

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

RE: TOWN OF JAMESTOWN

AAD NO. 94-005/WRE

DECISION AND ORDER

This matter is before the Administrative Adjudication Division for Environmental Matters ("AAD") on (1) Motion for Summary Judgment filed by the Division of Water Resources ("Division") on April 18, 1995; and (2) Motion for Summary Judgment filed by the Town of Jamestown ("Town" or "Respondent") on April 24, 1995. Each of these cross-motions asserts that on the basis of the Stipulated Facts and pleadings filed in the instant matter that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Oral argument on the motions was heard on May 22, 1995.

Division issued the Notice of Violation and Order No. 1193 ("NOV") in the instant matter to the Respondent on or about August 26, 1994. The NOV cited Respondent for violations of R.I.G.L. 46-12-4, R.I.G.L. 46-12-4.1 and Rules 6(b) iii, 6(d) and 8.0 of the Rules and Regulations Pertaining to a User Fee System for Point Source Dischargers that Discharge Pollutants into the Waters of the State ("User Fee Regulations") in that Respondent has failed to pay the user fee of \$1840.00 assessed on December 8, 1993 and which became due in full within 45 days of receipt of the assessment letter, i.e. January 23, 1994. The NOV also assessed an administrative penalty of \$700.00. Respondent filed its

request for a hearing at the AAD on September 9, 1994.

The parties appeared before the AAD for a Status Conference on November 4, 1994 at which the parties represented that this matter involves a question of law for which their positions can be argued through presentation of briefs, and that no Prehearing Conference would be necessary as the facts are not in dispute. Pursuant to their request at the status conference, an Order of the AAD was issued on November 21, 1994 whereby (1) the parties were required to file stipulations, including a waiver of hearing and submission on the record (pursuant to AAD Rule 15.00(b) by November 30, 1994, (2) the parties were required to file briefs by December 30, 1994 and any reply briefs by January 13, 1995, and (3) this matter would be assigned to a hearing officer for consideration and decision pursuant to AAD procedure.

The parties failed to file their respective briefs by the dates appointed, consequently, a Prehearing Order was issued by the AAD on January 27, 1995 whereby a Prehearing Conference was scheduled for March 3, 1995. Pursuant to motion of the parties, an Order of the AAD was issued on March 9, 1995 whereby (1) the prehearing conference was passed, (2) the parties were required to file stipulations of fact, including the waiver of hearing and submission on the record (pursuant to AAD Rule 15.00(b) by March 24, 1995, (3) each party was

required to file a memorandum in support of its motion for summary judgment by April 14, 1995, (4) each party was required to submit its response to opposing memorandum by April 28, 1995, and (5) this matter was to be assigned to a hearing officer for consideration and decision pursuant to AAD procedure.

The Stipulated Facts were filed on March 24, 1995. Division filed its Motion for Summary Judgment and Memorandum in support thereof on April 18, 1994. Respondent filed its Motion for Summary Judgment and its Memorandum in Support thereof (in which it submitted arguments in opposition to Division's Motion) on March 24, 1995. Division filed its Memorandum in Response to Respondent's Motion for Summary Judgment on April 28, 1995.

The cross-motions were filed pursuant to Rule 56 of the Superior Court Rules of Civil Procedure ("Court Rules") and Section 8.00 of the Administrative Rules of Practice and Procedure for the AAD ("AAD Rules"). Section 8.00 of the AAD Rules permits the parties to make such motions as are permissible under the AAD Rules and the Court Rules. Court Rule 56, which governs motions for summary judgment, provides that "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and

that the moving party is entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

AAD Rule 15(b) provides as follows:

Submission Without a Hearing. Any party may elect to waive a hearing and to submit its case upon the record. Submission of a case without a hearing does not relieve the parties from the necessity of providing the facts supporting their burdens, allegations or defenses.

A search of the record at AAD reveals that the parties filed their agreed Stipulated Facts; however, no waiver of hearing and submission on the records has been filed. Consequently the within Decision and Order shall be rendered as a decision on the cross-motions for summary judgment, based on the stipulated facts, the memoranda and arguments of counsel and a review of the record in this matter at the AAD.

Division asserts that a review of the Parties' Stipulation and the pleadings in this matter establishes that the \$1840.00 assessed by Division against the Respondent on December 8, 1993 pursuant to R.I.G.L. §46-12-4 and Rule 6(b)iii of the User Fee Regulations as set forth in the NOV, remains unsatisfied; and therefore, Division is entitled to entry of judgment in its favor and against Respondent in the amount of \$1840.00.

