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Matthew Watsky *operates his Environmental Permitting and Regulatory, Land Use and Administrative Law practice out of his offices in Dedham, Massachusetts. A former Mass-DEP Deputy General Counsel, Mr. Watsky has represented a wide range of clients in private practice since 1990. He brings his experience and insight, primarily on behalf of for-profit corporations and property owners, to matters ranging from simple ANR approvals to complex matters with overlapping layers of federal, state and local environmental and land use regulation. In addition to environmental and land use, he represents clients in other areas of administrative law proceedings, such as those before OSHA, the FAA and local Airport Commissions.*

I. Introduction

Though earlier in my career I commonly participated as a panelist in CLE programs, authored commentaries and articles and even taught a college course for two semesters, the demands of juggling the law office, family and serving over the years on multiple non-profit boards forced the choice to back away from such activities. Life has phases, and I welcome the opportunity offered by Landlaw to try my hand again at commentary.

In this commentary, I address cases concerning enforcement related decisions, enforcement procedure and I contrast appellant's tactics used in cases reviewed under the DEP's Standard Rules of Administrative Procedure, 310 CMR 1.01, and the rules governing the assessment of administrative penalties, 310 CMR 5.00. The cases address substantive areas of Massachusetts Hazardous Waste Management Act, the Massachusetts Clean Water Act, and Regulations 314 CMR 12.00, Hazardous Waste Management Act G.L. c. c 21C, §7 and regulations at 310 CMR 30.853, and 811, and penalties assessed under 21E and 310 CMR 40.000. DEP issued very few recent decisions for permit appeals, and this group of cases offers lessons in a couple of effective ways, and shall we say the wrong way to handle an appeal of an enforcement matter.

In the *Matter of City of Gloucester*, Final Decision, 21 DEPR 85 (2014) the DEP reviews the Petitioner's appeal of a Unilateral Administrative Order (UAO), and the City's successful motion to vacate that Order so that the City's record remains clear. In the *Matter of Auto Body Solvent Recovery Corp*, Final Decision, 21 DEPR 86 (2014) a *pro-se* president and owner of a corporation missed the deadline for filing Pre Filed Direct Testimony while asserting he was attempting to settle the case, and futilely sought reconsideration of the dismissal. In the *Matter of Sherrill Gould*, Final Decision, 21 DEPR 88 (2014) Ms. Gould, a lawyer, represented herself and missed the deadline to file an appeal of a Penalty Assessment Notice ("PAN") issued under 310 CMR 40.000 for work to move contaminated soils on a known contaminated site without supervision of an LSP. In the *Matter of Stonebridge Commons Condominium Trust*, Final Decision, 21 DEPR 18 (2014) addresses a Petitioner's successful use of an appeal and negotiation to dramatically reduce stipulated penalties accrued under a previously executed Administrative Consent Order with Penalty ("ACOP").

From these cases we can take some lessons—appeals can be effective procedural tools to facilitate a settlement with more favorable terms than those set forth in the substantive ruling, even if that ruling is based on a final ACOP with stipulated fines; and late appeals, or failures to adhere to the procedural mandates and deadlines set by a Presiding Officer in a Scheduling Order will eliminate any potential to negotiate more favorable terms. The costs a *pro se* Petitioner might save by not hiring counsel to file and manage an appeal in an enforcement matter may not be worth the paper the *pro se* appeal was written on.

II. Vacating a UAO and Dismissing an Appeal of an UAO issued under 314 CMR 12.00

Matter of City of Gloucester, Final Decision, 21 DEPR 85 (2014) concerns the actions taken by the City of Gloucester to appeal the Unilateral Administrative Order ("UAO") issued by MassDEP against alleged violations in the operation of the City's publicly owned treatment works operation ("POTW"). Though denying the POTW needed repair and upgrades, and particularly denying that the alleged violations were "egregious", the City complied with the remedial requirements of the UAO. The City went ahead and apparently quickly replaced several components of its POTW pump station. Gloucester was then well positioned to appeal the UAO and challenge it as moot and seek its rescission. The Presiding Officer, on the basis of the City's claimed full compliance with the UAO, issued an Order to Show Cause why the appeal should not be dismissed as moot.

