

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
RESIDENTIAL AND COMMUNITY SERVICES DIVISION**

**PUBLIC NOTICE
NOTICE OF FUNDING AVAILABILITY**

**NEIGHBORHOOD-BASED ACTIVITIES:
Comprehensive Housing Counseling Services
Community Development Block Grant**

The Department of Housing and Community Development (DHCD) is soliciting applications under the federal Community Development Block Grant (CDBG) Program for Comprehensive Housing Counseling Services in designated neighborhoods of the District. Funding under this notice will be available for FY 2005 (October 1, 2004, to September 30, 2005), consistent with the Department's Consolidated Plan FY 2005 Action Plan submission to the U.S. Department of Housing and Urban Development (HUD).

The general scope of activities to be funded will be described in the Request for Applications.

The Request for Applications (RFA) will be released on or before May 21, 2004, and the deadline for submission is June 22, 2004, at 4:00 p.m. Applications can be obtained from 801 North Capitol Street, NE, 6th Floor Reception Desk, Washington, DC 20002. For additional information, please contact the Department of Housing and Community Development, Residential and Community Services Division at (202) 442-7161. The RFA will be available from the DHCD website, located at www.dhcd.dc.gov, on or about May 28, 2004.

A Pre-Application Conference will be held at the Department of Housing and Community Development on June 2, 2004, at 10:00 a.m., 801 N. Capitol Street, NE, 9th Floor. Attendance at the conference is encouraged for all potential applicants.

Two Rivers Public Charter School
Temporary Administrative Office
622 6th Street, NE
Washington, DC 20002
Phone: 202-546-4477
Fax: 408-790-0496

NOTICE: REQUEST FOR PROVIDING FOOD PREPARATION SERVICES

Two Rivers Public Charter School, in accordance with section 2204(c)(IX) (A) of the District of Columbia School Reform Act of 1995, hereby solicits proposals to provide meals for breakfast (approximately 88 elementary school students) and lunch (approximately 165 elementary school students). The meals must meet or exceed federal nutrition requirements and all compliance standards of the USDA School Breakfast Program and the National School Lunch Program (NSLP). Vendors will be required to deliver meals to the school at 1150 5th Street, SE, Washington, DC 20003.

Interested bidders will state their credentials, provide appropriate licenses and sample menus made in accordance with federal nutritional and serving requirements. All proposals must include a cost estimate.

Additional information can be obtained by calling 202-234-7796 or e-mailing wendy@goldstarnetwork.org and referencing Food Services. Full proposals are due at the above address by Friday, May 28th, 2004 at 5 PM.

NOTICE: REQUEST FOR PROVIDING CLEANING SERVICES

Two Rivers Public Charter School, in accordance with section 2204(c)(IX)(A) of the District of Columbia School Reform Act of 1995 hereby solicits proposals to provide janitorial services, including minor repairs, for its facility located at 1150 5th Street, SE, Washington, DC 20003. Performance of services includes maintaining a neat, clean work environment for staff and students. Additional information can be obtained by calling 202-234-7796 or e-mailing wendy@goldstarnetwork.org and referencing Janitorial Services. Full proposals are due at the above address or via the above fax number by Friday, May 28th, 2004 at 5 PM.

NOTICE: REQUEST FOR BUSINESS SERVICES

Two Rivers Public Charter School, in accordance with section 2204(c)(IX)(A) of the District of Columbia School Reform Act of 1995 hereby solicits proposals to provide business services in the areas of book keeping, accounting, budgeting, and internal financial control. Additional information can be obtained by calling 202-234-7796 or e-mailing wendy@goldstarnetwork.org and referencing Business Services. Full proposals are due at the above address or via the above fax number by Friday, May 28th, 2004 at 5 PM.

NOTICE: REQUEST FOR FURNITURE PURCHASE

Two Rivers Public Charter School, in accordance with section 2204(c)(IX)(A) of the District of Columbia School Reform Act of 1995 hereby solicits proposals for the purchase of school and office furniture. Additional information can be obtained by calling 202-234-7796 or e-mailing wendy@goldstarnetwork.org and referencing Furniture. Full proposals are due at the above address or via the above fax number by Friday, May 28th, 2004 at 5 PM.

NOTICE: REQUEST FOR BUSINESS INSURANCE

Two Rivers Public Charter School, in accordance with section 2204(c)(IX)(A) of the District of Columbia School Reform Act of 1995 hereby solicits proposals to provide business insurance. Additional information can be obtained by calling 202-234-7796 or e-mailing wendy@goldstarnetwork.org and referencing Insurance. Full proposals are due at the above address or via the above fax number by Friday, May 28th, 2004 at 5 PM.

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Rulemaking Handbook & Publications Style Manual (1983)	\$5.00
*Supplements to D.C. Municipal Regulations	\$4.00

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DISTRICT OF COLUMBIA BOARD OF APPEALS AND REVIEW

INTRODUCTION

The District of Columbia Board of Appeals and Review was created in 1955 by Executive Order 1-12 of the Board of Commissioners in order to provide appellate review, and in certain circumstances to act as a trial court, for a variety of municipal administrative law matters. Its organization and jurisdiction has been amended several times

Executive Order 96-27, dated March 5, 1996, stands as the current authorization. Members of the Board are appointed by the Mayor and confirmed by the City Council. The authorized composition of the Board consists of 16 members: five legal members who preside at hearings and normally draft decisions, six members from the public sector and five employees of the D.C. government grade 13 or higher. Members serve without compensation.

JURISDICTION

The Board's jurisdiction extends to appellate review of final decisions by administrative law judges in contested cases arising under the Civil Infractions Act of 1985 and under the District's littering laws. The addition of civil infraction penalties in the District has been motivated by the need to find alternative approaches to enforcing laws and regulations other than filing criminal charges and prosecuting law violators. Financial penalties can be quick, direct and effective. Littering laws are designed to promote the health and safety of District residents, visitors and those who have business in the city.

The Board also has appellate jurisdiction of final administrative agency decisions in certain building permit cases. Additionally, the Board has jurisdiction of appeals of decisions awarding or denying certificates of need, which are required before any new institutional health service in the District may be provided. The Board is authorized to take evidence in building permit and certificate of need cases.

Finally, the Board's jurisdiction extends to (1) appeals filed by persons denied security guard and detective licenses by the Metropolitan Police Department; and (2) appeals by health care providers who seek reimbursement of expenditures for services provided under the District's Medicaid program under contracts with the D.C. Department of Health. These two types of cases necessitate fact-finding hearings complying with the provisions of the D.C. Administrative Procedures Act.

The Board is scheduled to cease operations on March 22, 2004 when its jurisdiction will be transferred to the Office of Administrative Hearings (OAH), D.C. Code § 2-1831.01, *et seq.* Its decision will be maintained by OAH.

David H. Marlin, Board Chairperson
Phyllis D. Thompson, Vice Chairperson

SELECTED DECISIONS

Board decisions provide the most recent interpretations of District statutes and regulations in matters within the Board's jurisdiction. We have included decisions which contain significant rulings on recurring issues, decisions in which the Board has ruled on matters of first impression and decisions where there is broad public interest in the subject matter.

All the Board's decisions at least from January 2000 to March 22, 2004 have been separated by jurisdictional issue and placed in notebooks. They are available for review in the offices of OAH.

CIVIL INFRACTIONS

<u>Case Caption</u>	<u>Docket No.</u>	<u>Date</u>
Thornell K. Page II (substantial evidence test requires presentation of government records to verify infraction)	00-5591-CI	01-30-01
1336 14th Street, NW LLC (owners of commercial property jointly liable with tenant for failure to secure building permit)	01-5711-CI	04-16-01
James G. Davis Construction Corp. (Federal asbestos regulations incorporated into District law)	00-5456-CI	05-31-01
Providence Hospital (hospital cafeteria must be licensed by District)	00-5613-CI	06-25-01
Victor and Eleanor Gaetan (testimonial evidence may satisfy burden of proof that construction exceeded building permit)	00-5529-CI	09-19-01
David Gilmore, Receiver, D.C. Housing Authority (public housing must be in compliance with fire regulations)	99-5329-CI	11-07-01

- Avis Rent-A-Car Systems, Inc.** 99-5420-CI 01-08-02
(car rental agencies must be licensed to dispense gasoline)
- James Taylor Trash Removal Contractors, Inc.** 01-5656-CI 01-22-02
(recycling operation must be licensed under Solid Waste Facility Permit Act)
- Gold Line, Inc.** 01-5676-CI 02-06-02
(Federal law does not preempt District engine idling standards)
- L&M Contracting, Inc.** 01-5702-CI 04-03-02
(purpose of business solicitation law is to protect prospective consumers from fraud and misrepresentation)
- Waste Management of Maryland, Inc.** 99-5374-CI 06-28-02
(detection of air pollution not solely dependent on use of scientific equipment)

LITTERING

- The Fund for Public Interest Research** 99-5407-LC 05-10-00
(non-profit groups recruiting summer workers must comply with sign-posting regulations)
- Dorothy Barksdale** 99-5390-LC 03-07-01
(government must prove identify of litterer by substantial evidence)
- William Grote** 00-5459-LC 11-08-01
(trash receptacles must meet requirements of size, weight, composition, strength and be capable of being properly secured)
- Farokh Puladian** 03-5976-LC 05-05-03
(District policy of strict liability for littering violations that create a nuisance or fire hazard remove obligation to provide a warning or opportunity to abate)
- Roger Gerstenfeld** 03-5924-LC 06-05-03
(service of Notice of Violation is valid if sent to name and mailing address as listed on District's tax role)
- Paul Strauss** 03-5975-LC 10-28-03
(improper posting of campaign signs by campaign committee may be imputed to the candidate)
- 919 E Street Associates** 03-5941-LC 10-29-03

(owner of leased property jointly liable with lessee for storing and containerizing solid waste that would be a breeding ground for insects and rodents)

David Alterman 03-6030-LC 11-07-03
(lien on property for unpaid fines is not valid against a bona fide purchaser at tax sale unless lien had been filed with Recorder of Deeds)

International A.N.S.W.E.R 02-5859-LC 03-08-04
(organization distributing signs may be held liable for posting by implied authority)

James Bubar 02-5892-LC 03-10-04
(finding of improper site protection for excavation of driveway/sidewalk not supported by substantial evidence)

BUILDING PERMITS

J.C. & Associates 98-5456-BP 01-30-99
(denial of a raze permit because structure covered by Historic Landmark and Historic District Protection Act was not "imminently dangerous")

J. Brendan Herron, Jr. 02-5863-BP 05-22-03
(challenge to issuance of raze and construction permits may not trigger evidentiary hearing absent need to establish material facts; discussion of Construction Code requirements; need for environmental impact statement; and ANC status)

Laura Elkins, et ux. 03-5961-BP 07-09-03
(requirements for issuing valid stop work order)

Nebraska Avenue Neighborhood Asso. 02-5872-BP 12-30-03
(time to appeal issuance of building permits may not be extended because of later claims that construction is unlawful or poses safety risks)

CERTIFICATES OF NEED

Bio Medical Applications of D.C. 01-5609-CON 11-30-01

(determination of need for new out-patient hemodialysis facility not bound by District Comprehensive Health Plan)

Columbia Hospital for Women

01-5725-CON 03-14-03

(appeal is moot because hospital closed; discussion of citywide needs for new services and effect on institutional competition)

Good Hope Institute

02-5783-CON 12-23-03

(approval of freestanding outpatient methadone treatment facility affirmed based on need, accessibility and financial feasibility despite community opposition)

PROVIDER AGREEMENTS

Brice Warren Corporation, Inc. et al.

98-5358-PA 08-15-01

(contract of provider of services for mentally retarded may be cancelled for cause)

MEDICAID REIMBURSEMENT

Children's National Medical Center

95-5113-NPR 04-05-01

(reimbursement for inpatient hospital services must be based on correct date for calculating disproportionate share payment)

VENDING LICENSES

In the Matter of Xin X. Zhu

99-5394-LR 05-14-99

(vending license may be revoked for selling counterfeit goods)

SECURITY GUARD LICENSING

Since 2000, the board has scheduled more than 300 appeals filed by persons who applied to the Metropolitan Police Department (MPD) for security guard and detective licenses and whose applications were denied. Most denials either were for "material misstatements" on the application, i.e., that the applicant's arrest record was not accurately disclosed, or that the applicant lacked good moral character. The Board has reversed and remanded nearly 60 MPD decisions just in 2003 on various grounds, chiefly because the administrative decisions by the Security Officers Management Branch were arbitrary, failed to follow MPD regulations or failed to conform to the guidelines established in BAR decisions.

<u>Applicant</u>	<u>Bar Docket</u>	<u>Decision</u>
Willie Reeves ("material misstatement" on application although only arrest was in 1964 during civil rights demonstration in Mississippi)	01-5704-LR	06-13-00
Walter S. Leach (MPD entitled to substantial discretion in determining whether license should issue but policy of automatically disqualifying any applicant with multiple arrests on grounds of lacking "moral character" not permitted)	00-5556-LR	12-24-00
Deangela Batie (material misstatement defined to exclude charges more than 10-years old)	01-5741-LR	08-03-01
Travis Wood (test of materiality is whether information withheld would reasonably have influenced decision or reflect on honesty or integrity of applicant)	01-5765-LR	10-26-01
Kimberly N. Shuford (conviction for misdemeanor assault not an absolute bar to licensing if applicant demonstrates not a significant safety risk to community)	02-5766-LR	12-19-01
Keith Davis (MPD may not deny license based on internal policies never promulgated publicly in rules or regulations)	02-5771-LR	12-20-01
MacDonald Parsons (failure to list arrest by immigration authorities no bar to licensure when asylum granted)	02-5768-LR	12-20-01
Daren Antonio Dorsey (mitigating factors listed for waiver of six-month waiting period to reapply)	02-5770-LR	01-23-02
Omar A. Omar (detention by INS of immigrant seeking asylum need not be listed as arrest on application nor serve as a basis of denial)	02-5789-LR	02-25-02

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW

DAVID GILMORE, Receiver,)
DISTRICT OF COLUMBIA HOUSING)
AUTHORITY,)

Appellant,)

v.)

DEPARTMENT OF CONSUMER AND)
REGULATORY AFFAIRS,)

Appellee)

BAR Docket No. 99-5329-CI

DECISION AND ORDER

Appellant District of Columbia Housing Authority ("DCHA") appeals from a May 12, 1998 decision and order of the Department of Consumer and Regulatory Affairs ("DCRA") Office of Adjudication ("OAD"), finding that DCHA failed to maintain an operable fire protection system in four public housing complexes on dates cited in Fire Department Notices of Infraction ("NOIs"), and upholding fines totaling \$11,700. OAD Administrative Law Judge ("ALJ") Lennox Simon issued the decision and order after an administrative hearing conducted on March 30- April 1, 1998.

Oral argument in this matter was held before a panel of the Board, Antoinette Barksdale and James Thorne, on July 20, 2000. Leslie Jackson, Esq., argued the case for appellant DCHA. Arthur Parker, Esq., of the Office of Corporation Counsel, argued the case for appellee DCRA.

The Board members originally assigned to this case are unavailable to render a decision. In accordance with the Administrative Procedure Act, the panel identified at the end of this Decision and Order has reviewed the record, including notices of infraction issued to DCHA, hearing transcripts and exhibits, briefs of both parties, and the transcript of oral argument. The Board now rules as follows.

I.

Whether the OAD Order must be reversed because the OAD was predisposed to rule against DCHA: DCHA argues that the OAD order should be reversed because ALJ Simon was predisposed to rule against DCHA. DCHA cites a December 29, 1997 letter sent by DCRA Director W. David Watts to the Honorable Judge Stephen Graae of the Superior Court of the District of Columbia, in which Director Watts advised Judge Graae that the D.C. Fire Marshal had issued several NOIs to the receiver of DCHA for failure to maintain fire protection equipment at various public housing locations and that "DCRA believes that no abatement of these violations has occurred and that serious violations of the Fire Prevention Code continue to exist at these various public housing locations."¹ Director Watts stated that DCRA sought Judge Graae's guidance in "resolving these and any future violations of the Fire Prevention Code by DCHA" and advised Judge Graae that if he had any questions, he could contact Director Watts or OAD Chief ALJ Belva Newsome.

In a written motion submitted to the OAD prior to the administrative hearing, DCHA argued that Director Watts' letter showed that the OAD was biased against and would be predisposed to rule against DCHA and should therefore recuse itself from hearing the case. Chief ALJ Newsome denied DCHA's written motion, and ALJ Simon subsequently denied DCHA's oral motion for reconsideration. DCHA now renews its argument and further contends that ALJ Simon's conduct of the administrative hearing demonstrated his personal bias against DCHA.

The Board finds no basis to conclude that the OAD or ALJ Simon was biased against DCHA. As to DCHA's complaint about DCRA performing both enforcement and adjudicatory functions, the Board notes that the U.S. Supreme Court has repeatedly rejected claims that the combination of enforcement and adjudicative functions in the same agency creates a risk of bias or prejudgment that violates the guarantee of due process. See *Withrow v. Larkin*, 421 U.S. 35, 47-49 (1975), and cases cited therein. The Supreme Court has so ruled even in cases where the same individuals within an agency were involved in investigating and reporting allegedly illegal conduct and in adjudicating the legality of the conduct. See *FTC v. Cement Institute*, 333 U.S. 683 (1948) (noting that the respondents in an FTC hearing were free to point out by testimony, cross-examination and arguments why their business activities were legal). The Supreme Court recognized that invalidating the combination of enforcement and adjudicatory functions, which is found in many government agencies, "would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity." *Richardson v. Perales*, 402 U.S. 389, 410 (1971). Like the Supreme Court, this Board cannot conclude "that the mere fact that a tribunal has had contact with a particular factual complex in a prior hearing, or indeed has taken a public position on the facts, is enough to place that tribunal under a constitutional inhibition to

¹ Judge Graae oversaw the receivership for DCHA as a result of his judgment in *Pearson v. Kelly*, 92-CA-14030 (Sup. Ct. D.C., May 19, 1995), which charged the receiver with administering the District's public housing authority so as to provide housing in compliance with applicable housing codes and laws.

pass upon the facts in a subsequent hearing.” *Withrow*, 421 U.S. at 50, quoting *Pangburn v. CAB*, 311 F.2d 349, 358 (1st Cir. 1962).

The Supreme Court’s reasoning applies with particular force in this case, because ALJ Simon stated on the record that, prior to the hearing, he had not seen Director Watts’ letter to Judge Graae. (OAD Hearing Transcript (“Tr.”) at 10, 167-68). In addition, the Board sees nothing in the record of the hearing before ALJ Simon that discloses “an appearance of bias or prejudice sufficient to permit the average citizen reasonably to question the judge’s impartiality.” *Anderson v. United States*, 754 A.2d 920, 923 (D.C. 2000).

As DCHA complains, ALJ Simon did question DCHA counsel about the testimony she sought to elicit, but we do not perceive this as evidence of bias. DCHA had denied the existence of violations cited in the NOIs and ALJ Simon -- reasonably, in our view -- sought to clarify how testimony by DCHA witnesses would address the issue of whether violations existed, to narrow the testimony so that it addressed that issue, and to avoid duplicative testimony. (Tr. 15, 97, 186). Notwithstanding, ALJ Simon allowed DCHA counsel to proceed with her questioning in each instance, and gave her an opportunity to present her case over three days (during which she elicited testimony about the problems of recurrent vandalism that DCHA faced; DCHA’s repeated repairs and substantial repair expenditures; DCHA’s efforts to install and to obtain Fire Department approval for new, state-of-the-art fire alarm systems; and the Fire Department’s general policy of issuing warnings before fines and its practices in dealing with private businesses).

The record shows that, as DCHA complains, ALJ Simon sometimes interrupted DCHA counsel. But he likewise sometimes interrupted Fire Department witnesses. The record further shows that ALJ Simon sometimes allowed Fire Department witnesses to interrupt testimony, and that he asked questions about the foundation for testimony by DCHA witnesses. These examples appear to us to reflect nothing more than reasonable accommodations to the situation of representatives of the Fire Department, who were appearing without counsel. During the hearing, ALJ Simon issued a number of rulings adverse to DCHA, but, as our Court of Appeals has recognized, “[a]dverse rulings, without more, certainly do not establish that a judge lacked the impartiality necessary to give the accused a fair trial.” *Gregory v. United States*, 393 A.2d 132, 143 (D.C. 1978).

ALJ Simon did not rely on the statement by Director Watts that no abatement of fire safety violations had occurred, but specifically asked DCHA witnesses whether fire protection systems were operative on the dates in question (Tr. 285, 288,328) and questioned Fire Department witnesses about the then-current status of fire safety systems at DCHA public housing sites. (Tr. 50-51). In his order, ALJ Simon reduced the assessed fines, on the basis of evidence that DCHA had attempted to abate the violations cited in the Fire Department NOIs.

In sum, upon a careful review of the record, the Board finds no appearance of bias and no basis for questioning ALJ Simon's impartiality.

II.

Was the OAD Decision and Order arbitrary and capricious, unsupported by a preponderance of substantial evidence in the record, or contrary to law? As the factual basis for sustaining fines in the amount of \$11,700 (\$1,000 per violation for each of 13 violations, less \$100 per violation, on the basis of DCHA's attempts to abate the violations after being cited), ALJ Simon cited the following: Fire Inspector Duane Parker's testimony that he observed that there was no operating fire protection system at ten buildings at the East Capitol public housing complex on March 26, 1997, and that upon reinspection on March 27, 1997, there had been no abatement of the violations; Fire Inspector Parker's testimony that he observed that there was no operating fire protection system at the Benning Heights public housing complex on May 6, 1997; Fire Inspector Parker's testimony that he observed that there was no operating fire protection system at the Arthur Capper public housing complex on April 4, 1997; Fire Inspector Parker's testimony that he observed that there was no operating fire protection system at the Hopkins public housing complex on April 4, 1997;² and issuance of NOIs with respect to each of the thirteen violations that Fire Inspector Parker described.

DCHA argues that the ALJ Simon's Decision and Order was arbitrary and capricious, unsupported by substantial evidence in the record, and contrary to applicable law. Specifically, DCHA contends that the Fire Department was required under applicable regulations and by its established policy to issue violation notices or notices-to-abate before issuing NOIs (and thereby imposing fines), but failed to do so for two of the properties in question; that the Fire Department did not afford DCHA a reasonable time within which to abate violations before issuing NOIs; that the Fire Department unreasonably assessed fines even though it was aware that DCHA was in the process of installing new fire alarm systems; that the Fire Department unreasonably withheld approval of fire watches as adequate fire protection alternatives while the new systems were being installed; and that DCHA was the target of disparate treatment by the Fire Department, which worked with private businesses to help them avoid fines for fire prevention code violations.

As to 12 of the 13 NOIs, the Board finds it unnecessary to address the issues DCHA raises. We explain our ruling as to these 12 NOIs in section II.A below. As to NOI 036051 (Hopkins), DCHA's arguments raise difficult issues of regulatory construction, which we address in Section II.B below.

² ALJ Simon's decision erroneously refers to April 4, 1998.

A.

The Fire Department issued the NOIs in question pursuant to Title 16 of the District of Columbia Municipal Regulations, which implements D.C. Law 6-42, the Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985, D.C. Code Ann. § 6-2701 *et seq.* See 16 DCMR § 3100.1 (note). Section 6-2711 establishes specific requirements for NOIs. Each NOI must contain, *inter alia*, the name and address of the respondent; a citation of the law or regulations alleged to have been violated; the nature, time and place of the infraction, and the amount of the fine applicable to the infraction. D.C. Code Ann. § 6-2711(b)(1), (2), (3), and (5).

Section 6-2711(c) states:

If an administrative law judge or attorney examiner determines that a notice of infraction is defective on its face, the administrative law judge or attorney examiner shall enter an order dismissing the notice of infraction and shall promptly notify the respondent.

The Board has reviewed the record copies of the NOIs at issue in this matter and finds that seven of the NOIs are defective on their faces and should have been dismissed. NOIs 036031, 036020, 036028, 036033, 036034, 036035 (all relating to the East Capitol complex) all contain no description of the nature of the infraction. The Fire Department did not fill in the line labeled "Nature of Infraction." NOI 036036 (relating to the Benning Heights complex) contains no indication of the time of the infraction. The Board holds that, under D.C. Code Ann. § 6-2711(c), these seven NOIs must be dismissed as defective on their faces. We therefore reverse that portion of the OAD Order relating to the fines and costs (totaling \$6,580) based on these NOIs.³

The Board upholds the OAD Order as to NOIs 036026, 036027, 036030, and 036032 (relating to the East Capitol complex) and NOI 036052 (relating to the

³ The Board notes that all 13 of the NOIs cite 16 DCMR § 3235.1(c) as the "law or regulation alleged to have been violated." This is an erroneous citation. Section 3235.1(c) states that a violation of 12 DCMR § F-501.1 (requiring that fire protection systems be maintained in operative condition at all times) is a Class I violation (for which a fine of \$1,000 may be imposed). The violations that Fire Inspector Parker observed were violations of 12 DCMR § F-501.1, *not* violations of 16 DCMR § 3235.1(c). Because of these erroneous citations to section 3235.1(c), all 13 NOIs have a defect on their faces. Nonetheless, the Board is constrained to conclude that dismissal is not warranted on this basis. Although 16 DCMR § 3235.1(c) is an erroneous citation, its title ("BOCA National Fire Prevention Code § F-501.1") does refer to section F-501.1. We therefore deem the erroneous citation to be a harmless error. See *F. W. Woolworth Co. v. Board of Appeals and Review*, 579 A.2d 713, 716 (D.C. 1990) (incorrect citation not cause for dismissal where it did not deprive respondent of notice of the charge); 1 DCMR § 511.1 (Board shall apply the rule of harmless error).

