

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION

STATE OF OHIO

CITY OF COLUMBUS, ET AL.

APPELLANTS,

V.

**CHRISTOPHER JONES, DIRECTOR
OF ENVIRONMENTAL PROTECTION,**

APPELLEE.

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CASE No. ERAC 254926-254927

ISSUED: MAY 1, 2002

RULING ON MOTION TO DISMISS
AND FINAL ORDER

THE ENVIRONMENTAL REVIEW APPEALS COMMISSION:

Julianna F. Bull, Chair
Toni E. Mulrane, Vice-Chair
Jeff Cabot, Member

**236 East Town Street, Suite 300
Columbus, Ohio 43215**

Telephone: 1/614/466-8950

COUNSEL FOR APPELLANTS:

Susan E. Ashbrook, Esq.
Assistant City Attorney
90 W. Broad Street
Columbus, Ohio 43215

COUNSEL FOR APPELLEE DIRECTOR

Margaret A. Malone, Esq.
Lori A. Massey, Esq.
Lauren C. Angell, Esq.
Assistant Attorneys General
Environmental Enforcement Section
30 E. Broad Street - 25th Floor
Columbus, Ohio 43215

This matter comes before the Environmental Review Appeals Commission ("ERAC" or "the Commission") upon the April 1, 2002 Second Motion to Dismiss Appeal filed by Appellee Director of the Ohio Environmental Protection Agency ("Director," "OEPA," "the Agency"). The basis for the Motion is Appellee's contention that the Commission lacks the requisite subject matter jurisdiction to entertain the instant appeal filed by Appellants City of Columbus ("the City") and Mr. Gary L. Hickman ("Hickman"), on the basis that it is not an appeal from a final action of the Director. Appellants filed a Memorandum in Opposition to the Director's Second Motion to Dismiss on April 11, 2002.

Both Appellants are represented by Ms. Susan Ashbrook, Esq., Assistant City Attorney, City of Columbus, Ohio. Appellee Director is represented by Ms. Lori A. Massey, Esq., Ms. Margaret A. Malone, Esq., and Ms. Lauren C. Angell, Esq., Assistant Attorneys General, State of Ohio.

Based upon a review of the filings and attachments, the relevant law and regulations, and the Certified Record, which the Commission sua sponte moves into evidence, the Commission hereby makes the following Findings of Fact, Conclusions of Law and Final Order dismissing the instant action for lack of subject matter jurisdiction.

FINDINGS OF FACT

1. On March 15, 2001, Appellant Hickman, a Wastewater Chemist II at the City of Columbus Jackson Pike Wastewater Treatment Plant, filed a Class IV, Part I Wastewater Operator Certification Application with the OEPA. (Certified Record "CR" Item 2.)

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2. An August 18, 2000 memorandum from Kirk M. Leifheit, Secretary of the Advisory Board of Examiners for Water and Wastewater Treatment Plant Operators ("Advisory Board"), sets out the components of a Class IV application as follows:

The Class IV application is separated into two parts. Part I is the standard certification application that is used by all applicants to detail their experience and education. . . .

Part II of the application is the written examination report as described in the attachments. . . . You must have received approval from the Board on Part I of your application before you can submit the Part II application report. (CR Item 3.)

3. A "Class IV Guidance" document attached to Mr. Leifheit's August 18, 2000 memorandum further explains that a candidate for Class IV certification must possess a "valid Class III certificate and must be in responsible charge, or have been in responsible charge of a Class III or Class IV water system or wastewater treatment works for at least 2 years."

Alternatively, the document provides:

An assistant to the responsible charge person of a Class IV water system or wastewater treatment works who has demonstrated a high degree of overall responsibility at said works, may be considered in addition to the responsible charge individual. The assistant must possess a valid Class III certificate and have been the assistant (or equivalent position) to the person in responsible charge for a period of at least two years, while possessing a valid Class III certificate. (CR Item 3.)

4. The minutes of the Advisory Board meeting of March 22, 2001 indicate that the Board reviewed Hickman's Part I application and voted to return the application to Appellant because, "it is not clear if he is the assistant to the responsible charge person." (CR Item 4.)

5. In this regard, on April 2, 2001, Mr. Leifheit sent Appellant Hickman a letter which provided as follows:

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Your Part I application for Wastewater Class IV certification has been reviewed by the Advisory Board of Examiners. I regret to inform you that you have been declared ineligible at this time.

Based upon the information that you submitted, it does not appear that you have been the operator in responsible charge of a Class III or a Class IV plant, or the assistant to the operator in charge of a Class IV plant, for the required two years.

