

(Sent Copy to Jay Lei
10-12-07
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The Honorable Judge Brian M. Tollefson
Hearing Date: October 12, 2007
Time: 11:00 a.m.

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STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT

VICTORY MOTEL, an
unincorporated Washington
business entity,

Petitioner,

v.

STATE OF WASHINGTON,
DEPARTMENT OF HEALTH,

Respondent.

NO. 07-2-07094-5

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER DENYING
PETITION FOR JUDICIAL REVIEW

THIS MATTER came before the Court on August 31, 2007, on a Petition for Judicial Review filed by Victory Motel challenging the March 16, 2007 Findings of Fact, Conclusions of Law and Final Order affirming the Department of Health's Notice of Imposition of Penalties for failure to conduct a sanitary survey and failure to collect and submit five (5) coliform samples per month.

The Court heard oral argument from Petitioner, Mr. Jay Lei, owner, Victory Motel, and counsel for Respondent, Dorothy H. Jaffe, Assistant Attorney General.

In making its decision, the Court considered:

1. Certified Administrative Record filed with the court on August 3, 2007;
Petitioner Objects to Accuracy AND Completeness of the Certified Record
2. Petitioner's Brief for Hearing filed on August 15, 2007;
3. Respondent's Reply Brief filed on August 22, 2007;

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER DENYING
PETITION FOR JUDICIAL REVIEW

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1 4. Petitioner's Rebuttal to Respondent's Brief and Evidence with attached
2 documents, filed on August 28, 2007.

3 I. FINDINGS OF FACT

4 Based on the arguments made and the evidence presented, the Court finds:

5 1.1 The Victory Motel is located on 10801 Pacific Hwy SW, Tacoma,
6 Washington. The owners of Victory Motel are Jiangong (Jay) Lei and Yumei Pan.

7 1.2 The Victory Motel water system provides water from a well for one (1)
8 residential connection, serving the Respondent's family members and seventeen (17)
9 service connections, serving a monthly population of approximately 378 to 418
10 occupants.

11 1.3 On May 14, 1996, based upon information submitted by the owners, the
12 Department determined that the Victory Motel Watery System was a Group A water
13 system.

14 1.4 Beginning on June 1, 1999, the Department of Health (Department)
15 informed Petitioner that as a Group A public water system, it was required to conduct a
16 sanitary survey of the water system every five (5) years pursuant to WAC 246-290-
17 416.

18 1.5 Petitioner was scheduled to complete a sanitary survey during the July 1,
19 1999 to June 30, 2000 time period, to be conducted by the Tacoma Pierce County
20 Health Department (TPCHD).

21 1.6 TPCHD contacted Petitioner on May 2, 2000, informing it that a sanitary
22 survey needed to be completed during May 2000 to July 14, 2000.

23 1.7 The Department contacted Petitioner on February 18, 2003, February 11,
24 2004, November 12, 2004, and December 6, 2004, stating that a sanitary survey is
25 required of all Group A water systems once every five years and that it needed to
26 contact TPCHD to schedule its sanitary survey.

1 1.8 On November 22, 2004, and again on December 1, 2004, Petitioner,
2 Mr. Lei, requested a water facility inventory (WFI) form so he could update his
3 system's information including its classification.

4 1.9 On December 23, 2004, the Department received an updated WFI Form
5 from Victory Motel, which indicated that the water system had one (1) residential
6 connection and (17) non-residential connections.

7 1.10 On January 13, 2005, the Department sent Petitioner an updated WFI
8 form with the changes that Mr. Lei requested, indicating that the system is classified as
9 a Group A transient non-community system since it serves at least 15 connections.

10 1.11 On March 11, 2005, the Department issued a Notice of Violation to
11 Petitioner for failure to schedule a sanitary survey within the last five (5) years. If a
12 sanitary survey was not completed or scheduled to be completed within fifteen (15)
13 days of the Notice of Violation, Petitioner was required to monitor for coliform
14 bacteria at least five (5) times per month.

15 1.12 On May 18, 2005, Petitioner (Mr. Lei) met with the Department (Bob
16 James and Ingrid Salmon) and TPCHD (Brad Harp and Michelle Cox) to discuss the
17 sanitary survey requirement. During this meeting, Mr. Lei was informed that his
18 system was a Group A and a sanitary survey was required.

19 1.13 By letters dated June 29, 2005, and August 3, 2005, the Department
20 again requested that Petitioner schedule a sanitary survey of its Group A water system
21 unless it could provide justification to demonstrate that the water system had less than
22 fifteen (15) service connections.

23 1.14 On October 18, 2005, the Department issued Petitioner a red operating
24 permit for failure to schedule a sanitary survey. A red operating permit indicates a
25 water system is substantially out of compliance with drinking water regulations.
26

1 1.15 On December 1, 2005, December 22, 2005, February 9, 2006, March 28,
2 2006, April 28, 2006, and May 24, 2006, the Department issued Petitioner Coliform
3 Monitoring Violations for failure to submit five (5) coliform samples per month for the
4 months of October, November and December 2005 and January, February, March and
5 April 2006.