Arthur Capper complex). Testimony at the OAD hearing established that each of these five NOIs was preceded by the notice of violation or notice of abatement that DCHA alleges was required. Further, under 16 DCMR § 3101.2, each NOI is "prima facie evidence of the validity of the issuance and the truth of the facts alleged in the NOI," and DCHA witnesses did not deny that the fire protection systems at these properties were inoperable on the dates in question.

The Board sees merit in DCHA's argument that the Fire Department allowed inadequate time for abatement of the violations (24 hours at East Capitol and only a few hours at Arthur Capper), and that it was unreasonable for the Fire Department to issue NOIs when it knew of (and had Fire Department representatives had several times met with DCHA representatives to discuss) DCHA's work toward installation of new fire safety systems. However, we will not substitute our judgment for that of Fire Department personnel, who testified that the absence of operable fire alarm systems and of an approvable fire watch created life-threatening conditions and imminent danger; that DCHA had progressed too slowly in putting the necessary protections in place; and that fines were necessary to achieve the remedial purposes of the fire prevention code.

As to DCHA's claim of disparate treatment, the Board finds that the record falls short of the showing that is necessary to sustain such a claim. A claim of disparate treatment requires a showing that those whose treatment is being compared are similarly situated. *See Metropolitan Washington Board of Trade v. PSC of the District of Columbia*, 432 A.2d 343, 361 (D.C. 1981). DCHA presented testimony that the Fire Department was more lenient and "business friendly" with and "worked with" private entities such as the MCI Center, Safeway and Hechinger's. However, DCHA did not show that its public housing complexes were similarly situated to these entities. To the contrary, there was testimony that fire prevention code violations at public housing developments had been a problem prior to the receivership and had continued to be a problem since the receiver was appointed in 1995; there was no comparable testimony about continuous or repeated violations by private entities. Furthermore, Fire Department witnesses testified that inoperable fire protection systems pose an imminent danger in residential buildings and building where there are many elderly or non-ambulatory individuals. There also was testimony that the D.C. Public Schools, where large numbers of children may be present, were fined on many occasions for fire code violations. All these factors weigh in favor of a conclusion that DCHA public housing complexes and the private entities about which DCHA witnesses testified were not similarly situated. Thus, the Board concludes that even if DCHA was fined while private businesses were not, the record provides no basis for disturbing NOIs 036026, 036027, 036030, 036032 and 036052.

The Board may not substitute its judgment for that of the ALJ as to the amount of the fines if they are within the range permitted by law. *See D.C. Code Ann. § 6-2723; 1 DCMR § 512.4.* Under DCMR § 3235.1(c), it is a Class 1 infraction to have an inoperable fire safety system in violation of section F-501.1. The fine for a Class 1 infraction is \$1,000 per day, the amount imposed by the Fire Department and reduced by

ALJ Simon.. DCMR 3201.1(a). The Board therefore sustains fines and costs totaling \$4,700.

B.

NOI 036051 (relating to the Hopkins complex) raises more difficult questions. DCHA witnesses did not deny that the fire protection system was inoperative on the date in question, and DCHA elicited testimony that the Fire Department did not follow its practice of issuing a notice of violation or notice to abate before issuing the NOI. NOI 036051 thus raises the issue of whether the Fire Department may issue a fine for a violation of the fire prevention code without first issuing a warning or notice of violation and, where appropriate, affording the respondent an opportunity to abate the fire code violation before a fine is imposed.

To resolve this issue, we must resolve the apparent conflict between several provisions of law. The relevant provisions are found in 16 DCMR and in 12 DCMR § 3100 *et seq.*, the D.C. Fire Prevention Code Supplement of 1992, which expressly incorporates the Building Officials & Code Administrators International, Inc. ("BOCA") Fire Prevention Code except where amended by the Code Supplement. See 12 DCMR §§ F-100.3 and F-100.3.1.

16 DCMR § 3101.6 states:

Unless otherwise prescribed by law, an NOI shall be issued by the Director *upon observance of an infraction*. When applicable provisions of law require that a respondent be given a certain period of time to abate a violation, an NOI shall not be issued until that period of time has elapsed.
[Emphasis added.]

DCRA contends that this provision governs, and that it was appropriate for the Fire Department to issue NOIs without prior warning notices because no law requires that owners be given any "certain period of time" to abate fire code violations.

12 DCMR § F-111.1, entitled "Notice of violation," states in relevant part that:

Whenever the code official observes an apparent or actual violation of a provision of this code . . . the code official shall prepare a written notice of violation citing the relevant code section, describing the conditions deemed unsafe and specifying time limits for the reinspection of same to insure that the required repairs or improvements have been made

to render the buildings, structures, or premises safe and secure.

Section F-111.2, entitled "Failure to correct violations," states in relevant part that:

If the notice of violation is not complied with as specified by the code official, the code official shall, first, issue a collateral citation; then if violations are not corrected as specified, request the Corporation Counsel to institute the appropriate legal proceedings to restrain, correct or abate such violation . . .

Section F-111.3, entitled "Penalty for violations," states that:

Any person, firm or corporation violating any of the provisions of this code or failing to comply with any order issued pursuant to any section thereof, upon conviction shall be punished by a fine of not more than \$1,000 or imprisonment for not more than 90 days, or both. Each day that a violation continues, after service of a notice as provided in this code, shall be deemed a separate offense.

DCHA argues that section F-111.1 of the Fire Prevention Code Supplement required the Fire Department to issue a notice of violation or notice to abate before issuing an NOI. DCRA contends, however, that section 3101.6 is a part of a "concurrent" remedial scheme that authorizes enforcement action without the procedures specified in the Fire Prevention Code Supplement, and that trumps any fire code provision that can be read to require issuance of a notice of violation before an NOI. DCRA relies on 12 DCMR F-101.4 (the current citation is F-101.5.1), which states that "[w]hen any provision of this code is found to be in conflict with any other provision of this code, the provision which established the higher standard for the promotion and protection of the safety and welfare of the public shall prevail."

The Board rejects DCRA's approach toward resolving conflicts between the relevant provisions of 12 DCMR and 16 DCMR. Section F-101-4 establishes a rule for resolving conflicts between conflicting Fire Prevention Code provisions, not a rule for resolving conflicts between provisions of different Titles of the DCMR. *See* 12 DCMR § F-101.1 (use of term "this code"). We believe that any conflicts between 12 DCMR and 16 DCMR must instead be resolved by attempting to harmonize the provisions to the extent possible. *See School Street Associates Limited Partnership v. District of Columbia*, 764 A.2d 798, 806 (D.C. 2001).

We believe that 16 DCMR § 3101.6 and the Fire Prevention Code provisions of 12 DCMR can best be harmonized by regarding the NOI described in

section 3101.6 as imposing the penalty described in section F-111.3. We read section F-111.3 to authorize the imposition of fines beginning with the first day of a violation, *i.e.*, immediately after the fire inspector's observation of an infraction. Thus we do not agree with DCHA that it was contrary to law for DCRA to issue NOIs immediately or without affording DCHA a reasonable time within which to abate violations. We do agree with DCHA, however, that section F-111.3 requires a two-step process, since it authorizes penalties for any violation that continues "after a service of notice as provided in this code" -- which we read to mean the notice of violation referred to in section F-111.1. We think that the Fire Department is required to issue a notice of violation before imposing a penalty through issuance of an NOI (although we see nothing in the Fire Prevention Code that would bar the Fire Department from issuing both on the same day where, in its judgment, immediate abatement of a violation is required. Any other reading would be inconsistent with the remedial objectives of the Fire Prevention Code Supplement. The code "shall be construed to secure its expressed intent, which is to insure public safety . . . and to secure safety to life and property . . ." D.C. Fire Prevention Code Supplement § F-100.6).

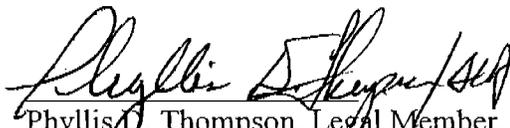
We note that our reading appears to be consistent with the Fire Department's general policy, although the terminology that the Fire Department uses suggest that it derives its policy from section F-111.2.⁴ Section F-11.2 refers to issuance of a "collateral citation." Fire Department representatives testified at the administrative hearing that Fire Department procedure is to issue first a warning or a notice of violation (sometimes referred to in the testimony as a "notice of abatement"), and then to issue a "collateral," which is the same as a fine, if a violation is not abated. (It is not clear to the Board that the "collateral citation" to which section F-11.2 refers is to be issued to impose the penalty referred to in section F-111.3, but it is not necessary for us to resolve that issue here.) Even if our attempt to harmonize the regulatory language misses the mark, we think the Fire Department might well be estopped from insisting on any other reading to the detriment of DCHA in this case.

Accordingly, because the Fire Department did not issue a notice of violation or notice to abate in conjunction with issuing NOI 036051, we rule that this NOI must be dismissed.

⁴ The Board notes with some frustration, however, that during the administrative hearing, counsel and witnesses used various terms interchangeably, making it difficult to determine precisely what Fire Department procedure is. See Tr. 64, 106, 116, 130.

ORDER

Now therefore, it is **ORDERED** this 7th day of November, 2001, that the decision of the OAD with respect to NOIs 036031, 036020, 036028, 036033, 036034, 036035, 036036, and 036051 is hereby **REVERSED** and the NOIs are hereby dismissed; the decision of the OAD with respect to NOIs 036026, 036027, 036030, 036032 and 036052 is **AFFIRMED**; and DCHA is ordered to pay fines and costs in the amount of \$4,700.



Phyllis D. Thompson, Legal Member, Presiding
David Marlin, Legal Member
Gary Ivens, Legal Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA

BOARD OF APPEALS AND REVIEW

Thornell K. Page II	)	BAR Docket NO:	00-5591-CI
Appellant)		
)		
v.	)	Violation No. A208753	
)		
D.C. Department of Consumer and)		
Regulatory Affairs)		
Appellee)		

OPINION AND ORDER

This case came before a single legal member of the Board, David H. Marlin, at a duly scheduled hearing on Wednesday, January 24, 2001. The Appellant Thornell K. Page II appeared *pro se*. Matthew J. Green, Jr., Esq., Attorney, Enforcement Division, Department of Consumer and Regulatory Affairs (DCRA) represented the District of Columbia government as Appellee.

The appeal was from a decision by DCRA Attorney Examiner Henry W. McCoy issued on June 7, 2000 where Mr. Page was fined \$1,050.00 and \$40 costs for operating an unlicensed housing business at 165-35th Street, NE for the years 1994, 1995 and 1996. Housing business licenses are mandated by D.C. Code 47-2828 and regulated under 14 DCMR 200.1 *et seq.*

According to Examiner McCoy's decision, this matter began on June 15, 1999 when housing inspector Debra Ryan visited the property. When she could not find a posted housing business license, Inspector Ryan returned to her office, searched official records but found nothing to establish that housing business licenses for the years 1994 through 1999 ever had been issued for this address. The violation notice referenced above, therefore, was served on the Appellant.

At the DCRA hearing in this case conducted on April 27, 2000, according to Examiner McCoy's decision (the Board's review of the record is handicapped because neither party produced a transcript of the DCRA hearing), Appellant testified that he purchased the property in 1994 and had paid the licensing fee and obtained a license for all the years in question. He did, in fact, produce copies of official licenses covering the period from November 1, 1997 through October 31, 1998 and from May 24, 1999 through October 31, 1999. Additionally, Appellant produced a cancelled check accepted by Examiner McCoy as proof of payment for fiscal year 1997. The record was kept open until May 5, about a week, to permit Appellant to provide proof that he had obtained licenses for fiscal years 1994, 1995 and 1996.

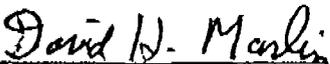
The first issue before the Board is whether DCRA met its burden of proving by a preponderance of the evidence that appellant had not obtained the necessary licenses for the years in question. If it did not, its decision may be considered arbitrary and not supported by substantial evidence.

At the pre-hearing telephone conference call conducted in this case on January 17, the Board instructed the parties to present oral arguments relating to "(1) the accuracy of DCRA housing business license records and (2) whether financial and other business records may properly document and establish that licenses were issued." Neither party responded to our order at our hearing. The Board's request for enlightenment resulted from the obvious inaccuracy, or perhaps non-existence, of licensing records maintained by DCRA. If a housing inspector consults official department records concerning a specific building and comes up with a blank, and the owner then produces copies of licenses issued by the department, the owner has demonstrated that the department's records are erroneous. Any presumption of regularity attaining to government record keeping has been rebutted. Under these circumstances, is it proper to shift the burden of demonstrating compliance over a multi-year period to the license holder, and then to penalize the licensee if his records are no better? We think not.

At our January 24 hearing, Appellant represented that he provided evidence to Examiner McCoy before the May 5 deadline in the form of bank statements which documented that he provided the proper license fees for 1996 and 1995. He proffered this documentation to the Board and also argued that proof for 1994 should be waived on the grounds that evidence of compliance for five of six years demonstrates a pattern of compliance. DCRA attorney Green argued that bank statements are unacceptable, stating that only cancelled checks or DCRA receipts could be considered as proof of payment. DCRA's policy of proof may be too limited. In any event, the Board does not find facts when a contested case is heard on the record.

DCRA did not disclose to the Board, or previously to this Appellant, its record keeping system, e.g., whether duplicate copies of license fee receipts, or carbon copies of licenses, or ledgers of fee payments are maintained either by paper documentation or electronically. Evidence of this nature may be essential for the government to establish at a contested hearing, where cross-examination is permitted, that there has been neither an applications for or the issuance of a housing business license in a situation where DCRA's records do not corroborate its position.

THEREFORE, it is ORDERED this 30th day of January 2001 that the decision of Examiner Henry W. McCoy dated June 7, 2000 is REVERSED and the case is REMANDED to the Appellee for action not inconsistent with this Order.


David H. Marlin
Legal Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW

PROVIDENCE HOSPITAL,)	
)	
<u>Appellant,</u>)	
)	
v.	)	BAR Docket No. 00-5613--CI
)	
DEPARTMENT OF CONSUMER AND)	
REGULATORY AFFAIRS,)	
)	
<u>Appellee.</u>)	

ORDER

This matter came up before a panel of the Board, at a duly scheduled hearing set for 10:00 a.m., Monday, June 25, 2001.

Appellant was represented by Thomas E. Neary, Esq. Appellee was represented by Brenda Walls, Esq., Assistant Corporation Counsel.

Pre-hearing briefs were filed by the parties.

Prior proceedings

Appellant appealed from the Decision and Order of Attorney Examiner Henry W. McCoy, dated August 18, 2000, in which he found the Appellant operated a restaurant without having a license and imposed a fine of \$500.

The Notice of Infraction was issued on January 13, 2000, by Inspector William Moseby of the Department of Consumer and Regulatory Affairs ("DCRA"), who appeared at the hearing before Attorney Examiner McCoy on May 9, 2000. Among other things, Inspector Moseby testified that the cafeteria operated by Appellant was open to the public in that no signage limited access to the cafeteria to the Hospital's employees or to visitors to the Hospital's patients. Evidence adduced at the May 9 hearing also showed that the cafeteria prepared food for consumption on the premises and that the dining area in the cafeteria could accommodate approximately 50 patrons.

Deborah M. Gayle, Assistant Vice President for Quality Management, Medical Affairs, who testified on behalf of Appellant, did not dispute Inspector Moseby's testimony. While Ms. Gayle testified that the primary purpose of the cafeteria was

to feed Appellant's employees, Ms. Gayle acknowledged that she would not be amazed if she were told that "members of the community eat there for lunch."

Appellant contended that Inspector Robin Marlin of the Department of Health, the agency responsible for inspecting the Appellant's cafeteria for compliance with the food handling services regulations, advised the Appellant that no license was required.

Applicable law

Pursuant to D.C. Code §1-1509, Appellant bears the burden to prove that the findings of the Attorney Examiner were unsupported by substantial evidence and that his conclusions were arbitrary and capricious and not in accordance with the law. See King v. Department of Employment Services, 560 A.2d 1067, 1072 (D.C. 1989). In determining whether Appellant has met its burden, the panel is guided by two well established principles. First, the findings of fact of the hearing officer are entitled to great weight. See In re Dwyer, 399 A.2d 1, 12 (D.C. 1979). Viewed in isolation, the evidence introduced on behalf of the Appellee on the accessibility of Appellant's cafeteria to the public may not be weighty; however, the evidence offered by Appellant in refutation was of no greater substance. Accordingly, the panel concludes that the Appellant has failed to establish that the findings of the Attorney Examiner were unsupported by substantial evidence.

The second principle that guides the panel is that, when an agency's decision is based on an interpretation of the statute it administers, that interpretation will be sustained unless shown to be unreasonable or in contravention of the language or the legislative history of the statute. See, Reneau v. District of Columbia, 676 A2d 913, 917 (D.C. 1996); Kalorama Heights Limited Partnership v. Department of Consumer and Regulatory Affairs, 655 A.2d 865, 868 (D.C. 1995). The relevant statutory provision in this matter is D.C. Code §47-2827, which declares a license to be required of any private club or restaurant and defines "restaurant" as "any place where food or refreshments are served to transient customers to be eaten on the premises were sold." Appellant posits that the term "transient customers" is ambiguous and contends for a narrow reading. Appellee, however, has construed the term "transient customers" as including visitors to hospitalized patients, contractors working in the building and such persons as may come in off the street to eat in Appellant's cafeteria.

Finally, contrary to Appellant's estoppel assertion, an inspector of the Department of Health cannot commit the Appellee

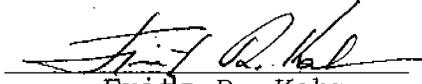
as to whether a license was required for the operation of Appellant's cafeteria, and Appellant could not reasonably rely on the health inspector's suggestion that one might not be required. See, e.g., Office of Personnel Management v. Richmond, 496 U.S. 414 (1990).

Conclusion

The panel deems the Appellee's interpretation of the statute not to be erroneous or inconsistent with its wording. We further find that the Appellant has failed to establish that the Attorney Examiner's conclusion that Appellant was operating a restaurant without a license was arbitrary and capricious or contrary to the law.

Wherefore it is

ORDERED that the appeal be, and hereby is, denied.


Fritz R. Kahn
Gary L. Ivens

Dated: June 25, 2001

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW**

1336 14th Street, NW LLC	)	BAR Docket No: 01-5711-CI
Appellant)	
	)	Notice of Infraction No. 043883
vs.)	
	)	01-OAD-1462E
Department of Consumer and Regulatory Affairs)	
Appellee)	

DECISION AND ORDER

This appeal presents the issue of whether the owner of a commercial building in the District is liable for not obtaining a construction permit prior to the commencement of a construction project even if renovations have been initiated, supervised and paid for by a tenant, all without the owner's knowledge. We believe the District may hold the owner legally responsible and deny the appeal.

We held oral argument on April 5, 2002. Appellant, 1336 14th Street, NW LLC, was represented by Management Member Charles V. Morra; Assistant Corporation Counsel Doris A. Parker-Woolridge represented appellee. The facts are not in dispute. Appellant has owned since 1998 a building at that address rented for business purposes. Renovation of the building was observed in April 2000 by Toni Cherry, a District housing inspector, who investigated, discovered the lack of a building permit and issued a stop work order to someone working at the site who identified himself as an owner and a contractor. Although the tenants eventually obtained a building permit, that permit did not authorize the replacement of windows at the rear of the property. After re-inspections confirmed the lack of a permit to replace the windows, Inspector Cherry issued the above-referenced violation notice on May 25, 2000. The owner was charged with violating D.C. Code § 6-641.09 (2001), which states, in pertinent part:

It shall be unlawful to erect, construct, reconstruct, convert, or alter any Building or structure or part thereof with the District of Columbia without obtaining a building permit from the Inspector of Buildings...

The District first served the infraction notice on the previous owner of the 14th Street property. When the error was discovered, the infraction was served on January 31, 2001 upon appellant, the correct owner, at its registered address. A contested hearing was conducted on April 4, 2001. On April 23, 2001, Administrative Law Judge James C. Harmon found that the evidence produced at the hearing established that appellant was the owner of the property at the time of the renovation and that the renovation was conducted without a building permit. He concluded a property owner has a legal duty to ensure compliance with the construction code. He found

appellant in violation and fined it \$500 and costs.

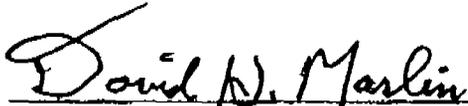
Appellant maintains that the responsibility for obtaining a building permit rested with its commercial tenant who authorized the work, was entitled to possession of the premises and was the beneficiary of the improvements. Citing an owner who may be unaware of renovations, based solely on ownership, misconstrues the District's construction code, appellant argues, since the statute cannot be said to apply only to a property owner. That argument is correct only as far as it goes. One needs to turn to the D.C. MUN. REGS. Tit. 12A, § 107.1 and § 107.1.2 (1999) which places the legal obligation to secure a building permit squarely on the owner, even when that responsibility is not exclusive. Section 107.1, entitled "Owner's Responsibility," states: "The owner, builder, or authorized representative shall be responsible for securing all the required permits... Work started without a permit where a permit is determined to be required shall be a violation of the Construction Codes." Section 107.1.2, entitled "By Whom Application is Made," states: "Application for a permit shall be made by the owner or lessee of the building or structure, or by the agent of either..."

These construction regulations, therefore, permit others to apply for permits, e.g., an authorized representative, lessee, and an agent of the owner or lessee. There is no question, however, that the DCRA is authorized to place liability on an owner if no permit has been issued, even if a tenant, for example, also is vulnerable. There are many justifications for holding the owner of record responsible, e.g., the District government may seek to sanction the one entity exclusively entitled to control the property, that possesses an equity interest and should be motivated to protect the property and ensure compliance with District laws.

Appellant further alleges a due process deprivation because it wasn't served with the notice of violation until seven months after the notice was written. We find this argument invalid. We have already noted that the delay in service was quickly corrected. The D.C. Administrative Procedures Act permits a "reasonable" time for service. See D.C. Code § 2-509(a) (2001). Once the correct owner was determined, service was timely. Secondly, appellant availed itself of the opportunity to present a defense in a contested hearing. Finally, the violation occurred as a matter of law once construction commenced without a permit. We find that appellant was not prejudiced by the delay.

Appellant has not met its burden of establishing that the decision was not supported by substantial evidence; nor is there merit in appellant's contention that this infraction was invalid because a certificate of occupancy was subsequently issued. An occupancy certificate is irrelevant because its issuance cannot *ex post facto* cure a violation of D.C. Code § 6-641.09.

Therefore, it is ORDERED, this 16th day of April 2001 that the appeal is DENIED.



David H. Marlin, Legal Member
Maureen A. Young, Public Member
Joan E. Schaffner, Public Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA

BOARD OF APPEALS AND REVIEW

James G. Davis Construction Corp.)
 Appellant)
 v.)
 Department of Consumer and)
 Regulatory Affairs)
 Appellee)

BAR Docket No: 00-5456-CI
 Violation No. 045555

OPINION AND ORDER

On February 8, 2001, the Board denied appellant's Motion for Summary Reversal based on collateral estoppel and ordered the parties to file briefs examining whether the decision by Hearing Examiner Lennox Simon, issued on January 7, 2000, was supported by substantial evidence. After careful consideration of the briefs and the entire record, we find error in the trial decision. We reverse Examiner Simon's decision and grant the appeal.

We summarized many of the facts of this case in our February 8 Order that need not be repeated. In its appeal, Davis argued that the basement tiles and second floor insulation, that form the basis of the violation notice served on Davis, were not tested to determine whether they contained regulated asbestos. Further, Davis argues there was no evidence offered to prove that Davis mishandled any materials that might have contained regulated asbestos. Overall, Davis contends, DCRA did not meet its burden of proving by substantial evidence in the record that the alleged violations occurred.

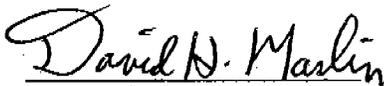
We agree. We note, first, that 20 DCMR 800 incorporates into District law Federal regulations defining and regulating asbestos control, e.g., 40 CFR Sec. 61 *et seq.* The Federal regulations provide a road map for analyzing, for instance, whether certain materials contain asbestos; whether the percentage of asbestos present, or the composition of the asbestos, is sufficient to invoke Federal or local protections; and whether any asbestos fibers were released into the environment. All these considerations, and more, are essential components of proving that a violation of asbestos regulations occurred. Appellant cited Jefferson State Rock Products, Inc. v. Land Regional Air Pollution Authority, 986 P. 2d 1224 (Ct.App.Ore. 1999) and In the Matter of Enviro-Probe, Inc. v. New York City Department of Environmental Protection et al., 635 N.Y.S.2d 635 (1995), as two cases in point that describe the regulatory burdens to be met in establishing asbestos-related violations.

In short, proof of asbestos-related violations requires proper testing and technical findings. The only evidence the government offered in this case was anecdotal. The DCRA inspector acknowledged he never tested the materials found on the second floor to determine whether asbestos was present; nor did he test any floor tiles.

