



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION ON**  
**FAILURE TO APPEAR AND**  
**FIX PENALTY**

OAL DKT. NO. ECE-LU 11991-10

AGENCY DKT. NO. PEA090002-1520-08-  
0003.1

**NEW JERSEY DEPARTMENT OF  
ENVIRONMENTAL PROTECTION,  
PESTICIDE CONTROL AND COASTAL  
AND LAND USE COMPLIANCE AND  
ENFORCEMENT,**

Petitioner,

v.

**BAY FRONT MARINA & YACHT  
BASIN LLC and KEITH BOYCE,**

Respondent

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**Ray Lamboy**, Deputy Attorney General, for petitioner (John J. Hoffman, Acting  
Attorney General of New Jersey, attorney)

**Keith Boyce**, respondent, pro se pursuant to N.J.A.C. 1:1-5.4(a)(5)

Record Closed: June 24, 2014

Decided: July 17, 2014

BEFORE **JOHN SCHUSTER III**, ALJ:

### **STATEMENT OF THE CASE**

In this matter respondents appeal the entry of an Administrative Order and Notice of Civil Administrative Penalty Assessment levied against it by the petitioner on November 12, 2009. The appeal was filed timely and the matter was transmitted to the Office of Administrative Law (OAL) on November 9, 2010, as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was scheduled for an in-person pre-hearing conference before the undersigned on June 24, 2014, at 10:00 a.m. DAG Lamboy appeared on behalf of the petitioner and no one appeared on behalf of Bay Front Marina and Yacht Basin, LLC or Mr. Boyce. As a result of respondent's failure to participate in the proceeding, a proof hearing was held. The results of that hearing are set forth herein. As a result of the respondent's failure to appear and/or participate in this proceeding, DAG Lamboy made an application to dismiss this appeal for failure to prosecute by the respondent.

### **FINDINGS OF FACT**

After being duly sworn, DAG Lamboy testified to the following facts concerning this matter.

1. In November 2009, a Administrative Order and Notice of Civil Administrative Penalty Assessment (AONOCAPA) was issued by the Department of Environmental Protection (DEP) against Bay Front Marina and Yacht Basin, LLC and Thomas Fuller, individually and Keith Boyce, individually. A timely appeal was filed from that assessment and the matter was transmitted to the Office of Administrative Law for resolution. On March 25, 2014, a telephonic status conference was held by the Honorable John R. Futey, ALJ at which time Mr. Boyce indicated that he would consult with his bankruptcy attorney to determine the extent of his personal liability for the assessment set forth in the AONOCAPA. DAG Lamboy advised Mr. Boyce that he had the option to

pursue his appeal or withdrawal it and apply to the DEP for an ability to pay analysis in which case his assessed penalty could be reduced if financial hardship was demonstrated. DAG Lamboy forwarded to Mr. Boyce the application he would have to submit if he claimed financial hardship.

2. On April 23, 2014, another conference call was held with Judge Futey, DAG Lamboy and Mr. Boyce. During that conference, Mr. Boyce indicated that Bay Front Marina and Yacht Basin, LLC had filed and received the discharge in bankruptcy. Mr. Boyce also indicated that he had retained Eugene Roth, Esq., to represent him in the appeal of the AONOCAPA before the OAL. Judge Futey requested Mr. Boyce instruct Attorney Roth to submit a letter of representation to the court; however, no letter was ever received at the OAL.
3. On May 20, 2014, an in-person status conference was scheduled before Judge Futey. Neither Mr. Boyce nor his attorney appeared. Judge Futey reassigned this matter to the undersigned for disposition.
4. On May 28, 2014, the undersigned sent to DAG Lamboy, Keith A. Boyce and Bay Front Marina and Yacht Basin, LLC a letter advising them that an in-person prehearing conference was scheduled for June 24, 2014 at 10:00 a.m. The letter indicated the importance of Mr. Boyce's attendance so that a fair resolution could be achieved. That letter also advised Mr. Boyce that if he or his legal representative did not appear at the June 24 conference, his appeal would likely be dismissed and a proof hearing would be held, which would be the first step in having a judgment entered against him.
5. Notices were sent to Mr. Lamboy and Mr. Boyce advising them that an in-person pre-hearing conference was scheduled before the undersigned on June 24, 2014.
6. On May 31, 2014, Mr. Boyce sent an e-mail to DAG Lamboy indicating that he had a conflict in his schedule for the June 24<sup>th</sup> date and asked Mr. Lamboy to reschedule the pre-hearing conference.

