IN THE SUPREME COURT OF OHIO

TRANS RAIL AMERICA, INC., Appellee, v. JAMES J. ENYEART, M.D., HEALTH COMMISSIONER, TRUMBULL COUNTY HEALTH DEPARTMENT Appellant.	:	08-0359 CASE NO. ~~2007-1549~~ On Appeal from the Franklin County Court of Appeals, Tenth Appellate District

MERIT BRIEF OF *AMICUS CURIAE* HUBBARD ENVIRONMENTAL AND LAND PRESERVATION IN SUPPORT OF APPELLANT JAMES J. ENYEART, M.D., HEALTH COMMISSIONER

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INTEREST OF AMICUS CURIAE

This case discusses the jurisdictional authority of the Environmental Review Appeals Commission ("ERAC"), an administrative tribunal established by statute to review actions of the director of the Ohio Environmental Protection Agency ("Ohio EPA") and local boards of health. The outcome of this case will affect the ability of citizens to participate in the construction and demolition debris facility licensing process. Certain boards of health, including the Trumbull County Health Department, have been authorized to issue construction and demolition debris facility licenses. The Tenth District Court of Appeals in its decision divested the Commissioner and the Health Department of their statutory power to issue the landfill license when the court granted ERAC with authority to hear this appeal. The amicus party, Hubbard Environmental and Land Preservation ("HELP"), requests that this Court reverse the decision of the Tenth District Court of Appeals and define the scope of ERAC's jurisdiction established under R.C. Chapter 3745 so as to maintain the landfill licensing process with the local boards of health, where such process belongs.

STATEMENT OF FACTS

Trans Rail America, Inc. ("Trans Rail") proposes to operate a construction and demolition debris landfill of approximately 243 acres located at 6415 Mt. Everett Road, Hubbard Township, Ohio. HELP is a non-profit corporation whose members reside in Hubbard Township and/or the City of Hubbard immediately adjacent to, and in the surroundings areas of, Trans Rail's site for the proposed landfill. HELP was formed to protect and represent the interests of the entire community. The community does not want the landfill; but if the landfill is to be constructed, then HELP seeks assurance that all legal requirements for landfill construction, maintenance, monitoring and permitting are followed. These requirements protect the health and safety of the HELP members and the environment in which they live.

Through statute, the Trumbull County Health Department is authorized to issue or deny construction and demolition debris landfill licenses. R.C. 3714.06. The Health Department possesses the knowledge necessary to determine whether a proposed landfill has met the legal requirements. Trans Rail filed its initial construction and demolition debris landfill license application with the Health Department on May 21, 2004. Before the Commissioner of the Health Department can issue or deny the landfill license, Trans Rail must provide in the application all of the information required by law. See, Ohio Adm. Code 3745-37-02. HELP members, through public participation, have in the past commented to the Health Department and expressed their concerns with Trans Rail's license application.

After twice receiving and reviewing the landfill license application, the Health Department informed Trans Rail each time that its license application contained numerous deficiencies; thereby, the applications were not considered to be complete applications. On or about March 30, 2006, Trans Rail resubmitted its application, which the Health Department again reviewed for completeness. On May 31, 2006, the Commissioner of the Health Department sent notice to Trans Rail that its application was still incomplete. The Health Department, while finding that some of the deficiencies from the previous versions of the application had been corrected, found that Trans Rail had not yet included, among other things, information in support of the new siting criteria for construction and demolition debris landfills. The Health Department informed Trans Rail that it could not process the application until the siting criteria information was submitted.

Rather than submit the siting criteria information, Trans Rail filed an appeal with ERAC. Trans Rail's Notice of Appeal stated that it was appealing to ERAC "from the final action" of the Health Commissioner of the Trumbull County Health Department, dated May 31,

2006, in which the Commissioner had determined that Trans Rail's License Application for a construction and demolition debris facility was incomplete. (Supp. p. 33, Notice of Appeal, p. 1, introductory paragraph.) Trans Rail requested ERAC to "(1) vacate the Health Department's determination; (2) find that Trans Rail's C&DD License Application is "complete" within the meaning of Ohio Adm. Code 3745-37-02; and (3) order the Health Department to process Trans Rail's C&DD License Application." (Supp. p. 34 at ¶ 6.) The Health Department filed a Motion to Dismiss with ERAC on the basis that ERAC lacked jurisdiction to hear Trans Rail's appeal. ERAC granted the Health Department's Motion holding that the Health Department's application incompleteness determination was not an act or action that was appealable to ERAC.

Trans Rail appealed ERAC's decision to the Tenth District Court of Appeals. The majority reversed ERAC's decision and held that ERAC had jurisdiction over Trans Rail's appeal. The majority's opinion relied solely on the language, "or ordering the director or board of health to perform an act," found in R.C. 3745.04(B) as the basis for jurisdiction. (App. p. 4, *Trans Rail Am., Inc. v. Enyeart* (2007), 10th Dist. Nos. 07AP-273, 07AP-284, 2007-Ohio-7144, at ¶ 9.) From the language, the majority concluded that ERAC had jurisdiction to hear appeals in which appellants were requesting ERAC to order the director or board to act without first considering whether a final, appealable action had occurred.

The Health Department appealed from the Tenth District Court of Appeals' decision, and HELP is supporting the Health Department's appeal by filing this merit brief with the Court. HELP respectfully requests this Court to reverse the decision of the Tenth District Court of Appeals and uphold ERAC's dismissal of Trans Rail's appeal.

ARGUMENT

Proposition of Law:

The Environmental Review Appeals Commission's jurisdiction, as defined in R.C. 3745.04, is limited to a review of final actions of local boards of health approved to administer R.C. Chapters 3714 and 3734.

ERAC is a statutorily-created review board that hears appeals from orders, the issuance or denial of permits and licenses, and other actions of the director of Ohio EPA and local boards of health. Because statutorily-created boards have only the jurisdiction conferred by statute, an analysis of the scope of ERAC's jurisdiction must begin with the language set forth by the General Assembly in R.C. 3745.04. This statutory language provides that ERAC has jurisdiction over acts or actions of the director or local boards of health. The courts have interpreted this language as requiring the director or board to have affected the rights of a party with finality before the party can appeal to ERAC. The Tenth District Court of Appeals, for the first time, interpreted R.C. 3745.04 as allowing ERAC to hear appeals even though the director or board had not yet taken a final action. This interpretation is contrary to the General Assembly's legislative intent and all established precedent regarding ERAC's jurisdiction. In fact, the Court of Appeals' holding establishes a dangerous precedent by allowing ERAC to order the director or board to act in instances when these agencies have taken no prior action. The parameters of ERAC's jurisdiction as conferred by statute and established precedent are analyzed first, followed by a discussion of the implications of the Court of Appeals' decision.

A. The statutory language and prior court precedent have definitively established that ERAC has jurisdiction to hear appeals only from final acts or actions of the local boards of health.

As a statutorily-created review board, ERAC's jurisdiction is confined by the parameters set forth in R.C. 3745.04. See, *Waltco Truck Equip. Co. v. Tallmadge Bd. of Zoning Appeals* (1988), 40 Ohio St.3d 41, 43, 531 N.E.2d 685 . "[W]here jurisdiction is dependent upon a statutory grant, this court is without the authority to create jurisdiction when the statutory language does not." Id. ERAC has been statutorily granted with jurisdiction to review actions of the director of the Ohio EPA and actions of local boards of health approved to administer R.C. Chapters 3714 and 3734[1]. R.C. 3745.04(B). Specifically, R.C. 3745.04(B) states, "Any person who was a party to a proceeding before the director of environmental protection may participate in an appeal to the environmental review appeals commission for an order vacating or modifying the action of the director or a local board of health, or ordering the director or board of health to perform an act." R.C. 3745.04(B).

In interpreting the statutory scheme set forth in R.C. 3745.04, the courts have consistently held that ERAC's jurisdiction is limited to appeals from final acts or actions of the director or board of health. *Kaple v. Jones* (Dec. 16, 2004), No. ERAC 745596 ("[T]he director must take some affirmative action * * * before there is an act or action of the director which is appealable to the Commission. An event which does not constitute an act or action of the director cannot form the jurisdictional basis for an appeal to the Commission."); see also, *US Technology*

[1] ERAC also has jurisdiction to hear appeals from actions by the director of Agriculture in the administration of Revised Code Chapter 903 and the State Fire Marshal in the administration of Chapter 3737. R.C. 3745.04(E) & R.C. 3737.882(D). This brief focuses on ERAC's jurisdictional authority over the local boards of health (as this case concerns a board of health's review of a construction and demolition debris facility license) and the director of Ohio EPA (as the statutory scheme often refers only to the director of Ohio EPA when defining the authority of ERAC even though that authority is extended to these other agencies).

Corp. v. Korleski (2007), 173 Ohio App. 3d 754, 2007-Ohio-6087, 880 N.E.2d 498; *Dayton Power and Light Co. v. Schregardus* (1997), 123 Ohio App.3d 476, 704 N.E.2d 589; *Youngstown Sheet and Tube Co. v. Maynard* (1984), 22 Ohio App. 3d 3; 488 N.E.2d 220; *Miller v. Schregardus* (Dec. 11, 1991), No. EBR 132470 ("[I]t is clear that the Board has jurisdiction only over those things that constitute either an action or are an act of the Director. Thus, unless the failure or refusal of the Director to take a particular enforcement action constitutes an act or action, it is not appealable to this Board"); *Inorganic Recycling of Ohio, Inc. v. Shank* (Nov. 30, 1989), No. EBR 252011 (Letter from Ohio EPA employee was not an act or action of the director and, therefore, did not confer jurisdiction to the Board under R.C. 3745.04); *Aristech Chem. Corp. v. Shank* (July 25, 1989), No. EBR 441977. In this case, the Tenth District Court of Appeals misinterpreted the jurisdictional scheme set forth in R.C. 3745.04 and departed from all established precedent when it isolated and seized upon the phrase "or ordering the director or board of health to perform an act" within R.C. 3745.04(B) to grant ERAC jurisdiction over appeals in which no appealable action has occurred.

1. **The entire act enacted in R.C. Chapter 3745 shows that the intent of the General Assembly was to grant ERAC with exclusive original jurisdiction over final acts or actions of the director and local boards of health.**

The entire act, not just one phrase, must be analyzed to determine ERAC's jurisdictional authority to hear appeals. "In reviewing a statute, a court cannot pick out one sentence and disassociate it from the context, but must look to the four corners of the enactment to determine the intent of the enacting body." *State v. Wilson* (1997), 77 Ohio St.3d 334, 336, 673 N.E.2d 1347. The Tenth District Court of Appeals disregarded this rule of statutory interpretation when it isolated the phrase "or ordering the director or board of health to perform an act" and held that a final action by the director or board was not necessary for ERAC to have

jurisdiction over the appeal. The Court of Appeals, in its ruling, ignored the numerous instances in which "action" is referenced within R.C. Chapter 3745.

For example, the procedure for filing an appeal to ERAC is contained within R.C. 3745.04(D), which states in relevant part, "An appeal shall be in writing and shall set forth the action complained of and the grounds upon which the appeal is based. The appeal shall be filed with the commission within thirty days after notice of the action." R.C. 3745.04(D) (emphasis added). Unless the director or the board has performed an action, the appellant would have no action to complain of in its appeal and would not have a date from which to calculate the 30-day period for filing the appeal.