The record, in addition, contains no government exhibits. DCRA seems to rely on a 1998 survey of this building conducted by Applied Environmental Inc. of Reston, Virginia, to establish that the building contained asbestos-regulated materials (Tr. 37-38) that would justify issuing the violation notices but did not introduce it into evidence. The survey, however, was placed into evidence by Davis to disprove the government's case. DCRA certainly failed to establish that the survey contained evidence needed to prove that appellant's job performance violated 20 DCMR Sec. 800.1.

Examiner Simon disregarded basic elements of proof and the decision cannot stand for lack of substantial evidence. Santos v. Department of Employment Services, 536 A2d 1085, 1089 (D.C. 1988). An agency's findings must be supported by reliable, probative and substantial evidence and its conclusions of law must flow rationally from these findings. Eilers v. Bureau of Motor Vehicle Services, 583 A. 2d 677 (D.C. 1990).

THEREFORE, it is ORDERED this 31st day May 2001 that the appeal is GRANTED and the decision appealed from is REVERSED.



David H. Marlin
Legal Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW

VICTOR AND ELEANOR GAETAN,)
)
 Appellants,)
)
)
 v.)
)
 DEPARTMENT OF CONSUMER AND)
 REGULATORY AFFAIRS,)
)
 Appellee)

BAR Docket No. 00-5529-CI

(OAD Case Numbers 1246-E,
1247-E, 1248-E, 2616-E, 2617-E
2618-E) (NOIs # 18990, 18991,
18992, 18993, 18994 and 18995)

DECISION AND ORDER

Appellants Victor and Eleanor Gaetan appeal from decisions of the Department of Consumer and Regulatory Affairs ("DCRA") Office of Adjudication ("OAD"), sustaining a total of \$3,000 in fines imposed for violation of D.C. Code §5-426 in connection with construction at appellants' residence and art gallery. OAD Administrative Law Judge ("ALJ") Lennox Simon held a hearing on March 8, 2000 on Notices of Infraction ("NOIs") #18990 (infraction date 7/16/99), #18991 (infraction date 7/23/99), #18992 (infraction date 7/30/99), #18993 (infraction date 8/6/99), and #18994 (infraction date 8/13/99), each of which cited appellants for constructing without a permit. ALJ Simon found that construction at appellants' site exceeded the scope of their building permit and, in a decision dated April 6, 2000, upheld fines totaling \$2,500 (five fines of \$500 each) and imposed court costs of \$200. OAD Attorney Examiner Henry McCoy held a hearing on April 19, 20 and 26, 2000 on NOI #18995 (infraction date 8/20/99), which cited appellants with constructing without a permit. Attorney Examiner McCoy found that appellants had constructed balconies at their residence in a manner beyond the scope of their building permit and, in a decision dated August 15, 2000, upheld a fine of \$500 and ordered appellants to pay costs of \$40.

Board members Phyllis Thompson, Gary Ivens and Joan Schaffner heard oral argument in this matter on August 17, 2001. Steven Skalet, Esq., argued the case for appellants. William Bennett, Esq., of the Office of Corporation Counsel, argued the case for appellee DCRA.

The Board has reviewed the record, including the transcripts of both hearings, and has considered the arguments presented in the parties' briefs and at oral argument. We now rule as follows on the issues presented.

The evidence and the OAD findings related to the infraction charged on the NOIs, and appellants had adequate notice of the charged infraction. ALJ Simon and Attorney Examiner McCoy upheld the fines in issue on the ground that appellants' construction exceeded the scope of their building permit. Appellants contend that the decisions must be reversed because OAD's findings and DCRA's evidence did not relate to or support the infraction charged on each of the six NOIs, *i.e.*, constructing *without a permit*.

We find appellants' argument unpersuasive. DCRA presented testimony that several elements of the construction at the rear of appellants' property went beyond the elements shown on appellants' approved plans and thus beyond the scope of the building permit issued on the basis of the approved plans. We think that construction of elements not covered by an existing building permit can fairly be described as constructing without a permit applicable to those elements. Thus, we find that the evidence presented and the OAD findings were pertinent to the infraction charged.

Moreover, even if, as appellants contend, the NOI descriptions of the nature of the infraction were "defective," no basis exists for reversing the OAD's decisions. The transcripts of the hearings before ALJ Simon and Attorney Examiner McCoy show that at each hearing, there was a clear articulation that the issue being adjudicated was whether the construction at appellants' site exceeded the scope of the approved plans and permit. (Simon Tr. 28-29, 31, 32; McCoy Tr. 22, 37, 9.) Appellants had ample notice of the charged infraction and an ample opportunity to defend against it. *See F. W. Woolworth Co. v. Board of Appeals and Review*, 579 A.2d 713, 716 (D.C. 1990) (incorrect citation was not cause for dismissal where respondent was not deprived of notice of the charge against it).

There was no error as to assignment of the burden of proof.

Appellants answered the six NOIs by denying the alleged infractions. As appellants note, 16 DCMR § 3109.4 states that if a respondent denies an infraction, "the Director [of DCRA] shall have the burden of proving the infraction by a preponderance of the evidence." *See also* D.C. Code Ann. § 6-2713(a). Appellants contend that ALJ Simon improperly shifted the burden of proof to the them, such that the "whole tenor of the hearing was that the citations were presumptively valid and the Gaetans had to rebut the presumed violation." Appellants' Brief at 5. They likewise contend that Attorney Examiner McCoy erred by imposing on them "the burden of proof of disproving the unsupported allegations in the NOI." Appellants' Brief at 9.

The Board finds no error with respect to assignment of the burden of proof. Under 16 DCMR § 3109.4, DCRA had the initial burden of going forward with evidence of an infraction on the dates in question, and DCRA would not have been entitled to prevail if, by the end of the hearing, it had failed to prove that it was more

likely than not that an infraction existed on the dates in question. But once DCRA presented some competent evidence of an infraction (as it did through the testimony of Chief Building Inspector Vincent Ford), it fell to the respondents to rebut DCRA's evidence with evidence of their own.¹ Such a shifting of the burden is fully consistent with the applicable preponderance-of-the-evidence standard. See *Warner Fruehauf Trailer Co., Inc. v. Boston*, 654 A.2d 1272, 1277 n. 11 (D.C. 1995) (under the preponderance of evidence standard, "[a]fter the plaintiff satisfies the prima facie burden of production, the burden then shifts to the defendant"); *Spencer v. District of Columbia*, 615 A.2d 586, 588 (D.C. 1992) (government's burden of proving its case by a preponderance of the evidence means that once the government has made an initial, prima facie showing, the burden shifts to the opposing party); *Gilles v. Ware*, 615 A.2d 533 (D.C. 1992) (same).

Appellants also appear to argue that, as a matter of law, DCRA could not have met its burden of proof because it did not introduce the approved plans at either hearing. The Board agrees that inclusion of the plans in the record and examination of the plans by the trier-of-fact may be desirable and useful and perhaps are typical in cases such as these. However, we cannot conclude that the absence of such documentary evidence was fatal to DCRA's case. There is no general rule of law requiring documentary evidence. See *Slaughter v. District of Columbia*, 134 A. 2d 338 (D.C. 1957) (no rule of law requires documentary evidence of age). The Board is not aware of, and appellants have not identified, any rule of law that requires the submission of documentary evidence to prove a building permit infraction. A court may uphold a fine for exceeding the scope of a building permit even when the permit has not been introduced into evidence. See *City of Halowell v. Morais*, 629 A.2d 55, 57 (Me. 1993). Where no documentary evidence is presented, resolution of factual issues must turn on the credibility of witnesses. See *Martin v. Brown*, 410 A.2d 205, 209 (D.C. 1979). The fact that no documents are introduced to support testimony does not nullify the testimony's evidentiary worth. See *Mark Keshishian & Sons, Inc. v. Washington Square, Inc.*, 414 A.2d 834, 842 (D.C. 1980).

The OAD Decisions were supported by a preponderance of evidence in the record. Appellants argue that DCRA failed to prove its case by a preponderance of the evidence and that the decisions by ALJ Simon and Attorney Examiner McCoy therefore cannot be sustained. The Board disagrees.

The preponderance-of-the-evidence standard "requires the court to merely determine who has the most competent evidence." *In re E.D.R.*, 772 A.2d 1156, 1160 (D.C. 2001), quoting *In re J.S.R.*, 374 A.2d 860, 864 (D.C. 1977). A preponderance of the evidence is "evidence which is of greater weight or more convincing than the evidence presented in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *In re E.D.R.*, 772 A.2d at 1160,

¹ DCRA did not introduce the actual NOIs into evidence at either hearing. Had DCRA done so, the NOIs themselves would have been *prima facie* evidence of the alleged infraction. See 16 DCMR § 3101.2.

quoting BLACK'S LAW DICTIONARY. Thus, the preponderance of evidence standard does not demand "absolute certainty as a standard of proof." *In re E.D.R.*, 72 A.2d at 1159.

Although neither party introduced appellants' approved building plans into evidence, DCRA presented at both hearings the testimony of Chief Building Inspector Ford, who explained that he was familiar with the approved plans, had observed the work on site on the dates in question, and had found that the construction deviated from the approved plans (Simon Tr. 29, 30; McCoy Tr. 36.) Inspector Ford also testified that respondents had promised to submit new plans and to obtain proper permits for the work done. (Simon Tr. 5, 19; McCoy Tr. 35.) Both ALJ Simon and Attorney Examiner McCoy found Inspector Ford's testimony to be "very credible." The Board finds no basis to disturb their findings that the construction at appellants' site deviated from their approved plans. *See City of Halowell*, 629 A.2d at 56 ("what a permit holder applied for and what was approved is a factual determination to be upheld on appeal unless clearly erroneous").

Appellants deride Inspector Ford's testimony as mere hearsay that did not suffice to enable DCRA to meet its burden of proof. Without determining whether all or any portion of Inspector Ford's testimony was hearsay, we reject this argument. In administrative hearings such as the hearings before the OAD, hearsay testimony is admissible and, when other factors suggest its reliability, it need not be supported by corroborating non-hearsay evidence. *See Martin v. District of Columbia Firefighters Retirement and Relief Board*, 532 A.2d 102 (D.C. 1987).

The record supports Attorney Examiner McCoy's finding that appellants "offered no evidence to rebut the testimony of Mr. Ford." Appellants not only failed in both hearings to rebut DCRA's evidence as to the charged infractions, but, through the testimony of Mr. Gaetan, undermined their own defense. Attorney Examiner McCoy observed that Mr. Gaetan's answers to questions about what the approved architectural plans called for (McCoy Tr. 97-98) were evasive and not credible. Moreover, although photographs of the non-compliant construction proffered by DCRA were not admitted into evidence because of appellants' foundational objections, Mr. Gaetan testified that the photographs accurately depicted the nature of the construction at the rear of his property. (McCoy Tr. 99-100.) That testimony, alongside the testimony of Mr. Ford that the construction shown in the photographs was not consistent with the approved plans, was sufficient for DCRA to meet the preponderance of evidence burden as to the infraction charged in NOI #18995. There is no basis to disturb the Attorney Examiner's fully supported findings.

In the hearing before Judge Simon on the other five NOIs, Mr. Gaetan and his counsel stressed that what appellants "denied" in their answer was that construction was ongoing at the time District inspectors issued a Stop Work order. (Simon Tr. 9, 46.) Appellants did *not* deny that the construction already completed on the infraction dates deviated from the approved plans and permit.

We hold that the decisions of ALJ Simon and Attorney Examiner McCoy, that the construction at appellants' site exceeded the scope of their building permit, are supported by a preponderance of evidence in the record.

Appellants were not deprived of due process. Appellants complain that they received multiple NOIs for the same conduct and that successive NOIs were written before they had been served with the notice(s) relating to the infraction charged on prior dates. They note, for example, that the first service date of any of the NOIs in issue was August 3, 1999, but that NOIs #18990, #18991, and #18992 were all written before that date. They argue that "numerous Notices of Infraction were written without Respondents being notified of any infraction, much less, being given an opportunity to respond," Appellants Brief at 6, and that "assessing repetitive fines for the same conduct while, simultaneously, failing to hold a hearing is erroneous and violates fundamental due process rights." *Id.* at 7.

The Board agrees with appellants that it is desirable that NOIs be timely served. If a different type of infraction were in issue,² or upon a different factual record, dismissal of one or more successive NOIs might be warranted. For the reasons discussed below, however, the Board finds no violation of due process and no basis for dismissal of the NOIs in this case.

16 DCMR § 3101.6 states:

Unless otherwise prescribed by law, an NOI shall be issued by the Director *upon observance of an infraction*. When applicable provisions of law require that a respondent be given a certain period of time to abate a violation, an NOI shall not be issued until that period of time has elapsed.
[Emphasis added.]

Appellants have not cited any law and the Board has not identified any law that required the District's building inspector to afford a building permit holder an opportunity to abate before issuing an NOI upon observation of construction performed without a permit.

Further, 12A DCMR § 116.4 states in pertinent part:

Any person who shall . . . alter . . . a building or structure in violation of an approved plan . . . shall be . . . punishable by

² For example, under fire safety code rules, a respondent must be given a notice of violation specifying the time allowed for abatement before an NOI may be issued. See 12 DCMR § F-111.3.

a fine Each day a violation continues shall be deemed a separate offense.³

Since the law did not entitle appellants to a notice to abate their building permit infraction before an NOI could be issued, and because an NOI could lawfully be issued for each day the violation continued, we cannot conclude that the issuance of successive NOIs, before appellants had actual notice of the first, was unlawful. Further, because the record discloses that appellants knew, from an earlier experience of receiving an NOI for construction beyond the scope of a permit at their property, that non-conforming construction presents the risk of a substantial fine (Simon Tr. 14; McCoy Tr. 64); because everyone is presumed to know that the law authorizes a fine for each day that a building permit violation continues;⁴ and because appellants knew of the building inspector's issuance of a Stop Work order at their property that preceded the issuance of the six NOIs in question, we perceive no unfair surprise.

Nor were appellants prejudiced by the delay in service of the NOIs, because the time for answering each of the NOIs did not begin to run until the NOI was served. *See* D.C. Code Ann. 6-2712(e). The delay in service did not deprive appellants of their opportunity to deny each NOI and to request a hearing as to each.

As to appellants' contention that no additional NOI should have been issued before a hearing was held on the first of the six NOIs, we think it was enough that appellants had an opportunity to challenge each of the NOIs before being required to pay any fine. As one court noted in rejecting a similar argument, it is not unfair to accumulate civil fines during the time awaiting trial, because the presumption of innocence (as to the first cited infraction) does not apply in civil matters. *See Village of Sister Bay v. Hockers*, 317 N.W. 2d 505, 508 (Wis. Ct. App. 1982). Courts have upheld fines imposed daily for a period of years. *See id.*, 317 N.W. 2d at 507 (upholding fines for each day from the date of the infraction notice until the time of trial, a period of 778 days); *see also People v. Djekich*, 280 Cal. Rptr. 824, 829 (Ct. App. Cal. 1991) ("courts have long sustained a pyramiding of penalties as a valid means of control"). More pertinent to this appeal, District regulations specifically contemplate that multiple fines for a civil infractions may be imposed before a hearing is completed on the first fine. *See* 16 DCMR 3101.5 ("[t]he Director may issue and serve an amended NOI for a repeat infraction at any time prior to the decision of the administrative law judge (ALJ) on the infraction").

We find that appellants were not deprived of procedural due process. What due process required was that they have an opportunity to be heard before being required to pay any fine. *See In re Balsamo*, 2001 D.C. App. LEXIS 190 (D.C. 2001)

³ 12A DCMR 116.3 provides that, in the discretion of the Director, the criminal violations and penalties described in section 116 may be adjudicated under the Civil Infractions Act of 1985 rather than under criminal provisions.

⁴ *See Dodson v. Scheve*, 339 A. 2d 39, 42 (D.C. 1975), *cert. denied*, 424 U.S. 909 (1976).

(what is constitutionally required is an opportunity to be heard before deprivation of a significant property interest). Appellants were heard, as to each of the six infractions. Although they complain that the sixth NOI was tried separately from the others, this appears to us to have represented a second chance (to revise their hearing strategy to avoid an additional penalty) that went beyond what due process required.

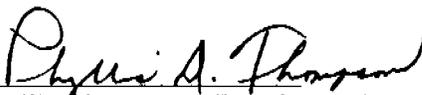
None of the other grounds for reversal that appellants cite has merit. Appellants contend that because Attorney Examiner McCoy did not render his decision within 90 days after the hearing as required by 16 DCMR § 3113.2 ("a decision in writing must be issued within ninety (90) days of the date the hearing is concluded"), his decision upholding NOI #18995 should be reversed. This argument is without merit.

Our Court of Appeals has stated many times that agency time deadlines such as the 90-day requirement of section 3113.2 are directory, not mandatory. *See, e.g., Nelson v. District of Columbia*, 772 A.2d 1154, 1156 (D.C. 2001), and cases cited therein. Attorney Examiner McCoy's failure to issue his decision within 90 days does not entitle appellants to relief.

Appellants also argue that Attorney Examiner McCoy erred by failing to dismiss NOI # 18995 when DCRA, on two scheduled hearing dates, appeared without its witness and was unable to proceed. We find that this was not a reversible error. Attorney Examiner McCoy's decision was akin to a determination to vacate a default judgment, which decision is committed to the "sound discretion of the trial court." *Clark v. Moler*, 418 A. 2d 1039, 1041 (D.C. 1980). Moreover, District law favors adjudications on the merits. *See Mewborn v. U.S. Life Credit Corp.*, 473 A. 2d 389, 391 (D.C. 1984). Attorney Examiner McCoy's decision states that appellants themselves were absent on a scheduled date and that Attorney Examiner McCoy subsequently vacated the default judgment that he had entered against them. The similar accommodation he made to DCRA does not strike us as unfair.

ORDER

Now therefore, it is **ORDERED** this 19th day of September, 2001, that the decisions of the OAD with respect to NOIs #18990, #18991, #18992, #18993, #18994, and #18995 are hereby **AFFIRMED**; and Appellants are ordered to pay fines and costs in the amount of \$3,240.


Phyllis Thompson, Legal Member, Presiding
Gary Ivens, Legal Member
Joan Schaffner, Public Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW

AVIS RENT-A-CAR SYSTEMS, INC.,

Appellant,

v.

DEPARTMENT OF CONSUMER AND
REGULATORY AFFAIRS,

Appellee.

BAR Docket No. 99-5420-CI
OAD No. 99-1079-H
Notice of Infraction No. 31835AMENDED FINAL DECISION
AND ORDER

This appeal came before Board members Antoinette Barksdale, who presided, and James Thorne for oral argument on September 27, 2000. Edward Statland, Esq., represented Avis Rent-A-Car Systems, Inc. ("Avis"), and Arthur Parker, Esq., of the Office of Corporation Counsel represented the Department of Consumer and Regulatory Affairs ("DCRA"). Board member Barksdale, having resigned from the Board, is unable to render a decision. In accordance with the Administrative Procedure Act, the panel identified at the end of this Decision and Order has reviewed the entire record, including the notice of infraction, the decision below, all exhibits, and the transcript of the oral argument. The parties had 30 days from the date of service of this Proposed Decision and Order to note exceptions and 45 days from the date of service of this Proposed Decision and Order to respond to any exceptions. On October 29, 2001, Avis filed exceptions to the Proposed Decision and Order.¹ The DCRA filed no exceptions and no response to the Avis exceptions. The Board issued a Final Order and Decision on December 11, 2001, which contained errors relating to the timeliness of the Avis exceptions. This Amended Final Order and Decision corrects those errors.

At issue in the appeal is whether Avis is obliged to have a license for the sale of gasoline at its rental car operation located at 1722 M Street, Northwest, in the District of Columbia pursuant to D.C. Code § 47-2814(a), and whether Avis had an accurate Certificate of Occupancy ("C of O") for that business operation pursuant to 11 D.C.M.R. § 3203.1.

¹ Because of a mailing error, Avis did not promptly receive the December 11th Order. Accordingly, the Avis exceptions were timely on the date filed. The Board took into account the arguments set forth in the Avis exceptions and found them without merit. In its filing, Avis requested reconsideration of the proposed decision issued on September 10, 2001, and additional argument. These requests are hereby denied.

Prior Proceedings

The Administrative Law Judge ("ALJ"), Rohulamin Quander, Esq., who heard the initial appeal on February 9, 1999, ruled against the Appellant on both points in an Opinion and Order dated July 8, 1999. In his Opinion and Order, the ALJ made specific findings of facts and conclusions of law, and he lowered the amount of the fine to be paid from \$500 for each violation to \$350 for each violation and assessed costs at \$40.

The Notice of Infraction was issued on December 14, 1998, by Inspector Ronald Johnson of the DCRA, who appeared at the hearing before the ALJ on February 9, 1999. The notice of infraction had two charges, failure to have a license for selling gasoline and failure to have a C of O. Among other things, Inspector Johnson testified that Avis dispensed gasoline from the 1722 M Street location as part of the rental car business and that he saw a sign noting that each rental car customer would pay more than two dollars per gallon for gasoline that Avis would put into the rental car which the customer returned. He also testified that he asked for a valid C of O when he made his initial inspection, and that none could be produced. At the February 9, 1999 hearing, counsel for the Appellant produced to the ALJ a copy of the C of O for the Avis operation at 1722 M Street. That C of O did not include gasoline sales. During the February 9, 1999 hearing, the ALJ mentioned on the record that he knew that Avis used the second floor of the building as part of its business. The Avis C of O produced by Appellant mentions only an operation on the first floor of the building.

Richard LeGrand, district manager for Avis, who testified on behalf of Appellant, did not dispute Inspector Johnson's testimony with respect to the presence of a C of O on the date of the inspection. Mr. LeGrand's testimony regarding gasoline indicates that each customer can opt to pay a "service fee" for refueling the rented Avis automobiles, either before the customer receives the automobile with a full gas tank or when the automobile is returned with less than a full gas tank.

Conclusions of law

Pursuant to D.C. Code §1-1509, Appellant bears the burden to prove that the findings of the Attorney Examiner were unsupported by substantial evidence and that his conclusions were arbitrary and capricious and not in accordance with the law. See *King v. Department of Employment Services*, 560 A.2d 1067, 1072 (D.C. 1989). In determining whether Appellant has met its burden, the panel is guided by two well established principles. First, the findings of fact of the hearing officer are entitled to great weight. See *In re Dwyer*, 399 A.2d 1, 12 (D.C. 1979). The evidence introduced at the hearing before the ALJ regarding the payment for gasoline as part of each customer's automobile rental is compelling. Clearly, customers pay for gasoline at the Avis rental location on M Street. The evidence offered by Appellant in refutation, qualifying the payment as a "service fee," does not effectively counter the finding of the ALJ that Avis "offers gasoline for purchase, even if on an occasional, low volume, and limited client-directed basis." Accordingly, the panel concludes that the Appellant has failed to establish that the findings of the ALJ were unsupported by substantial evidence on this point.

Inspector Johnson cited Avis for failure to have a C of O, in violation of 11 D.C.M.R. § 3203.1. Based on Inspector Johnson's factual testimony that gasoline sales were taking place at the Appellant's operation, the ALJ found that Appellant did not have a C of O for that activity. Thus, the ALJ's finding was supported by substantial evidence and will not be disturbed.

The second principle that guides the panel is that, when an agency's decision is based on an interpretation of the statute it administers, that interpretation will be sustained unless shown to be unreasonable or in contravention of the language or the legislative history of the statute. See *Reneau v. District of Columbia*, 676 A.2d 913, 917 (D.C. 1996); *Kalorama Heights Limited Partnership v. Department of Consumer and Regulatory Affairs*, 655 A.2d 865, 868 (D.C. 1995). The relevant statutory provision regarding gasoline sales is D.C. Code §47-2814(a), which declares a license to be required of any establishment where gasoline is sold. DCRA's interpretation of that statute is not unreasonable or in contravention of its language. Accordingly, the Board will not disturb the ALJ's finding that the statute does, indeed, apply to Avis.

Pursuant to 11 D.C.M.R. § 3203.1, the DCRA has determined that each C of O is supposed to capture the operation(s) of the business at the premise that the C of O covers. Inspector Johnson cited Avis for its failure to have a C of O that covers all of its operations at 1722 M Street. That the ALJ mentioned his personal knowledge of the Appellant's operations on the second floor is of no moment since it is the DCRA's interpretation that governs. At its worst, it was a harmless error for the ALJ to include in his opinion a parallel fact that did not come from the Inspector through the adjudicative process.² Because the DCRA's interpretation of the C of O regulations is not unreasonable, the Board will not disturb the ALJ's finding that Appellant lacked a proper C of O.

Conclusion

The panel deems the Appellee's interpretation of the relevant statute and regulation not to be erroneous or inconsistent. We further find that the Appellant has failed to

² The Board notes, however, that certain facts are fair game for judicial notice. See, e.g., Fed. R. Evid. 201(b): "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

establish that the ALJ's conclusions that Appellant (1) was selling gasoline without a license and (2) lacked a proper C of O were arbitrary and capricious or contrary to the law.

Wherefore it is

ORDERED that the appeal be, and hereby is, denied.



Gary L. Ivens
David Marlin
Phyllis Thompson

Dated: January 8, 2002

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW

JAMES TAYLOR TRASH REMOVAL)	
CONTRACTORS, INC.)	
)	
<u>Appellant,</u>)	
)	
v.	)	BAR Docket No. 01-5656-CI
)	
DEPARTMENT OF CONSUMER AND)	
REGULATORY AFFAIRS,)	
)	
<u>Appellee.</u>)	

ORDER

This matter came up before a panel of the Board, at a duly scheduled hearing set for 10:00 a.m., Tuesday, January 8, 2002.