6 1.16 In a letter dated January 17, 2006, the Department informed Petitioner
7 that even if a sanitary survey was completed in the year 2000, sanitary surveys are
8 required every five (5) years, and another survey of the water system needed to be
9 conducted.

10 1.17 On June 28, 2006, after failing to have a sanitary survey completed, the
11 Department issued a Departmental Order requiring Petitioner to schedule a sanitary
12 survey by July 31, 2006, and to submit five (5) coliform samples per month until a
13 sanitary survey report is received by the Department.

14 1.18 On August 23, 2006, the Department issued a Notice of Imposition of
15 Penalties in the amount of \$3,150.00 for failure to comply with the Department's June
16 28, 2006 Order.

17 1.19 On September 18, 2006, the Department received Petitioner's request for
18 an adjudicative proceeding.

19 1.20 An adjudicative hearing was conducted on January 23, 2007, and Health
20 Law Judge Arthur E. DeBusschere issued Findings of Fact, Conclusions of Law and
21 Final Order on March 16, 2007. The Health Law Judge affirmed the Notice of
22 Imposition of Penalties filed on August 23, 2006. In so doing, the Health Law Judge,
23 concluded that Petitioner's water system was correctly defined as a Group A transient
24 non-community system since it had eighteen (18) total service connections. Since
25 Petitioner was a Group A system, it was required to have a sanitary survey, which it
26

1 failed to do. In addition, the Health Law Judge concluded that Petitioner failed to
2 collect and submit five (5) coliform samples per month.

3 1.21 Petitioner filed its petition for judicial review on April 13, 2007.

4 1.22 On August 28, 2007, Petitioner filed its "Rebuttal to Respondent's Brief
5 and Evidence," stating that the Administrative Record is incomplete and inaccurate.
6 Petitioner offered additional documents to the court to be included as part of the
7 administrative record.

8 II. CONCLUSIONS OF LAW

9 Based on the above findings of fact, the court makes the following conclusions
10 of law:

11 2.1 The court has jurisdiction over this matter;

12 2.2 Final agency orders are reviewed by the courts under the APA.
13 RCW 34.05.534, 34.05.542, and 34.05.570.

14 2.3 To obtain relief from an agency order in an adjudicative proceeding, a
15 petitioner must demonstrate that the agency has acted in violation of constitutional
16 provisions or has failed to act in accordance with its statutory and regulatory authority
17 and that the petitioner has been substantially prejudiced by that violation.
18 RCW 34.05.570(1)(d) and (3).

19 2.4 In a Petition for Judicial Review, factual determinations must be upheld
20 if they are supported by "substantial evidence." RCW 34.05.570(3)(e).

21 2.5 Substantial evidence is "evidence that is sufficient to persuade a
22 rationale, fair-minded person of the truth of the finding." *In re Estate of Jones*, 152
23 Wn.2d 1, 8, 93 P.3d 147 (2004).

24 2.6 The court cannot substitute its judgment on credibility of witnesses or
25 the weight to be given conflicting evidence. *Callegod v. Washington State Patrol*,
26 84 Wn. App. 663, 676 n.9, 929 P.2d 510 (1997).

1 2.7 The substantial evidence standard is deferential and requires courts to
2 view "the evidence and the reasonable inferences therefrom in the light most
3 favorable to the party who prevailed in the highest forum that exercised fact-finding
4 authority." *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371-72, 859 P.2d 610
5 (1993).

6 2.8 In accordance with the error of law standard, questions of law are
7 reviewed *de novo*. *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 536, 869 P.2d 1045
8 (1994).

9 2.9 When an agency is interpreting the law it administers, substantial weight
10 is given to the agency's interpretation. *Renton Educ. Ass'n v. Public Empl. Relations*
11 *Comm'n*, 101 Wn. 2d 435, 443, 680 P.2d 40 (1984).

12 2.10 The term "public water system" is generally defined (in relevant part)
13 as:

14 Any system, excluding a system serving only one single-family residence
15 and a system with four or fewer connections all of which serve residences
16 on the same farm, providing water for human consumption through pipes
17 or other constructed conveyances...

18 RCW 70.119A.020(4).

19 2.11 The State Board of Health further defined a "public water system" as
20 Group A and Group B. A "Group A" system is defined as

21 A public water system providing service such that it meets the definition
22 of a public water system provided in the 1996 amendments to the federal
23 Safe Drinking Water Act (Pub. L. No. 104-182, § 101, §§ b).

24 WAC 246-290-020(4). A Group B is a "public water system that does not meet the
25 definition of a Group A water system." WAC 246-290-020(5)(c).

26 2.12 The Federal Safe Drinking Water Act (SDWA) defines a "public water
system" (in relevant part) as:

A system for the provision to the public of water for human consumption
through pipes or other constructed conveyances, if such system has at
least fifteen service connections or regularly serves at least twenty-five
individuals

1 (emphasis added). 42 U.S.C. § 300f(4)(A).

2 2.13 A public water system is further defined as “community” or “non-
3 community”:

4 The term “community water system” means a public water system that
5 (A) serves at least fifteen service connections used by year-round
6 residents of the area served by the system; or (B) regularly serves at least
7 twenty-five year-round residents.

