

**STATE OF WASHINGTON
DEPARTMENT OF HEALTH
OFFICE OF PROFESSIONAL STANDARDS**

In the Matter of the Public Water)	
System of:)	OPS No. 95-01-09-611 DW
)	Prog. No. 94-029
SOUTH KEYPORT HEIGHTS,)	
- Kitsap County,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW, AND
ID # 81860W)	FINAL ORDER
Respondent.)	
_____)	

A hearing was held before Health Law Judge Arthur E. DeBusschere, Presiding Officer for the Department of Health, on September 19, 1995, at 9:15 a.m. at the Tacoma Public Library, Cascade Room A, 1102 Tacoma Avenue South, Tacoma, Washington. Present at the hearing were Assistant Attorney General Lilia Lopez, representing the Drinking Water Program of the Department of Health (the Program), and Tim Blake, Regional Compliance Manager for the Program. Neither Juel Lange nor an attorney representing Mr. Lange was present at the hearing. The Presiding Officer, having heard the testimony and considered the evidence and argument presented at the hearing, now issues the following:

I. PROCEDURAL HISTORY

1.1 A Notice of Imposition of Penalties dated November 7, 1994 (the Notice) was issued by the Program to Juel Lange as owner and/or operator of the South Keyport Heights Water System (the Keyport Water System). The Notice informed Mr. Lange that if he wanted to contest the imposition of a \$240 fine he must complete

the enclosed Request for Adjudicative Proceeding form and file it with the Office of Professional Standards.

1.2 On November 30, 1994, the Program received a letter from Mr. Lange contesting the fine and requesting an adjudicative proceeding. His letter was forwarded to the Office of Professional Standards and received on January 6, 1995.

1.3 On February 15, 1995, a Scheduling Order and Notice of Hearing was issued scheduling a prehearing conference for June 6, 1995, at 10:30 a.m., and the hearing for July 6, 1995. On June 2, 1995, the Office of Professional Standards received the Program's prehearing conference statement and its proposed exhibits for the hearing.

1.4 A prehearing conference was held as scheduled on June 6, 1995. Neither Mr. Lange nor an attorney representing Mr. Lange attended the prehearing conference. Ms. Lopez requested that an order of default be issued for Mr. Lange's failure to attend the scheduled prehearing conference. The Presiding Officer issued an Order of Default dated June 29, 1995 and canceled the July 6, 1995 hearing date.

1.5 On July 3, 1995, Mr. Lange filed a letter requesting that the Order of Default be vacated. By order dated July 14, 1995, the Presiding Officer vacated the Order of Default and ordered the issuance of an Amended Scheduling Order/Notice of Hearing.

1.6 On July 14, 1995, an Amended Scheduling Order/Notice of Hearing was issued scheduling a prehearing conference for August 17, 1995, at 9:00 a.m., in Tacoma, Washington, and the hearing for September 19, 1995, at 9:15 a.m., at the

Tacoma Public Library, Cascade Room A, 1102 Tacoma Avenue South, Tacoma, Washington. Upon motion by Ms. Lopez, the prehearing conference was rescheduled to August 21, 1995.

1.7 A prehearing conference was held on August 21, 1995. Both Ms. Lopez and Mr. Lange were present by telephone. Following the prehearing conference the Presiding Officer issued Prehearing Order No. 3: Order Governing Conduct At Hearing. Mr. Lange was given until September 5, 1995 to file his proposed exhibits for the hearing.

1.8 On August 28, 1995, A Notice of Hearing was mailed to the parties notifying them of the time and location of the September 19, 1995 hearing. On September 6, 1995, the Office of Professional Standards received a letter dated September 5, 1995 and a packet of documents from Mr. Lange. In his letter, Mr. Lange notified the Presiding Officer that he would not attend the hearing on September 21, 1995. By letter dated September 15, 1995, Karen Engle, Paralegal for the Office of Professional Standards, notified Mr. Lange of the correct hearing date and enclosed a copy of the Notice of Hearing. On September 19, 1995, in response to Ms. Engle's letter, Mr. Lange called the Office of Professional Standards and informed Ms. Engle that he would not be attending the hearing.

1.9 The hearing was held as scheduled September 19, 1995. Neither Mr. Lange nor an attorney representing Mr. Lange was present.

II. PREHEARING MATTERS

2.1 Prior to the start of the hearing, the Presiding Officer identified and marked as exhibits the following documents which had been forwarded by Mr. Lange to the Office of Professional Standards:

- Exhibit 1 Notice of Hearing dated August 28, 1995.
- Exhibit 2 Prehearing Order No. 2: Order on Motion to Continue Prehearing Conference.
- Exhibit 3 Motion to Continue Prehearing Conference with cover letter dated August 15, 1995.
- Exhibit 4 Prehearing Order No. 3: Order Governing Conduct At Hearing with attachments dated August 24, 1995.
- Exhibit 5 Amended Scheduling Order/Notice of Hearing dated July 14, 1995.
- Exhibit 5a July 31, 1995, letter from Lilia Lopez to Juel Lange.
- Exhibit 6 Prehearing Order No. 1: Order Vacating Order of Default and Ordering An Amended Scheduling Order dated July 14, 1995.
- Exhibit 6a Order of Default dated June 29, 1995.
- Exhibit 7 July 1, 1995, letter from Juel Lange to Office of Professional Standards.
- Exhibit 8 June 14, 1995, letter from Lilia Lopez to Judge Arthur E. DeBusschere.
- Exhibit 9 June 12, 1995, letter from Juel Lange to Lilia Lopez.
- Exhibit 10 June 2, 1995, letter from Lilia Lopez to Karen Engle.
- Exhibit 11 Department's Prehearing Conference Statement dated June 2, 1995.
- Exhibit 12 Scheduling Order/Notice of Hearing dated February 15, 1995.
- Exhibit 13 Service of Enforcement Documents and Notice of Imposition of Penalties dated November 7, 1994.
- Exhibit 14 May 11, 1994, letter from Tim Blake to Juel Lange.
- Exhibit 15 Bilateral Compliance Agreement.
- Exhibit 16 August 4, 1995, letter from Tim Blake to Juel Lange.
- Exhibit 17 November 28, 1994 letter from Juel Lange to David Clark, Director, Division of Drinking Water.

2.2 The Presiding Officer ruled that Exhibits 1 through 12 would not be admitted as substantive evidence because these documents concern procedural matters and are not relevant to the issues to be decided at the hearing. However, the Presiding Officer ruled that Exhibits 1 - 12 are part of the record for purposes of procedural matters.

2.3 Ms. Lopez had no objection to the admission of Exhibits 13, 14, and 15 but objected to the admission of Exhibits 16 and 17. Ms. Lopez asserted that Exhibits 16 and 17 are not relevant to the issues to be decided at the hearing. The Presiding Officer ruled that Exhibits 16 and 17 are not relevant and would not be admitted as substantive evidence. Exhibits 13, 14, and 15 were admitted.

III. FINDINGS OF FACT

3.1 Tim Blake testified on behalf of the Program. Mr. Blake has worked for the Program for over 21 years and is the Regional Compliance Manager for the S.W. Region, including Kitsap County. Mr. Blake has an A.A. degree in civil engineering.

3.2 Mr. Blake testified that a purveyor of a public water system is required under Washington law to monitor for coliform bacteria in the water system at least once per month. Monitoring for coliform bacteria is required because the presence of coliform bacteria is a primary indicator that a water system is experiencing problems. In addition, disease causing organisms in a water system may have potential health implications for its users. According to Mr. Blake, without proper monitoring, problems with water contamination would go undetected and corrective measures would be

delayed. Mr. Blake testified that the presence of coliform bacteria in a water system should alert the system owner to take corrective measures.

3.3 Mr. Blake testified concerning the laws and procedures for monitoring a public water system. According to Mr. Blake, the Program is responsible for enforcing the Federal Safe Drinking Water Act which requires monthly bacteriological testing of a public water system. State monitoring requirements must be at least as stringent as federal monitoring requirements. Under Washington law, a purveyor must draw a sample of water from the water system and send it to a certified laboratory for analysis. Mr. Blake testified that although certified laboratories will often send the results of the analysis directly to the Program, the Purveyor has the ultimate responsibility for submitting monitoring results to the Program.

3.4 Mr. Blake is familiar with the Keyport Water System which is located in Kitsap County. The Keyport Water System services approximately 35 homes and Mr. Lange is its purveyor.

3.5 Mr. Blake testified that in four years Mr. Lange missed approximately 25% of the required monthly samples. Initially the Program sent Mr. Lange a letter notifying him of the missed water samples. Next, the Program and Mr. Lange entered into a Bilateral Compliance Agreement wherein Mr. Lange agreed to monitor the Keyport Water System for bacteriological quantity a minimum of once per month as required under WAC 246-290-300. Pursuant to the Agreement, failure to comply with the monthly monitoring schedule could result in the imposition of fines pursuant to RCW 70.119A. Mr. Lange signed the Agreement on February 4, 1992. (Exhibit 15)

3.6 On May 11, 1994, Mr. Blake wrote to Mr. Lange concerning his failure to monitor the Keyport Water System for bacteriological quantity for the months of March 1994; October, June and March of 1993; and November, August and May of 1992. (Exhibit 14). The letter also directed Mr. Lange to monitor the water served by the Keyport Water System on a monthly basis and to submit a bacteriological quantity report to the Department for the month of May 1994 and monthly thereafter. (Exhibit 14).

3.7 Mr. Blake testified that the Program did not receive the results of bacteriological monitoring for the Keyport Water System for the month of July 1994. A Notice of Imposition of Penalties was issued to Mr. Lange as owner and/or operator of the Keyport Water System imposing a \$240 fine. According to Mr. Blake, there were six monitoring violations between the date the Agreement was signed and the date of the Notice of Imposition of Penalties. Mr. Lange's exhibits do not refute the Department's assertions that he failed to collect and submit water samples from the Keyport Water System for the month of July 1994.