Additionally, ERAC's standard of review for appeals is confined to determining whether the action of the director or board was unlawful or unreasonable. If ERAC "finds that the action appealed from was lawful and reasonable, it shall make a written order affirming the action, or if [ERAC] finds that the action was unreasonable or unlawful, it shall make a written order vacating or modifying the action appealed from." R.C. 3745.05 (emphasis added). Without an action by the director or board of health, ERAC would have no undertaking of the director or board to review for reasonableness and lawfulness.

As the repeated use of the word "action" in R.C. 3745.04 and 3745.05 demonstrates, an act or action of the director or board of health is required to trigger ERAC's jurisdiction. ERAC applied this statutory scheme when dismissing Trans Rail's appeal. R.C. 3745.04(D) provides that to initiate the appeal Trans Rail must file a written notice of appeal setting forth the action complained of. Thus, to have a valid appeal to ERAC, Trans Rail must have complained of an action in its Notice of Appeal. Trans Rail complained of the Health

Department's incompleteness determination letter; yet, ERAC determined that this letter was not an action of the Health Department. Thus, ERAC concluded that it did not have jurisdiction.

Allowing only final actions to be appealed to ERAC preserves the rights of all interested parties, including HELP, to appeal an action of the director. Although under R.C. 3745.04 the right to appeal to ERAC is limited to "any person who was a party to the proceeding before the director," R.C. 3745.07 allows an appeal by indirectly affected parties, such as governmental representatives, public interest groups and environmental groups. The final paragraph of R.C. 3745.07 states:

> If the director issues, denies, modifies, revokes, or renews a permit, license, or variance without issuing a proposed action, an officer of any agency of the state or of a political subdivision, acting in a representative capacity, or any person who would be aggrieved or adversely affected thereby, may appeal to the environmental review appeals commission within thirty days of the issuance, denial, modification, revocation or renewal.

R.C. 3745.07 also provides that the director must give notice of each proposed action, each issuance, denial, modification, revocation, or renewal of a permit, license, or variance for which no proposed action was issued.

If this Court were to adopt the Tenth District's ruling, then third parties would be excluded from the appeals process. If the action appealed was not a final action of the director, such as not accepting an application for being incomplete, then third parties would not have notice of the act. Even if a third party did have notice of the act, they would be unable to appeal its terms because the director's request for more information before accepting a license application is neither an issuance, denial, modification, revocation, or renewal by the director.

2. The phrase "or ordering the director or board of health to perform an act" authorizes ERAC to order the board to perform an act only after ERAC has found the board's prior action to be unreasonable or unlawful.

In reconciling the language in the phrase "or ordering the director or board of health to perform an act" with the rest of R.C. 3745.04, the courts have held that the phrase authorizes ERAC to order the director or board to perform an act in cases in which ERAC has found the director or board's prior act to be unreasonable or unlawful.

In one such case, the Environmental Review Board ("EBR") (predecessor of ERAC) ordered the director of Ohio EPA to reissue his denial of air permit applications as a proposed action because EBR found the denial to be unlawful. *General Motors Corp. v. Williams* (Dec. 22, 1978), No. EBR 78-75, rev'd, (1979) 10th Dist. No. 79AP-53, rev'd, (1980) 63 Ohio St. 2d 232, 407 N.E.2d 527. In its appeal of the director's denial, General Motors argued that the director had unlawfully denied the air permits without holding an adjudicatory hearing at Ohio EPA. EBR vacated the director's denial and ordered the director to reissue its decision so as to allow General Motors the opportunity to request an adjudicatory hearing. The director's denial was the final, appealable action giving EBR jurisdiction over the appeal. In *General Motors*, the phrase "or ordering the director or board of health to perform an act" was used properly in providing EBR the authority to order the director to hold a hearing after EBR found that the director's prior action (denial of the air permits) had been unreasonable and/or unlawful.

This Court upheld EBR's decision that the director of Ohio EPA should have provided General Motors the opportunity for a hearing prior to denying the air permits. This Court stressed, "The EBR is a reviewing board in regard to licensing." *General Motors Corp. v. McAvoy*, 63 Ohio St. 2d at 235, 407 N.E.2d 527. The Court recognized EBR's limitations with

respect to review of the director's decisions and the permitting process. The Court stated, "Pursuant to R.C. 3745.05 [EBR] may only determine whether the Director of Environmental Protection has acted lawfully or reasonably in licensing. Any action taken concerning licenses is that of the Director whether he initiates the action or it is taken pursuant to an order of the EBR or a court." Id. Thus, this Court defined ERAC's role in the licensing process as that of a review board to determine whether the director or board of health's licensing action was reasonable and lawful. ERAC's role does not include ordering the director or board to act when no prior action has occurred.

In another similar case, the Tenth District Court of Appeals held EBR could reverse an action of the director based on EBR's authority in R.C. 3745.04 to modify the director's denial of a permit and order the director to issue a permit. *Ontario v. Whitman* (1973), 47 Ohio App. 2d 81, 352 N.E.2d 162. In its decision, the *Ontario* Court noted that the first paragraph of R.C. 3745.04 sets out who may appeal and the second paragraph of R.C. 3745.04 defines the subject of appeal being an action or act. The next paragraph then provides EBR with the authority to vacate or modify the director's action or order the director to act.

When analyzing the authority of EBR under R.C. 3745.04, the *Ontario* Court stated the following:

> It is emphasized again that while R.C. 3745.05 simply states that the board may issue an order 'vacating or modifying' the action appealed from, the far more significant and far-reaching authority of the board arises from the basic grant of power found in R.C. 3745.04, specifically, in addition to vacating or modifying, 'ordering the director * * * to perform an act,' **such as to issue a permit when the board finds the order of the director to be 'unreasonable and unlawful'** (R.C. 3745.05).

Id. at 89 (emphasis added).

Thus, the court determined that the "far-reaching" language of R.C. 3745.04 applied in instances in which EBR had held an action of the director to be unreasonable or unlawful. Nowhere in the decision did the court conclude that EBR had authority to order the director to act in any instance or without a director's final action. The basis for ordering the director to act must always first be the conclusion that a prior final action of the director was unreasonable or unlawful.

In this case, the dissent at the Tenth District Court of Appeals discussed the instances in which ERAC could exercise its authority to order the director to act. The dissent's example posited an instance in which ERAC had concluded that the director or board had unreasonably or unlawfully denied an approval, in which case, ERAC could order the director or board to grant the approval. The denial of the approval is a final, appealable action giving ERAC jurisdiction over the appeal. If ERAC concluded that the denial was unreasonable or unlawful, then ERAC could use its authority in R.C. 3745.04 to order the director or board to grant the approval. The dissent's interpretation comports with the General Assembly's intent and court precedent; therefore, HELP requests this Court to apply the same interpretation and hold that a final appealable action is required for ERAC to have jurisdiction over an appeal.

3. Interpreting the phrase "or ordering the director or board of health to perform an act" as granting ERAC carte blanche jurisdiction to order the director or board to act grants ERAC with mandamus authority over the director and boards of health.

Granting ERAC the authority to order the director or board to act without an initial finding that a final appealable action has occurred essentially provides ERAC mandamus authority over the director and the board of health. Mandamus is a writ issued to a board or person "commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." R.C. 2731.01. The remedy of mandamus is a drastic

one, to be invoked only in extraordinary situations. Writs of mandamus are to be issued by the supreme court, the court of appeals, or the court of common pleas. R.C. 2731.02.

If a person were seeking a judgment ordering the director or board of health to perform an act within its duty, then the person should file a writ of mandamus with the courts, not appeal to ERAC. See, *State ex rel. Northeast Ohio Sewer District v. Ohio EPA* (2007), 8th Dist. No. 87928, 2007-Ohio-834. The General Assembly never intended to give ERAC the authority to order the director or board to act unless ERAC were reviewing a final act or action of the director or board. If ERAC determines that the director or board's action was unreasonable or unlawful, then ERAC may, pursuant to statute, order the director or board to take an alternative action. But unless a final act or action has occurred, ERAC is without jurisdiction to hear the appeal.

B. The Tenth District Court of Appeals' holding provides appellants with the opportunity to circumvent the licensing process and grants ERAC with powers that have been reserved for the director of Ohio EPA and designated local boards of health.

In its decision, the Court of Appeals held that ERAC's jurisdiction does not depend on the finality of the Health Department's May 31, 2006 letter, or whether the Health Department performed any final action with respect to Trans Rail's application. Rather, the Court of Appeals held that R.C. 3745.04(B) grants ERAC "jurisdiction over two types of appeals: (1) an appeal from an 'action' that the ERAC may vacate or modify; and (2) an appeal requesting that the ERAC order the performance of an 'act.'" *Trans Rail Am., Inc.* at ¶ 9. In order to establish jurisdiction before ERAC, an applicant would only need to draft its appeal requesting ERAC to order the director or board of health to perform an act. No appeal would ever be dismissed for lack of jurisdiction because ERAC would no longer be required to determine its jurisdictional basis on whether a final appealable action has occurred.

The Court of Appeals' interpretation, besides being incorrect as explained above, could have devastating consequences to the ERAC appeals process and a citizen's ability to participate in the licensing process. The dissent acknowledged the dangerous precedent established by this reading. "Rather than requiring an applicant to complete the statutory process, the majority opinion allows an applicant to circumvent the process by prematurely appealing an agency's request for additional information or finding that an application is incomplete." *Trans Rail Am., Inc.* at ¶15 (French, J., dissenting).

Giving ERAC the authority to order the board of health to issue or deny the construction and demolition debris facility license before the board of health has done so itself divests the board of its licensing power and impugns the citizen's ability to participate in the licensing process. A person cannot operate a construction and demolition debris facility without a license issued by the board of health of the health district in which the facility is located. R.C. 3714.06 & Ohio Adm. Code 3745-37-01(C). Applications for construction and demolition debris facility licenses "shall be made on forms prepared by the director and shall contain such information as the director may require." Ohio Adm. Code 3745-37-02(A)(1). The board is prohibited from considering an incomplete application. Ohio Adm. Code 3745-37-02(A)(2). The board of health has sixty days to inform the applicant of the nature of its deficient application and the board's refusal to consider the application until the deficiency is rectified and the application completed. Ohio Adm. Code 3745-37-02(A)(2). Also, if the board "determines that information in addition to that required by rule is necessary to determine whether the application satisfies the requirements of Chapters 3745-400 and 3745-37 of the Administrative Code, the license applicant shall supply such information as a precondition to further consideration of the license application." Ohio Adm. Code 3745-37-02(A)(3). The cumulative

effect of these rules is to give the board discretion in determining whether an application is complete.

Under Ohio Adm. Code 3745-37-04, titled "Action by board of health or director," the board must "either grant or deny a construction and demolition debris facility license within ninety days of the date upon which a complete application is received." Ohio Adm. Code 3745-37-04(D) (emphasis added). Once the board has determined the application to be complete, then the board must take the final action of either issuing or denying the license. But, the board maintains discretion in determining when the application is complete. Ohio Adm. Code 3745-37-02(A).

Allowing the applicant to circumvent the licensing process removes the licensing power from the board of health and gives it to ERAC. For example, an applicant seeking a license from the board of health and who is unhappy with the time the board was taking to issue or deny the application or unhappy with the application procedures followed by the board could appeal to ERAC without first receiving a final decision on the application. In such an instance, ERAC would then be "stepping into the shoes" of the board to process the license application and determine whether the board should either issue or deny the license. The board, however, should be given the first opportunity to issue or deny the license because the statute and regulations specifically provide that the license is issued or denied by the board after receipt of a complete application.

