative Order on this 27th day of November, 1991.

Joseph F. Baffoni  
Hearing Officer

The within Decision and Order is hereby adopted as a Final Agency Decision and Order.

Louise Durfee  
Director

November 29, 1991