Relying on the ruling in the *Matter of Wilkinson Excavating, Inc*, Docket No. 2010-064, Recommended Final Decision (March 8, 2011) 18 DEPR 80 (2011), the City argued that the matter was not totally moot—that instead it had a right to vindicate itself against the merits of the UAO. Rather than simply a dismissal of the appeal, the City sought, and the Proceeding Officer agreed to vacate the UAO and then dismiss the appeal. As in *Wilkinson*, the Petitioner then was free of the onus of a Final Order on its record. A UAO that has become a Final Order can have significance for future cases, such as where the DEP alleges in the future that the facility has become non-compliant and with a Final Order UAO it would have a "history of non-compliance" that would result in a higher fine calculated for assessment of an administrative penalty. Allowing the UAO to become a Final Order might also have an adverse effect on insurance ratings and eligibility for financial grants and aid. The City handled this case

perfectly—managing the exposure to risk, eliminating the basis for the UAO, and successfully having the UAO rescinded.

III. License Reissuance Denial under the Massachusetts Hazardous Waste Management Act

In the *Matter of Auto Body Solvent Recovery Corp*, Final Decision, 21 DEPR 86 (2014) we see the hazards of taking too lightly the deadlines set by the Presiding Officer in the appeal process. Auto Body Solvent Recovery Corp ("ABSRC"), represented by its President, appealed the DEP's denial of a renewal of its hazardous waste transporter license pursuant to the MA Hazardous Waste Management Act and Regulations at 310 CMR 30.853, and ruling that barred ABSRC from reapplying for any hazardous waste transporter license for four years. In effect, the DEP put the company out of the hazardous waste transport business. The DEP based its license renewal denial on the Department's allegation of ABSRC's pattern of non-compliance with the Act and the Regulations; misrepresentation of facts during the license review process, and failure to demonstrate competence to transport waste. MassDEP also found that it had demonstrated non-compliance with the conditions of ABSRC's existing hazardous waste transporter license. ABSRC appealed, denying the DEP's contentions and requesting renewal of its license. So far, the case tracks the way in which the City of Gloucester began its appeal. The similarities end there.

In stark contrast to the manner in which the City of Gloucester managed its appeal, the decision reflects no efforts by ABSRC to correct the alleged errors during the appeal period or the pendency of the appeal. Then, during the appeal ABSRC failed to file any Pre-filed Testimony ("PFT") by the deadline set by the Presiding Officer ("PO") in the Adjudicatory Hearing. The PO issued a Recommended Final Decision dismissing the appeal based on this procedural error. ABSRC filed a Motion for Reconsideration, arguing that the MassDEP ignored attempts to settle the appeal outside of the Hearing and improperly used procedural grounds to dispose of the appeal. MassDEP opposed the Motion for Reconsideration, asserting the PO properly dismissed the appeal due to ABSRC's failure to file PFT. The PO denied the Motion for Reconsideration.

If ASBRC could have proved itself eligible for a license renewal and the MassDEP denial issued in error, and if ABSRC had submitted testimony before the deadline, the appeal process would have proceeded normally. The denial of the original appeal and the resultant denial of the motion for reconsideration followed directly from the failure on ABSRC's part to file PFT in a timely manner, regardless of any other actions on their part to settle the issue. But the case likely should never have gone that far—for ABSRC to have saved its business, it should have acted affirmatively to identify problems with its practices, and if it identified specific problems, to prepare the necessary steps to solve those problems and engage the DEP to negotiate an Administrative Consent Order. ABSRC's apparent lack of sophistication and passivity in managing its relationship with DEP as the licensing authority led to an inevitably bad outcome.

IV. Late Means Late

In the *Matter of Sherrill Gould*, Final Decision, 21 DEPR 88 (2014) we see a reiteration of the importance of meeting deadlines, especially if the appellant is a lawyer and should know the procedures already. From countless past decisions, we know that filing a timely appeal is a jurisdictional prerequisite to successfully commencing an adjudicatory hearing at DEP. It seems a bit surprising in this case, therefore, that the PO spent as much time on the background facts as he did.