Further, an appeal to ERAC does not automatically stay an action, so during the pendency of the appeal, the board could issue or deny the license, thus making the appeal moot or resulting in the applicant filing a new appeal from the board's final action. The applicant's legal rights should be determined by the board with finality before the applicant is allowed to

appeal, or the possibility exists that the applicant will file multiple appeals and congest ERAC's docket.

As explained above, the General Assembly intended in R.C. 3745.04 to grant ERAC authority to order the director or board to perform an act only when ERAC first determined that the specified government agency's initial action was unreasonable and unlawful. This historical interpretation of R.C. 3745.04(B) should be reinstated and confirmed by this Court for the following three reasons: (1) it maintains the integrity of both the legislative scheme and administrative process described in R.C. 3745.04; (2) it ensures that ERAC will not be burdened with premature appeals of which it is not well-equipped to handle; and (3) it conforms with all traditional precedent regarding ERAC's jurisdiction.

CONCLUSION

For all of the reasons set forth above, amici curiae respectfully urge this Court to reverse the decision of the Court of Appeals and reinstate the order of dismissal entered by the Environmental Review Appeals Commission.

Respectfully submitted,

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I certify that a copy of the foregoing was sent by ordinary U.S. mail this 5th day of August, 2008, to all counsel of record:

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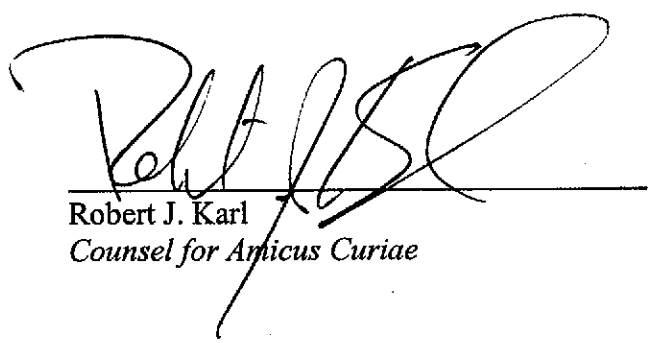

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UNPUBLISHED DECISIONS

22 of 22 DOCUMENTS

ARISTECH CHEMICAL CORPORATION, Appellant, v. RICHARD SHANK, DIRECTOR OF ENVIRONMENTAL PROTECTION, Appellee.

Case No. EBR 441977

Ohio Environmental Board of Review

1989 Ohio ENV LEXIS 14

July 25, 1989, Issued

[*1]

COUNSEL FOR APPELLANT: J. Jeffrey McNealey, Esq., Lisa P. Leavitt, Esq., PORTER, WRIGHT, MORRIS & ARTHUR, Columbus, Ohio.

COUNSEL FOR APPELLEE: Cheryl Roberto, Esq., Edward S. Dimitry, Esq., Assistant Attorneys General, Columbus, Ohio.

PANEL: James L. Baumann, Chairman; Peter A. Precario, Vice-Chairman; Julianna F. Bull, Member.

OPINION:

RULING ON MOTION FOR STAY AND FINAL ORDER

FINDINGS OF FACT

This matter comes before the Environmental Board of Review (EBR) upon an appeal by Appellant Aristech Chemical Corporation from an alleged action of the Ohio EPA, taken in the form of a letter to Appellant from an employee of the Ohio EPA, dated June 28, 1989. The appeal also requested the Board to grant a stay of the effectiveness of the Director's order and requested an expedited hearing on the stay.

An evidentiary hearing and oral argument on the stay was held before the Board on July 5 and July 6, 1989. Appellant was represented by Mr. J. Jeffrey McNealey and Ms. Lisa P. Leavitt, Attorneys at Law of Porter, Wright, Morris and Arthur, Columbus, Ohio. The Ohio EPA was represented by Mr. Edward S. Dimitry and Ms. Cheryl Roberto, Assistant Attorneys General, State of Ohio.

Based upon the testimony [*2] and evidence introduced at the evidentiary hearing, the briefs and arguments of counsel, the Board makes the following Ruling On Motion For Stay And Final Order.

PROCEDURAL BACKGROUND

1. Appellant Aristech Chemical Corporation is the holder of a permit to drill an underground injection well which had been issued on December 6, 1988. The well, known as the number 3 well, is to be used for the injection and disposal of hazardous waste at its Haverhill facility located in Scioto County, Ohio. (Appellant's exhibit 2; supplemental exhibit 1)

2. Pursuant to the permit, Appellant was authorized to drill into the geologic formation known as the Mt. Simon sandstone. This formation is located at approximately 5500 feet in vertical distance from the surface of the ground. The purpose of the drilling was to allow the construction of a deep well which would be used for the injection of hazardous waste into the Mt. Simon formation. (Testimony Paul Kaplow, Thomas Ball; Appellant's exhibits 1,5)

3. The circumstances leading to the present appeal began in May and June of 1989, as a result of an analysis of liquids collected during a drill stem test (DST). The test was run, as required by [*3] the permit to drill, at the time of encountering the Rose Run formation which is located at a vertical depth of approximately 4500 ft. Among other things, the analysis of the DST fluids indicated the presence of two unanticipated hazardous wastes -- phenol and ace-

tone-in this formation whose presence could not be explained. Subsequent testing of the formation confirmed the existence of these contaminants (Testimony George Chada, Wilson Hershey, Thomas Ball; Appellant's exhibit 1,5).

4. As a result of these test and subsequent results a letter under the signature of Gary L. Martin, Chief of the Groundwater Division of the Ohio EPA, was issued to Appellant. That letter was dated June 28, 1989, and is the subject of this appeal. Among other things, the letter stated: ". . . further drilling on well #3 is not authorized until Aristech has received written approval from Ohio EPA to resume such activity . . ." (Appellant's exhibit 1).

5. The letter also stated: ". . . I am directing Aristech Chemical Corporation to undertake the following course of action. . . ." This statement was then followed by a list of a number of tests and sampling protocols which were to be carried out by [*4] Appellant. (Appellant's exhibit 1).

6. Upon receipt of this letter, Appellant ceased drilling of the #3 well at the Haverhill site and, on June 30, 1989, filed its Notice Of Appeal with the Board thereby perfecting the present appeal. (Testimony, Paul Kaplow)

7. Along with the Notice Of Appeal was filed a Motion For Stay and Request For Expedited Hearing On Stay. At the opening of the hearing on July 6, 1989, the Appellee Director moved to dismiss the appeal based upon lack of jurisdiction in that the letter being appealed did not constitute an action of the Director of the Ohio EPA as defined in *Section 3745.04 of the Ohio Revised Code.*

FACTUAL BACKGROUND

8. The permit to drill issued to Appellant in December of 1988 contained a condition which required sampling at the various geologic formations encountered during the boring process. Specifically, this condition provided:

Formation testing at a minimum shall be performed by Drill Stem Testing (DST) in the geologic horizons prescribed below prior to the installation of casings. This does not limit nor relieve permittee from additional formation testing if determined by OEPA, additional formation testing is needed (sic). [*5] All DSTs shall be performed in a manner to provide data representative of the sampled intervals. OEPA shall be notified at a minimum of 24 hours prior to any DST. Permittee shall obtain approval of OEPA on any DST performed prior to resumption of drilling or construction operations.

(Appellant's exhibit 2, pg. 9)

9. The permit also contained the following general conditions:

A.1. Prior to any commencement of drilling, construction, or testing of the well, the permittee shall submit to OEPA for review and to receive written approval thereof for the final drilling program and final well construction diagram(s). (sic) At a minimum, the final drilling program and well construction diagram(s) shall satisfy the requirements mandated by this permit, attachments and all laws and rules incorporated by reference. Initiation of any drilling or construction of the well without prior written approval by the OEPA of the drilling program and/or well construction diagrams is STRICTLY PROHIBITED. (Emphasis in original)

(Appellant's exhibit 2, pg. 3)

10. Upon receiving the letter, the Appellant ceased the drilling of the #3 well. At the time that the drilling was terminated the well was [*6] at a depth of approximately 4400 vertical feet which is approximately 100 vertical feet above the Mt. Simon formation, the terminus of the well. (Testimony Thomas Ball; Appellant's exhibit 15).

11. During the course of the drilling of well #3, it had been the practice and procedure of both the Appellant and the Appellee to collect the required data as each relevant stratum was encountered; to provide the required data to the EPA for review; and then to proceed to recommence drilling based upon receiving written permission from the Ohio EPA to proceed to the next test interval as was provided in the permit terms and conditions. (Testimony Thomas Ball; Appellant's exhibit 1)

12. The record indicates that throughout the course of the drilling, the Appellant and the Appellee recognized and treated the authority of the Ohio EPA employees to authorize or to withhold authorization to recommence drilling based upon the analytical data collected as part of the operation and administration of the permit to drill. Authorizations to recommence drilling were not treated by either party as separate acts or actions of the Agency which might give rise to appeal rights. (Appellant's exhibits [*7] 3,20; Appellee's exhibits 1,14; Testimony Thomas Ball).

13. The record in this case demonstrates that all of the various activities taken or performed by the parties under the circumstances of this case were taken or performed in furtherance of the permit to drill and were within the scope of events and circumstances anticipated by the permit terms and conditions.

14. The record and evidence presented in this case demonstrate that the letter of June 28, 1989, which is the subject of this appeal, was part of the administrative process created by and anticipated by the permit to drill and did not constitute an appealable act or action of the Ohio EPA or of the Director.

CONCLUSIONS OF LAW

1. *Section 3745.04 of the Ohio Revised Code* provides, in relevant portion:

". . . as used in this section, 'action' or 'act' includes the adoption, modification, or repeal of a rule or standard, the issuance, modification, or revocation of any lawful order other than an emergency order, and the issuance, denial, modification, or revocation of a license, permit, lease, variance, or certificate, or the approval or disapproval of plans and specifications pursuant to law or rules adopted thereunder. [*8] . ."

2. In a case such as the present one, where the existence of an "act" or "action" is called into question, the burden is upon the Appellant to demonstrate that the event or events which are alleged to be acts or actions and which have triggered the appeal to the Board are in fact acts or actions of the Director as defined in the *Section 3745.04 of the Ohio Revised Code.*

3. Merely because the event triggering the appeal to the Board involved an employee of the OEPA rather than the Director is not, in itself, dispositive of whether the event was an act or action of the Agency. The question of whether or not a particular event or a particular document constitutes an act or action of the Agency is a question of fact which must be determined by the Board based upon the surrounding events and circumstances.

4. When a question is raised as to whether an event or document constitutes an act or action which would confer jurisdiction on this Board, the Board will proceed to determine whether or not it has jurisdiction over the subject matter of the appeal.

5. When the record before the Board demonstrates that the document or event being appealed represents an intermediate step in [*9] a continuing process which has been anticipated and specified in a previously issued permit, license or other document and where the subject matter of the document or event under appeal is not such that it indicates finality but is rather part of a contemplated review or evaluation process which will ultimately lead to a final resolution of the matter in question, no act or action has occurred as defined in *Section 3745.04 of the Revised Code.*

6. Applying these criteria in the present case, the record demonstrates that the letter which is the subject of this appeal does not constitute an act or action of the Agency. Consequently, that letter does not confer jurisdiction upon the Board.

