

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

IN RE: Naval Education and Training Center
Notice of Violation dated October 23, 1990

DECISION ON DIVISION'S MOTION TO STAY PROCEEDINGS AND
MOTION TO SUPPLEMENT THE RECORD AND VACATE ORDER OF DISMISSAL

This matter came before Hearing Officer McMahon pursuant to the instruction of the Director of the Department of Environmental Management referencing the Motion to Stay Proceedings to Enforce a Judgment and the Motion to Supplement the Record and Vacate Order of Dismissal Dated August 27, 1992 filed with the Director by counsel for the Division of Air and Hazardous Materials ("Division").

In response thereto, a review of the file in this matter has been conducted and reveals the following sequence of events:

1. A Prehearing Order was entered on June 16, 1992 which scheduled the within matter for prehearing conference on July 17, 1992;
2. Neither party attended the prehearing conference;
3. A Conditional Order of Default/Dismissal was entered on July 21, 1992 which granted the Division until July 28, 1992 to show good cause why this matter should not be dismissed for failure to appear or otherwise apprise the Hearing Officer of his inability to attend said conference;
4. The Division did not make any effort to show good cause for its failure to appear by the imposed deadline of July 28, 1992;
5. On August 7, 1992 a Motion for Judgment on Pleadings was filed with the Clerk of the DEM Administrative Adjudication Division and a Memorandum in Support of a Motion for Judgment of Pleadings was subsequently filed on August 11, 1992;

6. The Hearing Officer entered the Order of Dismissal on August 19, 1992;
7. On August 20, 1992 a Notice, indicating that a written recommended Decision and Order had been submitted to the Director for final approval on August 20, 1992, was issued by Bonnie L. Stewart, Administrative Clerk, to Lieutenant Commander Howard B. Goodman and to Mark W. Siegars, Esq.
8. To date, counsel for the Division has not explained his absence at the prehearing conference nor his failure to respond to the Conditional Order.

Background

The Naval Education and Training Center ("NETC") Notice of Violation was one of three Division matters scheduled for July 17, 1992; two were scheduled for prehearing conference and one for status conference. When counsel for the Division failed to appear, I asked the Clerk to call DEM Legal Services and she was advised that Mr. Siegars was not in the office. Non-appearance resulted in the issuance of three Conditional Order(s) of Default/Dismissal on July 21, 1992. The Division filed responses in two of the matters, but not in the NETC Notice of Violation.

Counsel were notified by letters that the responses had not shown good cause and that one had been filed late. As the parties in both matters represented that they had reached settlement however, and that Consent Agreements would be forthcoming, I postponed entry of the final orders and, in effect, stayed the matters.

Such action was appropriate pursuant to Section 17.00(a) of the Administrative Rules of Practice and Procedure for the Department of Environmental Management Administrative Adjudication Division for Environmental Matters ("AAD Rules") which provides in pertinent part:

a. Negotiations.

At any time prior to rendering a final decision, parties to a hearing may attempt to dispose of a matter by entering into a consent order. A joint request for a stay of a hearing for this purpose shall be forwarded to the hearing officer and shall indicate the present status of negotiations. If an agreement is not reached within the time period for which the stay was approved, a hearing shall be promptly rescheduled by the AHO.

Consent Agreements were subsequently filed and those matters are now closed.

The NETC notice of violation presented an entirely different situation, however. The standard prehearing order, and the one issued in this matter, as attached hereto, provides in paragraph 9:

9. Failure to appear:

- a. Upon failure of either the Respondent or Division to appear at the Prehearing Conference, the Hearing Officer shall sua sponte issue a Seven (7) Day Conditional Order of Default/Dismissal with prejudice which shall automatically become final unless objected to by the absent party (emphasis added), said objection stating the grounds for the failure to appear. Should the Conditional Order be vacated and the remainder of the Prehearing Order complied with prior to the scheduled date of the hearing, the hearing may proceed as scheduled.

Pursuant thereto, a Conditional Order was entered which allowed seven days for a showing of good cause why the matter should not be dismissed. No objection was received by the Clerk of AAD and, according to the provisions of the Prehearing Order, I considered the matter automatically dismissed. Clearly the provisions of Rule 17.00 did not apply as there was no indication the parties were pursuing settlement or sought a stay.

The existence of counsel's Motion for Judgment on Pleadings, filed after the deadline for objection to dismissal, was not included in the Order of Dismissal, not in any attempt to mislead the Director but because it was deemed irrelevant to the procedural matter of there being no objection to the Conditional Order of Dismissal. Such action was consistent with Section 16.00(b) of the AAD Rules: "Every final Decision shall contain a determination of every issue of fact or law necessary to the Decision in accordance with § 42-35-12 (emphasis added)."

DECISION AND ORDER

Having been served with a copy of the Order of Dismissal, DAHM counsel filed the Motion to Stay Proceedings to Enforce a Judgment and the Motion to Supplement the Record and Vacate Order of Dismissal Dated August 27, 1992 with the Director. Counsel presents several arguments in support of his efforts to vacate the dismissal but the foundation is that the Motion for

Judgment on the Pleadings had been timely filed, as there was only a Conditional Order pending, and that the Hearing Officer should have acted on his Motion.

First let me address several side issues raised in counsel's Memorandum in support of his motion to supplement the record and vacate the dismissal. One such complaint is that "Without notice to the DAHM, the Hearing Officer forwarded a Recommended Decision and Order to the Director . . ." (Memorandum, p. 3) and that the Division "was not properly notified of the Recommended Final Order prior to the issuance of the Final Order" (Memorandum, p. 5). The file in this matter indicates that a Notice was sent by the AAD Clerk though it is certainly possible that it was lost in the mail.

