

**DISTRICT OF COLUMBIA**  
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DISTRICT OF COLUMBIA  
DEPARTMENT OF PUBLIC WORKS  
Petitioner,

v.

MORRIS R. BATTINO  
Respondent

Case Nos.: 2011-DPW-K411782  
2011-DPW-K420402  
NOV Nos.: K411782  
K420402

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**FINAL ORDER**

**I. Introduction**

The Government has served two Notices of Violation upon Respondent Morris R. Battino, both Notices alleging that, at 1200 Perry Street, N.E., (the “Property”) Respondent violated 21 DCMR 2022.1 by failing to separate recyclable materials from other solid waste.<sup>1</sup> Notice No. K411782, issued on April 19, 2011, alleged that the violation occurred on April 18, 2011, and sought a fine of \$200. Notice No. K420402, issued on August 26, 2011, alleged that the violation occurred on August 24, 2011, and also sought a fine of \$200. The total of the requested fines was \$400.

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<sup>1</sup> 21 DCMR 2022.1 provides:

Each owner and occupant of a commercial property shall at a minimum, separate for recycling newspaper, clean and rinsed MF&B cans and GF&B containers from the regular trash prior to setting it out for collection.

Respondent filed timely answers to both Notices of Violation with pleas of Deny to the charges. The cases were consolidated for hearing.

A hearing was held on March 21, 2012. Investigator Sherry Porter, the Government Investigator who issued the Notices of Violation, (the "Investigator") appeared on behalf of the Government. Respondent appeared on his own behalf.

Based upon the testimony of the witnesses, my evaluation of their credibility, and the exhibits admitted into evidence, I now make the following findings of fact and conclusions of law.

## **II. Findings of Fact**

Respondent owns the Property, which is a commercial establishment. Petitioner's Exhibit ("PX") 101. The Property building includes Respondent's law offices and four residential dwelling units. As a commercial property owner, Respondent is required to maintain separate containers to store the solid waste and recycling materials generated by his law practice and by his tenants.

**Case No. K411782** - On April 18, 2011, the Investigator inspected the rear of the Property where Respondent stored his solid waste container and recyclable material container. The containers are located on the edge of a parking lot, and a sign is posted, stating to the effect that trespassers will be towed or prosecuted. The Investigator was inspecting the Property for compliance with the District's recycling laws. The Investigator did not request or obtain a search warrant or subpoena or permission from Respondent to enter Respondent's Property for this purpose.

The Investigator looked in the recyclable material container and found commingled solid waste and recyclable materials, including among other things: (1) loose plastic bags, Styrofoam, food wrappers (solid waste) commingled with newspapers, cardboard containers, glass bottles, and narrow-neck plastic bottles (recyclable); PX 100 photograph 1; and (2) within a plastic bag, food wastes (solid waste) commingled with unused toilet paper rolls and other paper products (recyclable). PX 100 photograph 2.

The area around both containers was neat.

**Case No. K420402** – On August 24, 2011, the Investigator again inspected Respondent's solid waste container and recyclable material container on the Property. Again, the Investigator was inspecting the Property for compliance with the District's recycling laws. The Investigator did not request or obtain a search warrant or subpoena or permission from Respondent to enter Respondent's Property for this purpose.

The Investigator opened Respondent's recyclable material container and found commingled solid waste and recyclable materials, including among other things: (1) a loose potato chip bag and soiled paper wrapping paper (solid waste) commingled with newspapers (recyclable); PX 102 photograph 3; (2) food wastes, plastic cleaner bags, and waxed paper (solid waste) commingled with tin cans (recyclable); PX 102 photograph 4; and (3) loose potato chip bag and sugar bags (solid waste) commingled with newspapers, plastic narrow-neck bottles, and a tin can (recyclable). PX 102 photographs 5, 6, and 7.

Again, the area around the two containers was neat.

**General Findings** - Respondent has experienced problems with illegal dumping of solid waste and recyclable materials from tenants of an apartment building next door, and from customers of various businesses nearby. Respondent can see his containers from his law office window, and he often confronts people who illegally dump materials into his containers. He has provided educational materials produced by DPW to his tenants to educate them about the recycling laws. Respondent periodically contacts 311 to report illegally dumping of trash in the neighborhood. Respondent generally tries to keep his Property neat to promote his law practice and to provide a good living environment for his tenants.