7. As a result, the Motion of the Appellee Director to dismiss this appeal is well taken and the appeal should be dismissed.

FINAL ORDER

The Motion of the Appellee to dismiss the present appeal is well taken and is hereby sustained. The appeal is ORDERED dismissed.

The Board, in accordance with *Section 3745.06 of the Revised Code* and *Ohio Administrative Code 3746-13-01*, informs the parties that:

Any party adversely affected by an order of the Environmental Board of Review may appeal to the Court [*10] of Appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation to the court of appeals of the district in which the violation was alleged to have occurred. Any party desiring to so appeal shall file with the Board a Notice of Appeal designating the order appealed from. A copy of such notice shall also be filed by the Appellant with the court, and a copy shall be sent by certified mail to the Director of Environmental Protection. Such notices shall be filed and mailed within thirty days after the date upon which Appellant received notice from the Board by certified mail of the making of an order appealed from. No appeal bond shall be required to make an appeal effective.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityStanding

8 of 8 DOCUMENTS

GENERAL MOTORS CORPORATION, (Chevrolet Motor Division, Parma Plant), Appellant, v. NED E. WILLIAMS, DIRECTOR OF ENVIRONMENTAL PROTECTION, Appellee

Case No. EBR 78-75

Ohio Environmental Board of Review

1978 Ohio ENV LEXIS 14

December 22, 1978, Issued

[*1]

COUNSEL FOR APPELLANT: Louis E. Tosi, Esq., Fred J. Lange, Jr., Esq., John P. Murtagh, Esq., FULLER, HENRY, HODGE & SNYDER, Toledo, Ohio.

COUNSEL FOR APPELLEE: Margaret A. Malone, Esq., Adam J. Wagenbach, Esq., Assistant Attorneys General, Environmental Law Section, Columbus, Ohio.

PANEL: Thomas M. Phillips, Chairman; Sherman L. Frost, Vice-Chairman.

OPINION:

FINDINGS OF FACT AND FINAL ORDER

This case came to the Environmental Board of Review on July 28, 1978, appealing a final order of the Director denying Appellant's permits to operate four coal-fired boilers located at its Parma, Ohio, plant. The appeal contained 15 assignments of error. The Board granted Appellant's request for a bifurcated hearing to allow argument on the assignment that the Director erred in issuing the actions as final actions thus depriving Appellant of a right to a hearing before the Ohio Environmental Protection Agency (OEPA), and further that the Director failed to state sufficient findings of fact upon which he based the denial of the permits to operate. On August 18, 1978, the Board held a hearing limited to these two issues and it is to them that the findings and holding which follow are confined since the Board [*2] finds them determinative.

The operative facts of this case are as follows. Appellant owns and operates four coal-fired boilers at its plant in Parma, Ohio, to supply steam for heat and production purposes for that plant. Continued operation of these boilers is essential to production at the plant. Each boiler is separate from the others and can be operated independently. On December 5, 1973, OEPA issued variances to Appellant to allow operation of these boilers during installation of sulfur dioxide and particulate control equipment. The control equipment was a double alkali flue gas desulfurization system ("scrubber") designed to remove both sulfur dioxide and particulate matter to levels permissible under OEPA regulations. A scrubber was installed on each boiler pursuant to the variance compliance schedule and has been operated since.

In May, 1974 Appellant applied for the permits to operate which are the subject of this appeal. At the request of OEPA, Appellant conducted stack tests on boilers No. 1 and 4 to demonstrate entitlement to permits for each boiler. At the direction of OEPA these tests were conducted in accordance with procedures described by the United States Environmental [*3] Protection Agency New Source Performance Standard regulations, *40 C.F.R. § 60.46* rather than the methods prescribed in applicable OEPA regulations, in particular *O.A.C. 3745-17-10*. The test results were submitted to OEPA on February 18, 1976, and showed particulate emission rates of .19 lbs./MMBTU for both boilers No. 1 and 4 and the scrubber system. Include din the particulate sampled was a portion of carry-over salts due to the interaction of the flue gas with reactant in the scrubber. The tests showed compliance for boilers No. 3 and 4; however, compliance for boilers No. 1 and 2 was disputed due to an unresolved difficulty with the salt carry-over caused by the scrubber. At various times Appellant requested that OEPA resolved the issue of sale carry-over from the scrubber, however, OEPA

never responded to these requests. On June 30, 1978, more than four years from the date of the original application the OEPA issued final actions denying operating permits for each boiler. The orders did not specify resolution of the issues of salt carry-over, experimental error, or the emission limitations applicable to the boilers. Rather the only reason given for the denial of permits [*4] was the following: "This source is not in compliance with the above mentioned State Code." (*O.A.C. 3745-17-10.*)

Appellant contends that the Director erred in issuing these actions as final actions and thereby depriving Appellant of its right to a hearing before the OEPA where outstanding questions could best be resolved and should be resolved as a matter of law and sound administrative policy. Further Appellant contends that the Director erred in failing to state specific findings of fact upon which the denial was based, particularly in light of the factual questions and data presented to the Agency which if resolved in favor of Appellant would have resulted in the issuance of permits. Appellant had several other assignments of error relating to contested or disputed test methodology and results and as well several constitutional assignments of error. Appellant contended that it presumed that the scrubbers required by earlier rulings of the OEPA and with its express approval are the source of the factual basis for the denial and objects to the Agency requiring a source to comply with one law in such a manner as to violate another. Appellant sought as relief that the Director's [*5] orders be vacated and remanded to the Director to allow a proper resolution of the outstanding issues before the Director and permit the Agency to issue specific findings of fact.

Further examination of the Record discloses the following. On March 19, 1975, Appellant sent the Cleveland Air Pollution Control Agency (CAPC) the results of emission tests by Crosbaugh Laboratories. (Director's Record, Item 23.) There are no records of emission tests after the equipment modifications were made pursuant to the eight-week variance sought on July 22, 1975, by Appellant. On April 5, 1977, in Cleveland, Air Pollution Control Commissioner Howard G. Bergman wrote to Appellant that the four coal-fired boilers could not be recommended for approval for failure to comply with *O.A.C. 3745-17-10.*. The letter provided information on emission tests and on measuring procedures but did not show how much the emissions violated the regulations. It stated that Appellant was using different emission calculating methods than agreed upon (Director's Record, Item 10). The Record also shows visible emission readings by CAPC on September 7, 1976, February 22, 1977, and May 24, 1977 (Director's Record, Items [*6] 11, 12, 18). There is nothing in the Record which shows what recommendations or supporting data were sent to the Director by CAPC, or that a copy was sent to Appellant. Over a year lapsed between CAPC's letter to Appellant advising that the agency could not recommend approval of Appellant's sought for permits to operate. There is nothing in the Record to show any efforts to resolve the problem of emission calculation methodology. Appellant's counsel stated that although there were meetings between Appellant and the Director's air programs branch and some letters, no resolution was reached (EBR Hearing August 17, 1978, at p. 96).

Ohio Revised Code § 3704.03(G) states that no application shall be denied in the absence of a written order stating the findings upon which the denial is based. It is Appellant's contention that the Director's order merely stating that Appellant was not in compliance with *O.A.C. 3745-17-10, O.A.C. 3745-35-02(C)(1)* and applicable laws does not provide a sufficient basis, the basic facts from which the ultimate facts may be deduced. The Agency responds that the statute only requires findings whether conclusory or not and not the facts upon which the denial [*7] is based or upon which the findings rest. Further, the Agency contends that the word "finding" in the statute has a different meaning from the phrase "findings of fact" and that the Legislature did not intend to impose the requirement for findings of fact on the Director in *Ohio Revised Code § 3704.13(G).*

Appellant argues that the Record should be generated by an Agency before administrative action is taken and that it is error for the Agency to attempt to generate the Record after administrative action is taken which generation could only take place if at all in a de novo hearing before this reviewing body. Appellant further contends that the Director's decision must be based on a complete Record which only an adjudication hearing can provide and not upon an unrecorded determination from an unknown agency source. The Director's order leaves unstated the amount of emission from Appellant's facilities, the Director's method of arriving at the conclusion as to the unlawfulness of Appellant's emissions, and which if any of Appellant's or the Agency's measurements and data were used for this determination.

Ohio Revised Code § 119.01(D) teaches us that "adjudication means [*8] the determination by the highest or ultimate authority of an agency of the rights, duties, provileges, benefits or legal relationships of a specified person. . . ." Even the Agency's definition of final action in *O.A.C. 3745-47-03(G)* defines a final action as ". . . the decision on any adjudicatory matter when all administrative remedies have been exhausted."

We believe that the Agency in choosing to issue a final order must support that conclusion under the law and his own regulations by setting forth the facts upon which it is based, facts which an adjudication hearing might have pro-

duced unless otherwise known and specified by the Agency. We do not believe the mere words in the Director's final order, "not in compliance with *O.A.C. 3745-17-10*" provide Appellant or anyone else with sufficient factual foundation to determine why it is necessary to subject Appellant to potential enforcement proceedings by the Agency. The Agency should provide the basis for the conclusions it has reach in any event, but most assuredly after creating a record which spans more than four and one-half years of meetings, tests and memorandums. The Agency must be responsible to some minimum standard in [*9] setting forth sufficient findings upon which its final orders are based. It is well accepted in administrative law that mere conclusory findings are insufficient as a foundation for Agency action. This is not a matter having to do with Agency discretion in the decision-making process. What the Board finds here is a complete absence of any factual foundation for these denials.

Ohio Revised Code § 119.06, The Ohio Administrative Procedure Act, is the fundamental statute governing the Director's action in this case. In determining the applicability of 119.06(C) to this case, 119.06 should be read carefully. Exemptions are provided from the otherwise mandatory requirements of a prior hearing:

. . .

(A) Orders revoking a license in cases where an agency is required by statute to revoke a license pursuant to the judgment of a court;

(B) Orders suspending a license where a statute specifically permits the suspension of a license without a hearing;

(C) Orders or decisions of an authority within an agency if the rules of the agency or the statutes pertaining to such agency specifically give a right of appeal to a higher authority within such agency or to another agency and also give the [*10] appellant a right to a hearing on such appeal.

Such sections do not require a stenographic record at a hearing except where the record of the hearing may be the basis of an appeal to court.

When a statute permits the suspension of a license without a prior hearing, any agency issuing an order pursuant to such statute shall afford the person to whom the order is issued a hearing upon request.

Whenever an agency claims that a person is required by statute to obtain a license, it shall afford a hearing upon the request of a person who claims that the law does not impose such a requirement.

Every agency shall afford a hearing upon the request of any person who has been refused admission to an examination where such examination is a prerequisite to the issuance of a license unless a hearing was held prior to such refusal.

Every agency shall afford a hearing upon the request of a person whose application for a license has been rejected and to whom the agency has refused to issue a license, whether it is a renewal or a new license, unless a hearing was held prior to the refusal to issue such license.

When periodic registration of licenses is required by law the agency shall afford a hearing [*11] upon the request of any licensee whose registration has been denied, unless a hearing was held prior to such denial.

