

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE PETROLEUM TANK RELEASE COMPENSATION BOARD
DEPARTMENT OF COMMERCE

In The Matter of the Petrofund
Contractor's License of DC Enterprises
of Northern Minnesota, Inc. and J & D
Enterprises, Inc.

**ORDER DENYING MOTION FOR
SUMMARY DISPOSITION**

This Motion for Summary Disposition was filed by the Board on December 5, 2002. Michael J. Tostengard, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, Saint Paul, MN 55101-2130, appeared on behalf of the Board. Larry Stauber, Jr., Attorney at Law, Stauber & Lien, 1011 East Central Entrance, Duluth, MN 55811-5501 appeared on Behalf of DC Enterprises of Northern Minnesota, Inc. DC Enterprises filed an Answer but did not file a memorandum in opposition to the Motion for Summary Disposition by January 27, 2003, the deadline set for a response. No notice of appearance has been filed on behalf of J & D Enterprises.

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum,

It Is Hereby Ordered:

1. The Motion for Summary Disposition is DENIED.
2. A prehearing conference will be held by telephone on **March 4, 2003 at 1:30 p.m.**

Dated this 12th day of February, 2003.

S/ Beverly Jones Heydinger

BEVERLY JONES HEYDINGER
Administrative Law Judge

MEMORANDUM

The Petroleum Tank Release Compensation Board (Board) has filed a Motion for Summary Disposition asserting that the petrofund contractor licenses of DC Enterprises of Northern Minnesota, Inc. (DC Enterprises), and J&D Enterprises, Inc., should be revoked. It asserts that Dale Cich, the Chief Executive Officer for both companies, has pleaded guilty in the United States District Court for the District of Minnesota to discharging pollutants into a wetland. The Board asserts that Mr. Cich "has engaged in conduct likely to deceive or defraud, or demonstrating a willful or careless disregard for public health or the environment."^[1]

The request for summary disposition is analogous to a motion for summary judgment under Rule 56.02 of the Minnesota rules of Civil Procedure. Summary disposition of a claim is appropriate when there is no genuine issue as to any material fact and one party is entitled to a favorable decision as a matter of law.^[2] A material fact is one that is substantial and will affect the result or outcome of the proceeding, depending upon the determination of that fact.^[3] In considering the Motion for Summary Disposition, an Administrative Law Judge must view the evidence in the light most favorable to the nonmoving party.^[4]

To obtain a summary disposition, the moving party must establish that there is no genuine issue of material fact. The initial burden is on the moving party to establish a prima facie case for the absence of material facts at issue.^[5] Once the moving party has established a prima facie case, the burden shifts to the nonmoving party.^[6] When the movant also bears the burden of persuasion on the merits at trial, as the movant does in this case, its burden on summary disposition is to present "credible evidence" that would entitle it to a directed verdict if not controverted at trial.^[7] To defeat a motion for summary judgment successfully, the nonmoving party must show that specific facts are in dispute that have a bearing on the outcome of the case.^[8] The existence of a genuine issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to meet the nonmoving party's burden.^[9]

In this case, it is undisputed that Mr. Cich is the sole shareholder and CEO of DC Enterprises of Northern Minnesota, Inc. The Board has not presented any evidence to support its claim that Mr. Cich is an owner, shareholder, director or chief executive officer of J & D Enterprises, Inc.

The Board has presented evidence that Mr. Cich has entered into a plea agreement with the United States Attorney to plead guilty to a charge that may disqualify him and DC Enterprises from participation in the Petroleum Tank Release Compensation Fund. A copy of the plea agreement, dated May 22, 2002, was submitted in support of the Board's motion. However, the plea agreement alone is not a sufficient basis upon which to grant summary disposition because the defendant may

withdraw the plea at any time for any reason or no reason until the plea is accepted by the court.^[10] Also, the court has the discretion to reject the plea.^[11]

The Board failed to provide any evidence that the court has accepted the plea. Thus it has failed to make a prima facie case. The Respondent to the motion may not rely on its pleadings alone to counter a summary disposition motion. However, in this case, the moving party failed to establish the prima facie case necessary to award summary disposition. The Board may renew its motion if the plea is ultimately accepted by the federal court.

In addition, summary disposition may not be granted against J & D Enterprises because the Board has failed to submit any evidence that Mr. Cich is a “partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the registrant...”^[12] of J & D Enterprises. Such a relationship must be established to disqualify J & D Enterprises.

B.J.H.

^[1] Minn. Stat. § 115C.112(3).

^[2] Minnesota Rules of Civil Procedure, Rule 56.03.

^[3] Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W.2d 804 (Minn. App. 1984).

^[4] Grandahl v. Bulluck, 318 N.W.2d 240 (Minn. 1982); Nord v. Herreid, 305 N.W.2d 337 (Minn. 1981); American Druggists Insurance v. Thompson Lumber Co., 349 N.W.2d 569 (Minn. 1989).

^[5] Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988).

^[6] Minnesota Mutual Fire & Casualty Company v. Retrum, 456 N.W.2d 719, 723 (Minn. App. 1990).

^[7] Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2557, 91 L.Ed.2d 265 (1986) (dissenting opinion restating majority position); Thiele, 425 N.W.2d at 583, n. 1.

^[8] Hunt v. IBM Mid America Employees Federal Credit Union, 384 N.W.2d 853, 855 (Minn. 1986).

^[9] *Id.*; Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W. 2d 507, 512 (1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988).

^[10] Fed. R. Crim. P. 11 (d).

^[11] *Id.*, (c) (3) and (5).

^[12] Minn. Stat. § 115C.112 (3).