### **III. Conclusions of Law**

Respondent is charged with two violations of 21 DCMR 2022.1, which requires each owner of a commercial property to separate certain recyclable materials from solid waste for collection. *See* 21 DCMR 2022.1. The Government has proven that Respondent violated this regulation on April 18, 2011, and on August 24, 2011 at Respondent's Property, because Respondent as a commercial property owner is required to comply with 21 DCMR Chapter 20, and he or his tenants or others using his recyclable material container failed to separate recyclable materials from solid waste, in violation of this regulation.

Respondent has raised several defenses to the charge: (1) that the Government has violated his right to be free from unreasonable searches under the Fourth Amendment to the U.S. Constitution; (2) that the Government has no power to charge him with a violation of the recycling laws because he complies with the requirement to hire a commercial solid waste collector and educates his tenants about recycling laws; and (3) that he is not responsible for

violations of § 2022.1 that occur on his Property but are caused by tenants or passersby. None of these arguments have merit.

### **1. DPW Did Not Conduct an Unreasonable Search**

Respondent contends that the Government has violated his right to be free from unreasonable searches under the Fourth Amendment, because the Government trespassed on his Property without first obtaining a warrant, a subpoena or permission from Respondent to enter his Property. The Government argues that it is not required to do these things before searching Respondent's recyclable material container for possible violations of the recycling laws.

The District of Columbia Court of Appeals has addressed the power of a regulatory agency to enter private property without a warrant to enforce the public nuisance laws, in *Holmes v. Dist. of Columbia Bd. of Appeals & Review*, 421 A.2d 27 (D.C. 1980). In that case, an inspector for the District of Columbia Department of Consumer and Regulatory Affairs ("DCRA") conducted a warrantless inspection of Mr. Holmes's property to determine whether he was in compliance with the housing laws of the District of Columbia, and cited Mr. Holmes for alleged violations found there. The Court of Appeals held that Mr. Holmes had impliedly consented to searches of his property at reasonable hours when he applied for an occupancy permit for his property. *Id. at 31.*

The power of DPW to conduct warrantless searches of the exterior of a property was also discussed in an OAH decision, ironically also involving Mr. Holmes as a party, *Holmes v. DPW*, OAH Case No. PW-V-05-K103228 (Final Order, August 30, 2005). In the OAH case, Mr. Holmes was charged with violating 21 DCMR 700.3 by improperly storing solid waste. Here is the discussion of the Fourth Amendment issue set forth in *Holmes v. DPW*:

The Fourth Amendment to the U.S. Constitution protects citizens against “unreasonable searches and seizures,” and provides that “no warrant shall issue except upon probable cause.” Respondent contends that the Inspector was required to obtain a warrant before entering his Property and therefore, the charge should be dismissed (presumably because the evidence obtained by the Inspector should be suppressed). The issues presented here are: (1) did the Inspector conduct a “search”?; (2) if so, was it an unreasonable search?; (3) must the results of the search be suppressed from evidence?; and (4) if the results of any search are suppressed, is there sufficient evidence to support a finding of violation of § 700.3? In this case, Respondent must fail on every issue.

On the first issue, *Mapp v. Ohio*, 367 U.S. 643 (1962) established that the exclusionary rule would operate against both the federal government and the states to exclude the use of evidence (at least in a criminal trial) obtained in violation of a person’s Fourth Amendment rights. The United States Supreme Court has recognized that a business enterprise has a reasonable expectation of privacy to its commercial facilities for Fourth Amendment purposes. *See, e.g., Marshall v. Barlow’s, Inc.*, 436 U.S. 307 (1978). However, as to areas located outside the buildings, the Supreme Court has made it clear that areas in the “open field” do not enjoy such expectations, but “curtilages” surrounding the buildings do. *Hester v. United States*, 265 U.S. 57 (1924); *Oliver v. United States*, 466 U.S. 170 (1984).