When periodic registration of licenses or renewal of licenses is required by law, a licensee who has filed his application for registration or renewal within the time and in the manner provided by statute or rule of the agency, shall not be required to discontinue a licensed business or profession merely because of the failure of the agency to act on his application. Action of an agency rejecting any such application shall not be effective prior to fifteen days after notice of the rejection is mailed to the licensee.

Thus, the section imposes a two-prong test before an order can be issued without a hearing. First, the order must be an order "of an authority within an agency." Second, there must be a right of appeal to a "higher authority within such agency," or to "another agency." In this case neither criterion is met. Here the order denying the operating permits was an order of the Ohio EPA itself. It came from the Director, the ultimate authority of Ohio EPA. Thus, this is not an intra-agency authority "authority within an agency" contemplated by 119.06(C). [*12] The order was not within the EPA but rather was the ultimate order of the Ohio EPA.

Notwithstanding this, the facts do not satisfy the second element of Section 119.06(C). The right of appeal to the Environmental Board of Review does not constitute "an appeal to an agency" because the Environmental Board of Review is not an agency as that word is defined in 119.01(A). The term "agency" in 119.01(A) means: ". . . (1) certain boards are specifically named, (2) the legislation concerning a Board specifically subjects such Board to this act, and (3)

a Board which has authority to issue, suspend, remove or cancel licenses." [In re *Martins Ferry Housing Authority, 2 Ohio App.2d 237* (Belmont County, 1965).]

These definitions of "agency" are recognized by the Ohio Supreme Court and controlling for purposes of determining the applicability of Chapter 119. [*Home Savings Association v. Boesch, 41 Ohio St.2d 115 (1975).]*

An example of an order or decision which does meet the requirements of 119.06(C) can be found in those of the Liquor Control Commission. The Liquor Control Commission is part and parcel of the Department of Liquor Control and it is empowered to hear appeals from [*13] decisions or orders made within the department on behalf of its Director. This procedure fits the description found in *119.06(C) of the Ohio Revised Code* that orders may be issued by"an authority within an agency." These orders are appealable pursuant to the department rules and the statutes pertaining to it and to a higher authority, the commission within the same agency with a right to a hearing before the commission. In this circumstance in such a case, orders from the department of liquor control can be made effective without a prior hearing. Additionally, the Ohio Board of Tax Appeals which is a part of the Ohio Department of Taxation has review authority over the tax commissioner who is also within this department. These departments differ markedly from the Ohio EPA wherein the Director is the sole and ultimate authority of the agency, and there is no connection with the Environmental Board of Review which is an entirely separate body both in responsibility and function. See Broadway Christian Church v. Williams, No. 37329, Cuyahoga County, 1978, which states: ". . . [t]he Environmental Board of Review, however, is an appellate review board, separate and distinct [*14] from the O.E.P.A. . . ." (Slip opinion, p. 15.)

A careful analysis of *R. C. 119.06* leads one to the following conclusion and this was the argument presented by counsel for General Motors. Our case involves the denial of permission to operate; i.e., the denial of a license to operate in the State of Ohio and the denial was issued without any formal hearing before the Agency. Yet, it was a final determination of rights as to Appellant. Section 119 with respect to the licensing function is rather specific, stating that an application for permit shall not be denied without a hearing if such a hearing is requested. In this instance such a hearing was requested. Additionally, Section 119.06 makes clear that no adjudication order shall be valid unless the hearing is afforded in accordance with the provisions of that chapter.

There is a regulation controlling the Agency which further guides us as to the appropriate proceedings before the Agency. *O.A.C. 3745-47-05* states that the Agency and the Director shall issue proposed actions except for provisions in subparagraph D. One of the conditions which must be met in order for the Director to issue a final order without a hearing is that [*15] there must exist no statutory prohibition from such issuance. Appellant contends that such a prohibition is found in 119.06.

When does Section 119.06 become operative? First, there must be orders or decisions of "an authority within an agency." Here there is no specific right to appeal to a higher authority within the Ohio EPA.

Looking to the second criterion, having as its operative language "or to another agency." Is the Environmental Board of Review for purposes of this statute an "agency"? The definition of agency for Section 119 purposes is found in Section 119.01 which is also the definitional section for 119.06(C). There are three criteria which must be met insofar as determining what is an agency under that statue. First, specific boards and commissions are named among which is not found the Environmental Board of Review. Secondly, the subject agency must be made specifically subject to Section 119 by virtue of its enabling legislation. Unlike the OEPA, the Environmental Board of Review is specifically not made subject to the provisions of Section 119. (*Revised Code 3745.03.*)

The third criteria is that the agency must have licensing authority. The Environmental [*16] Board of Review does not have licensing authority. Section 119.06 requires that a hearing be held before the Agency which does the issuing, of a denial of a license or permit upon the request of the applicant. In this case General Motors did request such a hearing, upon notification of the Director's intention with respect to the application.

The Agency, attempting to defend its action, cites Broadway Christain Church v. Williams, No 37329 (Agust 10, 1978). But Broadway did not specifically address in detail the language of 119.06(C) insofar as its applicability to the Agency's denial of operating permits. Additionally, the Boardway case does not deal with the procedural rights of an applicant for a permit.

The Agency contends that the Environmental Board of Review has authority over issuance, suspension, revocation or cancellation of licenses and would therefore be an "agency." The statute in question, 119.01(A), defines an agency as the repository of the licensing function of a department or board with the "authority or responsibility" of issuing licenses such as the Director has under *Section 3704.03(G), Revised Code.* The provision cited by the Attorney [*17] General, however, does not include a review body such as the Environmental Board of Review which may only determine

whether the Director of the Ohio Environmental Protection Agency has acted lawfully or reasonably in carrying out his function with regard to licensing. Even when a permit is modified by the Environmental Board of Review it is still issued by the Director. The situation is analogized to that of a court remanding a matter to an agency for specific relief. One would hardly consider a court as having authority or responsibility of issuing licenses although its reviewing function is a necessary part of the licensing process.

One of the interesting items in this case was the filing by Appellee Director on August 7, 1978, in which the Agency moved for a clearer specification of objections and assignments of error on the part of Appellant, complaining that in the absence of all the objections and assignments of error set forth more specifically by Appellant that the Director is deprived of the ability to prepare his case. It is interesting to note that the Director does not enjoy the posture of not knowing what his opponent is going to raise in its argument although [*18] the reverse does not appear to be a subject of concern to the Agency, that is, the issuance of final orders based on conclusory findings without support of any specific or clear factual setting.

Appellant contends, and this Board agress, that no administrative action should be permitted to stand unless the action is supported by a full and complete record. Further, Appellant contends that a hearing before the Environmental Board of Review is specifically conducted de novo to review a decision that has been made and not to form an initial decision. The record should be generated before action is taken.

The Agency contends that the record should be generated after the administrative action is taken. The Director is placing the cart before the horse and in fact the Agency itself admitted in one of its filings that a complete record did not exist and could not be developed in this case without a de novo hearing conducted as if the Agency had conducted it. It has been the rather consistent position of the United States Supreme Court to reject attempts by agencies to take action and thereafter justify such action at a later point in time. Citizens to Preserve Overton [*19] *Park v. Volpe, 401 U.S. 402, at 419 (1971); Burlington Truck Lines v. U.S., 371 U.S. 156, at 168-169 (1962); SEC v. Chenery Corporation, 332 U.S. 194, at 196 (1947).* Appellant contends that the Director's decision should be based on a complete record resulting from an adjudication hearing when contested issues are involved and such a hearing is requested. Only then can the Environmental Board of Review function properly as a review board. The Director's action will thus be focused upon the resolution of the important issues and the Agency will be forced to make specific findings and conclusions based upon a complete record rendering his action more amenable to review by whatever means. Should the procedures advocated by the Director in this case be permitted to continue, the Agency would need take no more action than flipping a coin on future permit applications, because a complete record upon which the decision must be based need not be developed prior to the decision. Contrary to the Agency's contention, Appellant's rights would not be adequately protected by de novo hearings before the Board because a hearing before the Board is conducted for a [*20] fundamentally different purpose than a hearing before the Director. In Citizens Committee to Preserve Lake Logan v. Williams, No. 77AP-504 (Franklin Cty. Court of Appeals, December 27, 1977, reconsidered February 7, 1978), the Court addressed this question finding that hearings before the Director are held to review evidence and enable an initial decision to be reached. Hearings before the Environmental Board of Review are held to provide appellate review of the decision already made to determine whether that decision is reasonable and lawful. In Lake Logan the Court stated that the Board may not substitute its judgement for that of the Director even if convinced that another action would be better. The Board must affirm the Director's action if it is in accordance with law and has some reasonable factual foundation, however minimal. Thus the hearings are different. In this case numerous complex factual and technical issues were unresolved and in many instances not even addressed. The "record" consists of independent documents, even unrelated documents. There is no description of the standards by which the Director determined to issue a final action.

The Franklin [*21] County Court of Appeals in Lake Logan suggests that the Director should first give full and fair consideration to issues presented him rather than relying upon the Board as a separate body in which to try, from ground zero, the propriety of his action. The method for accomplishing this is by adjudicatory proceedings before the Director in an original hearing with a preponderant burden of proof with the resultant findings and final order reviewable on appeal by this Board. Furthermore, the Lake Logan decision confirms sound principles of administrative law and due process which require that in a case such as this that an opportunity for a hearing be provided prior to a final action. A hearing should be afforded prior to the operative effect of a denial or order. [*United States v.. Illinois Central Railroad Company, 291 U.S. 457,463 (1934).]* The hearing should be held before the fact finding body most suited to making the factual determination. [K. Davis, Administrative Law Treatise, § 7.10 at 451 (1958).] The agency charged with making the initial decision should apply its expertise to the facts developed at the hearing rather than relying upon a reviewing [*22] body to correct an order upon appeal.[L.B. Wilson, Inc. v. *FCC, 170 F.2d 793 (D.C. Cir. 1948).]* Thus, a hearing should occur before the order is issued.

FINAL ORDER

Thus, it is the Board's finding that the Director's action was unlawful since he did not afford Appellant an opportunity for a hearing prior to the issuance of his order denying Appellant's applications for permits to operate, nor was there any reasonable factual foundation to support the order. The Director's denial is ordered vacated and the Director is ordered to reissue his order of June 30, 1978, as a proposed action so as to permit Appellant an opportunity to request an adjudication hearing if desired.

The Board, in accordance with *Section 3745.06 of the Revised Code* and *Ohio Administrative Code 3746-13-01* [formerly EBR-§ 7-01(A)], informs the parties that:

Any party adversely affected by an order of the Environmental Board of Review may appeal to the Court of Appeals of Franklin County, or if the appeal arises from an alleged violation of a law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. Any party desiring to so appeal [*23] shall file with the Board a Notice of Appeal designating the order appealed from. A copy of such notice shall also be filed by the Appellant with the court, and a copy shall be sent by certified mail to the Director of Environmental Protection. Such notices shall be filed and mailed within thirty days after the date upon which Appellant received notice from the Board by certified mail of the making of the order appealed from. No appeal bond shall be required to make an appeal effective.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawAgency AdjudicationDecisionsGeneral OverviewAdministrative LawAgency AdjudicationHearingsRight to HearingStatutory RightEnvironmental LawAir QualityOperating Permits

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INORGANIC RECYCLING OF OHIO, INC., Appellant, v. RICHARD SHANK, DIRECTOR OF ENVIRONMENTAL PROTECTION, EDWARD A. KITCHEN, Appellees

Case No. EBR 252011

Ohio Environmental Board of Review

1989 Ohio ENV LEXIS 19

November 30, 1989, Issued

[*1]

COUNSEL FOR APPELLANT: J. Jeffrey McNealey, Esq., PORTER, WRIGHT, MORRIS & ARTHUR, Columbus, Ohio.