Appellant was represented by Paul L. Pascal, Esq., of Pascal & Weiss, P.C. Appellee was represented by Arthur J. Parker, Esq., of the Office of the Corporation Counsel and Laura Gisolfi Gilbert, Esq., of the Appellee's Office of Compliance.

Pre-hearing briefs were filed by the parties.

Statement of the case

Appellant appeals from the Decision and Order of Attorney Examiner Henry W. McCoy, dated January 5, 2001, in which he concluded that the Notice of Infraction, dated December 15, 1999, and served December 20, 1999, citing Appellant with having violated DC Code §§6-3452 and 6-3453(a) and 21 DCMR §§733.1(h) and 733.1(a) had been properly issued by the Appellee and that Appellant had violated the cited District Code and Municipal Regulations provisions and should be fined accordingly.

By letter dated December 20, 1999, Appellant requested a hearing on the December 15, 1999, Notice of Infraction. A hearing was held before Attorney Examiner McCoy on March 9, 2000, and Appellant and Appellee offered witnesses and introduced evidence.

Attorney Examiner McCoy found that Appellant had been engaged in the recycling business at 5201 Hayes Street, NE, since 1989. At the time Appellant occupied the site, no Certificates of Occupancy were being issued by Appellee's Zoning Division specifically authorizing the conduct of a recycling business,

and, upon its application, Appellant, on December 29, 1989, was issued a Certificate of Occupancy as a "Warehouse - General Merchandise."

Subsequently, on February 8, 1993, the District's Zoning Regulations were amended to require recycling facilities to obtain Certificates of Occupancy for recycling. See, 11 DCMR §3203.1. On November 8, 1993, Appellant was issued a Notice of Infraction by Appellee for operating a recycling facility without having obtained the requisite Certificate of Occupancy. Appellant requested a hearing, and on December 15, 1993, a hearing was held before Attorney Examiner Rohulamin Quander. Attorney Examiner Quander rendered his Decision and Order on December 27, 1993, finding that Appellant was in technical violation of 22 DCMR §3203.1, but imposed no fine and waived costs.

Appellant appealed from the Decision and Order of Attorney Examiner Quander, and by its Decision and Order, dated March 19, 1998, in BZA No. 94-0001, James L. Taylor v. DCRA, the Board of Zoning Adjustment overturned Attorney Examiner Quander's Decision and Order. The Board of Zoning Adjustment held that an established undefined and regulated business, such as Appellant's, did not become illegal by virtue of the change in the District's Zoning Regulations. Appellant's recycling business qualified as a nonconforming use, as defined at 11 DCMR §199.1.

Meanwhile, the Solid Waste Facility Permit Act of 1995 and the Solid Waste Facility Permit Amendment Act of 1998 were enacted. See, DC Code §§8-1052 and 8-1053 (formerly DC Code §§6-3452 and 6-3453). The implementing regulations appear at 21 DCMR §733. DC Code §8-1052 prohibits the operation of an open waste facility in the District. DC Code §8-1053(a) prohibits the operation of a solid waste facility without a solid waste facility permit. 21 DCMR §733.1(h) requires that at the conclusion of a solid waste facility's approved hours of operation all solid waste shall be removed from the facility or stored inside the facility in enclosed and leak-proof containers or cargo areas of vehicles. 21 DCMR §733.1(a) requires unenclosed areas of the solid waste facility to be free of solid waste and litter.

Attorney Examiner McCoy found that Investigator Shirley Washington of Appellee's Office of Compliance, who testified at the hearing before him, had visited Appellant's facility on December 15, 1999, inspected the premises and took photographs of Appellant's exterior construction and demolition operations. She observed that within the exterior fenced-in yard of Appellant's facility there were piles of construction and demolition debris and that the trucks which brought construction and demolition debris for dumping at the facility imbedded such debris in the

ground. She also noted waste and litter in and about Appellant's site. Investigator Washington returned to Appellant's facility on March 7, 2000, and observed generally the same conditions.

Issues raised on appeal

Appellant does not deny, as Attorney Examiner McCoy had found in his Decision and Order, that Appellant conducts a recycling operation inside the building at the 5201 Hayes Street, NE, address and a construction and demolition operation outside in a fenced-in yard. Appellant does not dispute that construction and demolition debris is brought to its facility by trucks which dump it in the fenced-in yard, where it remains in piles awaiting processing. Appellant does contest that construction and demolition debris is solid waste or that Appellant does not have a permit authorizing the operation of a solid waste facility.

It is Appellant's contention that the provisions of the Solid Waste Facility Permit Act, as amended, are inapplicable to it and that Appellant's construction and demolition operation comes within the nonconforming use allowed it under its 1989 Certificate of Occupancy.

We have reviewed the transcript of the testimony of Appellant's President, Mr. James L. Taylor, at the hearing on December 15, 1993, before Attorney Examiner Quander, Attorney Examiner Quander's Decision and Order, dated December 27, 1993, and the Decision and Order of the Board of Zoning Adjustment in BZA No. 94-0001, James L. Taylor v. DCRA, dated March 19, 1998, and we are unable to find anything in these indicating that Appellant was conducting a construction and demolition operation prior to 1993 or suggesting that Appellant's construction and demolition operation was recognized as a nonconforming use of its 1989 Certificate of Occupancy. To the contrary, these refer to Appellant's recycling operation, and the nonconforming use which was deemed lawful by the Board of Zoning Adjustment was Appellant's recycling operation.

Appellant notes that Mr. Willie Goode of Goode Trash Removal, Inc., and Mr. Clarence Miller of Palmetto Refuse, Inc., testified on its behalf at the hearing before Attorney Examiner McCoy, stating that they had begun bringing construction and demolition debris to Appellant's facility as early as 1989. Appellant's Recycling and Tonnage Reports for the years 1991 and 1992, introduced by Appellee, however, show that Appellant processed no construction or demolition materials at the time.

Even assuming *arguendo* that Appellant's 1989 Certificate of Occupancy enabled it to conduct construction and demolition operations at the 5201 Hayes Street, NE, address, that would not

absolve Appellant of the need for complying with the provisions of the Solid Waste Facility Permit Act, as amended. DC Code §6-641.11 and 11 DCMR §101 permit of no doubt that the District's Zoning Regulations do not foreclose the application of subsequently enacted laws or adopted regulations which impose higher standards. The 1989 Certificate of Occupancy, even when read in a light most favorable to Appellant, would not absolve it, for example, from the after-hours storage of construction and demolition debris in enclosed and leak-proof containers or cargo areas of vehicles.

Appellant refers to the Solid Waste Facility Permit Act, as amended, as simply an indirect means of imposing a zoning requirement. We, however, view the Solid Waste Facility Permit Act, as amended, as a regulatory enactment, in the view of the Appellee adopted in the exercise of the District's police powers, and note that the legislation is codified in Chapter 8 of the DC Code, Environmental and Animal Control and Protection, whereas the District's Zoning Regulations are set out in Chapter 6 of the DC Code, Zoning and Height of Buildings. Appellant further contends that the Solid Waste Facility Permit Act, as amended, imposes requirements which cannot be met, as, for example, its set back requirements. Appellant has not been cited for having violated those provisions of the Act, and they are not involved in the instant appeal. We note, however, that, at the time of the hearing before us, counsel for Appellant acknowledged that Appellant has not asked for a variance or otherwise sought relief from those provisions of the Act.

Finally, Appellant maintains that the 1998 amendment of the Solid Waste Facility Permit Act, clarifying what constituted solid waste, was enacted after the June 30, 1995, date by which as an existing solid waste facility, it would have had to apply for a solid waste facility permit. The provisions of 8 DC Code §1053(e), however, enable one to apply for a solid waste facility permit at any time.

We have considered Appellant's other arguments on appeal but deem them to be unpersuasive.

Conclusions

There is a presumption of correctness of an agency's decision, and the burden of demonstrating error is upon the party appealing therefrom. Cooper v. Department of Employment Services, 588 A.2d 1172, 1174 (D.C. 1991). Our task is limited to determining whether the findings and conclusion in the Decision and Order of Attorney Examiner McCoy are supported by substantial evidence and are in accordance with the law. King v. Department of Employment Services, 560 A.2d 1067, 1072, 1967 (D.C. 1989).

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The fact findings of a hearing officer are entitled to great weight, for he is in the best position to observe the demeanor of the witnesses. Santos v. Department of Employment Services, 536 A.2d 1085, 1089 (D.C. 1988). His findings of fact, however, must be supported by substantial evidence, which is more than a mere scintilla. Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. King v. Department of Employment Services, supra, 560 A.2d at 1072.

A hearing officer's conclusions of law must flow rationally from his findings. Reneau v. District of Columbia, 676 A.2d 913, 917 (D. C. 1996). His interpretation of the statute of the agency which administers it must be upheld by us as long as that interpretation is reasonable and not plainly wrong or inconsistent with its legislative purpose. D.C. Preservation League v. Department of Consumer & Regulatory Affairs, 711 A.2d 1273, 1275 (D.C. 1998); Coumaris v. Alcoholic Beverage Control Board, 660 A.2d 896, 899 (D.C. 1995).

Applying these standards governing the scope of our review, we hold that the findings and conclusions in the Decision and Order of Attorney Examiner McCoy were supported by substantial evidence and were in accordance with the law. Wherefore,

IT IS ORDERED That the appeal be, and it is hereby, denied.


Fritz R. Kahn
David H. Marlin
Gary L. Ivens

Dated: January 22, 2002

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW

Gold Line, Inc.,)	
Appellant,)	
)	
	)	BAR Docket No. 01-5676-CI
)	
v.)	
	)	Notice of Infraction No. 19373
Department of Consumer and Regulatory Affairs,)	
	)	99-OAD-2291H
)	
Appellee)	
)	

DECISION AND ORDER

Appellant Gold Line, Inc. ("Gold Line") challenges a January 31, 2001 decision by the Department of Consumer and Regulatory Affairs ("DCRA") Office of Adjudication ("OAD"), upholding a fine imposed on Gold Line for violation of the engine idling regulation found at 20 DCMR § 900.1. Board members David H. Marlin, Brian K. Flowers, and Phyllis D. Thompson heard oral argument in this matter on December 10, 2001. Scott M. Zimmerman, Esq., argued the case for appellant. Leslie H. Nelson, Esq., of the Office of Corporation Counsel, argued the case for appellee.

The Board has reviewed the record and considered the arguments presented in the parties' briefs and at oral argument. We conclude, contrary to Gold Line's contention, that federal law did not preempt the application of 20 DCMR § 900.1 at issue in this case. We also conclude, however, that the factual record does not support the finding of an infraction. We therefore reverse the OAD decision and dismiss Notice of Infraction ("NOI") No. 19373.

Factual and Regulatory Background

The record establishes that D.C. Department of Health Inspector Abraham T. Hagos issued NOI 19373, assessing a fine of \$500 against Gold Line for an alleged violation that occurred on June 2, 1999. At a hearing before OAD Attorney Examiner E. Savannah Little on September 13, 1999, Inspector Hagos testified that he observed a Gold Line bus idling its engine while parked at 400 Constitution Avenue, N.W. for a period of ten minutes. Inspector Hagos testified that he visually inspected the bus and found that no passengers were on it. He cited the driver for a violation of 20 DCMR § 900.1.

Prior to its revision that became effective October 7, 1999,¹ section 900.1 provided as follows:

900.1 The engine of a gasoline or diesel powered motor vehicle, including private passenger vehicles, on public or private space shall not idle for more than three (3) minutes while the motor vehicle is parked, stopped or standing, except as follows:

(a) To operate power takeoff equipment such as, but not limited to, dumping, cement mixers, refrigeration systems, content delivery, winches, or shredders;

(b) To operate for fifteen (15) minutes air conditioning equipment on buses with an occupancy of twelve (12) or more persons; and

(c) To operate heating equipment when the local temperature is thirty-two degrees Fahrenheit (32 [degrees] F.) or below.

The driver of the Gold Line bus did not appear at the OAD hearing but Gold Line submitted his notarized statement, in which he asserted that, at the time of the alleged infraction, he was stopped at a red light near the intersection of Fourth Street and Constitution Avenue, N.W., while en route to a parking garage. He denied idling.

Gold Line presented testimony at the hearing to the effect that its buses must idle for at least four or five minutes after their engines are started for proper air brake operation, and for an even longer period for the bus air conditioning system to reach a comfortable temperature during hot weather, such as occurred on June 2, 1999. Gold Line argued that application of section 900.1 to penalize Gold Line because its bus idled for more than three minutes is inconsistent with a federal regulation (49 C.F.R. § 393.52) that requires motor carriers to maintain properly operating brakes and a federal statute (49 U.S.C. § 14101(a)) that requires motor carriers to provide safe and adequate equipment and facilities for passengers. Gold Line asked the OAD to rule that application of the idling regulation therefore was preempted by federal law.

OAD Attorney Examiner E. Savannah Little ruled that the OAD had no authority to consider Gold Line's preemption claim. She reasoned that the "adjudication of the constitutionality of a statute or regulation" is "beyond the jurisdiction of OAD." Attorney Examiner Little further noted that 16 DCMR § 3101.2 provides that a "properly completed NOI signed by the issuing agent shall be prima facie evidence of the validity

¹ See the Motor Vehicle Excessive Idling Fine Increase Amendment Act of 1999, effective October 7, 1999 (D.C. Law 13-35; 46 DCR 6017).

of the issuance and the truth of the facts alleged in the NOI." She found that the evidence offered by Gold Line was not sufficient to rebut the government's *prima facie* case of a violation of 20 DCMR § 900.1 established through NOI 19373. She upheld the fine of \$500 and imposed on Gold Line costs of \$40.

On appeal, Gold Line again argues that as applied in this case, 20 DCMR § 900.1 was preempted by federal law.

Analysis

The OAD declined to rule on the preemption issue on the ground that such a ruling would amount to a ruling on the constitutionality of 20 DCMR § 900.1. The Board disagrees. A determination that application of a regulation is preempted by federal law is *not* equivalent to a ruling that the regulation is unconstitutional. See *Swift v. Wickham*, 382 U.S. 111, 120 (1965) (in cases in which it is alleged that a state regulation conflicts with and thus is pre-empted by a federal statute or regulation, the basic question involved is not one of interpreting the federal constitution, but one of comparing two statutes). The OAD correctly recognized that it is without authority to declare a Council regulation invalid. See *Archer v. District of Columbia Dep't of Human Resources*, 375 A.2d 523, 526 (D.C. 1977). However, as counsel for Gold Line acknowledged at oral argument, Gold Line does not seek a ruling that section 900.1 was invalid, but instead a ruling that, on the facts of this case, application of section 900.1 was preempted by federal law. Given the facts of this case, we need not rule on the question of whether the OAD could refuse to enforce a regulation on preemption grounds, because we conclude that as applied in this case, 20 DCMR § 900.1 was not preempted.

Where there is a conflict between State law and preeminent federal law, State law is nullified only "to the extent it actually conflicts with federal law." *Goudreau v. Standard Federal Savings & Loan Association*, 511 A.2d 386, 389 (D.C. 1986). Testimony by Gold Line witnesses at the hearing before the OAD was to the effect that idling a bus engine for up to five minutes before driving may be necessary for operation of the air braking system at a level of functionality that complies with federal law. Gold Line's experts also testified that a longer period of idling (perhaps 20 to 30 minutes) may be necessary to achieve an air temperature for passengers that meets federal standards of "safe and adequate" motor carrier operation. In light of such testimony, a finding of preemption might be appropriate had the evidence also established that Gold Line was fined for idling its bus engine for more than three or four minutes at a time when the bus was about to be placed in operation. Likewise, a finding of preemption at least arguably would be appropriate if the evidence had established in addition that the fine was imposed for engine idling that took place within 20 to 30 minutes of the time that the Gold Line bus was scheduled to pick up passengers, whose safety necessitated a habitable temperature inside the bus. The problem with Gold Line's preemption argument is that there was no such additional evidence presented in this case.

For purposes of appeal, Gold Line does not take issue with the testimony of Inspector Hagos that the bus was parked and was fined after it had idled for ten minutes. Thus, it is undisputed that the application of section 900.1 in this case did not entail a fine for idling for more than three or four minutes, but instead a fine for idling for more than ten minutes -- much more time than apparently was needed to comply with federal brake-safety requirements. In short, this application of section 900.1 was not inconsistent with the federal regulation on which Gold Line relies. Nor did Gold Line establish that Inspector Hagos's application of section 900.1 was inconsistent with what was at least arguably a requirement, arising under federal statute, for the bus engine to idle for 20 to 30 minutes in order for the bus to cool sufficiently before admitting passengers. No testimony or other evidence established that the Gold Line bus driver intended to accept passengers within 20 to 30 minutes of the time that Inspector Hagos first noticed that the bus was idling.

In sum, there was no evidence that section 900.1 was applied in such a manner that Gold Line was fined for activity in which its bus was required to be engaged at the time Inspector Hagos observed it, in order to comply with federal law. Accordingly, we rule that the application of 20 DCMR § 900.1 at issue in this case was not preempted by federal law.

We nevertheless conclude, on two grounds, that the NOI must be dismissed.

First, although 20 DCMR § 900.1 generally prohibits a gasoline-powered motor vehicle from idling for more than three minutes, the version of the regulation that was in effect in June, 1999 contained a number of exceptions, including the exception, described in paragraph 900.1(b), "to operate for fifteen (15) minutes air conditioning equipment on buses with an occupancy of twelve (12) or more persons." Inspector Hagos's testimony before the OAD appears to indicate that the inspector sought to ascertain whether the paragraph 900.1(b) exception was applicable. He testified that the outside temperature on the date in question was more than 90 degrees, suggesting that the bus would have needed air conditioning for passenger comfort. OAD Hearing Transcript at 44. He testified further to his understanding that buses "are allowed to idle more than 15 minutes if they have 12 or more passengers in the bus." *Id.* at 26. He also testified that he got out of his car and "went around the bus to get the information" about the number of passengers on the bus. *Id.* at 31-32. Inspector Hagos apparently assumed, or was satisfied, that the "to operate air conditioning" criterion of paragraph 900.1(b) was met. It appears that he wrote NOI 19373 upon determining that the 12-or-more-persons criterion was not met because there were no passengers on the bus.

However, as the Board reads the version of paragraph 900.1(b) that was in effect at the relevant time, the exception to the three-minute idling limit that it established applied to buses that had a passenger capacity of 12 or more persons. That is, we read the term "occupancy" as used in paragraph 900.1(b) to mean "passenger capacity" rather than "passenger load," so that the exception permitted a bus with a passenger capacity of 12 or more to idle for 15 minutes to operate its air conditioning (irrespective of the number of passengers actually on the bus). We believe this is the more logical reading.

because an exception that would have permitted idling for 15 minutes to operate air conditioning only if 12 or more passengers are on a bus would -- unreasonably we believe -- have precluded a bus operator from idling the bus engine to achieve a comfortable air temperature for passengers about to board the bus.²

The amendment that the Council of the District of Columbia made to section 900.1 in July 1999, which became effective on October 7, 1999, supports the Board's interpretation. The Council repealed the exception formerly contained in paragraph 900.1(b) and amended section 900.1 to state that, subject to a number of exceptions, "[t]he engine of a gasoline or diesel powered motor vehicle, . . . *including buses with a seating capacity of twelve (12) or more persons, . . . shall not idle for more than three (3) minutes while the motor vehicle is parked, stopped, or standing, including for the purpose of operating air conditioning equipment in those vehicles . . .*" 46 DCR at 6018 (italics added). The italicized language appears to reflect the specific intent of the Council to repeal the exception to the three-minute idling limit described in former paragraph 900.1(b). If that is correct, then the italicized language means that the Council understood the reference in former paragraph 900.1(b) to "buses with an occupancy of twelve (12) or more persons" to mean buses with a seating capacity of 12 or more. Also, at the hearing held by the Council on this legislation, the administrator of the agency vested with the authority to enforce the regulations stated that the regulations provide exemptions for ". . . the operation of air conditioning equipment on buses with a capacity of 12 persons or more . . ." ³ Thus, the subsequent legislative history provides additional support for the Board's reading.

If our reading is the correct reading of former paragraph 900.1(b), Inspector Hagos was not entitled to find a violation by Gold Line upon observing that there were no passengers actually on the bus in question. It appears that a violation would have occurred if the bus had idled its engine for more than 15 minutes, but Inspector Hagos did not testify that he observed the Gold Line bus idling for more than 15 minutes. We find, therefore, that the evidence in the record is not sufficient to sustain a finding that Gold Line violated the engine idling regulation.

Moreover, contrary to the OAD's statement that NOI 19373 was *prima facie* evidence of the infraction alleged, the Board notes that the line that the inspector was to fill in to describe the "Nature of Infraction" was left blank. This omission was

² As discussed in the text that follows, the Board is aware that the Council now has eliminated the "to operate air conditioning" exception in its entirety because of concern about air pollution. But that does not undermine the Board's analysis of the reasonable meaning that must be attributed to the exception as it existed at the time NOI No. 19873 was issued.

³ See testimony of Ted Gordon, Deputy Director of Health for Environmental Health, for the Department of Health, on Bill 13-58, the Motor Vehicle Excessive Idling Fine Increase Amendment Act of 1999, at 8. Report of the Committee on Public Works and the Environment on Bill 13-58, the Motor Vehicle Excessive Idling Fine Increase Act of 1999 (Council of the District of Columbia March 16, 1999).

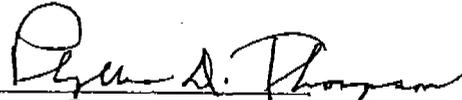
inconsistent with the requirements of the Department of Consumer and Regulatory Affairs Civil Infractions Act of 1985, D.C. Code Ann. § 6-2701 *et seq.*, which establishes specific requirements for NOIs. *Inter alia*, each NOI must contain the name and address of the respondent; a citation of the law or regulations alleged to have been violated; the nature, time and place of the infraction, and the amount of the fine applicable to the infraction. See D.C. Code Ann. §§ 6-2711(b)(1), (2), (3), and (5). Furthermore, section 6-2711(c) states:

If an administrative law judge or attorney examiner determines that a notice of infraction is defective on its face, the administrative law judge or attorney examiner shall enter an order dismissing the notice of infraction and shall promptly notify the respondent.

As an alternative basis for our ruling in this case, the Board finds that NOI No. 19373 was defective on its face because the nature of the infraction was not stated. For that reason, the NOI should have been dismissed by the Attorney-Examiner.

ORDER

Now therefore, it is **ORDERED** this 6th day of February, 2002, that the OAD decision on NOI 19373 is **REVERSED** and NOI 19373 hereby is dismissed.



Phyllis D. Thompson, Legal Member
David H. Marlin, Legal Member
Brian K. Flowers, District Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA

BOARD OF APPEALS AND REVIEW

L&M Contracting, Inc.	)	BAR Docket No: 01-5702-CI
Appellant)	
	)	Notice of Infraction No. 042527
vs.)	
	)	01-OAD-1112-G
Department of Consumer and Regulatory Affairs)	
Appellee)	

DECISION AND ORDER

This appeal requires the Board's first interpretation of the District's business solicitation law, as well as a determination of whether the decision of Administrative Law Judge Lennox J. Simon is supported by substantial evidence. We held oral argument on February 20, 2002. Appellant was represented by Marc S. Moskowitz, Esq; the government's representative was Assistant Corporation Counsel Brenda Walls.

At issue is the propriety of an enforcement action commenced by the Department of Consumer and Regulatory Affairs (DCRA), appellee, after a homeowner complained in August 1999 about the performance of a roofing contractor she had engaged. DCRA investigated in July 2000 and the Notice of Infraction referenced above was served on November 6, 2000. Appellant was cited for four separate infractions, each calling for a fine of \$500, as follows:

- (1) the solicitation by L&M Contracting, Inc (L&M), appellant, of a contract to perform roof repairs at the home of Ruth E. Arzonetti, 244-11th Street, N.E., without L&M possessing a valid home improvement business solicitors' license, a violation of 47 D. C. Code § 2835;
- (2) the solicitation of the same contract by L&M's president David B. Lindeman although he did not possess a home improvement salesman's license at the time, a violation also of 47 D. C. Code § 2835;
- (3) the performance of roof repairs at the 11th Street address without a construction permit, a violation of D. C. Code § 5-426 ; and
- (4) the failure of L&M to have a certificate of occupancy (C of O) for the location of the office at which it conducted its business, a violation of 11 DCMR § 3203.1.

Judge Simon held a contested hearing on January 16, 2001. Mr. Lindeman represented L&M; Vicki Whitnire, Esq., an investigator, appeared for DCRA. Judge Simon held on March 12, 2001, that L&M was licensed to conduct business in D.C. at 1923-9th Street, N.W. but was not licensed to solicit or to conduct a home improvement business at 7559 Alaska Avenue, N.W.; that Mr. Lindeman, acting for L&M, solicited a home improvement contract without a valid salesman's license; that L&M had begun roofing repairs at Ms. Arzonetti's house without a

construction permit; and that L&M did not possess the required C of O for the office at 7559 Alaska Avenue it used to solicit business. Appellant was held liable on all four citations and fined \$500 for each. We consecutively analyze each holding of liability, all of which were appealed on April 16, 2001.

