

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

100 CAMBRIDGE STREET, BOSTON, MA 02114 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

**March 8, 2024**

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In the Matter of  
King's Grant Water  
Company, Inc.

OADR Docket Number: 2020-023  
Enf. Document No. 00009566  
Attleboro, MA

Consolidated with

In the Matter of  
King's Grant Water  
Company, Inc.

OADR Docket Number: 2020-026  
Enf. Document No. 00009876  
Enf. Document No. 00009877  
Attleboro, MA

Consolidated with

In the Matter of  
King's Grant Water  
Company, Inc.

OADR Docket Number: 2020-035  
Enf. Document No. 00010061  
Enf. Document No. 00010062  
Attleboro, MA

Consolidated with

In the Matter of  
King's Grant Water  
Company, Inc.

OADR Docket Number: 2020-038  
Enf. Document No. 00010085  
Enf. Document No. 00010086  
Attleboro, MA

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**RECOMMENDED FINAL DECISION ON RECONSIDERATION**

These four consolidated appeals arise out of the issuance by the Massachusetts Department of Environmental Protection ("the Department") of four Notices of Intent to Assess a Civil Administrative Penalty ("Penalty Assessment Notices" or "PANs") in the total amount of \$18,250 against King's Grant Water Company, Inc. ("Petitioner"), for alleged violations of the Massachusetts

Drinking Water Regulations, 310 CMR 22.00. The Petitioner claims that it did not commit the alleged violations, that the penalties are unwarranted and excessive, and that it has a financial inability to pay the penalties.

I issued a Recommended Final Decision (“RFD”) on January 8, 2024 recommending that the Department’s Commissioner issue a Final Decision affirming the four PANS because the Department had properly issued them to the Petitioner. The Commissioner designated the Chief Presiding Officer as the Final Decision-Maker in the appeal on January 29, 2024.<sup>1</sup> After the Chief Presiding Officer reviewed the RFD and the record of the appeal, he issued a Final Decision on February 13, 2024 adopting the RFD and affirming the four PANs. On February 23, 2024, the Petitioner filed a motion to reconsider requesting that the Final Decision be vacated. I ordered the Department to submit any opposition to the motion by March 4, 2024. It submitted an opposition on that date.

The Petitioner raises three arguments in support of its motion to reconsider: first, it alleges that it provided sufficient information to prove that it lacked an ability to pay the four PANs. Second, it alleges that it was improper for the matter to be decided without an evidentiary adjudicatory hearing (“Hearing”). Third, it argues that I improperly considered an incident where its president, John Brady, allegedly contacted a witness. As discussed below, all these claims lack merit and as such, I recommend that the Chief Presiding Officer issue a Final Decision on Reconsideration denying the Petitioner’s motion to reconsider and affirming the Final Decision.

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<sup>1</sup> The Adjudicatory Proceeding Rules at 310 CMR 1.01(14)(b) provide that “[e]very final decision” issued in an administrative appeal “shall be in writing and shall be signed by the [Department’s] Commissioner or a designee of the Commissioner.”

**I. The applicable standards.**

**A. Motions for reconsideration.**

A party seeking reconsideration of a Final Decision has a heavy burden of demonstrating that the Final Decision was unjustified. 310 CMR 1.01(14)(d); Matter of Vecchione, OADR Docket No. WET-2014-008, Recommended Final Decision on Reconsideration (Nov. 4, 2014), 2014 MA ENV LEXIS 83, \*6, adopted as Final Decision on Reconsideration (Nov. 7, 2014), 2014 MA ENV LEXIS 82. The party must demonstrate that the Final Decision was based upon a finding of fact or ruling of law that was "clearly erroneous." Id. A Motion for Reconsideration may be summarily denied if "[it] repeats matters adequately considered in the final decision, renews claims or arguments that were previously raised, considered and denied, or where it attempts to raise new claims or arguments . . . ." Id. at 6-7. Moreover, "reconsideration [of the Final Decision is not] justified by the [party's] disagreement with the result reached in the Final Decision." Id. at 7.

**B. The standard for directed decision.**

Contrary to the Petitioner's intimations, a Presiding Officer is not required to conduct a Hearing to adjudicate a contested appeal. The Presiding Officer is authorized not to conduct a Hearing when it would be pointless to conduct the Hearing where the appellant has no reasonable likelihood of prevailing in the appeal because of the appellant's evidentiary deficiencies. This authority is reflected in the directed decision rule in 310 CMR 1.01(11)(e).