COUNSEL FOR APPELLEES DIRECTOR AND EDWARD A. KITCHEN: Edward S. Dimitry, Esq., Assistant Attorney General, Environmental Enforcement Section, Columbus, Ohio.

PANEL: James L. Baumann, Chairman; Peter A. Precario, Vice-Chairman; Julianna F. Bull, Member.

OPINION:

RULING ON MOTION TO DISMISS FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This case presents to the Environmental Board of Review (EBR) an appeal by Appellant Inorganic Recycling of Ohio, Inc. from a letter written to Appellant by an employee of the Ohio Environmental Protection Agency and which Appellant contends is, in effect, an unreasonable and unlawful action of the Ohio EPA and the employee. The appeal was filed with the Board on August 28, 1989.

On October 2, 1989, the Ohio EPA filed a Motion to Dismiss the appeal based upon a lack of jurisdiction of the subject matter in the Board in that the letter did not constitute an act or action of the agency as defined in Section 3745.04 and that consequently the Board had no jurisdiction over the appeal.

Oral argument was held before the Board on October 17, 1989. Appellant was represented [*2] by Mr. J. Jeffrey McNealey, Attorney at Law of Porter, Wright, Morris & Arthur, Columbus, Ohio. Appellees Director and Edward Kitchen were represented by Mr. Edward S. Dimitry, Assistant Attorney General, State of Ohio.

Based upon the memoranda and arguments of Counsel, the pleadings, exhibits attachments, and the record certified to this Board, the Environmental Board of Review makes the following ruling on the Motion to Dismiss and issues its final order.

FINDINGS OF FACT

1. Appellant Inorganic Recycling of Ohio, Inc. (Appellant) is a company which utilizes hazardous and non-hazardous secondary materials to manufacture another, ceramic material which can, apparently, be used in various ways and for various purposes such as an architectural aggregate, an abrasive material or as a refractory material.

2. Appellant's manufacturing process is conducted from mobile units which are installed and operated at the site of each waste generator's plant. Appellant received a Permit To Install (PTI) its the mobile facility from the Ohio EPA in 1987.

3. On July 26, 1989, Appellant received a letter from Mr. Edward A. Kitchen in his capacity of Manager of the Technical Assistance and [*3] Engineering Section of the Division of Solid and Hazardous Waste Management of the Ohio EPA. (See Exhibit D, Notice of Appeal; Cert. Rec. Doc. 2) It is this document which forms the basis of the present appeal.

4. On its face, the letter does not purport to be nor represent itself to be an action of the Agency, final or otherwise. It is not characterized as an order, it is not signed by the Director and it does not contain any appellate information notifying the parties of their right to appeal as is traditionally found in actions of the Agency.

5. The letter recites that the Ohio EPA is in agreement with certain statements made by the U.S. EPA in a separate letter which had been sent to Appellant regarding a submittal apparently filed by Appellant with the U.S. EPA. The letter further states that the Ohio EPA would "expect" further activities of Appellant utilizing hazardous waste, to be done under the supervision of U.S. EPA and Ohio EPA and further that any such hazardous waste activity would be done only after the preparation and submittal of a work plan. (Cert. Rec. Doc. 2)

6. The letter also states that it was not authorizing any commercial operations of Appellant which [*4] utilized hazardous waste and it further stated that any treatment of hazardous waste without specific approval of a work plan by both Ohio and U.S. EPA would be considered a violation of law. The letter also recounted certain discussions and meetings which had taken place between Appellant's employees and certain employees of the Ohio EPA.

7. The letter did not order nor did it require Appellant to take any affirmative action. The letter further did not order nor mandate that Appellant cease or desist in any operations or processes being performed by Appellant.

8. Significantly, the letter did not purport to affect, modify, or revoke any of the terms or conditions specified in either the Permit To Install which had previously been issued to Appellant or any other permit or license.

9. While the letter clearly had implications and effects could impact upon Appellant's business operations and business plans, the letter did not in itself determine nor adjudicate any rights or privileges of Appellant. It was merely a statement of the position of the Agency with respect to a matter apparently before another agency (the U.S. EPA) and also states the OEPA's position and expectations [*5] with regard to future hazardous waste activities by Appellant.

10. The record here does not demonstrate that the letter is a final determination of Appellant's rights and privileges.

CONCLUSIONS OF LAW

11. The Board has previously recognized that an action of the Ohio EPA or the Director may occur even when the action has been taken or triggered by an employee of the Ohio EPA rather than the Director. As this Board has stated, "the question of whether or not a particular event or a particular document constitutes an act or action of the agency is a question of fact which must be determined by the Board based upon the surrounding events and circumstances." (Aristech Chemical Corporation v. Richard Shank, Case No. EBR 441977, July 25, 1989)

12. In determining whether or not the event or document in question is an appealable action, one of the issues the Board must determine is whether or not the event or document in question determines or adjudicates with finality any legal rights and privileges of the appealing party or parties.

13. Where the record before the Board demonstrates that a document of the Ohio EPA does not make a final determination of Appellant's rights [*6] but rather is either part of a previously contemplated review or evaluation process as was found in Aristech (Supra) or that the document is merely explanatory of an Ohio EPA policy or Ohio EPA position and does not determine nor adjudicate the rights or privileges of the appealing party, the event or document will not be construed to be a final or appealable action.

14. In applying the Aristech (Supra) criteria and the criteria specified above to the letter under appeal in the present case, the record demonstrates that the letter does not constitute an act or action of the agency and consequently, does not confer jurisdiction to the Environmental Board of Review under *section 3745.04 of the Ohio Revised Code.*

15. As a result, the Motion of the Appellee Director to dismiss the appeal is well taken and the appeal should be dismissed.

FINAL ORDER

The Motion of the Appellee to dismiss the present appeal is well taken and is hereby SUSTAINED. The appeal is ORDERED dismissed.

The Board, in accordance with *Section 3745.06 of the Revised Code* and *Ohio Administrative Code 3746-13-01*, informs the parties that:

Any party adversely affected by an order of the Environmental Board [*7] of Review may appeal to the Court of Appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation to the court of ap-

peals of the district in which the violation was alleged to have occurred. Any party desiring to so appeal shall file with the Board a Notice of Appeal designating the order appealed from. A copy of such notice shall also be filed by the Appellant with the court, and a copy shall be sent by certified mail to the Director of Environmental Protection. Such notices shall be filed and mailed within thirty days after the date upon which Appellant received notice from the Board by certified mail of the making of an order appealed from. No appeal bond shall be required to make an appeal effective.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityFinal Order RequirementAdministrative LawJudicial ReviewReviewabilityStandingEnvironmental LawLitigation & Administrative ProceedingsJudicial Review

1 of 1 DOCUMENT

PHYLLIS & RON KAPLE, APPELLANTS v. CHRISTOPHER JONES, DIRECTOR OF ENVIRONMENTAL PROTECTION, ET AL., APPELLEES

CASE NO. ERAC 745596

Ohio Environmental Board of Review

2004 Ohio ENV LEXIS 9

December 16, 2004, Issued

[*1]

COUNSEL FOR APPELLANTS: Appellants appeared, Pro Se.

COUNSEL FOR APPELLEE DIRECTOR: Summer J. Koladin Plantz, Esq., Assistant Attorneys General, Environmental Enforcement Section, Columbus, Ohio.

COUNSEL FOR APPELLEE HANSON: Brian P. Barger, Esq., Patricia J. Kleeberger, Esq., BRADY, COYLE & SCHMIDT, LLP, Toledo, Ohio.

PANEL: Toni E. Mulrane, Chair; Julianna F. Bull, Vice-Chair; Melissa M. Shilling, Member.

OPINION:

RULING ON MOTIONS TO DISMISS AND FINAL ORDER

This matter comes before the Environmental Review Appeals Commission ("ERAC" or "the Commission") upon Motions to Dismiss filed by Appellee Director of the Ohio Environmental Protection Agency ("Director," "OEPA," "the Agency") and Appellee Hanson Aggregates Midwest, Inc. ("Hanson"). In their motions, Appellees assert that the Commission lacks subject matter jurisdiction over the appeal filed on April 8, 2004 by Appellants Phyllis and Ron Kaple, because the matter which Appellants are attempting to appeal is not a final, appealable action of the Director.

Appellants Phyllis and Ron Kaple are appearing *pro se* in this matter. Appellee Director is represented by Ms. Summer J. Koladin Plantz, Esq., Assistant Attorney General, State [*2] of Ohio. Appellee Hanson is represented by Mr. Brian P. Barger, Esq. and Ms. Patricia J. Kleeberger, Esq., Brady, Coyle & Schmidt, LLP, Toledo, Ohio.

FINDINGS OF FACT

1. Appellee Hanson operates a limestone quarrying and processing facility in Bloomville, Seneca County, Ohio ("the Bloomville facility"). On January 12, 2004, Appellee submitted a permit to install ("PTI") application to the OEPA for new portable aggregate processing equipment it plans to install at the Bloomville facility. (Appellee Hanson's Memorandum in Support of Motion to Dismiss, Case File Item V.)

2. On March 19, 2004, a Public Notice regarding the Agency's receipt of the application appeared in the Legal Notices section of *The Advertiser-Tribune* of Tiffin, Ohio. The public notice provided as follows:

PUBLIC NOTICE

> The following applications and/or verified complaints were received, and the following draft, proposed, or final actions were issued, by The Ohio Environmental Protection Agency (OEPA) last week. . . . n1

n1 The deleted information is the standard information contained in an OEPA Public Notice and includes a discussion regarding what constitutes "Draft Actions," "Proposed Actions" and "Final Actions," as well as instructions on how to submit written comments or request a public meeting relative to draft or proposed actions and how to file an appeal from final actions. Despite the inclusion of this standard information, the only matter announced in this specific Public Notice is the receipt of Appellee Hanson's permit application, which is not a draft, proposed, or final action. Thus, it appears to the Commission that the standard information in this Public Notice is somewhat superfluous and confusing as it relates to the announcement that a permit application has been received by the Agency.

[*3]

Application For Permit To Install

Hanson Aggregates
Midwest - Bloomville
4575 Seneca County Road 49
Bloomville OH
Facility Description: Air
Application No 03-16131
Application Received For
Permit To Install Portable

Aggregate Plant (Attachment to Notice of Appeal, ERAC Case No. 745596, Case File Item A.)

3. On April 8, 2004, the Commission received a filing from Appellants Phyllis and Ron Kaple, in which they indicated that they were appealing the legal notice discussed above. Appellants further declared "we are requesting this permit be denied . . . ." Finally, in closing, Appellants stated, "we are appealing all their permits!" (ERAC Case No. 745596, Case File Item A.)

4. On August 26, 2004 and September 17, 2004, respectively, Appellee Director and Appellee Hanson, filed Motions to Dismiss the instant appeal. The basis for their motions is that the matter referenced in the March 19, 2004 Public Notice is not a final act or action of the Director and, thus, the Commission does not possess subject matter jurisdiction to entertain the appeal. To date, Appellants have not responded to the Motions to Dismiss. (Case File Items S, V.)