3.8 Mr. Blake testified that the Program has the statutory authority to impose a penalty of up to \$5,000 per violation per day. Because certain violations do not justify a \$5,000 fine, the Program uses a standard formula to calculate every penalty imposed. According to Mr. Blake, this formula considers three factors: the degree of risk, past compliance and the size of the water system. Each factor is evaluated based on the individual circumstances of the particular water system and a corresponding number is assigned with higher numbers assigned to more serious violations. These numbers

and a base multiplier of 10 are used to calculate the penalty for a particular violation. Mr. Blake used this formula to calculate the \$240 penalty for Mr. Lange's failure to monitor the Keyport Water System for the month of July 1994.

IV. CONCLUSIONS OF LAW

4.1 If a party requests an adjudicative proceeding but fails to appear at the hearing, the presiding officer may issue an order of default or may proceed to hear the matter in the absence of the party and issue a final order. WAC 246-10-204.

Mr. Lange requested an adjudicative proceeding to contest the Department's imposition of a \$240 penalty. However, Mr. Lange failed to appear at the hearing. Because the Presiding Officer had earlier issued an order of default for Mr. Lange's failure to attend a scheduled prehearing conference and because Mr. Lange advised the Office of Professional Standards that he would not attend the hearing, the Presiding Officer decided to proceed to hear this matter in Mr. Lange's absence and to issue this Final Order.

4.2 Department regulations concerning public water supplies are designed to protect the health of consumers using public drinking water supplies by ensuring the provision of high quality drinking water. The water system purveyor is responsible for complying with the requirements of Department regulations. WAC 246-290-001.

A "purveyor" includes any person that owns or operates a public water system. RCW 70.119A.020(6).

4.3 The purveyor is responsible for the collection and submittal of coliform samples at least once per calendar month. WAC 246-290-300(2)(a). In addition, the purveyor must ensure that the required water samples are collected, transported and submitted for analysis by the state public health laboratory or another laboratory certified by the Department. WAC 246-290-300. A purveyor is also responsible for submitting all reports required by chapter 246-290 WAC to the Program. Monthly reports must be submitted before the tenth day of the following month, unless otherwise specified. WAC 246-290-480(2).

4.4 The Keyport Water System is a public water system, the operation of which is governed by chapter 246-290 WAC. Mr. Lange is the purveyor of the Keyport Water System. As purveyor, Mr. Lange has the responsibility to monitor the Keyport Water System by collecting drinking water samples for bacteriological analysis as required by WAC 246-290-300 and by submitting reports to the Department as required under WAC 246-290-480(2). The Department did not receive a report of the bacteriological analysis of the water in the Keyport Water System for the month of July 1994. Mr. Lange failed to collect a water sample for bacteriological analysis the month of July 1994 in violation of WAC 246-290-300 and failed to submit a bacteriological analysis report to the Department in violation of WAC 246-290-480.

4.5 A person who violates a law or rule regulating public water systems administered by the Department of Health is subject to a penalty of not more than five thousand dollars per day for every such violation. RCW 70.119A.040. Mr. Lange had been notified previously of this violation and he signed an Agreement to comply.

(Exhibit 14; Exhibit 15) The Department's imposition of a \$240 penalty against Mr. Lange for violations of WAC 246-290-300 and WAC 246-290-480 is within its statutory authority and should be affirmed.

V. DECISION AND ORDER

Based on the forgoing Procedural History, Findings of Fact, and Conclusions of Law, the Presiding Officer hereby makes the following ORDER:

5.1 The Department's imposition of a \$240 penalty against Juel Lange as purveyor of the South Keyport Heights Water System for violation of WAC 246-290-300 and WAC 246-290-480 is AFFIRMED.

5.2 As provided in RCW 34.05.461(3), 34.05.470, and WAC 246-10-704, either party may file a petition for reconsideration. The petition must be filed with the Office of Professional Standards, 2413 Pacific Avenue, P.O. Box 47872, Olympia, Washington 98504-7872, within ten days of service of this Order. The petition must state the specific grounds upon which reconsideration is requested and the relief requested. The petition for reconsideration shall not stay the effectiveness of this Order. The petition for reconsideration is deemed to have been denied 20 days after the petition is filed if the Office of Professional Standards has not acted on the petition or served written notice of the date by which action will be taken on the petition.

5.3 Proceedings for judicial review may be instituted by filing a petition in the Superior Court in accord with the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review must be filed

within thirty (30) days after you have been served with this Final Order, as provided by RCW 34.05.542.

DATED THIS 17TH DAY OF NOVEMBER,
1995.

/s/
ARTHUR E. DeBUSSCHERE, Health Law Judge
Presiding Officer

DECLARATION OF SERVICE BY MAIL

I declare that today I served a copy of this document upon the following parties of record: LILIA LOPEZ, JUEL LANGE by mailing a copy properly addressed with postage prepaid.

DATED AT OLYMPIA, WASHINGTON THIS ____ DAY OF NOVEMBER, 1995.

Office of Professional Standards

cc: DAVE CLARK