It is Respondent's contention that the Stipulated Facts establish that the Division is liable to the Town in the amount of \$6,031.50 as reimbursement for fees paid to Division for the years 1991, 1992 and 1993 pursuant to the Division's rules and regulations; and therefore, the Town is entitled to judgment in its favor for the sum of \$6031.50 minus the \$1840.00 claimed by Division, and that the \$1840.00 so deducted should then be returned to the Town pursuant to the Division's rules and regulations.

In deciding on motions for summary judgment, the trier of facts must conduct an examination of the pleadings, admissions, and other appropriate evidence in a light most favorable to the party opposing the motion. If after the submission of the appropriate evidence there is an actual dispute about the facts, then a genuine issue of material fact exists that cannot be resolved by a motion for summary judgment. However, where there is no genuine issue as to any material facts, and the moving party is entitled to judgment as a matter of law, summary judgment properly issues. Commercial Union Companies v. Graham 495 A.2d 243 (R.I. 1985).

The parties have stipulated that Respondent is responsible for the operation of a wastewater treatment facility located at 44 Southwest Avenue in the Town of Jamestown, Rhode Island; that on December 8, 1993 the Respondent was properly assessed a user fee of \$1840.00 for

the period commencing February 1, 1994 and concluding February 1, 1995; and that Respondent has refused to pay said user fee which has been due and owing to Division since January 23, 1994. There is no dispute that said user fee was properly assessed and remains due to Division in accordance with the provisions of Section 46-12-4 and 46-12-4.1 of the Water Pollution Act and Rule 6(b)iii of the User Fee Regulations.

It has also been stipulated by the parties that Respondent has previously paid assessed user fees to the Division for the years 1991, 1992 and 1993 totaling \$6031.50; that Respondent would appear to be entitled to reimbursement from the State of Rhode Island for \$6031.50 and that as of the date of filing of the Stipulated Facts, the State has failed and refused to provide Respondent with reimbursement of the \$6031.50.

A review of the Stipulated Facts and the pleadings in this matter in a light most favorable to the opposing party, (in each of the motions) demonstrates that there is no dispute as to the Division's entitlement to the user fee as alleged in the NOV. The Town's allegations as to its entitlement to reimbursement of users fees is not contested by Division; however Division maintains that contrary to Respondent's contentions, the Town's request for reimbursement must be addressed by the Department of Administration and not the Department of Environmental Management.

The function, powers, duties and responsibilities of the DEM concerning pollution monitoring systems are contained in R.I.G.L. Chapter 46-12, entitled Water Pollution ("Act"). Section 46-12-4 of the Act, which provides

Pollution monitoring system - The director shall establish a pollution monitoring system, and a fee system for point source discharges who discharge sewage into the surface waters of the state. Monies derived from the fee system shall be used by the director to develop and operate a pollution monitoring program. The director shall monitor the levels of conventional and hazardous pollutants especially toxic pollutants discharged into the surface waters and shall assess the impact thereof.

Section 46-12-4.1 of the Act provides:

Fees-Limits-Recovery of costs - The fee established by the director pursuant to §46-12-4 shall be based on the individual discharger's need for monitoring and the effluent's potential for environmental degradation as determined by the director; provided, however, that any fees charged discharges shall be in addition to and not substituted for funds appropriated by or monitoring required by the state or federal government for similar purposes; and further provided:

(a) The director shall annually adopt by regulation, in accordance with the provisions of chapter 35 of title 42, the maximum cost of the monitoring program for the next fiscal year. The fee charged any discharger shall not exceed the actual cost of the pollution monitoring program of that discharger.

(b) The operating authority for any publicly owned treatment facility is hereby empowered to recover any costs incurred under the provisions of this chapter, including administrative costs, by levying an assessment on their customers. Monies derived from the fees shall be deposited into a restricted receipt account for use by the director to carry out the requirements of §46-12-4 and shall be unable to match any federal funds appropriated for these purposes.

Section 46-12-9(a) of the Act provides in part:

Notices of violation and compliance orders - (a) The director shall follow the procedures provided in §42-17.1-10(g) in issuing any notice of violation or compliance order authorized pursuant to this chapter of any rules, regulations, or permits promulgated thereunder.

The recovery of the user fees by the Town is governed by R.I.G.L. §§45-16-6 thru 45-13-10, which requires a system to be established for the reimbursement to cities and towns for the costs of state mandates.

Section 45-13-9 provides:

Reimbursement to cities and town for the costs of state mandates.

(a)(1) The department of administration shall submit to the budget office by September 1 of each year, a report by each city and town, of the cost of state mandates established after January 1, 1979 to be reimbursed for the next preceding July 1 - June 30 period.