1) Soliciting by L&M. Solicitation of business in the District is governed by D. C. Code § 47-2835, which requires any "person" (a business firm or an individual) who offers to perform repairs or provide certain commercial services to apply for and receive a solicitor's license. License applicants must provide their address and supply a performance bond. L&M does not dispute that it submitted a written proposal to repair Ms. Arzonetti's roof and that its covering letter and the proposal itself, dated August 10, 1999, listed 7559 Alaska Avenue, N.W. as L&M's business address. Further, appellant concedes it did not have a business license issued by the District for the Alaska Avenue address at the time of the solicitation. L&M maintains, however, that licensing was unneeded at Alaska Avenue because its business office was located at 1923-9th Street, N.W., a location used to store roofing material, for which purpose it had been issued a certificate of occupancy (C of O) by DCRA.

The record makes clear that Mr. Lindeman resides at 7559 Alaska Avenue, N.W. and used his home as an office and its address on L&M's letterhead in order to solicit business. In short, L&M's business address, for potential customers such as Ms. Arzonetti, was 7559 Alaska Avenue, N.W.

L&M defense, at trial and on appeal, misinterprets the intent of the District's solicitation law. Its purpose is to protect prospective consumers of services, i.e., persons who are approached and solicited as customers, from fraud and misrepresentation. Solicitors are required to provide their business address to DCRA in order to obtain a license. This registration policy provides regulatory officials the details needed to contact solicitors if necessary in order to enforce District law. As important, it permits consumers to approach government official with the name of a solicitor if the address is unknown or is misrepresented. The evidence adduced at the hearing proves that L&M did not possess a solicitor's license for the Alaska Avenue address that was used to solicit Ms. Arzonetti's business. That was a violation of D.C. Code 47-2835 and the \$500 fine levied by Judge Simon is upheld. We note the well-established principle that a reviewing body "must give weight to any reasonable construction of a regulatory statute that has been adopted by the agency charged with its enforcement" and "unless the agency's interpretation is plainly wrong or inconsistent with the statute," the interpretation will be sustained "even if there are other constructions which may be equally reasonable." National Geographic Soc. v. D.C. Dept. of Employment Services, 509 A 2d 618, 620 (D.C. 1998).

(2) Soliciting by L&M President David B. Lindeman. Mr. Lindeman stated at the contested hearing on January 16, 2001 that he did not possess a home improvement salesman's license on August 10, 1999, as required by law, and did not contest this charge. He did place into evidence a copy of a DCRA license for calendar year 2000 issued to him as a home improvement salesman for L&M (Gov't Ex. 13). On appeal, he now challenges the \$500 fine by maintaining he was mistaken and was in fact licensed on that date. His counsel, Mr. Moskowitz, submitted in appellant's brief (Ex.3) a printout purporting to be a home improvement license for Mr. Lindeman covering 1999 and argued this is proof Mr. Lindeman was licensed at that time.

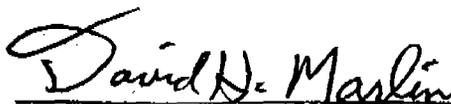
First, we note that the infraction notice was served on November 6, 2000, more than two months before the contested hearing was held on January 16, 2001. Mr. Lindeman, therefore, had ample notice before the date of the hearing that there was a need to produce evidence refuting this alleged violation or he could be held liable. Secondly, the Board, in reviewing the appeal of a contested case, may not hold an evidentiary hearing but must conduct its review on the record submitted. See 1 DCMR § 510 *et seq.* We cannot judge the credibility or reliability of the evidence now offered on appeal but note, on the surface, it falls below the burden of proof appellant must meet. That evidence should have been submitted to DCRA's Office of Adjudication at the time of the contested hearing, or should have been the subject of a motion for reconsideration. We affirm this violation.

(3) Constructing without a permit. A contractor is required to have obtained a construction permit prior to the time work begins, as mandated by D.C. Code § 5-426. Judge Simon concluded as a matter of law that L&M performed roof repairs "without obtaining a construction permit," but failed to make a direct detailed finding of fact of when the roofing work at Ms. Arzonetti's house actually began. Our examination of the record shows that L&M was issued Building Permit B424944 to repair Ms. Arzonetti's roof on February 28, 2000 (Appellant's Ex. 6). Ms. Arzonetti's complaint letter (Gov't Ex. 1), the source of DCRA's investigation, states scaffolding was erected in February and the "project started three weeks later." The contract with Ms. Arzonetti called for the work to begin on or before February 15 (Gov't. Ex. 9). The most direct evidence in the record is L&M's invoice dated April 29, 2000, which listed "Carpentry on built-in gutters," priced at \$4, 820.00, occurring between February 15-24 (Gov't Ex. 4). We believe these facts produced by DCRA fulfill the requirements of the D.C. Administrative Procedures Act, D.C. Ann. § 1-1501 *et seq.*

(4) Failure to use a business office without a certificate of occupancy. 11 DCMR §3203.1 forbids the use of a structure for "any purpose other than a one-family dwelling" without a C of O. It is undisputed that appellant had not obtained a C of O for 7559 Alaska Avenue, N.W. Obtaining a C of O for the 9th Street storage facility is not relevant to the issue of L&M's legal responsibility to obtain a certificate for Alaska Avenue. We affirm.

Finally, appellant argues the fines imposed are excessive and seeks their reduction. The Board's regulations, however, (See 1 DCMR § 512.4) prohibit modifying monetary sanctions if the fines are within legal limitations. Appellant did not meet that burden of proof.

THEREFORE, this 3rd day of April 2002, we AFFIRM Judge Simon's decision of liability in all respects and DENY the appeal.



David H. Marlin, Legal Member
Maureen Young, Public Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW

Waste Management of Maryland, Inc.)	
)	
Appellant,)	
	)	BAR Docket Nos. 99-5374-CI
	)	98-OAD-1690H (NOI 029538)
	)	98-OAD-1691H (NOI 029539)
	)	98-OAD-1639H (NOI 029541)
)	
v.	)	BAR Docket No. 99- 5416-CI
	)	98-OAD-1244H (NOI 036853)
	)	98-OAD-1245H (NOI 036854)
	)	98-OAD-1246H (NOI 036855)
)	
	)	BAR Docket No. 00-5576-CI
	)	00-OAD-1927H (NOI 045646)
District of Columbia Department of)	
Health, Environmental Health)	
Administration,)	
)	
Appellee)	
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DECISION AND ORDER

Appellant Waste Management of Maryland, Inc. (“Waste Management”) challenges three decisions by the Department of Consumer and Regulatory Affairs (“DCRA”) Office of Adjudication (“OAD”), upholding notices of infraction (“NOIs”) issued to Waste Management. The NOIs charged Waste Management with violations of the air pollution control regulations found at 20 DCMR §§ 107.1, 202.2(b), and 903.1.

BAR Docket No. 99-5374 is an appeal from an OAD decision by Administrative Law Judge (“ALJ”) Rohulamin Quander dated January 21, 1999, upholding NOIs 029538, 029539 and 029541. BAR Docket No. 99-5416 is an appeal from an OAD decision by ALJ Quander dated June 14, 1999, upholding NOIs 036853, 036854 and 036855. BAR Docket No. 00-5576 is an appeal from an OAD Decision by ALJ Lennox Simon dated May 31, 2000, upholding NOI 045646. By order dated May 14, 2001, Board Chairman David H. Marlin ordered consolidation of the three appeals, which raise several common issues.

Board member Antoinette Barksdale, who is no longer with the Board, chaired a Board panel that heard oral argument in Docket Nos. 99-5374 and 99-5416 on July 20, 2000. Board members Gary L. Ivens, Brian K. Flowers, and Phyllis D. Thompson ("the January 15, 2002 Board panel") heard oral argument in Docket No. 00-5576 on January 15, 2002. At both arguments, Mary Carolyn Brown, Esq., argued the case for appellant and Arthur Parker, Esq., of the Office of Corporation Counsel, argued the case for appellee.

The Board initially issued a Proposed Decision and Order and afforded the parties an opportunity to note exceptions. Waste Management submitted its "Exceptions to Proposed Decision and Order" on May 17, 2002.

Having read the briefs and reviewed the records in each of the three appeals, reviewed the transcript of oral argument in Docket Nos. 99-5374 and 99-5416, considered the oral argument in Docket No. 00-5576, and considered Waste Management's exceptions to the Proposed Decision and Order, the Board now issues its decision in all three appeals, as follows.

Factual and Regulatory Background

The record discloses the following facts. Waste Management operates a solid waste transfer station at 2160 Queens Chapel Road, N.E. The transfer station is a facility where short-haul garbage trucks bring commercial non-hazardous waste to be transferred to larger tractor-trailers for final disposition outside the District.

The Waste Management transfer station is located in a heavy commercial/light industrial district zoned "C-M." The zone boundary line nearest to the Waste Management transfer station is the boundary of a residential district that is approximately 300 feet away.

During the time periods covered by these appeals, the Waste Management transfer station had three odor abatement machines, each of which utilizes carbon filters and pre-filters to filter out odor. The equipment must be turned off to change the filters. A "Magnehelic gauge" indicates when the filters should be changed.

During March, 1998, the District of Columbia Department of Health Air Quality Office of Compliance ("DOH") issued a permit to Waste Management for operation of its odor abatement equipment. The permit, which DOH issued pursuant to 20 DCMR 200, contains several stated conditions, including a general requirement that the transfer station be operated in compliance with the applicable air pollution control requirements of 20 DCMR.

20 DCMR Part 200 contains the District's air pollution control regulations. 20 DCMR § 903.1 provides as follows:

An emission into the atmosphere of odorous or other air pollutants from any source in any quantity and of any characteristic, and duration which is, or is likely to be injurious to the public health or welfare, or which interferes with the reasonable enjoyment of life and property is prohibited.

20 DCMR § 107.1 provides that

The devices or practices provided for the control of air pollutants discharged from stationary sources, or otherwise complying with the law, shall remain operative or effective, and shall not be removed.

Docket No. 99-5374: On May 19, June 2 and July 9, 1998, DOH Air Quality Inspector Babatunde Adebona conducted inspections at the Waste Management transfer station. Inspector Adebona conducted his May 19 inspection after DOH received a complaint about odors from a commercial office in the vicinity of the transfer station. At the site, Inspector Adebona smelled an unpleasant odor of rotting garbage in the air and determined that the source of the odor was the transfer station. Inside the transfer station, he observed that unit #3 of the odor abatement equipment had a gauge reading of over 3.0 inches of water pressure. The permit issued to Waste Management for operation of its odor abatement equipment states, as condition 5, that the equipment "must be properly maintained and operated in accordance with the recommendations of the manufacturer. Proper operation is demonstrated when the Magnehelic gauge on the filter panel displays a static pressure of no greater than 2.75" [inches] water gauge." On the basis of his observation of the gauge reading in excess of 3 inches of pressure and his observation that the unit #3 filters were blocked with dirt and debris, Inspector Adebona issued NOI 029538. The NOI charged Waste Management with emitting odorous air pollutants in violation of section 20 DCMR § 903.1, and with failing to comply with (unspecified) permit conditions, which the NOI stated was a violation of 20 DCMR § 202.2(b).¹

On June 2, upon conducting what he described as a "multimedia" inspection, Inspector Adebona smelled an unpleasant odor of rotting garbage in the air near the transfer station and observed that the transfer station's odor abatement equipment unit #2 had a reading of zero even though it was turned on. The inspector concluded that the equipment was not operating properly. He also learned that the facility's air deodorizer was broken. On the basis of his inspection, Inspector Adebona issued NOI 29539, charging Waste Management with emitting odorous air pollutants in violation of section 20 DCMR § 903.1, and with failing to comply with (unspecified) permit conditions, in violation of 20 DCMR § 202.2(b).

¹ By its terms, 20 DCMR § 202.2(b) permits DOH to revoke or suspend a permit for failure to comply with permit conditions. However, 16 DCMR § 3224.3 cites section 202.2(b) as the regulatory basis for fines for failing to observe permit terms, a Class 2 infraction.

On July 9, during a routine inspection at the transfer station, Inspector Adebona detected an unpleasant odor of rotting garbage in the air and entered the facility to inspect. He observed that the filters on the odor abatement equipment were being replaced. Upon their replacement, he observed gauge readings of 0.3", 0.3" and 1.0" on the units. He believed that the 1.0" reading in conjunction with newly replaced filters indicated an equipment malfunction. At Inspector Adebona's request, a service representative technician turned off the odor abatement equipment and checked the gauge that was reading 1.0". He appeared to try to recalibrate the gauge with a screwdriver, which Inspector Adebona advised him was improper. On the basis of his inspection, Inspector Adebona issued NOI 29541, charging Waste Management with emitting odorous air pollutants in violation of 20 DCMR § 903.1, and with three counts of failing to comply with permit conditions 3, 5, and 7, in violation of 20 DCMR § 202.2(b). In language substantially similar to that of 20 DCMR § 903.1, permit condition 3 states that "The emissions into the atmosphere of any objectionable odor from the facility in any quantity and of any characteristic, and for any duration which interferes with the reasonable enjoyment of life and property is prohibited." As noted above, permit condition 5 requires that the equipment be maintained and operated in accordance with the recommendations of the manufacturer. Permit condition 7 requires immediate telephone notification to DOH of violations of permit conditions or of 20 DCMR, followed by a written report describing the violation and planned remedial action.

The OAD held a hearing on NOIs 29538, 29539 and 29541 on September 29, 1999. In a detailed decision dated January 21, 1999, ALJ Quander found Waste Management liable for all of the charged infractions, but halved the fines on the basis of Waste Management's significant capital outlays and other efforts to abate odor emissions. ALJ Quander found that the transfer station's odor abatement equipment regularly malfunctioned, resulting in ongoing violations of section 903.1 and of permit conditions.

Docket No. 99-5416: Inspector Adebona conducted further inspections of the Waste Management transfer station on October 8, October 27, and November 6, 1998. On each occasion, he smelled an unpleasant odor of rotting trash that made it unpleasant to walk, work or eat in the area. He observed that some of the odor abatement equipment was shutdown (unit # 1 was offline on October 8 and unit # 2 was offline October 27) and that Magnehelic gauge readings on some of the units (unit # 3 on October 8 and units 1 and 3 on November 6) exceeded the maximum acceptable 2.75 inches. Inspector Adebona issued NOIs 36853, 36854 and 36855, each citing Waste Management for emitting odorous pollutants in violation of 20 DCMR § 903.1; failure to have an effective pollution control device in violation of 20 DCMR § 107.1; and failure to observe permit conditions in violation of 20 DCMR § 202.2(b), on the basis of failing immediately to report the violations. An OAD hearing on the NOIs was held on May 12, 1999. On June 14, 1999, ALJ Quander issued a detailed decision finding Waste Management liable. He again reduced the fines, by half, because of what he found were Waste Management's substantial efforts at mitigation.

Docket No. 00-5576: On August 17, 1999, DOH Inspector Neil Williams inspected the Waste Management transfer station in response to complaints. Inspector

Williams testified that he detected an odor from the Waste Management facility and across the street from the front of the facility and smelled strong odors of rotten food, meat, chicken and eggs. He found that the transfer station's deodorizing system was not working and that odor emanating from the transfer station was interfering with community residents' enjoyment of their properties. He issued NOI 045646, citing Waste Management for emitting odorous pollutants from its trash transfer facility in violation of 20 DCMR § 903.1. Waste Management appealed the infraction notice to the OAD and a hearing took place on March 15, 2000. On May 31, 2001, ALJ Simon issued a decision upholding the NOI and the assessed fine.

Issues on Appeal, Analysis, and Conclusions of Law

Appellant raises similar challenges to each of the three OAD decisions. The issues appellant raises, and the Board's findings as to each issue are discussed below. The Board's analysis recognizes that we may reverse an order of the OAD order only if it is arbitrary or capricious, unsupported by substantial evidence in the record, or not in accordance with law. *See* 1 DCMR § 510.14.

1. In each appeal, appellant argues that the finding that it emitted odors in violation of section 903.1 was not based on substantial evidence because the DOH Inspector was untrained in scientific methods of odor measurement and failed to use scientific methods for odor source-detection. Appellant argues that Inspector Adebona had no formal training in measuring the intensity of odors and took no readings of wind speed and direction. Likewise, appellant argues, Inspector Williams was untrained in methods of odor detection, unfamiliar with scientific literature on odor abatement, and unaware of the standards for measuring and discerning odors, and did not use reliable or scientific methods to determine whether an infraction occurred. In particular, appellant complains that Inspector Williams took no wind velocity measurements and did not perform proper triangulation to allow a precise calculation of the odor's origin.

As the Board has previously observed, the District's air pollution regulations do not require the use of scientific methods of odor detection. *See The New Partnership v. Department of Consumer and Regulatory Affairs*, BAR No. 98-5307-CI. An inspector's use of his nose and sense of smell can be a sufficient basis for determining the source of an odor. In each OAD decision, the ALJ credited the testimony of the DOH Inspector that the source of the odor was the Waste Management transfer station. We must accept the ALJs' findings because, on the record,² they are not clearly erroneous. *See In re J.D.W.*, 711 A.2d 826, 830 (D.C. 1998).

² It appears from the parties' briefs and the comments of counsel at oral argument that tape recordings of the hearing in Docket No. 00-5576-CI have been misplaced. As a result, no transcripts of those tapes are available and the Board has been unable to review the hearing record. Although Waste Management suggested in its brief that the unavailability of the transcripts was prejudicial to its ability to argue the appeal (in particular, its contention that DCRA failed to demonstrate by a preponderance of the evidence that the alleged infraction occurred), counsel for Waste Management stated at

2. Waste Management also argues in each appeal that DOH did not prove by a preponderance of the evidence each of the elements necessary to establish a violation of 20 DCMR § 903.1. Specifically, Waste Management argues that because of the lack of evidence of any citizen complaint as to some of the counts and the limited testimony by the inspectors about the citizen complaints that led to other counts, DOH did not meet its burden of establishing that any odor emanating from the transfer station interfered with reasonable enjoyment of life or property in the vicinity, or was likely to be injurious to the public health or welfare, as required to establish a violation of section 903.1. In Docket No. 99-5374, for example, Waste Management argues that although Inspector Adebona testified that his inspection on May 19, 1998 and subsequent issuance of NOI 29538 were prompted by a complaint received by DOH, no evidence was presented as to when and where an offensive odor was detected, or as to whether the complainant lived or worked in the area. Appellant relies on the OAD ruling in *DCRA v. L.G. Industries*, 98-OAD-1942H and 98-OAD-1943H, in which OAD Chief ALJ E. Savannah Little ruled that in the absence of such testimony, DOH failed to meet its burden of proof to establish a violation of section 903.1.

The Board finds that there was substantial evidence in the record in each of the OAD proceedings to support the OAD findings that appellant violated section 903.1 on all of the occasions cited. In Docket No. 99-5416, Inspector Adebona testified that the odor of rotting trash that he smelled near the transfer station site made it unpleasant to walk, work or eat in the area. In Docket No. 00-5576, ALJ Simon found "very credible" Inspector Williams' testimony that the odors of rotten food, meat, chicken, eggs and other commercial trash he smelled coming from appellant's place of business were "unpleasant and unbearable." We think such testimony by the inspectors was a sufficient basis for finding that the odors were likely to be injurious to the public welfare and interfered with the enjoyment of life and property in the affected area. Accordingly, we affirm the OAD findings that DOH established violations of section 903.1 by a preponderance of the evidence. See *KOH Systems v. District of Columbia Department of Employment Services*, 683 A.2d 446 (D.C. 1996); *Kalorama Heights Ltd. Partnership v. D.C. Department of Consumer and Regulatory Affairs*, 655 A.2d 865 (D.C. 1995).

3. Appellant next argues that even if the evidence otherwise was sufficient to sustain a finding of a violation of section 903.1, as a matter of law Waste Management cannot be held liable for a violation of section 903.1 on the basis of odors detected at its transfer station located in the C-M District. Businesses in the C-M district, appellant asserts, are presumed to emit odors; under the District's zoning laws and regulations, appellant argues, such businesses' industrial uses are "already segregated from residential areas so that any particular adverse effects they may generate are localized within the industrial areas." Appellant notes that its transfer station is surrounded by a cement plant, an auto paint shop, a machine repair shop and a taxicab garage, uses that it argues "can tolerate the more intensive uses of property."

oral argument that appellant does not challenge ALJ Simon's findings summarizing the testimony of Inspector Williams.

Appellant argues that the District's zoning regulations, specifically 11 DCMR § 804.9(d), "allow[] odorous gases or other odorous matter to be emitted within the C-M District," and restrict such emissions only along the borders of the C-M District. 11 DCMR 804.9(d) provides that:

The emission of any odorous gases or other odorous matter or steam in such quantities to be offensive or noisome at any point along the boundaries of the district in which the use is located shall be prohibited.

Appellant urges the Board to rule that an alleged infraction of 20 DCMR § 903.1 "must be evaluated in light of and reconciled with [this] apparently conflicting zoning regulation." It argues that "if the general provisions of section 903.1 are given greater weight than the odor restrictions for C-M zones, the zoning restrictions are rendered meaningless," because the "recognition in the zoning regulations that offensive odors might be emitted in manufacturing districts no longer serves any purposes." Appellant urges the Board to find that "odors that may be offensive are explicitly permitted in the C-M district as long as they are not detected along the zone boundary line." It argues that this construction of the law harmonizes sections 903.1 and 804.9 and "provides a more rational and objective basis for determining whether an odor is injurious to the public health or interferes with the reasonable enjoyment of life or property." It urges that the "concept of offensive odors crossing the boundary of the zone district gives regulated business a more predictable standard by which to monitor its operations." Finally, it contends that since no evidence was presented that any odor was detected at the boundary line zone closest to the transfer station (the boundary of the residential district that is approximately 300 feet away), the Board should find that there was insufficient evidence to sustain the OAD's findings that appellant was liable for an emissions violation.³

Appellee counters that any apparent conflict between sections 903.1 and 804.9(d) should be resolved by reference to 11 DCMR § 101.4, which states:

The provisions of any statute or other municipal regulations shall govern whenever the provisions of that statute or of the other municipal regulations do the following:

(d) Impose higher standards than are required by this title.

³ In its brief in Docket No.00-5576, appellant notes that ALJ Simon's decision of May 31, 2000 did not address these arguments and for that reason must be found to be arbitrary and capricious. The Board agrees that the OAD hearing officer should have made findings on this and all material, contested issues. *See* D.C. Code Ann. § 1-1509(e); *Speval v. D.C. ABC Board*, 407 A.2d 549 (DC 1979). In light of our reasoning below, however, we find that this omission was harmless error. *See* 1 DCMR § 511.1.

Appellee argues that because section 903.1 imposes "higher, or more restrictive odor emission standards" than section 804.9(d), DOH's enforcement of this higher standard was expressly permitted by the zoning regulations, and the OAD's findings that appellant violated section 903.1 should stand.

The Board finds that there is no conflict between sections 903.1 and 804.9(d), and we therefore see no need to fashion a harmonious middle ground or to resort to the conflict-resolution rule contained in 11 DCMR § 101.4. We also think it is section 804.9(d) that imposes the higher standard.

Section 804.9(d) appears to impose something akin to strict liability for emission of odorous gases along a boundary zone. That is, if an odor is emitted such that it is detected along the boundary line, and if it is offensive, its emission is a violation of section 804.9(d) regardless of the duration of the emission and whether the emission interfered with any activity or was injurious. By contrast, section 903.1 prohibits only those emissions that are of a duration that makes them likely to be injurious to the public health or welfare or that causes them to interfere with reasonable enjoyment of life or property. The quantum of proof necessary to establish a violation of section 903.1 is greater, and therefore section 903.1 is a less severe standard than section 804.9. An odorous emission of very short duration that is offensive but not unbearable presumably would violate section 804.9(d) if it is detectable at the boundary line, but may well not constitute a violation of section 903.1, since (and here we agree with appellant) it probably is not reasonable to insist or to expect that businesses in the C-M District should never emit an offensive odor detectable for even a very brief period in close proximity to their premises.

We think the OAD's rulings are consistent with application of the standard established by section 903.1. In each case, the OAD heard testimony that the odor detected in the immediate vicinity of the transfer station was unbearable, not merely offensive, and interfered with ordinary human activity. As discussed above, we find that by this evidence, DOH satisfied its burden of proof with respect to the charged violations of section 903.1. We therefore affirm the OAD rulings insofar as they upheld the charged violations of section 903.1.⁴

4. In Dockets 99-5374 and 99-5416, Waste Management argues that it was contrary to law for the OAD to uphold the NOIs pertaining to violations of 20 DCMR § 202.2(b) (failure to observe permit conditions). The gist of appellant's argument is that DOH exceeded its authority in requiring Waste Management to obtain a permit for odor

⁴ Waste Management also argued in its briefs that 20 DCMR § 903.1 is unenforceable because it is unconstitutionally vague. The Board rejected a similar argument in *The New Partnership v. Department of Consumer and Regulatory Affairs*, BAR No. 98-5307-CI and, for the reasons cited in that decision, also rejects Waste Management's argument on this point.

abatement equipment and in imposing permit conditions. Citing 20 DCMR §200.1,⁵ appellant contends that District air pollution control regulations in effect during 1998 allowed DOH to require a permit for the installation of an air pollution control device only in a "stationary source," defined in the 1998 version of 20 DCMR § 199 to mean a facility subject to regulation under the federal Clean Air Act ("CAA").⁶ Since, appellant argues, the CAA has never regulated the emission of odorous gases, DOH has no authority under District air pollution control regulations to impose permit requirements relating to equipment to control the emission of odorous material. Appellant argues that DOH may not "bootstrap itself into an area in which it has no jurisdiction" by improperly requiring a permit and then holding Waste Management liable for permit violations.