If you believe that you have the required experience the Board will re-evaluate any additional information that you submit. Such a re-evaluation would need to include an updated table of organization and a copy of your previous and current job description.

If you have any questions, please contact Julie Gillenwater, Ohio EPA Certification Unit, at (614) 644-2752. (ERAC Case Nos. 254926-254927, Attachment to Case File Item A.)

6. On May 2, 2001, Appellants Hickman and the City of Columbus filed a Notice of Appeal with the Commission indicating they were appealing, "the Director's denial of Mr. Hickman's Part I, Class IV Wastewater Operator Certification Application." Attached to the Notice of Appeal, as the action being appealed, was the April 2, 2001 letter of Mr. Leifheit. (ERAC Case Nos. 254926-254927, Case File Item A.)

7. On June 4, 2001, Appellee Director filed a Motion to Dismiss the appeal in which he asserted the Commission lacked subject matter jurisdiction to hear the instant action because Mr. Leifheit's letter did not constitute an action of the Director. Appellants filed a Memorandum in Opposition to the Director's Motion to Dismiss on August 10, 2001 and the Director filed a Reply on August 23, 2001. (ERAC Case Nos. 254926-254927, Case File Items E, L, M.)

8. On October 16, 2001, the Commission issued a ruling denying the Director's Motion to Dismiss. (ERAC Case Nos. 254926-254927, Case File Item N.)

9. On April 1, 2002, Appellee Director filed a Second Motion to Dismiss in which he, once again, asserted that the Commission lacks subject matter jurisdiction in the instant matter since the April 2, 2001 letter written by Kirk M. Leifheit, one of the seven members of the Advisory Board, was not an appealable final action of the Director. A letter from the Director to Appellant Hickman regarding his Class IV, Part I Application was attached in support of this second Motion to Dismiss. The Director's letter stated that Appellant's application for Wastewater Treatment Class IV certification had been reviewed by the Advisory Board and OEPA staff and a determination had been made that Appellant did not qualify. The letter further indicated that the denial was being issued as a proposed action of the Director and that Appellant had 30 days from the date of issuance (March 8, 2002) to challenge this proposed action by requesting an adjudication hearing at the Agency. Finally, the letter stated that in the event Appellant did not appeal this action [by requesting an adjudication hearing], "it will become final as of the effective date noted at the beginning of this letter [April 22, 2002]." (ERAC Case Nos. 254926-254927, Case File Item HH.)

10. On April 11, 2002, Appellants filed a Memorandum in Opposition to the Director's Second Motion to Dismiss. In their Memorandum in Opposition, Appellants assert that the "action taken by Ohio EPA on April 2, 2001 [Mr. Leifheit's letter] was a final denial of Mr. Hickman's Class IV application, and that action gives this Commission the jurisdiction to determine all of the issues raised by the City in the Amended Notice of Appeal." Appellants further claim that Appellee Director's purported proposed action dated March 8, 2002 is unlawful since this Commission currently possesses jurisdiction over the instant matter, thus

precluding the Director from taking any further action pending resolution of the instant appeal.

(ERAC Case Nos. 254926-254927, Case File Item JJ.)

CONCLUSIONS OF LAW

1. Ohio Revised Code Section ("R. C.") 3745.04 outlines the scope of the Commission's jurisdiction in relevant part as follows:

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 . . .

2. An "act" or "action" of the Director which may be appealed to the Commission is defined in R. C. 3745.04 as follows:

. . . '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.

3. This same definition of "action" or "act" is reiterated in the pertinent regulation found at Ohio Administrative Code Section ("OAC") 3745-1-01(A).

4. In the instant case, we are asked to determine whether the April 2, 2001 letter from Kirk M. Leifheit, Secretary of the Advisory Board of Examiners, to Appellant Hickman is a final act or action of the Director which may be appealed to this Commission.

5. Historically, when a question is raised as to whether a document, including a letter, constitutes a final action of the Director which is appealable to this Commission, we begin by examining both the substance and form of the letter, as well as the circumstances and events surrounding the sending of the document. (Coalition for a Safe Environment and Citizens Action

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et al. v. Schregardus, et al, ERAC Case Nos. 483934-483936, issued October 5, 1999; County Waste Company, Inc. v. Schregardus, et al., ERAC Case No. 043952, issued August 6, 1998; Cleveland Auto Livery v. McNamee, ERAC Case No. 183330, issued March 5, 1996; Temple v. Schregardus, ERAC Case No. 183327, issued November 21, 1995.)

