

IN THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

AYAZ, INC.,	:	
	:	
Petitioner,	:	
	:	Docket No.:
v.	:	OSAH-BNR-UGST-1417598-67-Malihi
	:	
JUDSON H. TURNER, DIRECTOR	:	
ENVIRONMENTAL PROTECTION	:	
DIVISION, GEORGIA DEPARTMENT	:	
OF NATURAL RESOURCES,	:	
	:	
Respondent.	:	

ORDER DENYING RESPONDENT’S MOTION FOR SUMMARY DETERMINATION

On June 6, 2013, Petitioner Ayaz, Inc. filed a *Petition for Hearing on Denial of Coverage Under the [Georgia Underground Storage Tank Act (“GUST”)] Trust Fund*. The Director of the Environmental Protection Division of the Georgia Department of Natural Resources denied the petition on June 14, 2013, asserting that the petition was untimely. Petitioner appealed the Director’s decision of untimeliness. Petitioner’s *Second Petition for Hearing on Denial of Coverage Under the GUST Trust Fund* was referred to the Office of State Administrative Hearings (“OSAH”) on November 7, 2013. On December 23, 2013, Respondent filed a *Motion for Summary Determination*, alleging that it had correctly dismissed Petitioner’s first *Petition for Hearing* as untimely. On January 16, 2014, Parties filed a *Joint Consent Motion for Continuance*, including a stipulation to allow Petitioner up through and including Monday, January 20, 2014, to file Petitioner’s Response, which was due on January 13, 2014. However, because this Court is ruling in favor of Petitioner, the added delay of waiting for a response is unnecessary. For the reasons given below, the Respondent’s *Motion for Summary Determination* is **DENIED**.

A. Standard on Summary Determination

Summary determination in this proceeding is governed by OSAH Rule 15, which provides, in relevant part:

A party may move, based on supporting affidavits or other probative evidence, for summary determination in its favor on any of the issues being adjudicated on the basis that there is no genuine issue of material fact for determination.

Ga. Comp. R. & Regs. 616-1-2-.15(1). On a motion for summary determination, the moving party must demonstrate that there is no genuine issue of material fact, such that the moving party “is entitled to a judgment as a matter of law on the facts established.” *Pirkle v. Env’tl. Prot. Div., Dep’t of Natural Res.*, OSAH-BNR-DS-0417001-58-Walker-Russell, 2004 Ga. ENV. LEXIS 73, at *6-7 (Oct. 21, 2004) (citing *Porter v. Felker*, 261 Ga. 421 (1991)); see generally *Piedmont Healthcare, Inc. v. Ga. Dep’t of Human Res.*, 282 Ga. App. 302, 304-05 (2006) (noting that summary determination is “similar to a summary judgment” and elaborating that an administrative law judge “is not required to hold a hearing” on issues properly resolved by summary adjudication).

B. Findings of Undisputed Material Fact

The following material facts are undisputed:

1.

Petitioner applied for reimbursement under the GUST Trust Fund. *Petition for Hearing*.

2.

The review of the application followed a routine procedure. Richard Strickfaden, the Unit Coordinator of the Regulatory Compliance Unit of the Underground Storage Tank Management Program, and his staff reviewed the application and prepared a decision for the

Director's review and signature. *Respondent's Motion for Summary Determination ("Respondent's Motion"), Strickfaden Affidavit.*

3.

In this instance, Mr. Strickfaden and his staff recommended denial of the Petitioner's application and prepared the letter of denial for the Director to sign. Anticipating that the Director would sign the letter on May 8, 2013, the denial letter bore the date May 8. The year, however, was inadvertently mistyped as 2012. The letter stated: "You have the right to petition for a hearing on this decision within thirty (30) days from the date of issuance of same." *Stickfaden Affidavit and attached Exhibit A.*

4.

The Director signed the denial letter earlier than anticipated, and the letter was mailed on May 1, 2013. *Stickfaden Affidavit.*

5.

Petitioner received the denial letter on May 2, 2013. *Stickfaden Affidavit and attached Exhibit B.*

6.

The Petitioner, interpreting the year as typographical error, filed a petition for a hearing on June 6, 2013, within thirty days of the date on the denial letter. *Respondent's Motion, Sailor's Affidavit; Petition for Hearing on Denial of Coverage Under the GUST Trust Fund n.1.*

7.

On June 14, 2013, the Director notified Petitioner by letter that its appeal was untimely and would not be processed. Specifically, the letter stated that the "request for a hearing was filed more than 30 days following your receipt of the denial [on May 2, 2013]," and was thus

untimely. The letter further noted that “this determination is an appealable action of the Director.” *Second Petition for Hearing on Denial of Coverage Under the GUST Trust Fund* (“*Second Petition*”), *Exhibit B*.

8.

On July 11, 2013, Petitioner appealed the Director’s decision of June 14.

C. Law and Analysis

1.

Under Code Section 12-2-2(c)(2)(a), a party “aggrieved or adversely affected by any order or action of the director” has thirty days from “the issuance” of the Director’s order or other action to petition the Director for a hearing before OSAH. In Respondent’s *Motion for Summary Determination*, he argues that Petitioner’s appeal of the denial of its application for reimbursement under the GUST Trust Fund was untimely because it was filed thirty-six days from the date it was mailed on May 1, 2013.¹ In other words, the Respondent asserts that the denial letter was issued on the date that it was mailed. Admitting that the statute does not interpret the term “issuance,” Respondent relies on two OSAH cases in interpreting the word to mean “the sending forth or promulgating of the permit as opposed to its execution or signing or receipt.” *Marshlick v. Coastal Marshland Protection Committee*, OSAH-BNR-CM-0605105-25-Gatto, 2005 Ga. ENV LEXIS 55 (October 14, 2005) (internal citations omitted) (citing *In Re: Cole Jernigan*, No. DNR-EPD-SW-AH 3-95, 1995 Ga. ENV LEXIS 17 (April 13, 1995)). Neither of those cases is persuasive.