The directed decision rule provides that "[u]pon the petitioner's submission of prefiled testimony [for the Hearing in the appeal] ... any opposing party may move for the dismissal of any or all of the petitioner's claims, on the ground that upon the facts or the law the petitioner has failed to sustain its case...." 310 CMR 1.01(11)(e). As my RFD noted,

"Dismissal [of an appeal pursuant to 310 CMR 1.01(11)(e)] for failure to sustain a case, also known as a directed decision, is appropriate when a party's direct case - generally, the testimony and exhibits comprising its prefiled direct testimony - presents no evidence from a credible

source in support of its position on the identified issues." In the Matter of Thomas Vacirca, Jr., OADR Docket No. WET-2016-017, Recommended Final Decision (April 11, 2017), 2017 MA ENV LEXIS 22, at 14-15, adopted as Final Decision, (April 18, 2017), 2017 MA ENV LEXIS 28. In essence, a directed decision should be entered against the petitioner in the appeal when the petitioner does not have a reasonable likelihood of prevailing on its claims in the appeal because the petitioner's evidentiary submissions are deficient as a matter of law. Id.

Matter of Valis, OADR Docket No. 2021-015, Recommended Final Decision, 2022 MA ENV LEXIS 23, \*4 (Jul. 7, 2022), adopted as Final Decision (Jul. 25, 2022), 2022 MA ENV LEXIS 22. Because pre-filed testimony is equivalent to direct testimony in court, directed decision is akin to a motion for directed verdict under Mass. R. Civ. P. 50(a) governing civil suits in court.

## **II. Analysis.**

### **A. The Petitioner did not provide evidence sufficient to raise a genuine issue of material fact for adjudication at a Hearing regarding whether it had an inability to pay the penalties.**

The Petitioner raised as a defense in the appeals that it lacks the financial ability to pay the four PANs. The Petitioner has the burden to prove inability to pay by a preponderance of the evidence presented at the Hearing. Matter of Stephen W. Seney, OADR Docket No. 2012-019, Recommended Final Decision (Mar. 25, 2013), 2013 MA ENV LEXIS 27, \*5, adopted by Final Decision (Apr. 2, 2013), 2013 MA ENV LEXIS 26; Matter of Ferry Street Partners Investment Trust and Daniel J. Messier, Trustee, OADR Docket No. 2015-008, Recommended Final Decision (Oct. 11, 2016), 2016 MA ENV LEXIS 63, \*53 n.7, adopted by Final Decision (Dec. 14, 2016), 2016 MA ENV LEXIS 62. The Petitioner's financial inability defense cannot be based on conclusory statements that it lacks the financial ability to pay the penalty; the Petitioner must support the claim with corroborating financial records. In the Matter of Blackinton Common, LLC, Docket No. 2007-115 & 147, Recommended Final Decision (Sep. 25, 2009) (financial inability defense "must include financial statements, tax returns, and other competent 'kind[s]' of evidence on which reasonable

persons are accustomed to rely in the conduct of serious affairs'"), adopted by Final Decision (Jan. 7, 2010).

The Petitioner argues in its motion to reconsider as follows:

KGW [the Petitioner,] provided the necessary KGW Federal Tax Returns, and according to MassDEP policy, it is up to MassDEP to request additional details they need to clarify the Federal Tax Return line items. All KGW received from MassDEP was a simple statement that the information in the Federal Tax Returns was insufficient, and therefore submitted a Motion to Dismiss based on KGW's failure to sustain a case related to an ability to pay. MassDEP did not follow their procedures. KGW subsequently requested that MassDEP provide KGW with the proper DEP forms to further document KGW's inability to pay. In response to this request the forms KGW received from MassDEP "MassDEP Individual Financial Data Request Form["] appears to be designed for individuals to complete. This form is not the appropriate form for an S-Corporation. It was also not part of the DEP's Inability to Pay instructions, but after KGW asked where is this form, required the Secretary for the OADR to request it be provided by the DEP.

Motion to Reconsider, p. 1. The Petitioner's argument is unavailing.

First, it is the *Petitioner's* burden to demonstrate inability to pay. Seney, 2013 MA ENV LEXIS 27, \*5.