(2) The budget office shall annually include the statewide total of the statement of costs of state mandates to be reimbursed in the state budget for the next fiscal year provided, however, that any costs resulting from the rules and regulations of state departments or agencies shall be allocated to the budgets of those departments or agencies.

(b) The state treasurer shall in July of each year distribute to cities and towns the reimbursements for state mandated costs in accordance with the report submitted by the department of administration to the state budget office.

The Statutes involved lend no support for Respondent's arguments. Clearly the DEM has been authorized by statute to impose users fees, but DEM lacks the authority to consider reimbursements. Section 45-13-9 clearly provides that the department of administration shall submit an annual report (concerning the cost of state mandates) to the budget office,

and the state treasurer shall distribute to municipalities the reimbursement for state mandated costs in accordance and reports.

Assuming that Respondent is entitled to reimbursement as alleged, it would be difficult not to be sympathetic to their plight; however, DEM can only operate within its statutory boundaries. It has been stipulated by the parties that Division has pursuant to statutory authority properly imposed the subject users fee, and Division is therefore entitled to the \$1840.00 assessed by Division.

The Respondent's argument that it is entitled to reimbursement from Division lacks merit. The statute governing reimbursement to municipalities for the costs of state mandates does not authorize or empower DEM to consider requests for reimbursement. Agencies must operate within the scope of their authority, and attempts to set-off in the instant matter any amounts due Respondent from the department of administration/state treasurer cannot be considered by the AAD.

In addition to Division's lack of authority to consider requests for reimbursement, AAD lacks jurisdiction to consider Respondent's reimbursement request. AAD's jurisdiction is set forth in R.I.G.L. §42-17.7-2, which provides in part:

Adjudication of environmental licenses and violations - Informal Resolution. All contested enforcement proceedings, all contested licensing proceedings, and all adjudicatory proceedings under

chapter 17.6 of title 42 shall be heard by the division of administrative adjudication pursuant to the regulations promulgated by the director of environmental management;...

It is a well-established principle that agencies are a product of the enabling legislation that creates them, and agency action is only valid, therefore, when the agency acts within the parameters of the statutes that define their powers. The statute is the source of agency authority as well as of its limits. in re Advisory Opinion to Governor, 627 A.2d 1246 (R.I. 1993). The statute creating AAD empowers it to hear notices of violation, but the AAD is not clothed with the authority to hear and determine requests for reimbursement between municipalities and the department of administration/treasury. Consequently, Respondent's Motion for Summary Judgment must be denied.

A review of the Stipulated Facts and the pleadings in this matter establishes that there is no genuine issue of material fact regarding Respondent's violation of §46-12-4, 46-12-4.1 and Rule 6(b)iii of the User Fee Regulations. Division is therefore entitled to summary judgment against Respondent for \$1840.00. The Division did not appear to request summary judgment for the \$700.00 administrative penalty that was assessed against Respondent in the NOV; however, to avoid any confusion, Division's Motion for Summary Judgment is granted in part as to the Respondent's liability for the violation alleged in the NOV but denied as

to the penalty assessment.

Although this Decision and Order operates as what is sometimes termed a "partial summary judgment", it is actually an order under Court Rule 56(d) establishing certain facts and leaving others for determination at the hearing. Russo v. Cedrone, 118 R.I. 549, 375 A.2d 906 (1977).

Based upon the Stipulated Facts, I find as a fact the following:

1. The AAD has personal and subject matter jurisdiction over the Respondent to consider the instant matter.
2. The Respondent is responsible for the operation of a wastewater treatment facility located at 44 Southwest Avenue in the Town of Jamestown, Rhode Island (the "facility").
3. On November 12, 1993, the Respondent received a copy of DEM's draft Fee Assessment dated November 8, 1993 which identified the monitoring which DEM proposed to accomplish at the facility during the period commencing February 1, 1994, and concluding February 1, 1995.
4. The Respondent failed to comment on the DEM's draft Fee Assessment within twenty (20) days of receipt.
5. Upon failure to receive any comments from the Respondent within twenty (20) days of its receipt of the draft Fee Assessment, the Division issued a final assessment on December 8, 1993.
6. On December 8, 1993, the Respondent was assessed a user fee in the amount of one thousand eight hundred and forty (\$1840.00) dollars and was so advised by the DEM in a letter sent to Respondent and dated December 8, 1993.
7. The Respondent was required to pay the assessed user fee in full within forty five (45) days of the receipt of the December 8, 1993 letter. The Respondent received the December 8, 1993 letter on December 10, 1993.
8. The Respondent has refused to pay DEM the user assessment in the amount of one thousand eight hundred and forty

(\$1840.00) dollars which has been due and owing since January 23, 1994.