6. With regard to the form of the letter from Mr. Leifheit, the Commission notes the following: 1) It is signed by the Secretary of the Advisory Board of Examiners, not by the Director; 2) It contains no language identifying it as a “final action”; rather, it indicates that Appellant Hickman has been “declared ineligible at this time,” and states that the Advisory Board will re-evaluate any additional information Appellant submits to satisfy the relevant experience criteria necessary to fulfill the application requirements; 3) It does not contain any of the customary information outlining the recipient’s right to appeal the substance of the letter; and 4) It does not indicate that the letter has been entered into the Director’s journal as a final action. Thus, in form, Mr. Leifheit’s letter does not purport to represent a final appealable action of the Director, nor does it possess any of the indicia the Commission has traditionally found in documents which we have determined constitute final actions. (Emphasis added.)

7. However, even if the document at issue does not satisfy the traditional criteria relating to form, it may still be a final action of the Director if the substance of the document adjudicates with finality any legal right or privilege of the appealing party. Conversely, if the letter simply represents an intermediate step in a continuing process, or if the subject matter of the document indicates that it is part of a contemplated review or evaluation which will ultimately lead to a final action by the Director, then no final action which may be appealed to this Commission has

occurred. (See e.g., Auburn Community Church v. Schregardus, ERAC Case No. 284060, issued February 11, 1999.)

8. Thus, in order to determine the import of Mr. Leifheit's letter and whether it constitutes a final act or action of the Director, we must first review the regulations relating to the Class IV, Part I Wastewater Operator Certification Application at issue herein.

9. The regulations regarding water supply works and wastewater works personnel are set forth in OAC Chapter 3745-7.

10. Further, OAC 3745-7-10 provides that the Director shall appoint an Advisory Board of Examiners consisting of seven members. It is an action of this Advisory Board, through its Secretary, Mr. Leifheit, that is at issue herein. The duties of this Advisory Board, are set out in OAC 3745-7-11 and include, inter alia:

(C) Review applications for examination and certification and advise the director as to which applicants meet the prerequisites for admission to the examination for which application is made. (Emphasis added.)

11. Ohio Administrative Code Section 3745-7-05 sets out the certification classifications for water supply works and wastewater works operators under OAC Chapter 3745-7. Included in this classification system are Class IV Wastewater Operators, the certification being sought by Appellant Hickman herein.

12. Specifically, OAC Section 3745-7-06, entitled "Certification of operators," states in relevant part:

(A) The director shall, in accordance with this chapter, provide for the examination of individuals applying for certification as operators as set forth in rule 3745-7-05 of the Administrative Code and for the issuance of appropriate certificates to applicants certified by meeting the appropriate requirements and passing the

examination.

(C) To be eligible for examination, applicants shall meet all of the following conditions:

(4) Have the following minimum education and operating experience:

Class IV Education: High School Diploma Operating Experience: See paragraph (D)(5) of this rule

13. Ohio Administrative Code Section 3745-7-06 provides:

(5) Applicants for class IV certification shall possess valid class II certification in the same field and have been in responsible charge of a class III or IV public water system or treatment facility within a public water system or wastewater works or treatment facility within a wastewater works for at least two years while in possession of this class III certification, or possess valid class III certification in the same field and have served as an assistant to the individual in responsible charge of a class IV public water system or treatment facility within a public water system or wastewater works or treatment facility within a wastewater works for at least two years, while in possession of this class III certification.

14. In the matter currently before the Commission, the Advisory Board found that Appellant Hickman's application reflected that he did not possess the requisite operating experience outlined in OAC 3745-7-06(D)(5) to qualify for Class IV Wastewater Operator Certification. It appears that due to this lack of operating experience, the advisory board declined to advise the Director pursuant to OAC 3745-7-11(C) that Appellant Hickman met the prerequisites for admission to the examination for Class IV Wastewater Operator Certification.¹

¹ Despite the unambiguous requirements for the certification of operators contained in OAC 3745-7-06, it is important to note that there are several instances in this regulation where the Director may use his discretion to accept substitute training or education in lieu of a specific requirement under the regulation. For example, OAC 3745-7-06(C)(4)(b) states, "The director may accept post high school education or training in place of operating experience in qualifying for examination under this rule." Similarly, OAC 3745-7-06(D)(2) provides, "The director may accept substitution of each year of college completed by an applicant not holding a bachelor's degree, for twelve months of required operating experience." (Also see OAC 3745-7-06(D)(3).)

15. Thus, the plain language of OAC 3745-7-11 makes it clear that the Advisory Board is only authorized to make recommendations and advise the Director regarding various aspects of operator certifications; i.e., they are not empowered to take any definitive actions on their own.² The mere advisory nature of this board is emphasized when one considers the discretion which the Director has been granted in this same chapter. It is axiomatic that if the Director had intended to grant the Advisory Board ultimate authority regarding the certification decisions contained in OAC Chapter 3745-7, he would not have drafted his regulations in such a way that the Board was only empowered to “recommend” certain actions to the Director, or “advise” the Director.