Second, it is not incumbent on the Department to coax financial information from the Petitioner where the latter has the burden of proving it lacks the ability to pay the four PANs. Moreover, the Petitioner was aware of the financial information that needed to be provided to the Department as early as 2021. See Aff. Holly Lee (2020-023), ¶ 5; Aff. Holly Lee (2020-026), ¶ 5; Aff. Holly Lee (2020-035), ¶ 5; Aff. Holly Lee (2020-038), ¶ 5.

Third, the financial information that the Petitioner did provide to the Department was insufficient to prove even a *prima facie* case. This is reflected by the facts that the Petitioner's purported 2020 Federal tax return is unsigned, and none of the tax returns it provided to the Department indicated any depreciation of assets, which makes them unable to be used in the

Department's Estimated Available Cash Flow analysis. See Comprehensive Policy for Assessing Financial Condition (Nov. 3, 2014), p. 10 ("The first part of the analysis determines the Estimated Available Cash Flow for each of the three most recently completed tax years by adding the taxable income before net operating losses or special deductions to the depreciation." ). The Petitioner's purported IRS Form 4506-T also failed to attest that the signer had the authority to execute the document, making it useless to the Department. The failure to file a correct Form 4506-T is alone fatal to the Petitioner's case, because it makes it impossible for the Department to have verified any of the other financial information that the Petitioner provided.

Even if the Petitioner determined that the Individual Financial Data Request Form would not have accurately described its financial status, the Petitioner is not absolved from disclosure. There is nothing in the record indicating that the Petitioner sought alternatives to disclosure. The Petitioner nevertheless knew that he could submit other financial information in support of its financial inability to pay claim. The Petitioner was able to provide profit and loss statements, for example.

In sum, the Petitioner was given ample notice and numerous opportunities to provide a complete picture of its finances. It categorially failed to do so, instead submitting incomplete filings. Accordingly, a Hearing would have been pointless. Directed decision in favor of the Department was appropriate, and nothing has changed since I issued my RFD granting a directed decision to the Department.

**B. Cross-examination of the Departments' witnesses was unnecessary because the Petitioner failed to prove a *prima facie* case.**

The Petitioner next objects to "Summary Decision without a hearing[,] even though the OADR had directed the DEP to schedule a time and place for a hearing. Such a hearing would have provided KGW an opportunity to cross-examine witnesses." Motion to Reconsider, p. 1. The Petitioner misses the mark.

It is not relevant whether the Petitioner had the opportunity to cross-examine the Department's witnesses because the Department did not put up any witnesses. The Department did not file pre-filed testimony because they were not required to while I considered the Department's motion for directed decision. Simply put, there was no one to cross-examine. This is therefore not a basis to reconsider the Final Decision.

**C. Whether the Petitioner contacted a witness or not is irrelevant to the Final Decision.**

The Petitioner contends that it should have had the opportunity to cross-examine the witnesses who alleged that the Petitioner contacted a witness during the pendency of this matter (discussed on page 3 of the Recommended Final Decision). Motion to Reconsider, p. 2. He contends that this witness was biased against him because they had refused to pay for the Petitioner's drinking water services. Id.

These allegations by the Petitioner are irrelevant to the outcome of this matter. First, the incident was mentioned only in the procedural history of OADR Docket Number 2020-023. There was no pre-filed testimony regarding the incident, so it played no part in my RFD. More importantly, whether this incident happened or not has no relevance to whether the Petitioner had an inability to pay the four PANs.

**III. Conclusion.**

The Petitioner has failed to meet its heavy burden to warrant reconsideration of the Final Decision. Therefore, I recommend that the Chief Presiding Officer issue a Final Decision on Reconsideration that denies the Petitioner's motion to reconsider and affirms the Final Decision.

**Date:** March 8, 2024



Patrick M. Groulx  
Presiding Officer

## **NOTICE OF RECOMMENDED FINAL DECISION ON RECONSIDERATION**

This decision is a Recommended Final Decision on Reconsideration of the Presiding Officer. It has been transmitted to MassDEP's Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d) and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision may be appealed and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party may file a motion to renew or reargue this Recommended Final Decision on Reconsideration or any part of it, and no party may communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion, directs otherwise.



## **Service List**

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