

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

RE: N.E. ECOLOGICAL DEVELOPMENT, INC. AAD NO. 92-042/AHE
LOUIS VINAGRO, JR. & BEVERLY VINAGRO AAD NO. 92-044/AHE
LOUIS VINAGRO, JR. & ANTHONY VINAGRO AAD NO. 92-045/AHE
CONSOLIDATED MATTERS

**DECISION & ORDER ON INTERVENOR'S MOTION TO VACATE
AND FOR ADMINISTRATIVE HEARING FOR
DETERMINATION OF PENALTY**

This matter is before Hearing Officer Baffoni On the Motion to Vacate and for Administrative Hearing for Determination of Penalty ("Motion") filed by the Town of Foster ("Town"). The Town asks AAD to vacate a consent agreement entered between The Department of Environmental Management and the Respondents on May 5, 1997 and further requests that an Administrative Hearing be held on the above matters to determine the amount of penalty, if any, which should be assessed against the Respondents.

The Division of Water Resources ("Division") of the Department of Environmental Management ("DEM") and the Respondents filed objections to said Motion. The Town filed a Response to said objections. The Hearing Officer has determined that oral argument on the Motion is not warranted since the presentation of testimony or oral argument would not advance the Hearing Officer's understanding of the issues involved.

BACKGROUND

Notices of Violation and Order ("NOVs") were issued on August 4, 1992 to the above-named Respondents alleging that the Respondents violated certain provisions of the Refuse Disposal Act. In the NOVs, the

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Division set forth the relief it sought and its intent to assess an administrative penalty. Respondents filed Requests for Hearing at the AAD. While said matters were pending, the AAD granted Intervenor status to the Town. All parties participated in settlement negotiations. The parties agreed to a resolution of the remedial aspects of the NOV but full agreement could not be reached due to differing views of the parties concerning the administrative penalty. Subsequent to the resolution of the remedial portion of the NOVs, the Respondents filed a Motion to Dismiss the Town as an intervening party. The Motion to Dismiss the Town as Intervenor was denied by the AAD. The Town, in the instant matter, represents that thereafter, without notice to the Town, DEM and Respondents entered into the "Consent Agreement"; and that without notice to the Town, DEM dismissed all administrative actions against the Respondents in violation of the Town's rights as an Intervenor.

The Town asserts that its intervenor status entitled it to be treated as a party in all phases of said matters, and that therefore the DEM cannot settle the case without the approval of the Town. It is the contention of the Town that an agreement entered into between Respondents and DEM, and without the Town of Foster, is null and void, as was DEM's unilateral dismissal of the matter without notice to the town. The Town maintains that the administrative penalty assessed to the Respondents is inappropriate and insufficient, that the Town has the right to insist on a more exemplary and substantial penalty and that an administrative

hearing should be held to determine the amount of the penalty.

The Respondents essentially contend that the executed Consent Agreement is fully binding, including the payment of a penalty by the Respondents with the consent and agreement of DEM. It is argued by Respondents that the Town has no standing to object to the Consent Agreement or to insist on a penalty or its amount.

The Division asserts that the Respondents' requests for hearing having been withdrawn, the Town cannot now independently seek to force a hearing to be held as to the determination of the penalty which should be assessed. It is maintained by Division that the requests for hearing by the Respondents which conferred jurisdiction upon the AAD, having been withdrawn, the administrative actions were concluded. The Division argues that although the Town as Intervenor would have been entitled to participate in an AAD hearing had such a hearing been conducted, the Respondents' withdrawal of their requests for hearing removed that option.

The sole issue for consideration by this Hearing Officer is whether the Consent Agreement should be vacated and an administrative hearing held by the AAD to determine the amount of penalty, if any, which should be assessed against Respondents.

R.I.G.L. §42-17.7-2 provides that all contested enforcement proceedings, all contested licensing proceedings, and all adjudicatory proceedings under Chapter 17.6 of Title 42 shall be heard by the AAD. §42-

17.7-2 further directs that "INotwithstanding the foregoing, the director shall be authorized in his or her discretion to resolve contested licensing and enforcement proceedings through informal disposition . . ."