In *Dow Chemical Co. v. United States*, 476 U.S. 227, 236-237 (1986), the Supreme Court held that a commercial property owner did not have a reasonable expectation of privacy to the open grounds of its facility under the “open fields” doctrine. Further, in that case, the conduct by the government of aerial surveillance and taking of photographs, without physical entry, did not constitute a “search” or a “seizure” for Fourth Amendment purposes. *Id.* at 237.

In this case, the Inspector observed the violation of § 700.3 from a vantage point across the street, and she took her photograph from there. Under *Dow* and its progeny, the Government did not conduct a search or seizure by observing the Property and taking photographs. The only possible point of contention is whether the Inspector unlawfully intruded on Respondent’s Property. However, the Inspector relied almost completely upon her observations made before she entered the Property.

Assuming that the Inspector conducted a “search” by entering the grounds of the Property, the search was nevertheless reasonable under the guidelines of the Supreme Court. First, the Inspector conducted an administrative search for public health and welfare purposes, and the standard for a reasonable search is somewhat relaxed for administrative searches. In many circumstances, probable cause alone can substitute for a warrant. *See Ker v. California*, 374 U.S. 23 (1963). In addition, where an industry is highly regulated, and the inspector conducts a search incident to its field of investigation, the inspector has a right to inspect the

area without a warrant. *Tri-State Steel Constr. v. OSHRC*, 26 F.3d 173 (D.C. Cir. 1994).

Here the Inspector was inspecting her Ward for violations of the Litter Control Act, D.C. Official Code Title 8; DCMR Titles 21 and 24. The Inspector observed a trash container overflowing with trash and debris and numerous such items strewn on the ground. She then entered the rear yard portion of the premises to see these items up close, and she limited her field of inquiry to her legitimate purpose. Under these circumstances, I can see no basis for Respondent's contentions that a warrant was necessary or that any "search" violated his Fourth Amendment rights.

On the third issue, the evidence resulting from the Inspector's investigation should not be suppressed, in part because the evidence either did not result from a search (observations made from across the street) or did not constitute an unreasonable search for which a warrant was required (observations made while in the rear yard). In addition, under *Mapp, supra*, and the cases that followed *Mapp*, the exclusionary rule was applied mostly in criminal cases, to deter police misconduct. The rationale for the exclusionary rule has less application in administrative hearings involving public health and safety considerations.

Finally, even if the results of the Inspector's intrusion into the Property were excluded, there was sufficient evidence in the record to support a finding that Respondent violated § 700.3. The Inspector's observations from across the street and her photograph, PX 100, would not be suppressed under the exclusionary rule, and they showed that Respondent's Property had uncontainerized trash and debris that met the definition of § 700.3.

*Id. at pp. 3-6.*

In the present case, Respondent owns a commercial property in the District and is aware that he is being regulated for compliance with the recycling laws that apply specifically to commercial property owners. The Investigator had the power to inspect properties in the District for compliance with the recycling laws, codified under 21 DCMR Chapter 20. She entered onto the open part of the Property, in the parking lot where the solid waste container and the recyclable material container were located. While she did not observe a possible violation of law from the street, her intrusion was limited to inspecting the solid waste container and the recyclable material container, to perform her investigative powers.

Based on these facts, I conclude that the Government Investigator did not commit an unreasonable search of Respondent's Property. First, Respondent had a lessened expectation of privacy to the "open fields" of his Property that did not constitute curtilage of his house. Second, Respondent had a lessened expectation of privacy because there is pervasive regulatory scheme for compliance with the recycling laws in the District. Under these circumstances, there is no requirement of a warrant because the intrusion into Respondent's zone of privacy was *de minimis* and was strictly related to the regulatory powers that the Investigator maintained.

To require a warrant for any such intrusion into private property would frustrate the purpose for the recycling laws, to require commercial establishments to practice recycling for the benefit of the public.

## **2. The Government Has the Power to Charge a Violation of § 2022.1**

Respondent contends that, if he complies with the legal requirements to hire a commercial recycling material collector and educates his tenants about the recycling laws, the Government has no further power to sanction him for failing to separate recycling materials from solid waste. Respondent asserts that the content of his recyclable material container is a matter of private interest between Respondent and his recyclable material collector. This is incorrect.