16. The relevant regulations anticipate that the Advisory Board will advise the Director and the Director will take all definitive actions relative to operator certification applications. At the time of the Director’s filing of his first Motion to Dismiss, it appeared the Director did not intend to take any further action in this matter. Indeed, despite the fact that Mr. Leifheit had sent Mr. Hickman the “declared ineligible” letter on April 2, 2001, the Director did not take any definitive action on his application until the issuance of his proposed denial on March 8, 2002, almost one year later. Thus, even though it appeared to the Commission that the Director was required to take some action under the regulations, if he declined or failed to do so, Appellants would have

Significantly, the advisory board does not possess any similar discretion in what they many accept relative to the required prerequisites set out in the regulations.

² The Advisory Board’s role as a mere advisor to the Director is also reflected in OAC 3745-7-12 dealing with the suspension or revocation of certifications. Specifically, OAC 3745-7-12(B) empowers the Advisory Board to conduct a review regarding the possible suspension or revocation of the certification of an operator, however, upon completion of their review, the advisory board, “may recommend that the director suspend or revoke an operator’s certification(s).” Once again, it is clear the advisory board may not take such action on its own.

been without recourse if the Commission had dismissed Appellants' appeal of Mr. Leifheit's letter. That is, in the absence of any action by the Director, the letter of Mr. Leifheit would have been the final, definitive determination by the OEPA on Mr. Hickman's Class IV certification application. However, with the Director's issuance of his proposed denial on March 8, 2002, the situation has dramatically changed.

17. The Commission certainly does not condone the Director's nearly one year delay in taking action in this matter. However, we must base our decision today on the aforementioned regulations and the fact that the Director has now issued a proposed action denying Appellant Hickman's Class IV, Part application. As a result, Mr. Hickman currently has two options: 1) He may request an adjudication hearing before the Agency with the ultimate determination resulting from this hearing being a final action which could be appealed to this Commission; or 2) He may decline to request an adjudication hearing before the Agency, the proposed action would become a final action on April 22, 2002, and this final action could be appealed to this Commission. We feel this was the recourse which was anticipated under the regulations; i.e., the review by this Commission of a final determination of the Director, not the review of a recommendation to the Director by an Advisory Board.

18. Finally, Appellants' claim that the Director was precluded from taking any action in this matter once jurisdiction was assumed by the Commission with the filing of Appellants Notice of Appeal. We disagree and reiterate the well-settled principle of law that jurisdictional challenges may be raised at any point in a proceeding.

19. For the foregoing reasons, we hereby find the Director's Second Motion to Dismiss well

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taken and dismiss the instant action for lack of subject matter jurisdiction.

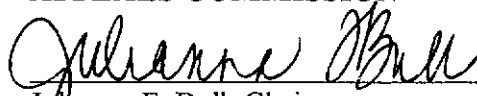
FINAL ORDER

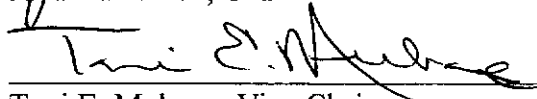
Based upon the foregoing discussion, the Commission rules to grant Appellee Director's Second Motion to Dismiss and hereby ORDERS this matter DISMISSED.

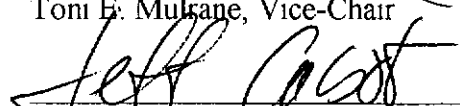
The Commission, in accordance with Section 3745.06 of the Revised Code and the Ohio Administrative Code 3746-13-01, informs the parties that:

Any party adversely affected by an order of the Environmental Review Appeals Commission may appeal to the Court of Appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulations 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 Commission 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 the Appellant received notice from the Commission by certified mail of the making of an order appealed from. No appeal bond shall be required to make an appeal effective.

**THE ENVIRONMENTAL REVIEW
APPEALS COMMISSION**


Julianna F. Bull, Chair


Toni E. Mulrane, Vice-Chair


Jeff Cabot, Member

Entered in the Journal of the
Commission this 1st
day of May, 2002.


Mary J. Okley, Executive Secretary

RULING ON MOTION TO DISMISS
AND FINAL ORDER

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COPIES SENT TO:

CITY OF COLUMBUS
GARY L. HICKMAN
CHRISTOPHER JONES, DIRECTOR
Susan E. Ashbrook, Esq.
Margaret A. Malone, Esq.
Lori A. Massey, Esq.
Lauren Angell, Esq.

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[CERTIFIED MAIL]