

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

In Re: James and Scott Fraza
Application No. 90-0140

DECISION ON THE MOTION BY THE STATE FOR SUMMARY JUDGEMENT

Authority

Said motion is properly before the Hearing Officer Patricia Byrnes pursuant to the Freshwater Wetlands Act R.I.G.L. § 2-1-20 et seq. as amended; statutes governing the Administrative Adjudication Division R.I.G.L. 42-17.7.-1 et seq., as amended; the Administrative Procedures Act R.I.G.L. 42-35-1 et seq., as amended; the duly promulgated Rules and Regulations Governing the Enforcement of the Freshwater Wetlands Act; and the Administrative Adjudication Division Rules of Practice and Procedure.

Representation

The State is represented by Patricia Solomon, Esq. and Leo Dailey, Esq is counsel for the Respondent.

Background

James and Scott Fraza received a Notice of Violation and Penalty (NOVAP) on September 14, 1990 for unlawfully altering a wetland and were assessed a \$ 4,000.00 administrative penalty. The Respondents filed a timely notice of appeal on September 20, 1990. An informal meeting was held between the Frazas and the Division on October 16, 1990. The Administrative Adjudication Division conducted a Status Conference on April 26, 1991 and a control date

for settlement was established for August 16, 1991. No consent order was entered. This matter was then scheduled for prehearing and hearing. A Prehearing Conference was held on November 7, 1991.

After the prehearing on December 4, 1991, the State filed a Motion for Summary Judgement. Respondents filed a timely objection to the request received on December 12, 1991 and the State submitted a written response to the objection dated December 18, 1991.

Decision

Superior Court Rules of Civil Procedure Rule 56 governs the availability of summary judgement and provides a requirement that before the trier of fact grants such a motion there must exist no genuine issue of material fact. A issue of material fact is not merely a factual dispute but a dispute over facts which might effect the outcome of the suit Anderson v. Liberty Lobby, Inc. 477 US 242, 91 Led 2d 202, 106 S.Ct 2505 (1986).

The Department asserts that Respondents' agreement at the prehearing to the stipulated facts and disputed issues leaves no genuine issue of material fact to be decided by the Hearing Officer. At this conference DEM's counsel provided to Respondents' attorney and the Hearing Officer a list of witnesses and exhibits, a summary of the Department's position and a list of stipulated facts and disputed issues. The Frazas' counsel provided no witness list or summary and accepted the stipulated facts and disputed issues presented by the State.

Additionally, in support of its claim for Summary Judgement the State

provided to the Hearing Officer and the opposing party a Memorandum of Law discussing the elements needed to prove the violation and arguments on the issues as well as an affidavit from its primary witness. In response to the Motion for Summary Judgement Respondent objected but did not file an affidavit or other supporting evidence to substantiate his claim. It is not a absolute requirement of the Rule that the non moving party file an affidavit in support of his motion Steinberg v. State 427 A2d 338 (1981), Nicola v. John Hancock Mutual Life Insurance Co. 471 A2d 945 (1984). Despite failure of the non-moving party to file supporting affidavits, if the affidavit from the moving party does not establish the absence of a material fact the request for summary judgement should be denied, Steinberg, Supra.

When ruling on motions for summary judgement the tires of fact can not pass on the credibility of evidence Palazzo v. Big G. Super Markets, Inc. 110 RI 242, 292 A2d 235 and must consider the affidavits, pleadings, admissions, answers to interrogatives and other appropriate evidence in the light most favorable to the party opposing the motion Marandola v. Hillcrest Builders, Inc. 102 RI 46 227 A2d 785 (1967). Casador v. First National Stores, Inc. 478 A2d 191 (1984).

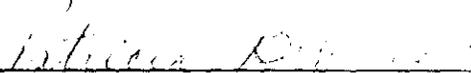
Reviewing the stipulated facts and issues, the elements needed to substantiate a prima facie case and the affidavit provided by the State in the light most favorable to the Respondents the Hearing Officer fails to see that any genuine issue of material fact remains in dispute.

Since no genuine issue of material fact exists, the Department is entitled to Summary Judgement as a matter of law. Alfano v. Landers 585 A2d

651, (1991), Tangleridge Dev. Corp. v. Joslin 570 A2d 1109 (1990).

Therefore Summary Judgement is hereby granted.

Entered as an Administrative Order this 30th day of December, 1991.



Patricia Byrnes
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, 4th Floor
Providence, RI 02908
(401) 277-1357

Entered as a Final Order on this 31st day of December, 1991.

December 31, 1991

Date



Louise Durfee
Director
Department of Environmental Management
9 Hayes Street
Providence, Rhode Island 02908

CERTIFICATION

I hereby certify that I caused a true copy of the within to be forwarded regular mail, postage pre-paid to Leo Dailey, Esq., Nolan and Dailey, 1070 Main Street, Coventry, Rhode Island 02816; and via inter-office mail to Patricia Solomon, Esq., Office of Legal Services, 9 Hayes Street, Providence, Rhode Island 02908 on this 31st day of December, 1991.