7. On June 2, 2014, DAG Lamboy advised Mr. Boyce by e-mail that it was Mr. Boyce's obligation to request an adjournment; however he could advise the court that DAG Lamboy would consent to that request. On June 6, 2014, DAG Lamboy again e-mailed Mr. Boyce asking if he requested an adjournment of the hearing because he had not received a copy of the communication. He also advised Mr. Boyce that if he did not appear in-person at the conference it would probably result in the dismissal of his administrative appeal.
8. On June 24, 2014, DAG Lamboy appeared for the in-person pre-hearing conference and neither Mr. Boyce nor anyone on his behalf appeared on behalf of Bay Front Marina and Yacht Basin LLC or on behalf of Keith Boyce. DAG Lamboy moved for dismissal of this appeal and requested that a proof hearing be held affirming the penalty issued in the AONOCAPA. DAG Lamboy's request to the court was granted.

### **PENALTY**

The DEP analyzed the violations and the history of the activities on this property and determined that Mr. Boyce was aware of existing Water Front Development violations on the site prior to his purchase as he had met with DEP representatives and indicated that once he purchased the property he would either apply for the necessary permits or remove the illegal activity that had taken place. Since respondent did neither, the DEP determined that this failure to make the corrections consisted of a MAJOR violation. A MAJOR violation carries a burden of three penalty points. For the purpose of determining SERIOUSNESS of the violations, the area violated was determined to be an excess of 2,000 square feet but less than 5,000 square feet. That determination incurred an additional six point violation for the SERIOUSNESS of the offense. In addition a special area assessment was imposed as a result of violations concerning shellfish habitats and submerge vegetation habitat. The special area penalty consisted of an additional two points. The total points incurred by way of penalty was therefore eleven points. The DEP Water Front Development Penalty Assessment Table provides that any penalty greater than ten points would incur a

monetary penalty of \$25,000. Because the regulations provide that when a penalty is assessed, that penalty is a daily penalty. However, the DEP has in its discretion to limit the continuing non-compliance when using a daily penalty analysis if the monetary fine would yield an unreasonable amount. Therefore, the DEP limited their daily penalty to two days resulting in a Water Front Development Penalty Assessment of \$50,000.

The DEP also asked for a penalty against the respondents for their un-permitted activity under the CAFRA regulations. There they determined the conduct was MAJOR because Mr. Boyce agreed to correct the violations and did not do so. That again incurred a three point penalty. The area disturbance in that matter was also less than 5,000 feet by greater than 270 feet, which incurred a two point violation. Therefore the total points accumulated for the CAFRA violations were five points. Five points equates to a daily \$5,000 monetary penalty and because the DEP used its discretion and lessened the penalty to two days of the continuing non-compliance, respondents were assessed a total of \$10,000 for the CAFRA violations. The total penalty then is \$50,000 for the unauthorized water front activities and \$10,000 for the unauthorized CAFRA activities for a total of \$60,000. Under the circumstances before me, I **FIND** that that penalty is fair and reasonable under all the circumstances that were presented at the proof hearing.

### **CONCLUSIONS**

I **CONCLUDE** that respondents Bay Front Marina and Yacht Basin, LLC and Keith Boyce individually have failed to prosecute this matter on their behalf and their appeal is therefore **DISMISSED**.

### **ORDER**

I **ORDER** respondents Bay Front Marina and Yacht Basin, LLC and Keith Boyce individually and jointly to be assessed a monetary penalty of \$60,000 for the violations set forth in the ANOCAPA of November 2009.

I hereby **FILE** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Environmental Protection does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **DIRECTOR, OFFICE OF LEGAL AFFAIRS, DEPARTMENT OF ENVIRONMENTAL PROTECTION, 401 East State Street, 4th Floor, West Wing, PO Box 402, Trenton, New Jersey 08625-0402**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

July 17, 2014

\_\_\_\_\_  
DATE

  
**JOHN SCHUSTER III, ALJ**

Date Received at Agency: \_\_\_\_\_

Date Mailed to Parties: \_\_\_\_\_

/cad

**WITNESSES**

For Petitioner:

Ray Lamboy, Deputy Attorney General

For Respondent:

None

**EXHIBITS**

For Petitioner:

None

For Respondent:

None