CONCLUSIONS OF LAW

1. Two discrete statutes [*4] authorize appeals to the Commission: Revised Code Section ("R.C.") 3745.04 and *R.C. 3745.07*. Specifically, *R.C. 3745.04* provides in part:

> Any person who was a party to a proceeding before the director may participate in an appeal to the environmental review appeals commission for an order vacating or modifying *the action* of the director of environmental protection or local board of health, or ordering the director or board of health to perform *an act* . . . .
> (Emphasis added.)

2. *Revised Code Section 3745.04* defines an "act" or "action" of the Director which may be appealed to the Commission as follows:

> ". . . 'act' or 'action' includes the adoption, modification or repeal of a rule or standard, the issuance, modification or revocation of any lawful order other than an emergency order, and the *issuance, denial, modification, or revocation of a* license, *permit,* lease, variance, or certificate, or the approval or disapproval of plans and specifications pursuant to law or rules adopted thereunder. (Emphasis added.)

3. Further, *R.C. 3745.07* [*5] authorizes appeals to the Commission under the following circumstances:

> If the director *issues, denies, modifies, revokes, or renews a permit,* license, or variance without issuing a proposed action, an officer of an agency of the state or of a political subdivision, acting in a representative capacity, or any person who would be aggrieved or adversely affected thereby, may appeal to the environmental review appeals commission within thirty days of the issuance, denial, modification, revocation, or renewal. (Emphasis added.)

4. Explicit in both *R.C. 3745.04* and *R.C. 3745.07* is that the Director must take some affirmative action relative to a permit or permit application ("issue, deny, modify, revoke or renew") before there is an act or action of the Director which is appealable to the Commission. An event which does not constitute an act or action of the Director cannot form the jurisdictional basis for an appeal to the Commission. (See e.g., Inorganic Recycling of Ohio, Inc. v. Shank, EBR Case No. 252011, issued November 30, 1989; National Lime and Stone Co. v. Shank, EBR Case No. 321960, [*6] issued January 17, 1990.)

5. In the facts before us today, the legal notice at issue simply advises the public that the Director has received an application for a permit to install from Appellee Hanson. He has yet to make any determination regarding what action he will take on the merits of the application. Once the Director reaches a final decision regarding Appellee Hanson's application, this decision will be announced in a new Public Notice. This Public Notice will specifically state that the Director's decision relative to the permit application is being issued as a final action of the OEPA which may be appealed to the Commission. The Public Notice will further contain detailed instructions regarding how such an appeal may be filed. n2

> n2 It is easy to understand how Appellants were confused by the Public Notice at issue since the information preceding the announcement of the Director's receipt of Appellee Hanson's application encompassed generalized information regarding draft, proposed and final actions. However, the confusing nature of the Public Notice does not change the fact that the Director's receipt of a permit application is not a final action which is appealable to this Commission.

[*7]

6. In sum, Appellants have attempted to appeal a matter upon which the Director has not yet made a determination. Thus, there is no final act or action of the Director which this Commission possesses jurisdiction to review. As such, Appellant's Notice of Appeal is premature and must be dismissed.

FINAL ORDER

Based upon the foregoing, the Commission grants the Motions to Dismiss filed by Appellee Director and Appellee Hanson and hereby ORDERS this matter DISMISSED.

The Commission, in accordance with *Ohio Administrative Code Section 3746-13-01*, informs the parties that:

> Any party adversely affected by an order of the commission may appeal to the court of appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred. The party so appealing shall file with the commission a notice of appeal designating the order from which an appeal is being taken. A copy of such notice shall also be filed by the appellant with the court, and a copy shall be sent by certified mail to the director or other statutory agency. [*8] Such notices shall be filed and mailed within thirty days after the date upon which appellant received notice from the commission of the issuance of the order. No appeal bond shall be required to make an appeal effective.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewReviewabilityStandingEnvironmental LawAssessment & Information AccessPublic ParticipationReal Property LawZoning & Land UseSpecial Permits & Variances

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DAVID G. MILLER, Appellant, v. DONALD SCHREGARDUS, DIRECTOR OF ENVIRONMENTAL PROTECTION, AEROMEX, INC., CITY OF LOVELAND, Appellees

Case No. EBR 132470

Ohio Environmental Board of Review

1991 Ohio ENV LEXIS 9

December 11, 1991, Issued

[*1]

APPELLANT REPRESENTED PRO SE: David G. Miller, Loveland, Ohio

COUNSEL FOR APPELLEE DIRECTOR: Cheryl Roberto, Esq., Lori A. Massey, Esq., Assistant Attorney Generals, Environmental Enforcement Section, Columbus, Ohio

COUNSEL FOR APPELLEE LOVELAND: Richard Melfi, Esq., City Solicitor, City of Loveland, Cincinnati, Ohio

PANEL: Peter A. Precario, Chairman; Julianna F. Bull, Vice-Chairwoman; Jerry Hammond, Member.

OPINION:

RULING ON MOTION TO DISMISS, FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter comes before the Board upon the Motion of the Director of the Ohio Environmental Protection Agency for an Order dismissing the present appeal for lack of jurisdiction of the subject matter in the Board. The Board notes that the Motion was filed on July 11, 1991. A response was received to the Motion on behalf of the Appellant on September 3, 1991. The Appellant in this matter, David G. Miller, has filed the Notice of Appeal and all pleadings in this case pro se. The Ohio Environmental Protection Agency is represented by Ms. Cheryl Roberto and Ms. Lori A. Massey, Assistant Attorneys General.

Summarizing the issues in the present case, Appellant has appealed an alleged "decision" [*2] on the part of the Director of the Environmental Protection Agency not to take follow-up enforcement action on certain findings and orders which the Director had previously issued to Appellee Aeromex on May 31, 1990. In essence, the Notice of Appeal alleges that certain requirements of the findings and orders had not been followed by Appellee Aeromex and that the Director has failed or refused to enforce the previously issued findings and orders. Appellant alleges that this failure to enforce was in fact a "decision" or action of the Director and consequently appealable to this Board.

Section 3745.04 of the Ohio Revised Code provides, in relevant part, as follows:

As used in this Section, "action" or "act" includes the adoption, modification, or repeal of a rule or standard, the issuance, modification, or revocation of any lawful order other than an emergency order, and the issuance, denial, modification, or revocation of a license, permit, lease, variance, or certificate, or the approval or disapproval of plans and specifications pursuant to law or rules adopted thereunder.

Any person who was a party to a proceeding before the Director may participate in an appeal to the Environmental [*3] Board of Review for an Order vacating or modifying the action of the Director of Environmental Protection or local Board of Health, or ordering the Director or Board of Health to perform an act. The Environmental Board of Review has exclusive original jurisdiction over any matter which may, under this section, be brought before it.

Under this Section, it is clear that the Board has jurisdiction only over those things that constitute either an action or are an act of the Director. Thus, unless the failure or refusal of the Director to take a particular enforcement action constitutes an act or action, it is not appealable to this Board.

Upon a review of the Notice of Appeal, the pleadings of the parties and the certified record, it is clear that the allegations regarding the so-called decision of the Director are in fact assumptions and conclusions arrived at by the Appellant rather than being events or actual conclusions reached by the Director. The observation that the Director has not taken a specific enforcement action desired by a party does not necessarily demonstrate that the Director is taking no action nor does it demonstrate that the Director will not take some action [*4] at a time determined to be appropriate by the Director.

No authority has been cited to the Board which would lead to the conclusion that the Director is under a legal obligation to commence an enforcement action on the previously issued orders involved here within any specific time period or on a schedule deemed necessary by Appellant. The decision to take an action, the time frame within which to commence such an enforcement action and the authority to determine what events and which developments will precipitate such an enforcement action are decisions within the discretion of the Director. Unless the failure or the refusal of the Director to take a particular enforcement action adjudicates the rights or privileges of a party in some fashion, no "act" or "action" has occurred.

In the present case it does not appear from a review of the record and the pleadings of the parties, that any legal rights or privileges of the Appellant -- or any party to this proceeding -- have been determined or adjudicated by the events or lack of enforcement alleged by Appellant. Under the circumstances of this case, the mere fact that the Director has not brought an enforcement action does not [*5] in itself constitute an act or action of the Director which is appealable to this Board. On this basis, the Motion of the Appellee Director to dismiss the present action is well taken.

The Board further notes that while the allegations of the Appellant might very well constitute an appropriate basis for an action in mandamus, unless the pleadings and the record before the Board demonstrate that the failure to perform certain duties amounts to an act or action of the Director as those terms are defined in section 3745.04 ORC, this Board has no jurisdiction to consider the appeal.

ORDER

The Motion of the Appellee Director to dismiss the present action is well taken and is hereby sustained. The appeal is hereby overruled and dismissed.

The Board, in accordance with *Section 3745.06 of the Revised Code* and *Ohio Administrative Code 3746-13-01*, informs the parties that:

Any party adversely affected by an order of the Environmental Board of Review may appeal to the Court of Appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation to the court of appeals of the district in which the violation was alleged to have occurred. Any party desiring [*6] to so appeal shall file with the Board a Notice of Appeal designating the order appealed from. A copy of such notice shall also be filed by the Appellant with the court, and a copy shall be sent by certified mail to the Director of Environmental Protection. Such notices shall be filed and mailed within thirty days after the date upon which Appellant received notice from the Board by certified mail of the making of an order appealed from. No appeal bond shall be required to make an appeal effective.

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative LawJudicial ReviewRemediesMandamusAdministrative LawJudicial ReviewReviewabilityStanding

[Cite as *State ex rel. Northeast Ohio Sewer Dist. v. Ohio Environmental Protection Agency*, 2007-Ohio-834.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87928

STATE OF OHIO EX REL., NORTHEAST OHIO SEWER DISTRICT

RELATOR-APPELLANT

vs.

OHIO ENVIRONMENTAL PROTECTION AGENCY, ET AL.

RESPONDENTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-574684

BEFORE: Stewart, J., Cooney, P.J., and Gallagher, J.

RELEASED: March 1, 2007

JOURNALIZED:

[Cite as *State ex rel. Northeast Ohio Sewer Dist. v. Ohio Environmental Protection Agency*, 2007-Ohio-834.]

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[Cite as *State ex rel. Northeast Ohio Sewer Dist. v. Ohio Environmental Protection Agency*, 2007-Ohio-834.]

MELODY J. STEWART, J.:

{¶ 1} Northeast Ohio Regional Sewer District (NEORSD), relator-appellant, appeals the judgment of the trial court dismissing its petition for a writ of mandamus. Relator assigns as error that the trial court improperly considered matters outside of the pleadings in making its ruling and that the trial court effectively converted the motion to dismiss into a motion for summary judgment without giving relator proper notice and an opportunity to present its own evidence as required under Civ.R. 12(B) and 56(C). The trial court found that relator did not have a clear legal right to the relief prayed for in the petition. We agree and affirm the judgment of the trial court.

{¶ 2} Relator filed its petition for a writ of mandamus on October 12, 2005 against the respondents, Ohio Environmental Protection Agency (OEPA) and Joseph Koncelik, director of the OEPA, to compel them to issue a permit to install (PTI) additional facilities at its combined overflow treatment facility. In the petition, relator asserts that respondents had unlawfully and improperly refused to issue the permit.