21 DCMR Chapter 20 imposes a number of duties on a commercial property owner. The owner is responsible for separate removal of recyclable material by a licensed recyclable waste collector. 21 DCMR 2021.2. The owner is responsible for notifying his tenants of their responsibilities regarding separation of recyclable materials. 21 DCMR 2021.3.

In addition to these requirements, the owner is also responsible for separation of the recyclable materials. 21 DCMR 2022.1. That is the regulation that Respondent is charged with violating. This regulation imposes a separate duty, apart from the duties to hire a recyclable material collector and to educate his tenants as to their responsibilities.

### **3. Section 2022.1 Imposes Strict Liability on Property Owners**

Respondent next urges that the passersby or the tenants are responsible for the violation of § 2022.1, and not Respondent. I disagree. This regulation imposes strict liability for a violation that occurs at a property upon both the property owner and anyone who occupies the property.

The District of Columbia Court of Appeals has held that 21 DCMR 700.3 imposes strict liability on those who own or control a property, regardless of the source of, or reason for, the offending waste. *See Gary Investment Corp. v. District of Columbia Department of Health*, 896 A.2d 193, 197 (2006) (imposing strict liability on property owner for violation of § 700.3); *Bruno v. District of Columbia Board of Appeals and Review*, 665 A.2d 202, 203 (D.C. 1995) (also imposing strict liability).

Not every regulation under the Litter Control Administration Act imposes strict liability on the property owner. However, 21 DCMR 2022.1 is a strict liability regulation. This regulation specifically places the duty to separate recyclable materials from solid waste upon the “owner,” as well as the occupant.

The Government has proven that the two violations of § 2022.1 occurred on property owned by Respondent. I conclude that he is strictly liable for the violations, even if other persons caused the violations.

#### **4. The Appropriate Fine**

Respondent contends that he is only subject to a fine of \$50 for each violation of § 2022.1. In support of this position, he cites *DPW v. Battino*, OAH Case Nos. 2010-DPW-K19106 and K402191 (Final Order, March 4, 2011). Respondent's Exhibit ("RX") 208.

In the cited Final Order, the Administrative Law Judge gave Respondent the benefit of the fine schedule that is no longer in effect.

Prior versions of the fine schedule, under 21 DCMR 2061, established different fines based on the square footage of the commercial property in question or the number of units, depending on the type of commercial property. However, under the current version of 21 DCMR 2061, in effect at the time of the violation, a single fine of \$200 is prescribed for a first violation of § 2022.1 by the proprietor of a commercial building property (apartment building or office), regardless of square footage. 21 DCMR 2061.1.

Since Respondent has taken strong steps to comply with the recycling laws, and since he has taken steps to prevent future violations by policing his Property and reporting violators, I will reduce each fine to \$100. The total of the fines is \$200.

**IV. Order**

Based on the above findings of fact and conclusions of law, it is, this \_\_\_\_\_ day of \_\_\_\_\_ 2012:

**ORDERED**, that Respondent shall pay a fine in the total amount of **TWO HUNDRED DOLLARS (\$200)** in accordance with the attached instructions within 35 days of the mailing date of this Order (30 days plus 5 days service time pursuant to D.C. Official Code § 8-807(h)(1) and 1 DCMR 2811.5); and it is further

**ORDERED**, that if Respondent fails to pay the above amount in full within 35 days of the date of mailing of this Order, interest shall accrue on the unpaid amount at the rate of 1½ %, starting 35 days from the mailing date of this Order, pursuant to D.C. Official Code § 8-807(h)(1) and 24 DCMR § 1312.7; and it is further

**ORDERED**, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondent's licenses or permits pursuant to D.C. Official Code § 8-807(d-1), and the placement of a lien on real and personal property owned by Respondent pursuant to D.C. Official Code § 8-807(f); and it is further

**ORDERED**, that the appeal rights of any party aggrieved by this Order are stated below.

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Paul B. Handy  
Administrative Law Judge

