

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

Steve Sviggum, Commissioner,
Department of Labor and Industry,

**ORDER FOR
SUMMARY DISPOSITION**

v.

EnviroTech Remediation Services, Inc.

This matter came before Administrative Law Judge Eric L. Lipman on May 12, 2008, for oral argument on Respondent's Motion for Summary Disposition.

Rory H. Foley, Assistant Attorney General, appeared on behalf of the Minnesota Department of Labor and Industry (Department). Jesse R. Orman, Fabyanske, Westra, Hart & Thomson, P.A., appeared on behalf of EnviroTech Remediation Services, Inc. ("EnviroTech" or Respondent).

Based upon all of the files, records and proceedings in this matter, and for the reasons detailed in the Memorandum below,

IT IS HEREBY ORDERED THAT:

1. Respondent EnviroTech Remediation Services' Motion for Summary Disposition is DENIED.
2. Sufficiently in advance of the telephonic pre-hearing conference, now scheduled in this matter for **Thursday, June 19, 2008**, Counsel shall confer with each other on a timeline within which to complete any needed discovery and mutually convenient dates for an evidentiary hearing.

Dated: May 30, 2008

/s/ Eric L. Lipman
ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

EnviroTech seeks dismissal of a Complaint made under the Minnesota Occupational Safety and Health Act, as untimely.¹

Following the December 30, 2005 workplace death of an employee of EnviroTech, the Minnesota Department of Labor and Industry Occupational Safety Health Administration (“MNOSHA”) issued a Citation and Notification of Penalty to the company. The April 14, 2006 Citation and Notification of Penalty asserted that EnviroTech failed to eliminate pressure from an elevator hydraulic line, or to otherwise block the elevator from moving, and that these failures resulted in fatal injuries to the employee.²

As it is permitted to do under applicable regulations, EnviroTech timely filed a Notice of Contest of the Citation and Notification of Penalty by facsimile.³ The facsimile transmission was sent by EnviroTech, and received by the Department, on May 10, 2006.⁴ EnviroTech likewise sent a copy of this Notice of Contest by First Class Mail; which was received by the Department two days later on May 12, 2006.⁵

Both parties agree that MNOSHA served a Summons and Complaint in this matter on August 9, 2006 – 91 days after the receipt of the May 10, 2006 Notice of Contest.⁶ Thus, the Department was one day late in completing the required service. Counsel for the Department explained at argument that the facsimile transmission of the Notice of Contest was not properly logged in upon receipt and that the due date to complete service of the Complaint was calculated from the date of the later-arriving, mailed copy of the Notice.

I. Factual and Regulatory Background

The Minnesota Occupational Safety and Health Act provides for a pyramiding and increasingly detailed set of filings in workplace safety matters. The Act provides for issuance of Citations and Notification of Penalties; an opportunity to dispute those Citations and Notifications through a Notice of Contest; the development and filing of a detailed Enforcement Complaint in support of the contested items; and a formal Answer from the employer in response to the agency’s Complaint.⁷

¹ See e.g., *Respondent’s Memorandum of Law in Support of Summary Disposition*, at 8.

² See, *Complainant’s Opposition Memorandum of Law*, Exhibit 1.

³ See, Minn. R. 5210.0007 (2), 5210.0536 (2) (2007).

⁴ See, *Respondent’s Memorandum of Law in Support of Summary Disposition*, Ex. A.

⁵ See, *Affidavit of Marie O’Neill*, at ¶ 4.

⁶ See, *Respondent’s Memorandum of Law in Support of Summary Disposition*, Ex. C.

⁷ See, Minn. Stat. §§ 182.66 and 182.661 (1), (3), (6) (2006).

The Act further provides timelines within which these exchanges must occur. For example, an employer's Notice of Contest must be received by the agency within 20 calendar days of the issuance of a Citation; service of the Complaint must follow within 90 calendar days of the filing of the Notice of Contest; and the employer's Answer must follow within 20 calendar days of the service of the Complaint.⁸

EnviroTech maintains that the Department's failure to strictly observe the statutory timelines as to the service of the Complaint deprives the Commissioner and the Office of Administrative Hearings of jurisdiction in this matter, obliging a dismissal of both the Complaint and the underlying Citation.

II. Legal Analysis

EnviroTech's argument urging dismissal is elegantly stated: It asserts that in order to give effect to the statutory terms that "[t]he commissioner *shall serve a complaint* on all parties no later than 90 calendar days after receiving a notice of contest," dismissal of the Citation and Notification of Penalty is required. Otherwise, continues EnviroTech, the Legislature's directive to the Department to serve Enforcement Complaints within a certain timeframe would be of no effect.

