

Department of Environmental Management
Administrative Adjudication Division
State of Rhode Island

IN RE: JOSEPH & JEAN KING

AAD No. 92-050/FWE
Notice of Violation No. C89-0112
March 8, 1993

DECISION ON DIVISION'S MOTION TO DISMISS

This matter came before Hearing Officer McMahon for oral argument on February 23, 1993 pursuant to the Motion to Dismiss filed by the Division of Freshwater Wetlands ("Division"). Said motion represented that the Administrative Adjudication Division was without subject matter jurisdiction due to a previously executed Consent Agreement. Respondent has objected.

Background

The pertinent facts are not in dispute and may be summarized as follows:

- (1) The Division issued a Notice of Violation and Order ("NOVAO") to Respondent dated April 20, 1989, wherein Respondent was notified of alleged violations of R.I.G.L. § 2-1-21, ordered to take certain corrective actions, and ordered to pay an administrative fine.
- (2) In lieu of an Administrative Hearing on said NOVAO, the parties entered into a Consent Agreement on or about August 22, 1989, wherein the parties agreed upon the terms and conditions for Respondent to restore the subject wetland and for payment of \$250.00.
- (3) Said Consent Agreement also provided that if Respondent failed to comply with any provisions of said Agreement, Respondent shall pay an administrative penalty of \$1,000.00, and an additional \$1,000.00 for each month that Respondent remains in violation of said Agreement, except that the Director of DEM for good cause shown, may defer or reduce such fine.
- (4) Said Consent Agreement further contained a provision that "The parties agree that this Agreement shall be deemed a final administrative decision under the Administrative Procedures Act (Title 42, Chapter 35 of the General Laws of Rhode Island) from which no timely appeal was taken, and which is enforceable by resort to Superior Court."
- (5) The Division wrote to Respondents on or about October 29, 1992, stating that because they had failed to comply with certain provisions of the Consent Agreement, Respondents were ordered to pay an administrative penalty of \$1,000.00 and an additional \$1,000.00 for each month they had remained in non-compliance with the Agreement. Full payment of \$36,000.00 was required to be made within ten (10) days, or this matter would be referred to Division's Legal Services.
- (6) Respondents filed the within Request for Hearing on November 9, 1992 wherein they requested a hearing on the "notice" of administrative penalty dated October 29, 1992 (the letter referenced in paragraph (5) above). Said Request denied the allegations contained in the notice and asserted that the proposed administrative penalty was excessive.

Arguments

The Division contends that this matter is improperly before the Administrative Adjudication Division ("AAD") due to the provision in the Consent Agreement which designated it a final administrative order under the Administrative Procedures Act, R.I.Gen.Laws § 42-35-1 et seq. Pursuant thereto, any non-compliance with

the Consent Agreement would be enforceable in Superior Court, not the AAD.

Respondents argue that they have a right to be heard, not on the original NOVAO, but on the allegations that they have not complied with the Consent Agreement and on the concomitant administrative fine levied in the DEM letter of October 29, 1992. Citing § 42-17.6-4 that “[w]henver the director seeks to assess an administrative penalty on any person, the person shall have the right to an adjudicatory hearing ...”, the Respondents’ requested a hearing before the AAD.

DECISION AND ORDER

The sole issue for consideration by this Hearing Officer is whether the AAD has jurisdiction to entertain Respondents’ claim for the initiation of formal adjudicatory proceedings after a Consent Agreement has been entered. This same issue was addressed in *A. Cardi Realty Corp.*, AAD No. 92-023/FWE (Show Cause Decision dated May 18, 1992). Therein, as here, the Consent Agreement was entered into by the parties in lieu of an Administrative Hearing regarding the alleged violations in the NOVAO. Said Consent Agreement contained the terms and conditions of the order agreed upon for resolution of the issues that arose pursuant to the NOVAO as well as an admission of jurisdictional facts. It also provided for the imposition of certain monetary penalties upon Respondents’ failure to comply with the Consent Agreement. It was further specifically provided in the Consent Agreement that “The parties agree that this Agreement shall be deemed a final administrative decision ... from which no timely appeal was taken, and which is enforceable by resort to Superior Court.”

In *Cardi*, after an extensive review of the pertinent statutes, this tribunal held:

A clear reading of the statutes demonstrates that the AAD lacks jurisdiction to entertain Cardi’s claims for the initiation of formal adjudicatory proceedings. Cardi has effectively waived its right to an adjudicatory hearing and the Consent Agreement has become a final administrative decision; therefore, it is not subject to an appeal to AAD nor a request for a hearing. The terms of the Consent Agreement are clear and unambiguous. The parties agreed that the Consent Agreement constituted a final administrative adjudication enforceable in Superior Court. The APA itself provides that resort from final administrative adjudications are to the Superior Court. *Cardi* at 9.

I so find herein.

Based on the foregoing, Respondents’ request for hearing must be denied and this matter is dismissed for lack of subject matter jurisdiction.

Wherefore, it is hereby

ORDERED

1. That Respondents’ Request for Hearing is hereby denied and dismissed.

Entered as an Administrative Order this 3rd day of March, 1993.

Mary F. McMahon
Hearing Officer

The within Decision and Order is hereby adopted as a Final Agency Order this 8th day of March, 1993.

Louise Durfee
Director