Appellee's response is that Waste Management is foreclosed from raising this argument before the Board since it failed to present this argument to the OAD. We agree with appellee. As a general rule, matters not properly presented to a trial court will not be resolved on appeal. *See Rab v. Safeco Ins. Co.*, 556 A.2d 1072, 1076 (1989); *Williams v. Gerstenfeld*, 514 A.2d 1172 (1986); *Chase v. Gilbert*, 499 A.2d 1203, 1209 (D.C. 1985). Courts deviate from this principle "only in exceptional situations and when necessary to prevent a clear miscarriage of justice apparent from the record." *Williams*, 514 A.2d at 1177. We find no such exceptional circumstances here.⁷

⁵ 20 DCMR 200.1 provides that "A permit from the Mayor shall be obtained before any person shall cause, suffer, or allow the construction of a new stationary source, or the modification of an existing stationary source, or the installation or modification of any air pollution control device on a stationary source."

⁶ We note that 20 DCMR § 199 was amended in 2000 to provide that a "stationary source" is one that emits or may emit pollutants subject to regulation under either the CAA "or this Title." *See* 47 D.C. Reg. 9686 (December 8, 2000).

⁷ We also note that while appellant's argument may have some merit, the issue of whether the permit regulations could be applied to an odor-emitting facility is not without doubt. It appears that the CAA as implemented in the District of Columbia during the period in dispute did not regulate odor emissions. *See* 60 FR 44431 (1995) (noting that EPA would not review provisions of 20 DCMR pertaining to testing for odors since they governed provisions not included in the District of Columbia State Implementation Plan). However, in at least one other jurisdiction, odors have been subject to regulation under the CAA. *See Concerned Citizens of Bridesburg v. Philadelphia Water Dep't*, 843 F.2d 679 (3rd Cir. 1987), *cert. denied*, 488 U.S. 853 (1988). Thus, at least arguably, the reference in 20 DCMR § 199 to a stationary source as a facility "subject to regulation under the federal Clean Air Act" refers to facilities that might be regulated under the CAA, whether or not they are subject to CAA regulation in the District.

The Board notes in addition that although the 1988 version of 20 DCMR § 199.1 contained a limiting definition of "stationary source," the opening sentence of section 199.1 may have created latitude for DOH to construe the term "stationary source" more broadly. That sentence states that "When used in Chapters 1 through 9 of this title, and in forms prescribed under those chapters, where not otherwise distinctly expressed or

Appellant contends that its argument is not untimely, citing the principle that jurisdictional challenges may be raised at any time. *See, e.g., Weaver v. Grafto*, 595 A.2d 983, 986 (D.C. 1991). In its exceptions to the Board's Proposed Decision and Order, appellant cites *F.W. Woolworth Co. v. District of Columbia Board of Appeals and Review*, 597 A.2d 713 (D.C. 1990), for the proposition that this principle applies so as to permit a party to raise on appeal, for the first time, an argument that an administrative agency (here, DOH) exceeded its jurisdiction in taking a disputed action (here, requiring a permit for odor abatement equipment and issuing NOIs for violation of permit conditions).

The Board is not persuaded that *Woolworth* stands for the principle for which Waste Management cites it. *Woolworth* argued before the D.C. Court of Appeals, for the first time, that neither a Department of Consumer and Regulatory Affairs ALJ nor the Board had had authority to rely on a regulation in issue to impose a civil sanction. The court reasoned that "[b]ecause this is a jurisdictional argument, *Woolworth* cannot be deemed to have waived it by failing to raise it before the ALJ and the Board." *Woolworth*, 579 A.2d at 716-17. The court's statement is consistent with the view, which the Board expressed in its Proposed Decision and Order, that the rule permitting jurisdictional challenges to be raised at any time pertains to challenges to the jurisdiction of a court or other adjudicative body, such as the Board or an ALJ, rather than to challenges to the authority of an administrative agency to take the action in dispute.⁸

Nonetheless, as Waste Management's argument suggests, courts have reached differing conclusions about whether a reviewing court may consider a challenge to an agency's jurisdiction even when the challenge was not raised before the agency. *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 20.06 (1972) (also noting that it is not always obvious which questions are jurisdictional for purposes of avoiding waiver at the administrative level). The Board concludes that it should be guided by the policy rationale for the waiver rule, which is that appellate review is hindered by the failure of the litigant to allow the agency to apply its expertise. *See McKart v. United States*, 395 U.S. 185, 194 (1969), cited in *Railroad Yardmasters of America v. Harris*, 721 F.2d 1332, 1338 (D.C. Cir. 1983). The Board also believes that a sound approach is the rule

manifestly incompatible with the intent of this subtitle, the following terms shall have the meaning ascribed."

⁸ This interpretation of the rule is supported by courts' frequent articulation of the rule as the principle that "[p]arties cannot waive subject matter jurisdiction by their conduct or confer it on the court by consent, and the absence of such jurisdiction can be raised at any time." *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 474 (D.C. Cir. 1976), quoted in *Customers Parking, Inc. v. District of Columbia*, 562 A.2d 651, 654 (D.C. 1989); *see also Paton v. District of Columbia*, 180 A.2d 844, 845 (D.C. 1962) ("Although the jurisdictional issue was not questioned by either appellant or appellee, it is well settled that jurisdiction of the subject matter of a case may neither be assumed by a court nor conferred upon it by consent or silence of the parties").

that party who failed to raise an issue of jurisdiction before an agency in the first instance may not challenge the agency's jurisdiction on appeal unless the agency "patently traveled outside the orbit of its authority." K. DAVIS, *supra*, § 20.06, quoting *Cotherman v. FTC*, 417 F.2d 587, 594 (5th Cir. 1969).

Using these decision-making guides, the Board concludes that Waste Management must be deemed to have waived its argument that DOH had no authority under District air pollution control regulations to impose permit requirements relating to equipment to control the emission of odorous material. This is a case in which the Board would have benefited from testimony by DOH as to whether it construed the regulatory term "stationary source" broadly to include odor-emitting facilities subject in some jurisdictions to regulation under the CAA (*see* footnote 7 *supra*), testimony that might have been available had Waste Management raised this issue below. We think that the possibility that DOH did broadly construe the term "stationary source" to include a facility such as the Waste Management transfer facility means that DOH did not patently travel "outside the orbit of its authority" in requiring Waste Management to obtain and to abide by the terms of the odor abatement equipment permit in issue.

5. In Docket Nos. 99-5416 and 99-5374, Waste Management argues that even if the permit and other regulations that it contends were relevant only to stationary sources applied to its operation of the transfer station, DOH failed to establish by a preponderance of the evidence that its transfer station violated the regulations cited on the NOIs. The failure of proof as to the charged violations of 20 DCMR § 107.1 (air pollution control devices "shall remain operative and effective") and 20 DCMR § 202.2(b) (failure to comply with permit conditions), appellant argues, relates to what appellant alleges was Inspector Adebona's lack of familiarity with the mechanics and operation of the odor abatement equipment at the transfer station.⁹

Appellant argues that Inspector Adebona could not distinguish between an inoperative gauge (which appellant apparently contends does not constitute a violation) and a malfunctioning machine, and was not familiar with the manufacturer's specifications for calibrating gauges on the equipment. Appellant cites in particular Inspector Adebona's conclusion that one of the odor abatement units was not working because of its zero gauge reading (the basis for the section 202.2(b) violation charged on NOI 029539), a conclusion that appellant argues improperly ignored the facts that the unit's filters had just been changed and that it takes up to ten minutes for filtering to register after a filter change. (Tr. 44.) There was no evidence, appellant argues, that Inspector Adebona waited for the equipment to become fully operational to obtain a reliable reading, and therefore his testimony that the equipment was malfunctioning should not have been credited. Similarly, appellant argues, Inspector Adebona's testimony in Docket No. 99-5416 about an equipment malfunction, relating to his observation about a technician's use of a screwdriver on one of the odor abatement units,

⁹ Appellant presented testimony that it is the only transfer station in the District that uses this expensive and sophisticated type of odor abatement equipment. (Tr. 160)

should not have been credited since the inspector admitted during his testimony that he did not actually know what the technician had been doing. (Tr. 115).

Although appellant may be correct that not every observation as to which Inspector Adebona testified indicated an equipment malfunction or other permit violation, the Board finds that on the record as a whole there was substantial evidence to support the charged violations of 20 DCMR § 107.1 (equipment shall remain operative and effective) and 20 DCMR § 202(b) (failure to observe permit condition 5) (equipment must be properly operated and maintained, with no gauge reading over 2.75 inches). Inspector Adebona appeared to be quite familiar with the manufacturer's instructions relating to the odor abatement equipment, with the expected range of gauge readings, and with readings that are consistent with recent filter replacement. His reliance on a zero gauge reading as an indicator of an equipment malfunction, in conjunction with his detection of unpleasant trash odors, was a sufficient basis for the OAD to uphold the charged violation of section 202.2(b) on NOI 029539. Likewise, Inspector Adebona's observation of gauge readings in excess of 2.75 inches, his observation of a gauge reading higher than expected for a unit with newly-replaced filters, and his observation of offline equipment not undergoing maintenance were all sufficient bases for the OAD to uphold the cited violations of section 107.1 (equipment shall remain operative and effective) and section 202.2(b) (with respect to permit condition 5, requiring that the equipment be maintained and operated in accordance with the recommendations of the manufacturer).¹⁰

Rulings as to NOIs

Docket 99-5374. Although NOIs 029538 and 029539 do not list permit condition 5 as the specific basis for the charged violation of section 202.2(b), it appears to the Board that the discussions during the inspection about the malfunctioning gauge and inoperative equipment put appellant on notice of the charged violations. Therefore, for the reasons discussed in the paragraph above, and having already upheld all of the charged violations of 20 DCMR § 903.1, we uphold NOIs 029538 and 029538 in full.

We also uphold the charged violations section 903.1 and 202.2(b) (permit condition 5) in NOI 029541. However, we find that the section 202.2(b) (permit

¹⁰ We do not understand any of the NOI citations to constitute DOH's having charged appellant with violating the air pollution control regulations by taking its odor abatement equipment offline to perform maintenance. We therefore do not reach appellant's argument that it was arbitrary and unreasonable for DOH to consider maintenance during business hours to be a violation and to trigger reporting requirements. We do not need to decide whether the Waste Management permit condition (and requirement of section 107.1) specifying that the odor abatement equipment must "remain operative" means that, during the transfer station's regular operating hours, appellant may not perform any maintenance tasks that require a shutdown of equipment.

condition 3) citation is duplicative of the section 903.1 citation.¹¹ We also find that Inspector Adebona's testimony about the permit condition 3 citation, which suggested that it related to a technician's improper effort to recalibrate the Magnehelic gauge (Tr. 51), did not provide a reasonable basis for the citation. We find in addition that the evidence presented did not provide a substantial basis for upholding the cited violation of section 202.2(b)(permit condition 7), the failure to make a report to DOH. Inspector Adebona did not explain what should have been reported and did not testify to facts permitting the ALJ to conclude that matters that were required to be reported were in fact not reported. (Tr. 52). We therefore find that the fines that the OAD upheld for these charged violations, amounting to \$500, should be reversed.

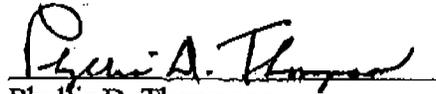
Docket 99-5416. For the reasons discussed above, we uphold the charged violations of sections 903.1 and 107.1 in NOIs 036853, 036854 and 036855. We also uphold the citations in all of these NOIs to unspecified violations of section 202.2(b). Like appellant, we question Inspector Adebona's testimony that appellant was required to make telephone reports of violations identified by the DOH inspector, and we would not uphold the cited section 202.2(b) violations if the violations chargeable under this regulation were such alleged reporting violations only. We uphold the section 202.2(b) permit condition violation cited on NOIs 036853 and 036855 because, on each of the relevant dates (October 8 and November 6, 1998), Inspector Adebona observed two offline or malfunctioning units, one of which supported the charged section 107.1 violation (equipment shall remain operative and effective), and the other of which supports the charged section 202.2(b) permit violation (failure to observe permit condition 5, that equipment "must be properly operated and maintained"). We uphold the unspecified section 202.2(b) permit condition violation cited on NOI 036854 because the record contains evidence that odor abatement unit #2 that Inspector Adebona found offline on October 27, 1998 had been offline several days earlier as well, without any report to DOH.

Docket 00-5576. A violation of section 903.1 was the only violation charged on NOI 045646 (Docket 00-5576). For the reasons discussed above, we affirm the OAD ruling upholding NOI 045646.

¹¹ As noted, permit condition 3 states that "The emissions into the atmosphere of any objectionable odor from the facility in any quantity and of any characteristic, and for any duration which interferes with the reasonable enjoyment of life and property is prohibited." Section 903.1 states that an "emission into the atmosphere of odorous or other air pollutants from any source in any quantity and of any characteristic, and duration which is, or is likely to be injurious to the public health or welfare, or which interferes with the reasonable enjoyment of life and property is prohibited."

ORDER

Now therefore, it is **ORDERED** this 28th day of June, 2002, that the OAD decisions upholding NOIs 044646 (Docket 00-5576); NOIs 036853, 036854 and 036855 (Docket 99-5416); and NOIs 29538 and 29538 (Docket 99-5374) are **AFFIRMED**. The OAD decision upholding NOI 029541 (Docket 99-5374) is **AFFIRMED** as to the cited violations of 20 DCMR §§ 903.1, 107.1 and 202.2(b) (permit condition 5). The OAD ruling upholding NOI 029541 (Docket 99-5374) is **REVERSED** as to the cited violations of 20 DCMR § 202.2(b) (permit conditions 3 and 7).



Phyllis D. Thompson

Legal Member and Presiding Board Member

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW**

IN THE MATTER OF:	)	BAR Docket No: 99-5407-LC
)	
The Fund for Public Interest Research, Inc.	)	Litter Control Violation Nos. 207423-3 and 207426-1
)	

OPINION AND ORDER

This case came before the Board of Appeals and Review (Board) on March 16, 2000 from an appeal filed with the Board on June 2, 1999 by The Fund for Public Interest Research (The Fund). Board legal member David H. Marlin and Board public member Eduardo Balarezo comprised the hearing panel.

The Fund was represented by Emily Greenfield, its citizen outreach director. The District was represented by Assistant Corporation Counsel Janice Skipper.

On June 22, 1998, Litter Control Violation Nos. 207423-3, 207426-1, 207424-4, 207425-0 and 207427-2, were issued to The Fund by the Solid Waste Management Administration, Department of Public Works (DPW), all charging a violation of 24 DCMR 108.1, illegally affixing signs on public lampposts. The latter three citations were dismissed and are not the subject of this appeal.

Violation No. 207423-3 cited The Fund for posting a sign reading "Summer Jobs for the Environment," which included the telephone number of the Fund, on District of Columbia property at 1520-17th Street, N.W., ordered the sign removed and imposed a fine of \$35. Violation No. 207426-1, issued one-half hour earlier, referred to an identical sign that had been posted at 6 Dupont Circle, N.W., and contained an identical order of removal and an identical fine. On August 25, 1998, DPW notified The Fund that it was in default of the penalties assessed and the fines were doubled to \$70 each. On September 10, 1998, The Fund requested a hearing before the DPW Office of Public Space Adjudication.

DPW held a contested hearing before its Bureau of Adjudication on April 26, 1999. The fact of affixing the posters on lampposts was not in dispute and one of the signs posted by The Fund was in evidence. The Fund contented that 24 DCMR 108.4, which authorizes posting of signs which do not relate to the sale of goods and services, provides an exception to the prohibition contained in Sec. 108.1. DPW rejected The Fund's argument that its signs fall into an "excepted category," and imposed the fines. The Fund appealed to this Board.

The Fund filed a pre-hearing appeal brief with the Board in which it explained that it was a non-profit corporation established for charitable and educational purposes, that it normally engages in the recruitment of persons who may wish to participate in its citizen outreach efforts and that the recruitment consists, in part, of posting signs in public areas to attract workers. The Fund argued that its non-commercial sign falls squarely within the exception of Sec.108.4.

At our appellate hearing on March 16, Ms. Greenfield reiterated The Fund's position that the recruitment posters fell into the exception of Sec. 108.4. Ms. Skipper argued that Sections 108.7 and 108.11 also had to be satisfied because 108.4 contains the clause "...subject to the restrictions set forth in this section," which means, she argued, that these other requirements are incorporated into Sec.108.4. She stated that the burden of satisfying all relevant requirements rests "on the person posting the sign to have a properly prepared sign. Failure to do so would not enable the government to ascertain whether you are, in fact, in compliance" (Tr. p.13).

Ms. Skipper, referring to the sign that had been introduced into evidence at the DPW hearing, demonstrated that it did not contain the date when it was affixed, as required by 108.7, and argued that The Fund did not file a copy of the sign with an agent of the Mayor, as required by 108.11. Ms. Greenfield conceded those issues.

District of Columbia Municipal Regulation 24 DCMR 108.1 provides:

No person shall affix a sign, advertisement, or poster to any public lamppost..., except as provided in accordance with this section.

24 DCMR 108.4 states:

Any sign, advertisement or poster that does not relate to the sale of goods or services may be affixed on public lampposts...subject to the restrictions set forth in this section..

24 DCMR 108.7 states:

Each sign, advertisement or poster shall contain the date upon which it was initially affixed to a lamppost.

24 DCMR 108.11 states:

Within twenty-four (24) hours of posting each sign, advertisement, or poster, two (2) copies of the material shall be filed with an agent of the District of Columbia so designated by the Mayor. The filing shall include the name, address, and telephone number of the originator of the sign, advertisement, or poster.

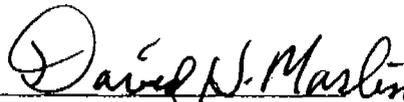
On June 27, 1997, final regulations governing the Board's appellate proceedings were published in the D.C. Register (See 44 D.C. Register 2934-2956). Section 510 of the regulations govern hearings by the Board that are conducted on the record, i.e., where there has been an evidentiary hearing in a contested case at the first stage of the proceeding, as here.

When conducting a review on the basis of the record developed before the Director of DPW, the Board may affirm, reverse or modify the order of the Director, or may vacate the order and remand the case for further proceedings.

Reversal of the Director's decision is limited to instances when the Board concludes that the decision is, inter alia, arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law; or is not supported by substantial evidence in the record.

It is clear that The Fund did not satisfy all the obligations imposed by 24 DCMR 108.1, specifically, the requirements of 108.7 and 108.11. The Fund also had argued that since DPW dismissed three of the citations, the law is being enforced unevenly and the remaining two citations should be dismissed. We find no merit in The Fund's positions and the fines imposed for the two violations cited must be upheld.

THEREFORE, it is **ORDERED** this 10th day of May, 2000 that the decision of DPW assessing penalties for Violations Nos. 207423-3 and 207426-1 is **AFFIRMED**.



David H. Marlin
Legal Member



Eduardo Balarezo
Public Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA

BOARD OF APPEALS AND REVIEW

Dorothy Barksdale	)	BAR Docket No: 99-5390-LC
Appellant)	
	)	Litter Control Violation No.
v.	)	2-05101-1
)	
Department of Public Works)	
Appellee)	

OPINION AND ORDER

This case came before the Board at a duly scheduled hearing on March 1, 2001 before a panel of David H. Marlin and Marcia G. Jones, legal members, and Maureen A. Young, public member. The Appellant Dorothy Barksdale appeared *pro se*. Patricia N. Young, Assistant Corporation Counsel, represented the Department of Public Works (DPW), Appellee.

Appellant was cited with Notice of Violation 2-05101-1 on April 23, 1998 which alleged a violation of 24 DCMR 1001.1, prohibiting, *inter alia*, throwing, depositing or leaving, or causing to be thrown, deposited or left, any garbage or trash in or upon any public space in the District, commonly referred to as illegal dumping. The charge resulted from an inspection by DPW Inspector Lawrence A. Dance at 1315 Pennsylvania Avenue, S.E., where he found 30 bags of trash and garbage on vacant private property abutting public space. A NationsBank envelope addressed to Appellant was found in a bag. The envelope and a picture of the accumulated trash and garbage were introduced into evidence at the contested hearing held on March 25, 1999. Appellant had been fined \$1,000, later reduced to \$200 by the DPW hearing examiner who found her liable.

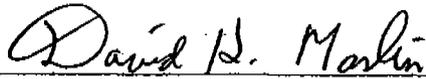
The issue for the Board is whether there is substantial evidence in the record to support the conclusion of liability. Appellant admits that she placed her trash behind her house without placing the trash in a secure container (an act that might have resulted in a violation of 21 DCMR 700.3 if that section had been cited). Appellant, however, denies she bears any responsibility for the trash found by DPW. We believe that the District's leap from discovering just one identifiable piece of paper in a pile of trash and garbage to the conclusion that Appellant is the person legally responsible for the pile's location, fails the substantial evidence test enunciated by the Board in Clyde T. & Wilma Coble v. DPW, BdAppRev (99-5378-LC), January 25, 2001 and Ronald Edwards v. DPW, BdAppRev (00-5457-LC), February 13, 2001.

The Board recognizes that dumping and littering is not uncommon in the District and that DPW faces a formidable challenge in keeping the city clean and discouraging littering. The City Council has enacted stringent laws to prevent littering and to penalize violators. DPW is carrying out those legislative proscriptions. Nevertheless, we believe that the evidence offered in

this case does not meet the test of substantial evidence.

Appellant deposited with DPW a \$30.00 transcript fee but did not order a transcript. The transcript fee must be refunded.

THEREFORE, it is ORDERED this 7th day of March 2001 that the appeal is GRANTED, the DPW decision is REVERSED and the case is REMANDED for action consistent with this Order.



David H. Marlin, Legal Member
Marcia G. Jones, Legal Member
Maureen A. Young, Public Member

opportunity to personally appear to argue his appeal orally. The motion is denied. First, the telephonic reaction was reversed the same day in a written order. Secondly, appellant did in fact appear for oral argument on April 10, 2001. Most significantly, appellant's contention falls far below asserting standards of impartiality which would require disqualification by the Code of Judicial Conduct applicable for quasi-judicial officers. Morrison v. District of Columbia Board of Zoning Adjustment, 422 A. 2d 347, 349 (D.C. 1980). Finally, this case has been decided unanimously by a panel of three judges.

Appellant was cited on October 8, 1999 by the Department of Public Works (DPW) for violation of 21 DCMR 708.11, a provision that prescribes in detail the size, weight, composition, strength and acceptable method of securing the receptacles used by District residents for containing trash prior to collection.

The notice informed appellant that there were two "busted" white plastic trash liners in a public alley to the left of his house located at 3710 Manor Place, N.W. next to trash containers used by the occupants of that house. The notice stated that the trash liners had not been properly tied, resulting in litter at a public space. A photograph of the scene was provided by DPW Inspector Ray.

Appellant wrote to DPW's adjudication office on November 16, 1999 to deny that the trash bags had been placed there by his tenants. He stated that the trash liners must have belonged to residents of nearby row houses on 37th Street, N.W. who also placed their trash in the alley for collection.

On December 12, 1999, a DPW hearing examiner issued a decision based on the infraction notice, the photograph and appellant's written denial. Appellant had not requested an evidentiary hearing to contest the charge, relying on his letter as his defense. The examiner found that the premises in question had white plastic trash bags in the rear that were broken open with the contents on the ground and that the trash had not been deposited in a proper container. The examiner concluded the photographic evidence linked the trash to appellant and found appellant liable. Appellant was fined \$35.00.

Mr. Grote's appeal to this Board, filed February 8, 2000, and his oral argument before the Board on April 10, 2001, attempt to establish facts that would exonerate him or his tenants as being responsible for the improper trash containers, and the littering that occurred as a consequence. Notably, he argued at the Board April hearing that he determined that the trash in question contained home renovation materials. He asserts that no renovations had been underway in his house but had taken place in the house of a neighbor.

The issue in this appeal is whether appellant has met his burden of proof as required by Board regulations (See 1 DCMR § 510.14) to demonstrate that the DPW decision is arbitrary, not in accord with the law or not supported by substantial evidence. We rule he has not and deny the appeal.

The Board is not the finder of facts. The opportunity to contest the allegations in the violation notice was available to appellant in a fact-finding hearing. Appellant could have appeared at a DPW hearing, testified himself, produced witnesses, submitted exhibits and requested the inspector's presence for cross-examination. Appellant, instead, waived that opportunity and relied on his letter which did not by itself overcome the preponderance of evidence offered by DPW.

The Board has often stated that there is a presumption that a hearing examiner's decision is entitled to great weight, King v. Department of Employment Services, 560 A 2d 1067, 1072 (D.C. 1982). The presumption can be rebutted if the decision is based on "no more than a scintilla of evidence, too insubstantial to support the charge," Santos v. Department of Employment Services, 536 A 2d 1085, 1089 (D.C. 1988). The record in this case contains substantial evidence to support the decision.

THEREFORE, it is ORDERED this 8th day of November 2001 that the appeal is DENIED.

