

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

RE: NATIONAL VELOUR CORP.

AAD NO. 90-15-AP

RULING ON PETITION FOR INSTRUCTIONS

This matter is before the hearing officer on the Petition for Instructions ("Petition") filed by the Division of Air Resources ("Division") in the above-entitled matter. National Velour ("Respondent") joined in the Petition. For purposes of addressing the Petition, I will outline only the pertinent travel of this matter. On December 15, 1992 an Order was issued granting the Division's Motion for Summary Judgment concerning violations of the Rhode Island Air Pollution Control Act, R.I. Gen. Laws §23-23-1 et seq. and the Air Pollution Control Regulations adopted pursuant thereto. A hearing on the administrative penalty was scheduled and the parties filed a joint motion for a stay of the administrative proceedings for the Superior Court and ultimately the Rhode Island Supreme Court to determine whether Respondents were entitled to a jury trial on the issue of the assessment of the administrative penalty. Very briefly stated, the Supreme Court held that the Respondents are not entitled to a jury trial on the assessment of the administrative penalty and consequently, the matter is again before the Administrative Adjudication Division for Environmental Matters for a hearing on the penalty assessment. National Velour Corp. v. Durfee, 637 A.2d 375, (R.I. 1994).

A prehearing conference was originally scheduled for July

26, 1995 and continued at the request of counsel to allow the parties to pursue settlement negotiations. On September 6, 1995, the Division filed the instant Petition. The Petition requests that the hearing officer instruct the parties as to the burden of proof at the remaining phase of the hearing concerning assessment of the administrative penalty.

The Division cites R.I. Gen. Laws §42-17.6-4(a) which addresses adjudicatory hearings on administrative penalties under the jurisdiction of the Department of Environmental Management. It provides as follows:

(a) A person shall be deemed to have waived his or her right to an adjudicatory hearing unless, within ten (10) days of the date of the Director's Notice that he or she seeks to assess an administrative penalty, the person files with the Director or Clerk of the Administrative Adjudication Division a written statement denying the occurrence of any of the acts or omissions alleged by the Director in the Notice, or asserting that the money amount of the proposed administrative penalty is excessive. In any adjudicatory hearing authorized pursuant to Chapter 35 of Title 42, the Director shall, by a preponderance of the evidence, prove the occurrence of each act or omission alleged by the Director.

As the Division correctly points out, the statute was enacted in 1987 and was in effect at the time the NOVAP was issued to the Respondents and remains in effect to date. The statute requires that a person contesting the money amount of the administrative penalty must assert that it is excessive.

The statute also requires the Director to prove the occurrence of each act or omission alleged in the NOVAP. The statute is silent on the issue of which party bears the burden of proof as to the administrative penalty. The Division contends that the statute, by requiring a Respondent to assert that the penalty is excessive, places the concomitant obligation upon Respondent to prove that which he or she asserts. Predictably, Respondent disagrees with the Division's interpretation.

The Director recently issued a Final Decision and Order in the matter of DTP, Inc., Final Decision and Order issued March 8, 1996. Therein, the Director provided an interpretation of both the 1987 Penalty Regulations and R.I. Gen. Laws §42-17.6-4. DTP, Inc. was cited by the Underground Storage Tank Section of the Department with numerous violations of underground storage tank regulations and assessed an administrative penalty. A Notice of Violation and Order was issued against DTP, Inc. and was twice amended. The violations which the Division proved at hearing occurred during the years 1987, 1988, 1989, 1990, 1991 and 1992. In his conclusions of law, the Director distinguished the violations based on the date of their occurrence and held that violations must be reviewed in accordance with the rules and regulations in existence at the time the violations occurred. DTP, Inc., Decision issued March 8, 1996. The Director then

addressed the Division's burden of proof for penalties assessed for violations which occurred commencing in 1987 up to the effective date of the 1992 Penalty Regulations. The Director held:

That in accordance with 1987 Penalty Rules Section 9 and 11 and R.I. Gen. Laws §42-17.6-4 the Division has the burden to prove by a preponderance of the evidence that the penalty was assessed in accordance with the Administrative Penalties for Environmental Violations Act and the Penalty Regulations. This burden includes proving that the amount of the penalty imposed is within the parameters of the Penalty Regulations and is not excessive.

Id., at p. 9.

In the pending matter all violations occurred prior to the effective date of the 1992 Penalty Regulations. Some occurred prior to the effective date of the 1987 Penalty Regulations. The conclusions of law adopted by the Director and issued as a Final Agency Order in DTP, Inc. address, to a great extent, the issue raised by the Division in its Petition for Instructions. Applying the Director's reasoning and conclusions reached in DTP, Inc., the Petition is answered as follows:

1. For violations that occurred after the effective date of the 1987 Penalty Regulations, the Division has the burden to prove by a preponderance of the evidence that the penalty was assessed in accordance with R.I. Gen. Laws §42-17.6 and the 1987 Penalty Regulations and is not excessive.

2. For violations that occurred prior to the effective date of the 1987 Penalty Regulations and prior to enactment of R.I. Gen. Laws §42-17.6, the Division has the burden to prove by a preponderance of the evidence that the penalty is in compliance with then applicable statutes and regulations.

Entered as an Administrative Order this 12th day of March, 1996.

Kathleen M. Lanphear

Kathleen M. Lanphear
Chief 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 Keith Fine, Esq., LICHT & SEMONOFF, One Park Row, Providence, RI 02903 and via interoffice mail to John A. Langlois, Esq., Office of Legal Services, 235 Promenade St., 4th Fl., Providence, RI 02908 on this 12th day of March, 1996.

Barry L. Stewart