{¶ 3} Respondents filed a motion to dismiss on December 12, 2005 for lack of jurisdiction and failure to state a claim upon which relief can be granted pursuant to Civ.R. 12(B)(1) and (B)(6). Respondents argued that R.C. Chapter 3745 provided the exclusive statutory procedure for review of the director's actions and that the director had recently denied relator's permit application, thereby divesting the court of jurisdiction over the matter. In support of their motion, respondents attached the

affidavit of Paul Novak, an OEPA engineer, that incorporated two letters from OEPA to relator. Relator opposed the motion and requested an immediate hearing on the merits of its petition.

{¶ 4} The court scheduled a hearing on the merits of the petition for February 24, 2006. Respondents filed a motion to reconsider the scheduling of that hearing, again claiming the court lacked jurisdiction to consider the matter. In a telephone conference on February 21, 2006, the court scheduled oral arguments for the following day on the issue of whether to go forward with the February 24, 2006 hearing on the merits. Following oral argument by both sides, the court granted respondents' motion to dismiss and cancelled the February 24, 2006 hearing.

{¶ 5} R.C. 2731.02 vests the court of common pleas with authority to issue writs of mandamus. As a court of general jurisdiction, the trial court has authority to determine its own jurisdiction. The record reflects that the trial court stated specifically that it was not interested in hearing about jurisdictional arguments because, "this court is convinced it does have jurisdiction." Respondents' assertion that the court dismissed the petition for lack of subject matter jurisdiction pursuant to Civ.R. 12(B)(1) is wrong. The court had jurisdiction to consider the petition.

{¶ 6} The Ohio Supreme Court has recognized that "[i]n order for a writ of mandamus to issue, a relator must show that (1) he has a clear legal right to the relief prayed for, (2) respondent is under a clear legal duty to perform the requested act, and (3) relator has no plain and adequate remedy in the ordinary course of the

law." *State, ex rel. Liberty Mills, Inc. v. Locker* (1986), 22 Ohio St.3d 102, 103, 488 N.E.2d 883, 885. See R.C. 2731. Relator had to prove all three elements before the trial court could grant the writ.

{¶ 7} OAC 3745-42-04(E) states, "Within one hundred eighty days after a completed application is filed, the director shall issue or propose to issue or deny a permit to install or plan approval." It is uncontested that the director failed to act on relator's application within 180 days. Relator filed its mandamus action one day after the deadline for action had passed. Relator did not seek an order compelling the director to consider the NEORSD application and to take some action. Relator sought an order compelling the director to issue the specific permit to install. The trial court found that relator did not have a clear legal right to the relief prayed for in the petition.

{¶ 8} Relator relies upon the Ohio Supreme Court's decision in *State ex rel. Liberty Mills v. Locker* (1986), 22 Ohio St.3d 102, to support its position that the court had the authority, not just to order the director to take some action on its application, but to order the director to issue the specific PTI for which it applied.

{¶ 9} *Liberty Mills* concerned the failure of the director of agriculture to grant a commodities handler license to a grain-handling business. The relator sought a writ of mandamus to order the director to issue the license, asserting that it had met all of the statutory requirements under R.C. Chapter 926 by (1) paying the fee, (2) submitting the required financial documents, and (3) filing proof of certain insurance

coverage. The supreme court granted the writ, finding that the applicant was in full compliance with the filing requirements set forth in R.C. Chapter 926. The court disagreed with the director's assertion that he had the discretionary authority to deny the application. Therefore, the court found that the applicant had shown a clear legal right to the issuance of the license and the director had a clear legal duty to perform the issuing act.

{¶ 10} In *State ex rel. Baker v. Cuyahoga Cty. Bd. of Commrs.* (1988), 46 Ohio App.3d 39, we followed the reasoning in *Liberty Mills* and affirmed the granting of a writ of mandamus ordering the board to certify certain cab drivers as minority business enterprises (MBE). We found that the only criteria for certifying minority business enterprises were that the applicant (1) be a qualified minority, (2) be a 51 percent owner of his operation, and (3) be 51 percent in control of his operation. By demonstrating compliance with these criteria, the applicants showed a clear legal right to the MBE certification.

{¶ 11} What distinguishes *Liberty Mills* and *Baker* from the instant case is the absence of discretionary authority on the part of the administrative officers in making their decisions. All that was required for the relators in those cases to demonstrate a clear legal right to the relief requested was compliance with simple, clearly defined statutory criteria. Absent any discretionary authority, the administrative officers' functions were primarily ministerial. A ministerial function is one in which a person acts "without regard to or the exercise of his own judgment upon the propriety of the

act being done." *State ex rel. Trauger v. Nash* (1902), 66 Ohio St. 612, 618, 64 N.E. 558, 559. Such is clearly not the case with the OEPA review of a PTI application.

{¶ 12} OAC 3745-42-04 sets forth the criteria for approval of a permit application by the director as follows:

{¶ 13} "(A) The director shall issue a permit to install or plan approval on the basis of the information appearing in the application or information gathered by or furnished to the Ohio environmental protection agency, or both, if he determines that the installation or modification and operation of the disposal system or land application of sludge will:

{¶ 14} "(1) Not prevent or interfere with the attainment or maintenance of applicable water quality standards contained in Chapter 3745-1 of the Administrative Code;

{¶ 15} "(2) Not result in a violation of any applicable laws; and

{¶ 16} "(3) Employ the best available technology."

{¶ 17} The determination of what is the "best available technology" is left to the discretion of the director. The director also has the discretion to "take into consideration the social and economic impact of water pollutants or other adverse environmental impacts that may be a consequence of issuance of the permit to install or plan approval." OAC 3745-42-04(C). And, "the director may impose such special terms and conditions as are appropriate or necessary to ensure compliance

with the applicable laws and to ensure adequate protection of environmental quality." OAC 3745-42-04(D).

{¶ 18} Relator is aware of the discretionary authority the director has in reviewing PTI applications. In its petition, relator states, "to the extent that issuance of a PTI is discretionary, Respondents have already exercised such discretion in favor of the issuance of the PTI to Relator." Relator bases this assertion on a letter sent from the respondents on July 5, 2001 in which the director states that the relator's facilities plan, "meets the applicable state and federal requirements and is hereby approved as adequate and complete." A complete reading of the letter, however, shows that relator's assertion is misleading. The director's letter goes on to state: "This facilities plan will be considered as part of any future submission of a Permit to Install/Plan Approval Application, accompanied by detail plans, as required by the Ohio Revised Code Chapter 6111.44 and the Ohio Administrative Code Chapter 3745-31. Construction shall not be initiated until a permit to install, based upon the approval of detail plans, is obtained from this agency. The approval of this facilities plan shall in no way be construed as acceptance or approval of detail plans."

{¶ 19} Relator's petition also asserts that its permit application is "administratively complete" and that it has submitted all required plans, fees and information and therefore has a right to issuance of the permit. OAC 3745-42-01 (K)

states, "'Complete,' in reference to an application for a permit, means that the application contains all the information necessary for processing the application. Designating an application complete for purposes of permit processing does not preclude the director from requesting or accepting any additional information." OAC 3745-42-04(A) states that the director shall issue a permit to install on the basis of "information appearing in the application or information gathered by or furnished to the Ohio environmental protection agency, or both ***." Unlike the situation in *Liberty Mills*, completing the statutory filing requirements under Chapter 3745 does not give the applicant a clear legal right to the issuance of the permit. It is simply the first step in the permit approval process.

{¶ 20} The Ohio Environmental Protection Agency is a specialized administrative body charged with protection of the environment. Created in 1972, OEPA is charged with promulgating and executing a long-term comprehensive plan to preserve and protect the natural resources of the state. The director of the agency has the power to take any action necessary to comply with the requirements of state and federal laws and regulations relating to waste disposal and treatment. R.C. 3745.01. To this end, the General Assembly has granted the director of environmental protection broad discretion in the decision to grant or deny permit applications. This discretion is clearly visible in the statutory criteria for issuance of a permit to install as shown above.

{¶ 21} Relator complied with all the procedural requirements for the filing of its application and was entitled to have the director exercise his discretion and either timely grant or deny its permit. Relator was not entitled to an order of the court directing the director to exercise that discretion in a particular way. "Mandamus will lie to compel an administrative officer or board to exercise discretion, but it will not lie to control discretion." *State ex rel. Benton's Village Sanitation Serv., Inc. v. Usher* (1973), 34 Ohio St.2d 59, 60, 295 N.E.2d 657,658. As relator had no legal right to the relief prayed for in its petition, relator failed to state a claim upon which relief could be granted, and the trial court's dismissal was proper.

{¶ 22} Relator argues that the trial court improperly considered evidentiary materials and factual assertions outside of the petition in making its ruling, thereby converting respondents' motion to dismiss into a motion for summary judgment without giving relator proper notice and an opportunity to present opposing evidence as required under Civ.R. 12(B). Civ.R. 12(B) states, "When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. *** All parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56." It appears from the record that the court improperly considered matters outside of the pleadings, specifically the director's December 8, 2005 proposed denial of the permit application, when it found that relator had a plain

and adequate remedy under the law through the appeals process set forth in R.C. Chapter 3745.

{¶ 23} However, this was not the only basis for the court's ruling. The trial court correctly dismissed the petition after finding that relator did not have a clear legal right to the issuance of the permit. This finding does not rely upon matters outside of the pleadings. Reversal of the court's decision, therefore, is not warranted.

{¶ 24} Before the trial court may dismiss the petition for failure to state a claim, it must appear beyond doubt from the petition that relator can prove no set of facts entitling it to recovery. *O'Brien v. Univ. Community Tenants Union* (1975), 42 Ohio St.2d 242. The recovery sought by relator, the issuance of the permit to install, is not relief to which relator is entitled. The decision on whether to issue a PTI requires the director to exercise discretion in several ways. He must consider the information in the application. He must consider other information provided by, or to, the agency. He must consider the social and economic consequences of issuing the permit. He must make specific subjective determinations before granting the permit. OAC 3745-42-04. The trial court has no authority to control these discretionary determinations and conclude that a PTI should issue. This is the relief relator seeks. It is clear from relator's petition that it can prove no set of facts that would entitle it to the specific relief sought.

Judgment affirmed.

It is ordered that appellees recover of appellant their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, JUDGE

COLLEEN CONWAY COONEY, P.J., CONCURS

SEAN C. GALLAGHER, J., CONCURS WITH
SEPARATE CONCURRING OPINION

SEAN C. GALLAGHER, J., CONCURRING:

{¶ 25} While I concur with the analysis and judgment of the majority, I write to note that this case involves not only the discretionary authority of the Ohio EPA, but its failure to timely exercise that authority. As the majority notes, the 180-day window under OAC 3745-42-04(E) expired. In my view, the subsequent "qualified denial" hardly amounts to the proper exercise of discretionary authority. The failure to make a timely decision, with clarity, works to the detriment of the NEORSD, which, like the EPA, has commitments and responsibilities to the public that must be addressed.

{¶ 26} We are bound by the jurisdictional requirements of R.C. 3745. Nevertheless, whatever the real reasons for the delay and subsequent denial, the position of the Ohio EPA should be timely and clearly communicated to the petitioning authority. Only then can a meaningful administrative appeal take place. The apparent shroud of uncertainty surrounding the permit review in this case fosters a sense of unfairness that is detrimental to the petitioning authority. R.C. 3745 should not be used as a means to delay a statutory responsibility.