David H. Marlin

David H. Marlin, Legal Member

Gary L. Ivens, Legal Member

Phyllis D. Thompson, Legal Member

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW**

919 E Street Associates	)	BAR Docket No: 03-5941-LC
Appellant)	
	)	Notice of Infraction No. 2-174694
vs.)	
)	
Department of Public Works)	
Appellee)	

DECISION AND ORDER

A telephone conference call was held for this appeal on October 27, 2003 conducted by David H. Marlin, chair of the Board of Appeals and Review. Michelle Kohler, Senior Vice President, appeared on behalf of appellant 919 E Street Associates (919 E Street). Assistant Corporation Counsel Lori Monroe represented the Department of Public Works (DPW), appellee.

Appellant was cited on March 3, 2000 by DPW Inspector Tom Day for a violation of 24 DCMR § 700.3 which requires all solid waste to be stored and containerized for collection in a manner that prevents food, harborage or breeding places for insects or rodents. The violation notice, which, according to the record, was served by certified mail, states that Inspector Day observed in the rear of 919 E Street, N.W. a "large accumulation of black bags of food waste, liquor bottles, cans, paper, club info and other debris uncontained dumped on public space around dumpster - ID found." Inspector Day attached two photographs to the citation which document the littering violation. The fine for the violation was listed as \$75.00.

Appellant responded on March 4, 2002 to this violation and three others (2163194, 2163200 and 2174522) that it no longer owns the commercial property at that location and the current owner should be contacted. A mail adjudication was conducted and on September 27, 2002, Hearing Examiner Pamela B. Washington fined appellant \$75.00 for Notice of Infraction No. 2-17469. Fines were also assessed for the other violations, all of which DPW stipulates will now be dismissed because official documents are missing. Examiner Washington considered the defense offered by appellant and rejected it, noting that the official records of the Office of the Chief Financial Officer prove that the property was still owned by 919 E Street at the time of the violation. She stated that the official records show the property was not sold until February 2001.

The Notice of Appeal, filed November 22, 2002, restates appellant's contention that it did not own the property in March 2000 and, furthermore, that the property was leased at that time to the Ritz Nightclub/The Spot nightclub. The lease, appellant argues, placed the sole responsibility for maintenance on the tenant so that a claim of violation of littering regulations should be served on the tenant. During the telephone call, appellant also argued it did not receive notice of the violation until after the property was sold and therefore did not receive the notice required by law.

The Board's standard for review of a case based on the record is whether the decision is arbitrary, not in accord with the law or not supported by substantial evidence. Appellant fails its burden of proof.

Appellant did not offer any documentation to challenge that it was the owner of record at the time the violation occurred. The finding of fact from District records that appellant was the owner in March 2000 has not been rebutted. The claim that an owner of leased property is absolved of responsibility for law violations perhaps committed by a lessee is unsupported by authority and is contrary to many decisions of this Board. Appellee cited 24 DCMR § 1305 as authority for holding the owner liable.

Finally, we have consistently held that more than a claim of non-receipt must be offered to disprove proper service when the record discloses that service was made by certified mail. Such service is authorized by 24 DCMR § 1306. Furthermore, the District has a policy of strict liability for littering violations. In *Bruno v. District of Columbia Board of Appeals and Review*, 665 A.2d 202, 204 (D.C. 1995), the court held that a person cited for a littering violation need not be provided a prior warning and opportunity to abate the nuisance before imposition of a fine.

THEREFORE, this 29th day of October 2003, the appeal is DENIED and the decision AFFIRMED. Notices of Violation Nos. 2163194, 2163200 and 2174522 are DISMISSED.



David H. Marlin, Board Chair

GOVERNMENT OF THE DISTRICT OF COLUMBIA

BOARD OF APPEALS AND REVIEW

Roger Gerstenfeld	)	BAR Docket No: 03-5924-LC
Appellant)	
	)	Litter Control Violation Nos.
v.	)	58996-1, 59843-3, 62379-4,
	)	64012-2, 68534-4, 69249-4,
Department of Public Works	)	69838-3, 71133-3, 72202-2
	)	and 96145-0
Appellee)	

DECISION AND ORDER

A telephone conference call was held for this appeal on April 25, 2003. David H. Marlin, a legal member of the Board of Appeals and Review, conducted the conference call. Roger Gerstenfeld appeared *pro se* and Assistant Corporation Counsel Corey Buffo represented the Department of Public Works (DPW), appellee.

On May 16, 2002, appellant filed a motion to vacate the 10 default judgments that were entered by DPW for each of the 10 littering citations, issued from October 10, 1991 through October 23, 1996, referenced above. Each citation was for a violation of 21 DCMR § 700.3, which states:

All solid wastes shall be stored and containerized for collection in a manner that will not provide food, harborage, or breeding places for insects or rodents, or create a nuisance or fire hazard.

Each violation notice listed conditions at Lot 40, 1844 Independence Avenue, S.E. that allegedly did not comply with the requirements of § 700.3, e.g., the presence of trash, bottles, cans, food containers, scattered papers, garbage, busted plastic bags and broken glass. Photographs of the trash were taken as evidence of the scene. Lot 40 is owned by Gorg von Mecklenburg, appellant's father-in-law.

Appellant's motion to vacate the default judgments was denied by Hearing Examiner Paul W. Wallig on September 26, 2002. He rejected appellant's argument that the citations were not properly served. This was the principal basis advanced by Mr. Gerstenfeld for the failure to contest the violations which resulted in default judgments, i.e. that the notices were sent to an incorrect address. Examiner Wallig found that the violations were sent by certified mail "to the name and mailing address on the tax rolls of the District" as required by D.C. Code § 8-803 and 24 DCMR § 1305. Specifically, Examiner Wallig found that the first three violation notices - 58996-1, 59843-3 and 62379-4 - were mailed to 6009 N Street, N.W. and the remaining notices were mailed to 1620 I Street, N.W., Suite 1000. Both addresses were those of the owner's attorney, Glenn R. Bonard, who was listed as the recipient of mail intended for Omnia Properties of DC.

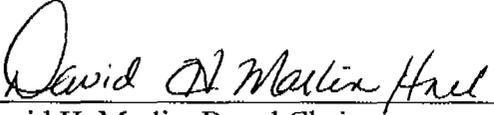
Appellant had contended that the trash referred to in the violation notices was on an adjoining lot, Lot 38, and that he was listed on the property tax role as the recipient for mailings for Lot 38. Therefore, he argued, the notices should have been sent to him and the failure to mail the notices to him amounts to reversible error.

If this argument had been made contemporaneously through a motion for reconsideration, an evidentiary hearing could have been scheduled to determine the validity of appellant's claim that the wrong lot was cited or even that the facts alleged in the citations lacked evidentiary value. But these violation notices were issued in 1991, 1992 (five notices), 1993 (three notices) and 1996.

Appellant has renewed the argument of improper service in this appeal filed with the Board on October 11, 2002. In addition, Mr. Gerstenfeld argues that actual notice was required by District law; that it was the District's custom and practice not to cite senior citizens (Mr. Mecklenburg) who did not intend to violate the law; and that the payment of property taxes by a property owner, and receipt by the District, signifies there are no outstanding law violations. No case citations or documentation was offered by appellant in support of these contentions. Nor could there be. They are without merit. Appellant declined to provide the Board a brief to substantiate these arguments.

We find no basis to overturn Examiner Wallig's decision, which is based on researching District tax records and which is entitled to deference. There is a presumption of correctness of an agency's decision, and the burden of demonstrating error is upon the party appealing therefrom. Cooper v. Department of Employment Services, 588 A. 2d 1172, 1174 (D.C. 1991). The Board's task is limited to determining whether the findings and conclusions in Hearing Examiner Wallig's decision are supported by substantial evidence and are in accordance with the law. King v. Department of Employment Services, supra, 560 A. 2d 1067 (D.C. 1989).

THEREFORE, this 5th day of June 2003, the appeal is **DENIED**.

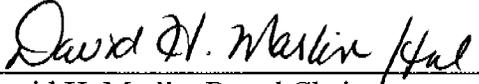

David H. Marlin, Board Chair

law has been enacted to promote public health. Compliance is required at all times of the day, irrespective of whether trash pickups are scheduled or whether a pickup is delayed or is aborted. The picture of the rear of the store conclusively demonstrates non-compliance. Furthermore, appellant is legally responsible for coping with unexpected problems, such as a blocked driveway. Perhaps the car could have been pushed or towed away; additional containers could have been available.

The District has a policy of strict liability for trash collections. In *Bruno v. District of Columbia Board of Appeals and Review*, 665 A.2d 202, 204 (D.C. 1995), the court held that a person cited for a littering violation need not be provided a prior warning and opportunity to abate the nuisance before imposition of a fine.

We find no basis to overturn Examiner Washington's decision. There is a presumption of correctness of an agency's decision, and the burden of demonstrating error is upon the party appealing therefrom. *Cooper v. Department of Employment Services*, 588 A. 2d 1172, 1174 (D.C. 1991). The Board's task is limited to determining whether the findings and conclusions in the decision are supported by substantial evidence and are in accordance with the law. *King v. Department of Employment Services*, supra, 560 A. 2d 1067 (D.C. 1989).

Therefore, this 5th day of May 2003, the appeal is DENIED.



David H. Marlin, Board Chair

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW

DAVID ALTERMAN,)	
)	
<u>Appellant,</u>)	
)	
v.	)	Docket No. 03-6030-LC
)	
DEPARTMENT OF PUBLIC WORKS,)	
)	
<u>Appellee.</u>)	

ORDER

By its Motion for Reconsideration, served November 24, 2003, Appellee questions the validity of the Pre-Hearing Order, dated November 7, 2003. Appellant replied by his Opposition, served December 1, 2003.

The assailed Pre-Hearing Order vacated the Decision on Motion to Vacate Default Judgment of Supervisory Hearing Examiner Paul W. Wallig, dated February 10, 2003, holding Appellant liable for the amount of the fines levied pursuant to Notices of Violation No. 205759-4, dated May 19, 1998, No. 79922-2, dated April 4, 1994, No. 215001-1, dated August 30, 1999, and thirteen other tickets issued to the then owner of the property at 3538 13th Street, NW, Mr. Charles Hood, and remanded the matter to the Appellee with instructions to refund the amounts paid by Appellant under protest. Appellant is a manager of the limited liability company which acquired the property at 3538 13th Street, NW, pursuant to a tax sale approved by the Superior Court on or about May 12, 2002.

The Pre-Hearing Order noted that Appellee can attach a lien against a property for unpaid fines, but, pursuant to DC Code §8-807(f)(1)(C), the lien shall be valid against a bona fide purchaser only if the lien is filed with the Recorder of Deeds. Neither Examiner Wallig's Decision nor anything else of record indicated that this was done.

In its Motion for Reconsideration, Appellee does not challenge the grounds upon which the Pre-Hearing Order was entered. It does not dispute that, pursuant to DC Code §8-907(f)(1)(C), a lien shall be valid against a bond fide purchaser only if the lien is filed with the Recorder of Deeds; nor does Appellee maintain that Examiner Wallig's Decision or anything else of record indicate that this was done.

Rather, Appellee alleges that Appellant's appeal was untimely and, hence, must be

dismissed. Appellee contends that Examiner Wallig's Decision was issued February 10, 2003, and that, pursuant to DC Code §8-809, Appellant's appeal needed to be filed within 15 days, that is, on or before February 25, 2003. Appellant's appeal, however, was dated May 5, 2003, and received by the Board on May 13, 2003, and, since, according to Appellee, the date for filing of an appeal is jurisdictional, the Board does not have authority to hear an appeal that is not filed timely.

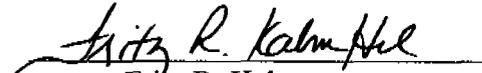
Disregarding that Appellee is slightly late in raising the matter of Appellant's alleged untimely filing of his appeal, six months having elapsed from the date when he filed his appeal, Appellee's argument is flawed on three grounds. First, Examiner Wallig's Decision was dated February 10, 2003. Appellee seems to equate the dating of a hearing examiner's decision with its issuance, within the meaning of DC Code §8-809. A more reasonable reading of the statute, however, would have the term issuance of the decision to mean the service of the decision. A party does not know whether he or she has been aggrieved by a hearing examiner's decision and is unable to decide whether to appeal to the Board until he or she has seen the decision, and he or she cannot have seen the decision until after it has been served. Second, Appellant in his appeal asserted that he did not receive a copy of Examiner Wallig's Decision until April 29, 2003. There is nothing of record to contradict his assertion, and Appellee does not do so. Allowing three days for the transmittal by mail, one reasonably can assume that Examiner Wallig's Decision was served on or about April 26, 2003, and, if that were the case, Appellant's appeal of May 5, 2003, would be well within the fifteen day appeal period contemplated by DC Code §8-809. Finally, Appellee maintains that the fifteen day appeal period of DC Code §8-809 is jurisdictional. Appellee, however, cites to no agency or court decision in support of its contention. As the appeal process is designed administratively to remedy wrongful actions taken by designated department of the District of Columbia Government, Appellee being one of them, it is appropriate that the statute be given a liberal reading. Therefore, it appears that the Board has the authority to entertain the instant appeal.

Appellee correctly notes that the appeal involves only Examiner Wallig's Decision, which cites to Notices of Violation No. 205759-4, dated May 19, 1998, No. 79922-2, dated April 4, 1994, and No. 215001-1, dated August 30, 1999. The appeal is not from the Decision on Motion to Vacate Default Judgment of Hearing Examiner Pamela B. Washington, dated October 23, 2002, which cited to the thirteen other Notices of Violation for regulatory infractions by Mr. Hood. By its Motion for Reconsideration, Appellee asks that "the Board amend its [Pre-Hearing Order] to relate to tickets 205759-4, 79922-2 and 215001-1 and delete the references to the thirteen other tickets that were outside of the jurisdiction of the Board." Appellee, however, misreads the Pre-Hearing Order. The reference to the thirteen other tickets was not the Board's; it was Examiner Wallig's. Examiner Wallig in his Decision recited:

These three tickets [205759-4, 79922-2 & 215001-1], and 13 others, were issued to Charles Hood, the recorded owner of the property, prior to 05-17-03. These tickets date back to 1990.

It was Examiner Wallig who brought up the thirteen other Notices of Violation, which, incidentally, included the ones which dated back to 1990. The Pre-Hearing Order did no more than paraphrase the factual findings in Examiner Wallig's Decision. If Appellant deems the reference to the thirteen other Notices of Violation to be offensive, it should take the matter up with Examiner Wallig. It certainly is not up to the Board incorrectly to summarize the factual findings as set out in Examiner Wallig's Decision. Wherefore,

IT IS ORDERED, that Appellee's Motion for Reconsideration be, and it is hereby, denied.


Fritz R. Kahn

Dated: December 3, 2003

Paul Strauss upholding nine citations issued to Appellant by the Department of Public Works ("DPW"). The citations were issued for Appellant's violations of D.C. Mun. Regs. ("District of Columbia Municipal Regulations") tit. 24, §§ 108.1 and 108.10 (1996), which prohibit, respectively, affixing signs to a public lamppost except in accordance with Section 108 and the posting of more than three versions of a sign on one city block. Violations of these regulations are administered through the Litter Control Administration Act (D.C. Code Ann. §8-801 (2003) *et seq.*).

Mr. Strauss is the District of Columbia's elected "shadow" United States Senator. He sought re-election to that position during the 2002 general elections. The campaign committee formed for his re-election efforts, The Committee to Re-Elect U.S. Senator Paul Strauss, placed political campaign signs promoting his candidacy throughout the District. As required by law, each sign contained the caption "[p]aid for by the Committee to Re-Elect U.S. Senator Paul Strauss, Richard J. Bianco, Treasurer."

On August 21 and 22, 2002, DPW inspectors observed several campaign signs for Appellant that were placed in violation of D.C. Mun. Regs. tit. 24, §§ 108.1 and 108.10 (1996). The inspectors issued 17 citations for the observed violations and each citation named "Paul Strauss" as the offender. Neither Appellant's campaign committee nor the treasurer of that committee was named on any of the citations.

At a hearing held on January 30, 2003 to address Appellant's challenges to the issuance of the citations, the Hearing Examiner for DMV, Pamela B. Washington, found Appellant (who was the Respondent in those proceedings) personally liable for 9 of the cited violations and fined him \$35 for each infraction. On February 14, 2003, Appellant filed a Notice of Appeal with the Board. The stated basis for the appeal was that the

“correct party was not ticketed” by DPW because the campaign signs in question were not posted by Appellant but by workers for his re-election campaign. For this reason, Appellant concluded, it is the “campaign [committee] and not the individual [candidate] that possesses ... responsibility for any alleged infractions.”

On February 28, 2003, a telephone conference call between the parties – Appellant and Corporation Counsel for the District of Columbia - was conducted by David Marlin, the Chair of the Board. On April 30, 2003, the Board ordered briefs from the parties in which they were to present case law from the District of Columbia and other jurisdictions in support of their positions. The parties’ briefs were filed in May and June 2003, and a three-member panel of the Board heard oral argument from the parties on September 10, 2003.

II. Standard of Review

The applicable standard of review for any decision by a Hearing Examiner is set forth in Title 1, Section 510 of the D.C. Mun. Regs., which provides that the Board may reverse a Hearing Examiner’s decision when the decision is “[w]ithout observance of procedure required by law; or ... [u]nsupported by substantial evidence in the record ...” D.C. Mun. Regs. tit 1, § 510.14 (2003). The review shall be “on the basis of the record established before the [agency].” D.C. Mun. Regs. tit. 24, § 510.1 (1996).

III. Discussion

Appellant raises two arguments in support of his position that he should not be held personally liable for the actions of his campaign committee that led to the issuance of the DPW citations. Appellant’s first argument is that a campaign committee is a

separate legal entity from the candidate it supports and that DMV did not have discretion to make any other determination. As support for this argument, Appellant cites the definitions of "candidate" and "political committee" in D.C. Code Ann. § 1-1101.01 (2003).¹ Appellant also draws an analogy between campaign committees and business corporations, asserting that the principles governing individual liability of corporate officers for the actions of a corporation are applicable to the determination of whether a political candidate can be held personally liable for the actions of his or her campaign committee. Specifically, Appellant asserts that in order for him to be held liable for the actions of his campaign committee DPW must prove that he had "apparent authority" over the committee's actions. Under general principles of agency law applicable to business corporations, apparent authority arises when a principal places an agent in a position which causes a third person to reasonably believe the principal has consented to the exercise of authority the agent purports to hold. Feltman v. Sarbov, 366 A.2d 137, 139 (D.C. 1976) (quoting Drazin v. Jack Pry, Inc., 154 A.2d 553, 554 (D.C. 1959)).

Appellant is correct that principles of agency law determine whether he can be held personally liable for the actions of his campaign committee. However, the Board agrees with Corporation Counsel that it is the implied authority of Appellant's campaign committee not its apparent authority that establishes Appellant's personal liability in this case. "Implied authority is actual authority inferred from the circumstances, such as the relationship between the parties and conduct of the principal toward the agent

¹ "Candidate" is defined as "an individual who seeks nomination for election, or election, to office." "Political committee" is defined as "any proposer, individual, committee (including a principal campaign committee"), club, association, organization, or other group of individuals organized for the purpose of, or engaged in ... promoting or opposing the nomination or election of an individual to office." D.C. Code Ann. § 1-1101.01 (2003).

manifesting the principal's consent to have the agent act for him." Lewis v. Washington Metropolitan Transit Authority, 463 A.2d 666, 669 (D.C. 1983) (citing W. SEAVEY, AGENCY § 8, at 11-13 (1964)). "Authority to do an act can be created by written or spoken words or other conduct of the principal which, reasonable interpreted, causes the agent to believe that the principal desires him so to act on the principal's account." Id. (quoting RESTATEMENT (SECOND) OF AGENCY § 26 (1958)).

In this case, the record before the DMV Hearing Examiner was sufficient to establish that Appellant either actively or passively authorized the actions taken by his campaign committee that led to the issuance of the citations. Appellant at the very least consented to the placement of the campaign posters – the act that led to the liability. The posters bore his name and/or likeness and were a regular and anticipated part of any political campaign. The action of placing the posters was clearly conspicuous and visible, and as such would have been objected to by Appellant if he did not consent. Moreover, it cannot be asserted that the committee would not have heeded Appellant's instructions to cease placing campaign posters or remove posters already placed that advocated Appellant's re-election since, as Appellant concedes, the campaign committee was created for the sole purpose of assisting in Appellant's reelection. For these reasons, it is the Board's determination that Appellant's campaign committee was acting with implied authority from Appellant when it placed the campaign posters in violation of D.C. Mun. Regs. tit. 24, §§ 108.1 and 108.10 (1996). Thus, the Hearing Examiner's determination that DPW correctly cited Appellant as the party responsible for the

violations is entitled to deference and Appellant was properly held personally liable for the citations.²

The Board's determination that Appellant can be held liable for the actions of his campaign committee is in accord with prior decisions of the Superior Court of the District of Columbia, *See Media Placement Consultants, Inc. v. Turner, et al.*, 120 Daily Wash. L. Rep. 685 (D.C. Super. Ct. 1992) (candidate found liable for debts incurred by campaign committee where candidate appointed director of committee and director had right to incur debt as part of his duties), and decisions from numerous other jurisdictions, *See Karl Rove & Co., Inc. v. Thornburgh*, 824 F. Supp. 662 (W.D. Tex. 1993) (finding candidate liable for campaign committee's debt where candidate and/or candidate's agent assented to the contract under which debt was incurred); *Guy Hunt v. Oscar Davis*, 387 So.2d 209 (Ala. Civ. App. 1980) (finding candidate liable for unpaid printing costs incurred by campaign where material carried candidate's name, candidate knew of printing, and passively permitted costs to be incurred); *Perry v. Meredith*, 381 So.2d 649 (Ala. Civ. App. 1980) (finding campaign committee had authority to place printing order and therefore bound candidate to pay for materials ordered).

Appellant's second argument against his personal liability for the DPW citations issued to him is based upon public policy considerations. Appellant argues that holding

² Appellant's argument that D.C. Code Ann. § 1-1102.11 supports the claim that he is legally independent from his campaign committee also fails. Although Subsection 1-1102.11 provides that nothing in Title 1, Chapters 10 or 11 of the D.C. Code "shall be construed as creating liability on the part of any candidate for any financial obligation incurred by a political committee," that subsection merely establishes that Appellant's candidacy *alone* cannot create personal liability. *Media Placement Consultants*, 120 Wash. L. Rep. 685, 688 (D.C. Super. Ct. 1992). The subsection does not trump applicable principles of agency law. To the contrary, the subsection goes on to state that "the actions of an agent acting for a candidate shall be imputed to the candidate." D.C. Code Ann. §1-1102.11 (2003).

him or any candidate personally liable for the actions of the candidate's campaign committee will not serve as a deterrent against future wrongs by the committee.

Appellant posits that if the committee is not forced to answer for its wrongful actions, there will be no incentive for the committee to avoid committing those actions again in the future. We do not find this argument to be persuasive. For all practical intents and purposes, political candidates exercise a high degree of direction and control over the actions of their campaign committees. It is not unreasonable to expect that the specter of personal responsibility for any improper actions will cause candidates to take steps to ensure that such actions either do not occur in the first place or do not reoccur.

As an additional public policy consideration, Appellant cites the potential for extreme financial hardship if he is held liable for the actions of his campaign committee. Multiplying the number of campaign posters hung city-wide by his campaign committee ("some 25,000") by the \$35 per violation fine assessed by DMV, Appellant envisions a situation where he could be subjected to a fine of over \$200,000. Appellant, citing D.C. Mun. Regs. tit. 3, § 3005.5 (2003), asserts that his campaign committee would be barred from raising funds to pay the debt or to pay the debt itself. As a result, Appellant and his family could have liens placed on their home and perhaps even lose their home in order to satisfy a debt that resulted from actions taken by Appellant's campaign committee.

While it is true that there may be some financial hardship imposed upon a candidate if he or she is held personally liable for improper actions taken by his or her campaign committee, the Board does not find this public policy consideration to be persuasive here. First, Section 3005.5 is irrelevant to this matter because it merely prohibits the commingling of campaign contributions with the candidate's personal

funds. It does not address the use to which campaign funds may or may not be put. In fact, there is no legal prohibition against Appellant's campaign committee using its campaign funds to pay for debts Appellant incurred as a result of actions taken by the committee on his behalf. In March 2002, D.C. Mun. Regs. tit. 3, § 3013, which proscribes limitations on the use of campaign funds, was amended to allow the use of campaign funds to pay fines or penalties resulting from litigation that "arises directly out of a candidate's or principal campaign committee's campaign activities." *Id.* § 3013.2(d) (2003). The fines levied against Appellant by DMV in this case would clearly be considered to have arisen directly out of the campaign activities of Appellant's campaign committee.

Second, the government also faces potential financial hardship if a campaign committee alone is held responsible for violations of DPW regulations. As the Corporation Counsel notes in its brief, "[c]ampaign committees are routinely created and disbanded as quickly as the fierce D.C. political wind changes direction." Even if a committee is still in existence at the time a citation is issued by DPW or adjudicated before a DMV Hearing Officer, there is often little the government can do to enforce any ensuing fines. Although the Litter Control Administration Act provides for unpaid fines to be enforced through a lien upon any property owned by the person cited, *see* D.C. Code Ann. § 1-1102.04 (2003), it is unlikely that the candidate's campaign committee will have any property to which a lien would attach. In addition, such a committee cannot be sued unless it is incorporated, *see Karl Rove*, 824 F. Supp. at 1282, which campaign committees are not required to be. There is clearly a risk that a candidate's campaign committee will not be legally or financially able to pay for debts resulting from

improper actions taken on behalf of the candidate. However, public policy considerations dictate that this risk should be borne by the candidate who as benefited from, and for all practical purposes directed and controlled, the actions of the campaign committee; it should not be borne by the general public, who would ultimately have to pay the fines and penalties left in the wake of the candidate's campaign activities if the candidate cannot be held liable and the campaign committee is unwilling or unable to accept responsibility.