In the view of the Administrative Law Judge that stance is overstated. There is a well-established rule of statutory construction that statutory provisions defining the time within which public officers shall discharge their duties are to be read as directory.⁹ This rule has particular force, as is the case here, in instances where the Legislature has not specified the consequence that is to follow the agency's failure to meet the statutory deadline.¹⁰

If an abrupt end to the dispute-resolution process was intended to follow the Department's failure to timely serve the Enforcement Complaint, the Legislature surely would have specified this result. Significantly, in the very same statute upon which EnviroTech relies, the Legislature provides for the agency's Citation and assessment to "be deemed a final order of the commissioner and not subject to review by any court or agency," if the employer's Notice of Contest to that Citation and assessment is not timely filed.¹¹ The fact that a sanction is not specified for the failure to timely serve an

⁸ See, Minn. Stat. § 182.661 (1), (6) (2006).

⁹ See, *City of Chanhassen v. Carver County*, 369 N.W.2d 297, 299-300 (Minn. App. 1985) (quoting *Wenger v. Wenger*, 274 N.W. 517, 518 (Minn. 1937)).

¹⁰ See, *Riehm v. Commissioner of Public Safety*, 745 N.W.2d 869, 876 (Minn. App. 2008); *Savre v. Indep. Sch. Dist. No. 283*, 642 N.W.2d 467, 472 (Minn. App. 2002).

¹¹ See, Minn. Stat. § 182.661 (1) (2006).

Enforcement Complaint, or the employer's Answer, strongly suggests that the Legislature did not intend dismissal to always follow this misstep.¹²

Additionally, EnviroTech's view is disfavored because it necessarily obliges a holding that Minnesota Rule 5210.0570, subpart 5, which vests case management authority in Administrative Law Judges, is *ultra vires*. This rule provides that the Administrative Law Judge "may enter an order affirming or vacating" a citation and notification as a sanction for the failure to timely file either an Enforcement Complaint or the Answer.¹³ The Department has long understood the Act as permitting Administrative Law Judges to resolve claims of untimely filing and this is a role that this Office has fulfilled in the past.¹⁴ The conclusion that this long-standing case management procedure violates the Act is neither a natural nor a favored view.¹⁵

Lastly, the very different impacts of reading the 90-day provision as mandatory, or directory, counsel against dismissal of the Complaint. EnviroTech acknowledges that the one-day delay in service of the Enforcement Complaint did not prejudice its preparation for a later hearing on the merits (or in any other way). By contrast, the impacts upon the agency are substantial. While counsel for the Department did concede that a dismissal of the Citation and Notification of Penalty might have a jarring effect upon the Department's mail room – inspiring it to take more care in tracking Notices of Contest that are received by facsimile – the appellate courts instruct that dismissal is "the most punitive sanction" to be "granted only under exceptional circumstances."¹⁶ Thus, however beneficial such a reminder might be, the agency's one-day miscalculation is not one of the exceptional circumstances described by the appellate courts.

Upon this record, therefore, dismissal is neither required nor appropriate.

¹² Compare, Minn. Stat. § 182.661 (1) (2006) with Minn. Stat. § 182.661 (6) (2006).

¹³ See, Minn. R. 5210.0570 (5) (2007).

¹⁴ See, e.g., *Commissioner, Dept. of Labor and Industry v. J.L. Schwieters, Constr., Inc.*, OAH Docket No. 8-1901-11335 (1997) (<http://www.oah.state.mn.us/aljBase/190111335.or2.htm>); *Commissioner, Dept. of Labor and Industry v. Fagen, Inc.*, OAH Docket No. 1-1901-10449-2 (1996) (<http://www.oah.state.mn.us/aljBase/19010449.or.htm>).

¹⁵ Compare, Minn. Stat. §§ 182.657 and 182.661 (6) (2006); compare also, *In re Excess Surplus Status of Blue Cross & Blue Shield of Minn.*, 624 N.W.2d 264, 278 (Minn. 2001) (deference is extended to an agency decision-maker in the interpretation of statutes that the agency is charged with administering and enforcing); *In re Twedt*, 598 N.W.2d 11, 13 (Minn. App.), *review denied* (Minn. 1999) (in matters of statutory construction, great weight is accorded to the construction given by the body charged with administering the problem sought to be remedied by the statute).

¹⁶ See, *Keefe v. Cargill, Inc.*, 393 N.W. 2d 425, 427 (Minn. App. 1986) (quoting *Firoved v. General Motors Corp.*, 152 N.W.2d 364 (Minn. 1967)).

E. L. L.