The MassDEP issued a Notice of Intent to Assess a Civil Administrative Penalty ("PAN") to Gould due to alleged violations of G.L. c. 21E and 310 CMR 40.000 (MCP), which govern assessment and remediation of oil or hazardous material releases. In the year 2000 Gould had a Licensed Site Professional ("LSP") assess the property and file a notice with the DEP that the site contained polynuclear hydrocarbons (PAHS), lead, and polychlorinated biphenyls (PCBs). In 2009, Gould's LSP identified areas that needed soil remediation. In 2013, without first removing the contaminated soils and without the oversight of an LSP, a contractor began clearing on the property to prepare it for construction of a single family home. Town Officials notified MassDEP, and the Department determined that the work involved excavating contaminated soils and mixing them with clean soils before spreading them out again. MassDEP was not notified ahead of time and did not approve the work, and no LSP was on-site to supervise the excavation.

MassDEP then issued a notice of Enforcement Conference to Gould, and met with her about the case. Gould alleged an inability to pay, but failed to document that claim. MassDEP proceeded with issuance of a PAN, assessing a penalty of $17,455.00. The decision in Gould then goes into detail about the wording of the PAN, its emphasis, in bold face type, that this was a serious matter and prompt action was necessary. As with the standard form for PANS, the instructions in it were clear regarding the appeal process and the deadline to file the appeal. Despite this, Gould missed the deadline, filing her appeal 10 days after the deadline had passed. MassDEP filed a motion to dismiss her appeal, which Gould opposed. The only aspect of the decision that is surprising is the PO's actual discussion and characterization of the Petitioner's excuses for the late filing, concluding that she simply had a very busy schedule. The PO allowed MassDEP's motion to dismiss.

Lessons learned—Gould had an opportunity in the enforcement conference to negotiate more favorable terms, and to prove her inability to pay or offer some mitigation for the error. MassDEP will often readily agree to modify the terms of an Administrative Consent Order resulting in a suspension of an administrative penalty if certain mitigatory actions are taken on an agreed timeline, and the alleged violator does not err again. Particularly where an alleged violator has no prior history of non-compliance, it is generally feasible to negotiate terms far more favorable that those initially presented in a draft PAN that accompanies a notice of enforcement conference. Nothing will harm your case more than failing to negotiate on a timely basis, and then compounding that mistake by missing the statutory deadline for an appeal. Gould failed to com-

ply with the substantive regulations, apparently exacerbated that error by failing to negotiate effectively, and then etched her fate in stone by failing to appeal in a timely manner.

V. Penalty Renegotiation

In the *Matter of Stonebridge Commons Condominium Trust*, Final Decision, 21 DEPR 18 (2014) we see an excellent contrast to the handling of the appeal in *Gould*, and an example of the flexibility that MassDEP has to reduce a penalty based on competent advocacy and affirmative steps taken by the appellant to respond to and mitigate the alleged violations. In *Stonebridge*, MassDEP had entered into an Administrative Consent Order with Penalty with the Stonebridge Commons Condominium Trust in February 2013. That ACOP set out deadlines for payment of a reduced stipulated penalty, and for submittal of an engineering report about the operation of the Stonebridge private Wastewater Treatment Plant ("WWTP"). Though Stonebridge paid half of the agreed penalty, it missed a deadline for the payment and for submittal of the engineering report, thus triggering a requirement to pay the full remaining amount of the previously agreed penalty ($3,162.50) and a stipulated penalty of $1,000 for each day the report was late, adding up to $158,000 of stipulated penalty assessed in DEP's Notice.

Stonebridge's counsel appealed the notice of assessment of stipulated penalty and then successfully engaged in negotiations to modify the terms. The ruling in *Matter of Stonebridge* approves the settlement agreement executed by Stonebridge and MassDEP Counsel, reducing the $158,000 stipulated penalty to $20,000, and allowing the payment of that reduced penalty along with the outstanding previously agreed fine of $3,162.50, over time, with seven payments, one every six months. Critical to the outcome—the condominium had actually operated the WWTP in compliance with the groundwater discharge permit limits, as required in the ACOP, as of July 2013. Though it erred by failing to pay the previously agreed penalty on time, and to file the engineering report on time, it had implemented the substantive measures to protect the environment. The reduction of the stipulated penalty was justified in part by the compliance with the permit discharge standards, and by noting that the condo's individual owners were already paying to operate the WWTP, and concluded the reduced penalty provided sufficient deterrence to future non-compliance. ■