Based on the foregoing admissions and arguments of the parties, I conclude the following as a matter of law:

1. There is no dispute as to any material fact concerning the liability portion of the NOV and the Division is entitled to judgment as a matter of law concerning liability for violations of R.I.G.L. Sections 46-12-4 and 46-12-4.1 and Rule 6(b)iii of the User Fee Regulations.

The Rules and Regulations for the Assessment of Administrative Penalties provides in Section 12 that once the Division establishes a violation, as it has done here, the burden shifts to the Respondent to prove by a preponderance of the evidence that the penalty assessment and/or economic benefit portion of the penalty was not in accordance with the Penalty Regulations. Respondent should be afforded an opportunity to come forward with evidence supporting its assertions. Accordingly, it is hereby

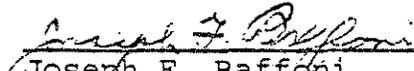
ORDERED

1. The Division's Motion for Summary Judgment is GRANTED in part as to the liability of the Town of Jamestown for violations of R.I.G.L. Section 46-12-4 and 46-12-4.1 and Rule 6(b)iii of the User Fee Regulations as alleged in the NOV.
2. The Division's Motion for Summary Judgment is DENIED as to the penalty assessment.
3. The Town of Jamestown's Motion for Summary Judgment is DENIED.
4. The remaining issue of the proposed administrative penalty will be set down for Prehearing Conference and Hearing. The Clerk will notify the parties of the dates and times for same. As required by Section 12 of the Penalty Regulations, the Respondent bears the burden of

proving by a preponderance of the evidence that the penalty assessment and/or economic benefit portion of the penalty was not assessed in accordance with the Penalty Regulations.

5. The above Findings of Fact and Conclusions of Law which establish Respondent's liability for the violations (as set forth in No. 1 of this Order) will be incorporated in the Decision and Order which will be issued following hearing on the remainder of the NOV and recommended to the Director for issuance as a Final Agency Decision and Order.

Entered as an Administrative Order this 11th day of August, 1995.



Joseph F. Baffoni
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, Third 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 James A. Donnelly, Esq., 24 Salt Pond Road (C-3), Wakefield, RI 02879-4324 and via interoffice mail to Gary Powers, Esq., Office of Legal Services, 9 Hayes Street, Providence, RI 02908 on this 11th day of August, 1995.



APPENDIX B

STIPULATIONS OF THE PARTIES

At the prehearing conference conducted on November 3, 1995, the parties identified those stipulations of fact which were filed with the AAD on March 24, 1995:

1. The Administrative Adjudication Division has personal and subject matter jurisdiction over the Respondent to consider the instant matter.
2. The Respondent is responsible for the operation of a wastewater treatment facility located at 44 Southwest Avenue in the Town of Jamestown, Rhode Island (the "facility").
3. On November 12, 1993, the Respondent received a copy of DEM's draft Fee Assessment dated November 8, 1993 which identified the monitoring which DEM proposed to accomplish at the facility during the period commencing February 1, 1994, and concluding February 1, 1995.
4. The Respondent failed to comment on the DEM's draft Fee Assessment within twenty (20) days of receipt.
5. Upon failure to receive any comments from the Respondent within twenty (20) days of its receipt of the draft Fee Assessment, the Division issued a final assessment on December 8, 1993.
6. On December 8, 1993, the Respondent was assessed a user fee in the amount of One Thousand Eight Hundred and Forty (\$1840.00) Dollars and was so advised by the DEM in letter sent to Respondent and dated December 8, 1993.
7. The Respondent was required to pay the assessed user fee in full with forty-five (45) days of the receipt of the December 8, 1993 letter. The Respondent received the December 8, 1993 letter on December 10, 1993.
8. The Respondent has refused to pay DEM the user assessment in the amount of One Thousand Eight Hundred and Forty (\$1840.00) Dollars which has been due and owing since January 23, 1994.
9. The Respondent has previously paid the assessed user fee to the Division for the years 1991, 1992 and 1993

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totaling Six Thousand Thirty-One and 50/100 (\$6031.50)
Dollars.

10. The Respondent would appear to be entitled to reimbursement from the State of Rhode Island in the amount of Six Thousand Thirty-One and 50/100 (\$6031.50) Dollars.
11. As of the date of filing of this stipulation, the State has failed and refused to provide the Respondent with reimbursement of the Six Thousand Thirty-One and 50/100 (\$6031.50) Dollars.

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APPENDIX C

LIST OF EXHIBITS

The below-listed documents are marked as they were admitted into evidence:

- Div. 1 Full Notice of Violation No. 1193 dated August 26, 1994 (9 pp). (copy)
- Div. 2 Full Decision and Order entered in the instant matter on August 11, 1995 (13 pp.) (copy).