The Notice, however, is merely a courtesy of this office and is not statutorily required nor required by the AAD Rules. R.I.G.L. § 42-17.7-6 provides: "After due consideration of the evidence and arguments, the hearing officer shall make written proposed findings of fact and proposed conclusions of law which shall be made public when submitted to the director for review." A similar provision is contained in Section 16.00(a) of the AAD Rules. The recommended decision is then no longer a process of the hearing officer but becomes part of the record. Parties are

required to be notified either personally or by mail of any final order. R.I.G.L. § 42-35-12. There is no such requirement for the recommended order sent to the director.

Counsel also states that the two AAD Decisions cited in the Order of Dismissal were dismissals which resulted from a party's failure to timely request a hearing as mandated by statute and thus should not have been cited as authority for dismissal of the NETC notice of violation. But in both Carol Anne Mancini, AAD No. 91-039/IE and Frederic Dupuis Spotless Cleaners, AAD No. 92-001/AHE, the matters were dismissed on the procedural grounds that there was failure to file a timely objection to the pending motion. The Mancini matter, in particular, considered a DEM Motion to Dismiss on the grounds that the request for hearing was not properly and timely filed, and, though the Hearing Officer found that "the Respondent has fulfilled all requirements for a request for hearing necessitated in the applicable statutes and rules," she granted the Department's motion to dismiss on the procedural grounds. at 5. That is precisely why the two cases were cited in the NETC Order of Dismissal: there, no objection was filed and the motions were granted; here, no objection was filed to the Conditional Order and a final order was entered.

Counsel's strongest argument is that, prior to entry of the final order, the record remained open and that his Motion was therefore proper. He cites Rule 54 of the Superior Court Rules of Civil Procedure in support of his position.

There are significant differences however, between the procedure used at AAD and that practiced in Superior Court. The AAD Rules specifically reference the Superior Court Rules of Civil Procedure in only two areas: motion practice (AAD Rule 8.00) and discovery (AAD Rule 12.00). I have reviewed the following statutes and rules in order to determine if Superior Court procedure would apply in any other manner: Chapter 35 of title 42, "Administrative Procedures"; Chapter 17.6 of title 42, "Administrative Penalties for Environmental Violations"; Chapter 17.1 of title 42, "Department of Environmental Management"; Chapter 17.7 of title 42, "Administrative Adjudication Division for Environmental Matters"; Chapter 19 of title 23, "Hazardous Waste Management"; the Rules and Regulations for Hazardous Waste Generation, Transportation, Treatment, Storage and Disposal; the Administrative Rules of Practice and Procedure for the Department of Environmental Management; and the AAD Rules. While the review proved instructive in several respects, there was no further reference to Superior Court procedure and, contrarily, there were clear indications that the administrative hearing procedure was dissimilar to the Court's.

Still, if it were only the matter of the Conditional Order, standing alone, and even though the Motion for Judgment on Pleadings was filed after the deadline for a showing of good cause, I would likely find his argument persuasive. But such a conclusion would completely disregard the Prehearing Order entered on June 16, 1992 which compelled the issuance of the Conditional Order. I cannot ignore the clear language of an order that has been routinely issued from this office. Paragraph 9 states that the Hearing Officer shall issue a Conditional Order which "shall automatically become final unless objected to" (emphasis added). If counsel's argument is to prevail, then paragraphs 9 and 10 of the Prehearing Order used by AAD are obsolete and should be discarded.

This situation additionally presents the interesting and ironic circumstance of the DAHM counsel urging that his Motion for Judgment on Pleadings be granted for lack of objection but that the Order of Dismissal not be granted for lack of objection.

It is indeed unfortunate that this matter was dismissed on procedural grounds. But such action was consistent with the pertinent statutes, rules, AAD orders and previous AAD decisions.

Wherefore, after consideration thereof, it is hereby

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ORDERED

The Division's Motion to Stay Proceedings to Enforce a
Judgment is Denied.

Entered as an Administrative Order this 13th day of
October, 1992.

Mary F. McMahon
Mary F. McMahon
Hearing Officer
Department of Environmental Management
Administrative Adjudication Division
One Capitol Hill, Third Floor
Providence, RI 02908

Entered as a Final Order this _____ day of October,
1992.

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

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DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
ADMINISTRATIVE ADJUDICATION DIVISION

IN RE: Naval Education and Training Center
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FINAL ORDER

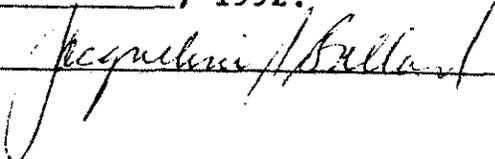
The Division's Motion To Stay Proceedings To Enforce
A Judgment is denied on the sole basis that the Division
failed to object to the conditional order of dismissal.



LOUISE DURFEE, DIRECTOR

CERTIFICATION

I hereby certify that I caused a true copy of the
within Final Order to be forwarded to Lieutenant Commander
Andrew J. McKay, Staff Judge Advocate, Naval Education
Training Center, Newport, RI 02841-5000; and LCDR Richard
Evans, Office of the Judge Advocate General, General
Litigation Division (Code 34) 200 Stoval Street, Alexandria,
VA 22332-2440 via regular mail, postage prepaid and via
interoffice mail to Mark W. Siegars, Esquire, Office of Legal
Services, 9 Hayes Street, Providence, RI 02908 on
this 19th day of October, 1992.



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