8 The term “non-community water system” means a public water system
9 that is not a community water system.

10 42 U.S.C. § 300f(15) and (16), 40 CFR § 141.2; WAC 246-290-020(5)(a) and (b).

11 2.14 A “non-community water system” is further defined as either a “transient
12 non-community water system” or a “non-transient non-community water system.”

13 “Transient non-community water system” or TWS means a non-
14 community water system that does not regularly serve at least twenty-five
15 of the same persons over six months per year.¹

16 “Non-transient non-community water system” or NTNCWS means a
17 public water system that is not a community water system and that
18 regularly serves at least twenty-five of the same persons over six months
19 per year.²

20 40 CFR § 141.2; WAC 246-290-020(5)(b).

21 2.15 Petitioner did not dispute that they have eighteen total service
22 connections, one (1) residential connection and seventeen (17) non-residential
23 connections. However, they argued that, based on WAC 246-290-020 Table 1, you do
24 not count the non-residential connections when determining the water system’s
25 classification. WAC 246-290-020 Table 1 describes a Group A water system as “a
26 system that regularly serves: 15 or more residential connections or 25 or more people
for 60 or more days per year.” Petitioner stated that Victory Motel has only one

¹ Example of a transient non-community water system include: restaurant, tavern, motels and
campgrounds.

² Examples of non-transient non-community water system include: school, daycare center or business.

1 residential connection, therefore the system had less than fifteen residential connections
2 and should not be classified as a Group A.

3 2.16 Petitioner's argument is in error. The state regulations and definition of a
4 Group A water system were intended to conform to the federal definition of a public
5 water system.

6 A public water system providing service such that it meets the definition
7 of a public water system provided in the 1996 amendments to the federal
Safe Drinking Water Act (Pub. L. No. 104-182, § 101, §§ b).

8 WAC 246-290-020(4). The federal definition of a public water system is clear, stating
9 that a public water system "has at least fifteen service connections." (emphasis added)
10 42 U.S.C. § 300f(4)(A). The federal definition references the word "service
11 connections," not just "residential connections." *Id.* Further evidence of this can be
12 found in the breakdown of the types of public water systems, "community" and "non-
13 community." 40 CFR § 141.2. "Community" water systems serve year-round
14 residential customers and "non-community" systems do not. *Id.* A federal "public
15 water system," which is synonymous with a state Group A water system, did not intend
16 to limit "service connection" to only "residential connections."
17 42 U.S.C. § 300f(4)(A).

18 2.17 The court is not persuaded that WAC 246-290-020 Table 1 is
19 misleading. Working through Table 1 in conjunction with the federal Safe drinking
20 Water Act, WAC 246-290 and RCW 70.119A, Victory Motel is a Group A transient
21 non-community water system since it serves at least fifteen (15) service connections.

22 2.18 The Health Law Judge correctly found that the Victory Motel water
23 system is a Group A public water system since it has eighteen (18) total service
24 connections and;

25 2.19. The Health Law Judge correctly found that as a Group A water system,
26 Victory Motel was required to obtain a sanitary survey;

1 2.20 The Health Law Judge correctly found that Victory Motel failed to submit
2 five coliform samples per month until a sanitary survey was completed;

3 2.21 The Health Law Judge therefore was correct in affirming the
4 Department's notice of imposition of penalty in the amount of \$3,150.00; and

5 2.22 The administrative record is complete, the additional documents offered
6 by Petitioner on August 28, 2007, should not be a part of the administrative record and
7 a remand is not necessary or appropriate to consider this additional evidence.

8 **III. ORDER**

9 Based on the Findings of Fact and Conclusions of Law, it is hereby ORDERED
10 as follows:

11 3.1 Pursuant to RCW 34.05.574(1), the challenged decision of the Health law
12 Judge's March 16, 2007, Findings of Fact, Conclusions of Law and Final Order is
13 AFFIRMED.

14 3.2 The Petition for Judicial Review is DENIED.

15 3.3 Pursuant to RCW 70.119A.040(5), the Petitioner is ordered to satisfy the

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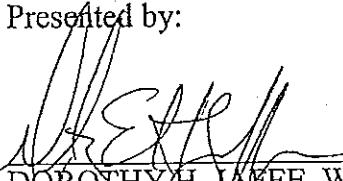
\$3,150.00 judgment from moneys paid into the registry of the court within ^{B.T.} 30 days of today's order.

DATED this 12th day of October, 2007

BRIAN TOLLEFSON


JUDGE BRIAN M. TOLLEFSON

Presented by:


DOROTHY H. JAFFE, WSBA #34148
Assistant Attorney General
Attorney for Respondent
Washington State Department of Health

Signed in the Presence of B.T.
Approved as to form by:
Reps Victory Motel owner
on Oct 12, 2007

JAY LEI, Owner
Petitioner, Victory Motel

FILED
DEPT. 8
IN OPEN COURT

OCT 12 2007

Pierce County Clerk
By _____
DEPUTY