R.I.G.L. §42-17.6-4 provides that "(w)henever the director seeks to assess an administrative penalty on any person, the person shall have the right to..an adjudicatory hearing..."(Emphasis added). The right to request an adjudicatory hearing is enjoyed exclusively by the party against whom a penalty is sought to be assessed. Although the Town as Intervenor was clearly entitled to participate as a party at the AAD hearing, the Town cannot independently seek a hearing since it is not a person against whom a penalty is sought.

Section 9.00(a) of the AAD Rules provides that a withdrawal of the request for hearing may be submitted in writing to the AAD at any time and shall be deemed a withdrawal with prejudice. There is no provision in the AAD Rules that a withdrawal be accepted or approved by a Hearing Officer. A withdrawal of a request for hearing is effective upon filing. The withdrawal of the Respondents' request for AAD hearings relative to the alleged violations was filed at the AAD on May 2, 1997 and divested AAD of jurisdiction.

The Consent Agreement dated and filed with AAD on May 5, 1997 is of no consequence with respect to AAD's jurisdiction. The act that divested AAD of authority and ended the administrative hearing process was the withdrawal of the requests for hearing filed with AAD on May 2,

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1998. Actions taken by the Division or Department subsequent to May 2, 1998 are not within AAD's province.

Even assuming *arguendo* that the Division could not have settled these cases without the Intervenor's approval while these matters were pending at the AAD, the AAD has no authority to consider the appropriateness of the Division's actions subsequent to the withdrawal of the requests for hearing. This tribunal lacks jurisdiction to consider the Town's requests and the instant Motion must be denied.

After review of the file and the documents presented relative to the instant Motion, I make the following Findings of Fact:

1. This matter initially came before the Administrative Adjudication Division ("AAD") pursuant to the Respondents' requests for formal hearings concerning the Notices of Violation ("NOVs") issued to them on August 4, 1992 by Division.
2. The NOVs notified Respondents of alleged violations of the Refuse Disposal Act (RIGL Chapter 23-18.9), ordered them to take certain corrective actions, and ordered them to pay an administrative penalty.
3. The Town sought and was granted intervenor status by the AAD.
4. All parties participated in settlement negotiations.
5. A settlement was not reached by all parties to the proceedings.
6. On May 2, 1997 the Respondents filed with the AAD a withdrawal of their requests for hearing on the three alleged violations.
7. A Consent Agreement dated May 5, 1997 (omitting the Town) was executed by the Division and the Respondents and filed at the AAD on May 5, 1997.

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Based on the foregoing, I conclude the following as a matter of law:

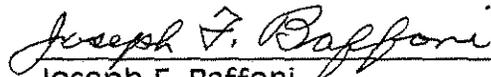
1. AAD was divested of jurisdiction over the alleged violations on May 2, 1997 upon the filing of the withdrawal of the request for hearing by Respondents.
2. The AAD lacks jurisdiction to grant the relief sought by the Town of Foster.

Wherefore, after consideration thereof, it is hereby

ORDERED

1. That the Intervenor Town of Foster's Motion to Vacate and for Administrative Hearing for Determination of Penalty be and is hereby **DENIED**.

Entered as an Administrative Order this 16th day of April, 1998.



Joseph F. Baffoni
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
235 Promenade St., Room 310
Providence, Rhode Island 02809
(401)-222-1357

Entered as a Final Order this 21st day of September 1998.



Andrew H. McLeod
Director
Department of Environmental Management
235 Promenade Street
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 J. William W. Harsch, Esq., 170 Westminster St., Suite 800, Providence, RI 02903; Nicholas Gorham, Esq., 58 Weybosset St., Providence, RI 02903 and via interoffice mail to Gary Powers, Esq., Office of Legal Services, 235 Promenade Street, Providence, Rhode Island 02908 on this 22nd day of ~~April~~, 1998.

September
Bruce L. Stewart