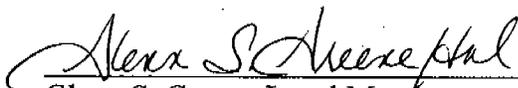
Conclusion

For the reasons stated above, the Board concludes that the DMV Hearing Officer correctly determined that DPW was not in error when it issued citations to Appellant Paul Strauss for violations of D.C. Mun. Regs. tit 24, §§ 108.1 and 108.10 (1996) where those citations were based upon actions taken by Appellant's campaign committee.

We note with regret that if DPW properly had cited both Senator Strauss and his campaign committee for campaign activities that violated the District's littering laws, this appeal may have been unnecessary. Nevertheless, this case does present a controversy requiring resolution and has provided the Board with an opportunity to discuss matters that may recur.

ORDERED AND ADJUDGED THIS 28th DAY OF October, 2003

BY:



Glenn S. Greene Legal Member
David H. Marlin, Legal Member
Mike Meier, Legal Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA

BOARD OF APPEALS AND REVIEW

International A.N.S.W.E.R.	)	BAR Docket No: 02-5859-LC
Appellant)	
	)	Notice of Infraction Nos. 328965-0,
vs.	)	328966-1 and 328967-2
)	
D. C. Department of Public Works)	
Appellee)	

DECISION AND ORDER

This appeal challenges the constitutionality of District of Columbia regulation 24 DCMR § 108.1 *et seq.*, a regulation promulgated to implement the District's littering laws by preventing the indiscriminate posting of signs and posters on public property. Appellant International A.N.S.W.E.R. (IA) also alleges the decision of the D. C. Department of Public Works (DPW) dated June 10, 2002, holding it liable for a violation of this regulation, is unsupported by substantial evidence and is contrary to law.

Some facts are undisputed. On March 18, 2002, between 11 a.m. and 12 noon, DPW Inspector Barry Carey, Sanitation Enforcement Branch, visited two locations where three signs had been posted on lampposts. Each sign advertised an 11 a.m. rally on April 20 at the White House and identified a web site and phone number (the former was www.InternationalAnswer.org; the latter was 202-543-2777). Each sign indicated the rally was for the purpose of gaining support for certain political objectives, namely, "U.S. out of Afghanistan," "No to racial and religious profiling," and "Money for Education NOT War." The signs, which are in evidence, did not indicate the date they were affixed.

Inspector Carey had been directed to these locations - 2423 Minnesota Avenue, S.E. and 2341 Pennsylvania Avenue, S.E. - by the Clean City Coordinator and ANC representative for this Southeast area. He took photographs of the signs and then returned to his office to research how to contact "International Answer" and to determine whether the signs had been posted illegally, i.e., not in compliance with 24 DCMR § 108.1 *et seq.* After concluding his research, Inspector Carey issued the three infractions referenced above. Inspector Carey ordered the signs removed within 72 hours. A fine of \$35.00 was listed for each offense. The infraction notices were served by certified mail.

The regulatory provisions pertinent to this appeal are:

24 DCMR § 108.1. No person shall affix a sign, advertisement, or poster to any public lamppost or appurtenances of a lamppost, except as provided in accordance with this section.

24 DCMR § 108.4. Any sign, advertisement, or poster that does not relate to the

sale of goods or services may be affixed on public lampposts or appurtenances of a lamppost, subject to the restrictions set forth in this section.

24 DCMR § 108.5. A sign, advertisement, or poster shall not be affixed for more than sixty (60) days....

24 DCMR § 108.7. Each sign, advertisement, or poster shall contain the date upon which it was initially affixed to a lamppost.

24 DCMR § 108.11. Within twenty -four (24) hours of posting each sign, advertisement, or poster, two (2) copies of the material shall be filed with an agent of the District of Columbia so designated by the Mayor...

On June 10, 2002, Hearing Examiner Pamela B. Washington conducted a contested hearing in this case for DPW, appellee, under the auspices of the Department of Motor Vehicles Adjudication Services. Sarah Sloane, a volunteer, appeared on behalf of appellant. Sarah Sloane and IA were each represented by legal counsel Mara Verheyden Hilliard. and Carl Messineo. Inspector Carey appeared as a witness for DPW. DPW was not represented by counsel. IA denied it had violated the law.

According to the transcript of the hearing obtained by IA and submitted by DPW, Inspector Carey testified to the facts outlined above and stated further in questioning by Hearing Examiner Washington that his investigation led him to a telephone call with Ms. Sloane (p.8). At that point, Hearing Examiner Washington permitted cross-examination of Inspector Carey by attorney Hilliard. Inspector Carey testified he did not see anyone place the signs on the lampposts and did not know who was responsible for those acts (p.10).

Examiner Washington then permitted attorney Hilliard to ask questions of Ms. Sloane. Ms. Sloane testified that IA does produce signs which it provides to volunteers to distribute for display "at universities and cafes, bookstores, on the street (p.13)." Ms. Sloane testified she did not know who posted the three signs that Inspector Carey cited (p.13); that IA intended that their signs be displayed indefinitely because the political message remains relevant (p.14); and explained that A.N.S.W.E.R. is an acronym for Act Now to Stop War and End Racism (p.15). Ms. Sloane was not subjected to cross-examination. Attorney Hilliard then summed up IA's defense by stating there was no proof that IA "directed or put up these signs themselves (p.16)." She argued further that the regulation is unconstitutional because it violates the First and Fourteenth Amendments to the U.S. Constitution. She argued that the regulation suppresses political dissent, favors some political speech over others, i.e., political campaign signs are permitted but signs containing political speech unrelated to campaigns are not permitted, and deprives appellant of due process of law.

Examiner Washington then asked Ms. Hilliard when the signs were posted (in order to determine whether the 60-day time limit in 24 DCMR § 108.5 was complied with); and whether IA had submitted two copies of the signs to the public space permit office (as required by 24 DCMR § 108.11). Mr. Messineo responded that IA did not admit it posted the signs cited and therefore had no responsibility to submit the signs for review (p.22-23). IA's counsel also argued that the

Notices of Infraction were invalid because they only cited 24 DCMR § 108.1 and did not refer to any sub-sections, such as 4, 5, 7 and 11, as rules that had to be followed (p.26).

That same day, June 10, 2002, Examiner Washington issued a written decision holding IA liable for the three infractions and assessed a \$35.00 fine for each. Hearing Examiner Washington reviewed the record and concluded: "Respondent had reasonable knowledge that some of the volunteers would post the signs in the public space and should have taken the necessary steps to ensure that copies of the signs were filed with the appropriate office." She determined the penalties should be assessed at \$35.00 per violation. An appeal was filed on June 25, 2002.

SUFFICIENCY OF THE EVIDENCE

Appellant was found liable for violating 24 DCMR § 108.1. It is clear from the facts in the record that appellant violated 24 DCMR § 108.1, 4, 7 and 11. There was no evidence to support a violation of 24 DCMR § 108.5, i.e., that the signs in evidence were in place longer than sixty (60) days. To sustain these findings, there must be evidence in the record that IA was responsible for producing and distributing the signs, that the signs did not contain the date they were affixed and that IA had a legal obligation to comply with subparagraph 11. We find there is substantial evidence in the record as required by 1 DCMR § 510.14 (e) of our regulations and affirm the decision.

It is obvious from the testimony of Ms. Sloane, the statements of counsel and the record as a whole, that the signs in evidence were produced by IA, were provided to unidentified persons and were intended for public display. IA cannot escape responsibility for the illegal posting of signs by stating they were placed by unidentified persons when it admits those persons received the signs from IA for that purpose. Whether the signs in evidence were posted by IA staff or by volunteers, those who placed the signs did so with the implied authority of IA. "Implied authority is actual authority inferred from the circumstances, such as the relationship between the parties and conduct of the principal toward the agent manifesting the principal's consent to have the agent act for him." Lewis v. Washington Metropolitan Transit Authority, 463 A.2d 666, 669 (D.C. 1983). The record is sufficient to hold IA responsible for exhibiting the signs in violation of 24 DCMR § 108.1 *et seq.* IA's denial of responsibility to file copies of the signs with the Mayor's agent based on its not knowing who posted the signs is disingenuous.

We turn next to IA's claim that the infraction notices were defective because the respondent was insufficiently informed of the content of the regulation. It is the responsibility of a recipient of a violation notice to make reasonable inquiries of the substance of the legal obligation entailed. A violation notice is sufficient if it provides reasonable notice of the scope of the offense. Russell v. District of Columbia Board of Zoning Adjustment, App D.C., 402 A.2d 1231 (1979); Revithes v. District of Columbia Rental Housing Commission, App. D.C., 536 A.2d 1007 (1987). We believe the language of 24 DCMR § 108.1 - "except as provided in accordance with this section" - provides reasonable notice that the remaining portions of the regulation must be examined. Appellant, represented by counsel, knew or should have known of its obligations to satisfy the law's requirements.

The facts are sufficiently detailed so that the basic underlying reasons for the conclusions may be

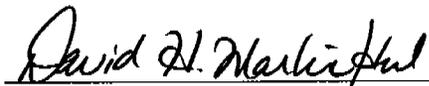
inferred. Daro Realty, Inc. v. District of Columbia Zoning Commission, 581 A.2d 295 (1990). There is a presumption of correctness of an agency's decision, and the burden of demonstrating error is upon the party appealing therefrom. Cooper v. Department of Employment Services, 588 A. 2d 1172, 1174 (D.C. 1991). The Board's task is limited to determining whether the findings and conclusions in Hearing Examiner Washington's decision are supported by substantial evidence and are in accordance with the law. King v. Department of Employment Services, 560 A. 2d 1067 (D.C. 1989). We find that IA has not met its burden of proof.

CONSTITUTIONAL CHALLENGE

The Board of Appeals and Review is authorized to consider issues of constitutionality by 1 DCMR § 510.14 (b). We may not, however, refuse to enforce any statute, rule or regulation of the United States or of the District of Columbia on the ground that it is repugnant to the Constitution of the United States, 1 DCMR § 512.9, Archer v. District of Columbia Department of Human Resources, 375 A.2d 523 (1977).

On August 14, 2003, DPW filed a Motion to Dismiss the portion of the appeal containing the constitutional challenge. Appellant filed a lengthy opposition. We conclude this issue in the case should be left for consideration by the District of Columbia Court of Appeals if appellant so choose to file an appeal there. The record in this case to date is insufficient for the Board to undertake a constitutional review.

THEREFORE, this 8th day of March 2004, the appeal is DENIED.



David H. Marlin, Board Chair
Mike Meier, Legal Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW

JAMES BUBAR)	
Appellants)	
)	
v.	)	Docket No. 02-5892-LC
)	
DEPARTMENT OF PUBLIC WORKS)	
Appellee)	

DECISION AND ORDER

This matter is an appeal from an order of the Department of Motor Vehicles Adjudication Services on behalf of the Department of Public Works ("DPW"), upholding a Notice of Violation and fine issued to appellant. The Notice of Violation ("NOV"), No. 210656-1, which was based on an April 30, 2002 observation by DPW Inspector Matthew Ketcha Gana, charged appellant with "improper site protection." The NOV cited 24 DCMR § 3403.5 and "Red Book 107.07, page 118."

The "ticket writer's notes" signed by Inspector Gana explain that the Inspector observed in front of 3206 Tennyson Street, N.W. a sidewalk area that had been excavated and left open. The notes state that the "Location was improperly protected whereby" it was "unsafe to the residents." A photograph attached to the ticket

writer's notes shows an excavated driveway, including an excavated sidewalk area; and two cones, one of which is on the excavated sidewalk area and the other of which is on an adjacent, non-public-space portion of the excavated driveway.

DMVAS Hearing Examiner Pamela Washington conducted a hearing on July 31, 2002. The Hearing Record states that Inspector Gana inspected the area in question in response to a complaint and found that "someone walking in the area could trip" and that "the area should have been covered so that people would have been able to cross without having to go into the roadway." Inspector Gana testified that appellant could have protected the area "by putting a yellow tape, or putting at least four cones; closed it; make sure that at least somebody should see that this area you can't go through. Or you could have put the plywood, so that people can walk through." Hearing Transcript at 29-30. As stated in the Hearing Record, appellant testified that the work was completed without injuries and that this was a "first offense" not preceded by any warning.

Hearing Examiner Washington noted in her decision that 24 DCMR § 3403.5 requires all work in the public space to be "performed in accordance with the District of Columbia

Department of Public Works Standard Specifications for Highways and Structures." These Standard Specifications are referred to as the "Red Book." Hearing Transcript at 6. The Hearing Examiner found that appellant failed to comply with the law, reasoning that, "The two cones were places [sic] in the center of the driveway and not in such a manner as to provide notice and safety to the public. The placement of the cones is more to prohibit one from using the driveway and not to give notice of the excavation in the sidewalk area." The Hearing Examiner found appellant liable for the assessed fine of \$500.

Appellant submitted his opening brief to the Board with his Notice of Appeal and submitted an additional brief after having had an opportunity to review the transcript of the hearing and a copy of the photograph that accompanied the ticket writer's notes. Despite the Board's order of February 11, 2004 requiring both parties to submit any further briefs by February 27, 2004, DPW did not submit a brief.

The Board may reverse the Hearing Examiner's decision only if it is arbitrary or capricious, contrary to law, or "unsupported by substantial evidence in the record." 1 DCMR § 510.14. The issue presented in this appeal is whether the Hearing Examiner's finding that the cones

provided insufficient notice and protection to the public is supported by substantial evidence in the record.

Substantial evidence "means more than a mere scintilla and such that reasonable minds might accept it as adequate to support a conclusion" *Office of the People's Counsel v. Public Service Commission*, 797 A. 2d 719, 725-26 (D.C. 2002). The substantial evidence test is satisfied so long as the decision-maker "fully and clearly explains its decision and demonstrates 'a rational connection between facts found and the choice made.'" *Id.* at 726. A decision-maker's rationale is entitled to special respect where the subject matter is complex and esoteric. *Id.*

Having reviewed the photographic evidence, the Standard Specifications for Highways and Structures, and the arguments presented in appellant's brief, the Board finds as follows.

As noted, 24 DCMR § 3403.5 requires all work in the public space to be "performed in accordance with the District of Columbia Department of Public Works Standard Specifications for Highways and Structures. As quoted in the Hearing Transcript (p. 28-29), section 107.07 of the "Red Book" Standard Specifications states that

The contractor shall provide, erect, maintain all necessary barricades, suitable and sufficient lights, danger signals, signs and other traffic control devices, and take all necessary precautions for the protection of the work and the safety of the public.

The Hearing Examiner reasoned that the cones that had been placed in the excavated area were to prevent use of the driveway and were not sufficient "to give notice of the excavation in the sidewalk area." She also found that the cones were placed "in the center of the driveway and not in such a manner as to provide notice and safety to the public."

The Board finds that the Hearing Examiner's decision is not supported by substantial evidence in the record and must be reversed.¹ It appears that, as a matter of law, traffic cones are one means of signaling the existence of an excavated area and potentially hazardous condition. See *Bostic*, 748 A. 2d at 426 (referring to the "absence of safety cones and signs or other warnings of a hazardous condition" on a pedestrian walkway). Moreover, as appellant's brief notes, the Manual on Uniform Traffic

¹We find that, because the facts of this case pertain to matters "within the realm of common knowledge and everyday experience," see *Bostic v. Henkels and McCoy, Inc.*, 748 A. 2d 421, 425 (D.C. 2000), the Hearing Examiner's findings are not entitled to heightened respect.

Control Devices for Streets and Highways cited in the Red Book appears to recognize traffic cones as devices that can be used to signal "pavement drop offs." Furthermore, no evidence was presented about (and the Hearing Examiner gave no consideration to) factors such as the depth of the excavation, the weather conditions, or the degree of danger inherent in pedestrians walking through the excavated area rather than being diverted to the street or being required to walk on plywood (alternatives that the DPW inspector suggested but that present their own hazards, see *Bostic*, 748 A. 2d 421 (involving a claim for injury caused when plaintiff walked over plywood boards covering trench excavations in a sidewalk area)).

In addition, the photographic evidence shows that one traffic cone was actually in the sidewalk area, not merely in the center of the driveway, as the Hearing Examiner found. From the photograph, it appears to the Board that the excavation was not deep; that walking through the excavated area would not pose any obvious hazard to a pedestrian who was on notice of the excavation; and that the placement of the cone in the sidewalk area would have been sufficient to provide notice of a special condition warranting caution. DPW provided no explanation as to why, in an area of the size depicted, it was necessary to have

four cones rather than one for the safety of the public. At the very least, the Board finds, the Hearing Examiner was not presented with evidence that was sufficient for her to choose Inspector Gana's explanation over appellant's. The substantial evidence test is not met where, as here, the evidence did not afford the hearing examiner a reasonable basis for choosing among competing explanations. See *Clark v. D.C. Dep't of Employment Services*, 743 A. 2d 722, 730 (D.C. 2000).

WHEREFORE it is **ORDERED** this 10th day of March, 2004, that the DMVAS decision is REVERSED.

A handwritten signature in cursive script that reads "Phyllis D. Thompson". The signature is written in black ink and is positioned above the printed name.

Phyllis D. Thompson, Legal Member

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF APPEALS AND REVIEW

In the Matter of:)
J.C. & Associates)
) BAR Docket No: 98-5356-BP
)

FINDINGS OF FACT, CONCLUSIONS OF LAW

On September 10, 1998, the Building and Land Regulation Administration (hereinafter "BLRA") of the Department of Consumer and Regulatory Affairs (hereinafter "DCRA") notified, appellant, J.C. & Associates that their application for a partial raze of a building at 1429 Rhode Island Avenue, N.W. (hereinafter "1429") had been denied Title 12 District of Columbia Municipal Regulation (hereinafter "DCMR"), Section 112.1. The Land Regulation Administration concluded that the application failed to demonstrate the existence of an "imminently dangerous" emergency structural conditions present on site which could justify waiving compliance with Section 5.1004 (Historic Landmark and Historic District Protection Act) since the site was designated a historical structure under said Act.

A hearing on the matter began January 10, 1999 and at the request of Assistant Corporation Counsel and with concurrence of Appellant's Counsel, the hearing was continued until January 15, 1999. The Hearing Committee of the Board of Appeals and Review (hereinafter "BAR") consisted of Patricia Randolph Williams, Legal Member, Curtis A. Boykin, Public Member and Angel Luis Irene, District Member. Philip M. Musolino, Esquire represented Appellant; Attorney Meena Gowda, Assistant Corporation Counsel represented the Government. Presenting testimony were George Milne, Chesapeake Design, and agent for J.C. & Associates; Ronald Steele, Steele Foundations, Inc.; Mr. Armando M. Lourenco, Administrator, DCRA Building and Land Regulation Administration and Ahmet Ozusta, Chief Structural Engineer, DCRA Building and Land Regulation Administration.

FINDINGS OF FACT

1. On May 11, 1998, a Construction Inspection Violation Notice was issued for 1427 and 1429 Rhode Island Ave. NW. The BLRA inspector, Stanley Waite, found that the structures were "in imminent danger of falling ... [and a] permit to raze the building [must be obtained]". (Plaintiff Exhibit (Pl. Ex. 3).
2. The 1429 property had been damaged by fire in 1997. (Tr. p. 65; Pl. Ex. 6; Def. Ex. 3).

3. Appellant J.C. & Associates through agent George Milne, filed an application for a construction permit to partially raze 1429 Rhode Island, Ave. NW on July 24, 1998. (Pl. Ex. 6).
4. On September 10, 1998, Armando M. Lourenco, Administrator, DCRA Building and Land Regulation Administration, denied the July 24th application citing that the application failed "to demonstrate the existence of an "imminently dangerous" emergency structural conditions present on site which would justify waiving compliance with Section 5.1004 (Historic Landmark and Historic District Protection Act)". (Pl. Ex. 10).
5. Mr. Lucerno's denial of appellant's application was based on his own personal inspection of the property, the recommendations of his Chief Structural Engineer, Ahmet Ozusta and a letter from Jeffrey Overmiller (Tr. pp. 203-207).
6. In an August 3, 1998 memorandum from Ahmet Ozusta, Chief Structural Engineer, BLRA, to Mr. Lourenco, Mr. Ozusta provided his recommendations and findings on 1429 after a field visit conducted July 24, 1998. Mr. Ozusta's memorandum concluded that "in spite of all damaging factors listed ... the building could be saved provided the following repairs and structural reinforcements are done" (Def. Ex. 3).
7. Upon inspection of 1429, Mr. Ozusta found that the structure was not "imminently dangerous" and could be preserved with proper repair which might entailing shoring. (Tr. pp. 128-132, 142).
8. Mr. Ozusta found no significant deterioration of 1429 from his visit in July 1998 until a subsequent visit in October 1998. (Tr. pp.132-136).
9. Mr. Ozusta testified that in preparing his recommendations for the proper repair of 1429, he considered that repairs should be done in timely manner to ward against the structure's further deterioration due to pending inclement weather. (Tr. pp. 142-143, 191-196).
10. Jeffrey Overmiller, Structural Design Group, Limited, sent a letter to George Milne and provided a copy of the letter to BLRA which stated that since the structure (1429) was historic it could not be razed completely. He writes "the front portion of the structure may be stable", ... "the front portion of the building could be stabilized safely from the exterior", ... "the rear wall ... likely could also be safely shored". (Pl. Ex. 7; Tr. p. 206).
11. There was discussion whether Chief of Buildings, Vincent Ford (Stanley Waite's supervisor), had inspected 1429, concurred with Inspector Stanley Waite's assessment that the structure was in imminent danger of falling down and advised Mr. Lourenco of these findings. (Pl. Ex. 3). Mr. Milne testified that he had spoken with Mr. Ford and Mr. Ford had advised him that he (Mr. Ford) would sign-off on the permit to take 1429 down to a safe level. (Tr. p. 72). However, Mr. Milne could not verify whether Mr. Ford signed-off on such a permit or advised BLRA that 1429 should be partially razed. (Tr. pp. 73-75). In further discussion on this issue, Mr. Lourenco testified that Vincent Ford, did not agree with Inspector Waite's characterization of 1429 as being an imminent danger. (Tr. pp. 239-240).

12. Mr. Lourenco testified that he had visited 1429 as late as January 12, 1999, took pictures of the structure and would still find that the structure did not pose an imminent danger of falling. (Tr. pp. 209-211).

13. During the time period in which Mr. Lourenco issued the September 10th denial letter, a September 23, 1998 public hearing was pending before the Mayor's Agent to hear testimony concerning an application for the full raze of the 1429 premises, filed with an application to raze an abutting structure at 1427 Rhode Island Ave., NW. (Pl. Ex. 10). The Historic Landmark and Historic District Preservation Act of 1978, D.C. Law 2-144, codified at D.C. Code sections 5-1001 et seq., prohibits the demolition of historically designated property without the approval of the Mayor's Agent.

14. By letter dated September 18, 1998, counsel for J.C. & Associates notified the Historic Preservation Board that they would withdraw their application for review by the Mayor's Agent and had proceeded to pursue other available remedies under D.C. Code 5-601. (Def. Ex. 3; Pl. Ex. 13a, Civil Action No. 98-7796, Calendar #7, Judge Hedge).

15. The case was then moved to Superior Court for findings on the appropriate administrative and injunctive relief available to plaintiff. The District of Columbia conceded that the Government would not object to the jurisdiction of the BAR to review limited and narrow issues in this case. (Tr. p. 23; Pl. Ex.).

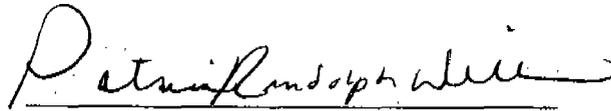
CONCLUSIONS OF LAW

1. The BAR's jurisdiction is limited to assessing whether the Government's determination was either arbitrary or capricious or clearly erroneous based on the facts.
2. It is within the authority of BLRA to waive compliance with the Historic Preservation Act and condemn a historic building if under exigent circumstances that building is imminently dangerous as codified under D.C. Code 5-601.
3. It is also within the authority of BLRA to properly determine what structural conditions meet the requisite requirements of an "imminently dangerous" emergency structural conditions present which would justify waiving compliance with Section 5.1004 (Historic Landmark and Historic District Protection Act).
4. BLRA, through independent review and consideration by the Administrator, and upon reliance on the recommendation and conclusion of staff and outside sources made an objective determination that an imminent danger did and does not exist at 1429 Rhode Island Ave., NW.

5. Upon consideration of the evidence, the BAR concludes that BLRA did not act arbitrarily or capriciously nor did they render an erroneous decision. BLRA's decision was made based upon the facts as deemed appropriate, reasonable and reliable by the Agency. BLRA met its burden in rendering its denial of a permit to partially raze 1429 Rhode Island Ave. N.W. under D.C. Code 5-601.

ORDER

THEREFORE, it is **ORDERED**, this thirtieth day of January, 1999, that the decision of the Department of Consumer and Regulatory Affairs Building Land Regulation Administration be and is hereby upheld.



Patricia Randolph Williams, Esquire
Hearing Committee Chairperson

January 30, 1999