¹ This is contrary to the Director’s assertion in his letter of June 14, 2013, that Petitioner’s appeal was untimely because it was not filed within thirty days from the day it received the notice on May 2, 2013.

2.

In *Marshlick*, the Department asserted that the permit was issued prior to its mailing date and that, therefore, the appeal was untimely as it was filed within thirty days of the mailing date. *Marshlick*, 2005 Ga. ENV LEXIS at *1-2. The decision relied on the regulations of the Board of Natural Resources, specifically Ga. Comp. R. & Regs. 391-1-2-.03(1), in finding the mailing date was the date of issuance. *Id.* at *3-4. This regulation, which stated that a petition for a hearing must be filed “within 30 days of the mailing of” an adverse action by the decision maker, has since been amended. The cited regulation now reads: “Petitions for hearing in contested cases shall be in writing and shall be filed in the manner and within the time required by applicable law or Rule.” Ga. Comp. R. & Regs. r. 391-1-2-.03 (2007). Thus, the regulation no longer asserts that the date of mailing is the date of issuance.

3.

The second case, cited by both *Marshlick* and the Respondent, *In Re: Cole Jernigan*, did not decide “whether the issuance of the Order occurred on the date the Director signed the Order or the date the Order was mailed . . . or the date the Post Office first provided [the petitioner] with notice.” 1995 Ga. ENV LEXIS at *4. *In Re: Cole Jernigan* merely found that “actual notice of the Order [was] not required[,] particularly where [the petitioner’s] failure to claim the certified mail sent to him prevented the notice from reaching him.” *Id.* at *3. The petitioner had received three notices from the post office of the certified mail, yet he persisted in failing to retrieve his mail. *Id.* at *2. Thus, in the face of the petitioner’s unexplained negligence, the court found that, at the latest, the petitioner should have filed an appeal within thirty days of the post office’s notice to him that he had received certified mail. *Id.* at *4.

4.

Here, the facts and law indicate that Petitioner's appeal was timely. Petitioner received a denial letter bearing the date May 8, 2012. The Regulatory Compliance Unit that routinely prepares denial letters deliberately dated Petitioner's letter as May 8,² intending that the letter would be signed and mailed on that date—i.e., issued on that date. The letter stated that Petitioner could file the “petition for a hearing on this decision within thirty (30) days from the date of issuance of same.” As the Regulatory Compliance Unit apparently intended, Petitioner interpreted the date on the letter as the date of issuance.³

5.

A case out of the United States Tax Court has analogous facts and reached a similar conclusion. In *Jones v. Commissioner of Internal Revenue*, the IRS mailed a deficiency notice on April 1. No. 16754-82, T.C. Memo 1984-171 at *10 (April 4, 1984). However, the notice was dated April 4. *Id.* The taxpayers filed a petition for review within ninety days of April 4. *Id.* The IRS asserted that because the ninety-day appeal period begins with the mailing of the notice, the appeal was untimely, as it was not within ninety days of April 1. *Id.* The court disagreed. *Id.* It found that because the letter stated that the taxpayers had “90 days from the above mailing date of this letter . . . to file a petition with the United States Tax Court for a redetermination of the amount of your tax,” and that the notice of deficiency did not indicate when it was mailed, “petitioners’ counsel was entitled to rely on the representation contained in the notice itself as to its mailing date.” *Id.* at *11. Even though there were cases in which the “courts [had] made the broad statement that the date of mailing . . . is not the date on the notice

² Although the year was mistyped as 2012 instead of 2013, this was an error and was interpreted by Petitioner as such.

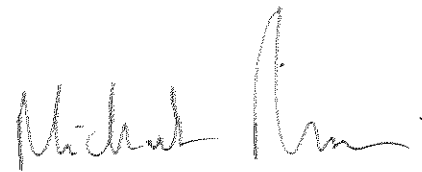
³ This Court fails to see what other purpose the date on the letter of denial would serve if not to indicate the date of issuance.

of deficiency but is the date on which the notice was delivered by the IRS to the post office,” the court distinguished those cases from the one before it. *Id.* at *11-12. Because the case before it was the only one involving a post-dated notice, in none of the other cases would the petitioner have been “disadvantaged by relying on the date of the notice.” *Id.* at *12. It found the petitioner’s reliance on the date of the letter to be reasonable and expected. *Id.* Thus, the court concluded that “to ignore the respondent’s error in dating the notice and to treat the date of deposit of the notice of deficiency in the post office as the date of mailing would frustrate the statutory scheme.” *Id.* at *14. Instead, the court chose to interpret the date on the notice to be the date of mailing. *Id.*

6.

Similarly, here, Petitioner reasonably relied on the date on the face of the letter, which Respondent impliedly admits was the intended day of issuance. As in *Jones*, the Court finds that under these facts, the date on the letter is considered to be the date of mailing.⁴ Thus, Petitioner timely filed a petition for a hearing within thirty days of the issuance of the denial letter. Accordingly, Respondent’s Motion for Summary Determination is **DENIED**.

SO ORDERED, this 17th day of January, 2014.



MICHAEL MALIHI, Judge

⁴ As in *Jones*, the Court does not “announce a rigid rule under which the date stamped on the fact of the notice will always be considered the date the notice was mailed.” T.C. Memo 1984-171 at *15.