

COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

**THE OFFICE OF APPEALS AND DISPUTE RESOLUTION**

**April 5, 2018**

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In the Matter of  
Sharon Chen, DMD, PC

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Docket No. 2017-041  
DEP File No.: RPAN 00003182

**RECOMMENDED FINAL DECISION**

In this appeal, the Petitioner Sharon Chen, DMD, PC challenges a \$500.00 Reporting Penalty Assessment Notice ("RPAN" or "Civil Administrative Penalty") that the Boston Office of the Massachusetts Department of Environmental Protection ("MassDEP" or "the Department") issued to the Petitioner on September 18, 2017 for purported violations of 310 CMR 73.00: Amalgam Wastewater and Recycling Regulations for Dental Facilities and 310 CMR 4.10(11)(b): Permits for Dental Mercury Amalgam Recycling. The RPAN alleges that the Petitioner violated these regulations by purportedly failing to: (1) submit to the Department a completed Environmental Results Program ("ERP") Certification by March 31, 2017 in violation of 310 CMR 73.00; and (2) pay the required \$200.00 permit fee in violation of 310 CMR 4.10(11)(b). RPAN, at p. 1. The Petitioner does not deny having committed these violations, but challenges the \$500.00 penalty amount, contending that "[it] is excessive." Petitioner's Appeal Notice (dated November 29, 2017, but filed with the Office of Appeals and Dispute Resolution

("OADR") on December 12, 2017). The Petitioner requests that the Department "forgive this first offense" and promises "[that] the offense] won't happen again." Id.

The Department has filed a motion to dismiss the Petitioner's appeal as being untimely, contending that the Petitioner filed the appeal beyond the 21 day deadline for appealing a civil administrative penalty as set forth in the Civil Administrative Penalty Statute, G.L. c. 21A, § 16, and the Department's Civil Administrative Penalty Regulations at 310 CMR 5.35. Department's Motion to Dismiss (March 16, 2018). The Petitioner opposes the Department's motion, admitting that it filed its appeal late, but requesting nevertheless that its appeal be allowed to proceed because in its view the \$500.00 penalty amount is excessive. Petitioner's March 20, 2018 Letter to OADR Opposing Department's Motion to Dismiss ("Petitioner's Opposition").

The Petitioner contends that the \$500.00 penalty amount is excessive because, among other reasons, (1) the Petitioner purportedly "initially did not understand" the requirements of 310 CMR 73.00 and 310 CMR 4.10(11)(b); (2) the Petitioner purportedly "submitted the [required] registration and paid the [required] \$200.00 [permit] fee as soon as [it understood the regulations' requirements]"; (3) "[the \$500.00 penalty] amount is too heavy-handed for [the Petitioner not having paid] the original \$200.00 [permit] fee"; and (4) the Petitioner purportedly "[would] be happy to pay" a reduced penalty amount of \$200.00, the same amount of the original permit fee, in order "[to] put this matter to rest." Petitioner's Opposition.

It is well settled that the timeliness of an administrative appeal under G.L. c 21A, § 16 and 310 CMR 5.35 challenging a Department civil administrative penalty assessment is a jurisdictional requirement for maintenance of the appeal that has been strictly applied in prior appeals of Department civil administrative penalty assessments. In the Matter of Wilbraham

Land and Development, LLC, OADR Docket No. 2017-016, Recommended Final Decision (February 13, 2018), adopted as Final Decision (March 1, 2018) (appeal of \$29,960.00 civil administrative penalty dismissed for being more than three months late); In the Matter of Sherrill Gould, OADR Docket No. 2014-012, Recommended Final Decision (July 14, 2014), 2014 MA ENV LEXIS 66, at 4, adopted as Final Decision (August 18, 2014), 2014 MA ENV LEXIS 67 (appeal of \$17,455.00 civil administrative penalty dismissed for being 10 days late); In the Matter of Erik Erkinen, OADR Docket No. 2011-006, Recommended Final Decision (May 13, 2011), 2011 MA ENV LEXIS 63, adopted as Final Decision (May 23, 2011), 2011 MA ENV LEXIS 27 (appeal of \$35,100.00 civil administrative penalty dismissed for being three days late). The jurisdictional nature of the 21 day appeal deadline finds its support in the provisions of G.L. c. 21A, § 16 which state that if a party fails to file an appeal within the 21 day deadline, the party “shall be deemed to have waived [its] right” to appeal the civil administrative penalty. The same provision appears in 310 CMR 5.35, which was adopted pursuant to G.L. c. 21A, § 16.

Here, the Department has submitted an Affidavit from one of its staff members with personal knowledge of the Department’s issuance of the RPAN to the Petitioner, setting forth the following uncontroverted facts:

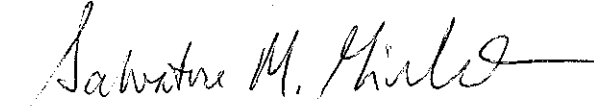
- (1) On September 18, 2017, the Department mailed the RPAN to the Petitioner by Certified Mail;
- (2) Included with the RPAN were instructions on filing an administrative appeal with OADR of the RPAN, including notice of the 21 day appeal deadline;
- (3) On September 20, 2017, the Petitioner received by Certified Mail, the RPAN with the administrative appeal instructions as set forth above; and

- (4) On December 21, 2017, OADR received the Petitioner's appeal of the RPAN (more than three months after the RPAN was issued).

Affidavit of Veronica O'Donnell (March 16, 2018).

In conclusion, I recommend that the Department's Commissioner issue a Final Decision dismissing the Petitioner's appeal of the \$500.00 RPAN as being untimely and affirming the RPAN.

Date: 04/05/18

  
Salvatore M. Giorlandino  
Chief Presiding Officer

**NOTICE-RECOMMENDED FINAL DECISION**

This decision is a Recommended Final Decision of the Chief Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d) and/or 14(e), and may not be appealed to Superior Court pursuant to G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect. Because this matter has now been transmitted to the Commissioner, no party and no other person directly or indirectly involved in this administrative appeal shall neither (1) file a motion to renew or reargue this Recommended Final Decision or any part of it, nor (2) communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

## **SERVICE LIST**

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