

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

BERNARD BURKETT, : Case No. ERAC 13-766785
: :
Appellant, : :
: :
v. : :
: :
SCOTT NALLY, DIRECTOR OF : :
ENVIRONMENTAL PROTECTION, : :
: :
Appellee. : :

RULING ON DIRECTOR'S MOTION TO DISMISS

Rendered on March 19, 2014

Bernard Burkett, pro se Appellant

Michael DeWine, Attorney General, *Kelly D. McCloud*, and
L. Scott Helkowski for Appellee Scott Nally, Director of
Environmental Protection

{¶1} This matter comes before the Environmental Review Appeals Commission ("ERAC," "Commission") upon a "Request for Jurisdiction" filed by Appellant Bernard Burkett on August 26, 2013. The Commission construed Mr. Burkett's filing as a notice of appeal. Case File Item A, B.

{¶2} Appellee Scott Nally, Director of Environmental Protection ("Director," "Ohio EPA") filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Motion") on January 6, 2014. Mr. Burkett filed a Response on January 21, 2014, and the Director filed a Reply on January 22, 2014. Case File Items H, I, J.

{¶3} Based upon the pleadings and motion, and relevant statutes, regulations, and case law, the Commission issues the following Findings of Fact, Conclusions of Law, and Final Order GRANTING the Director's Motion to Dismiss.

FINDINGS OF FACT

{¶4} In his notice of appeal, Mr. Burkett states that this matter relates to a petition originally filed before the Summit County Court of Common Pleas.¹ Further, Mr. Burkett indicates that the Summit County Court of Common Pleas, as well as the Ninth District Court of Appeals² and Ohio Supreme Court,³ "refused jurisdiction" in matters relating to the original petition. Regarding the present appeal before the Commission, Mr. Burkett states that he "would pray that [ERAC] take jurisdiction for the limited purpose to declare that although the law requires notification of the Director, he has no standing at [an] incorporation hearing." Secondly, Mr. Burkett requests that the Commission "take full jurisdiction of this process or appoint a non-biased court within 50 miles to supervise the continual process." Case File Item A.

{¶5} Attached to Mr. Burkett's notice of appeal is a nine-page document dated November 22, 2010, signed by Harry Ritchey⁴. Mr. Burkett characterizes Mr. Ritchey's document as an "angrily written response" to what Mr. Ritchey identifies as an order of the Summit County Court of Common Pleas. Case File Item A.

{¶6} Because Mr. Burkett's notice of appeal failed to identify a final action of the Director the Commission ordered Mr. Burkett to submit an amended notice of

¹ Order, *In re Greensburg Collection Dist.*, Summit C.P. No. CV 2010-05-3469 (Nov. 8, 2010).

² Journal Entry, *In re Greensburg Collection Dist.*, 9th Dist. No. 25723 (Apr. 27, 2011).

³ *In re Greensburg Collection Dist.*, 129 Ohio St.3d 1442, 2011-Ohio-4217 (Aug. 24, 2011).

⁴ Other than being the signer of this document, Mr. Ritchey is not affiliated with Mr. Burkett's appeal to ERAC.

appeal as required by Revised Code (“R.C.”) 3745.04 and Ohio Administrative Code (“Ohio Adm.Code”) 3746-5-07. Case File Item B.

{¶7} On October 7, 2013, Mr. Burkett filed a document titled Answer to Order to Revise Appeal, which the Commission construed as an amended notice of appeal. As with Mr. Burkett’s original notice of appeal, his amended notice of appeal failed to identify or attach a specific action of the Director. Instead, Mr. Burkett states that he is unable to provide such a document because, “[i]f, such document exists, it is propriety between the Director and consul (sic).” Case File Item G.

{¶8} On January 6, 2014, the Director filed his Motion to Dismiss, outlining the lengthy procedural history associated with Mr. Burkett’s activities in and petition filed with the Summit County Court of Common Pleas, as follows:⁵

On May 13, 2010, Appellant filed a petition signed by approximately seventy property owners, with the Summit County Common Pleas Court, requesting the Court to create the Greensburg Collection Sewer Sub-District (“sub-district”) pursuant to R.C. Section 6115.69 in the City of Green, Summit County, Ohio. The purpose of the sub-district was to provide for the collection and disposal of sewage and other liquid wastes produced within the district. After receipt of the petition, the Court of Common Pleas scheduled a public hearing, which was held on September 8, 2010. During the hearing, the Court heard testimony from the Appellant and other petitioners in favor of the formation of the sub-district, and testimony from the Village of Green, the County of Summit, and the Ohio Environmental Protection Agency (“OH EPA”) opposing the formation of the sub-district.

On November 8, 2010, the Common Pleas Court denied the petition on the grounds that Appellant and the petitioners were improperly proceeding pursuant to R.C. 6115.69. The court ruled that the proper procedure was to petition the Summit County Council pursuant to R.C. 6117 since Summit County has existing sanitary sewer facilities in the same area of Appellant’s proposed sub-district. The Court as determined that even if Appellant and

⁵ Although Mr. Burkett disagrees with the Director’s characterization of the prior proceedings as “litigation,” Mr. Burkett does not dispute the Director’s general description of the procedural history associated with this appeal. See Case File Item I.

the petitioners had followed proper procedure, they failed to demonstrate that the improvements sought by their petition were necessary.⁶

On December 8, 2010, Appellant and fellow petitioners appealed the Common Pleas Court decision to the Summit County Court of Appeals. On April 27, 2011, the Court of Appeals dismissed the appeal for failure to file a brief in compliance with the Rules of Appellate Procedure.⁷

Following the Court of Appeals dismissal, Appellant filed a Complaint for Declaratory Judgment in the Ohio Supreme Court seeking incorporation of the Greensburg Collection Sewer Sub-District, on May 18, 2011. Appellant named the Director as a Respondent in the Complaint. On August 24, 2011, the Ohio Supreme Court dismissed Appellant's Complaint.⁸

Case File Item H (internal citations omitted).

{¶9} In his Motion, the Director argues the instant appeal should be dismissed because the Director has issued no final appealable action relating to the issues raised in this appeal. Further, the Director argues that even if the Director had issued a final appealable action, Mr. Burkett lacks standing to appeal because he did not participate in a proceeding before the Director and because he is not aggrieved or adversely affected. Case File Item H.

{¶10} In response, Mr. Burkett explains he is appealing the Director's "action" consisting of Ohio EPA's "influence" on the Summit County Court of Common Pleas. Specifically, Mr. Burkett posits that the Common Pleas Court improperly allowed the Director to participate in the public hearing conducted on September 8, 2010. Further, Mr. Burkett theorizes that but-for the Director's involvement, the Court would have

⁶ Order, *In re Greensburg Collection Dist.*, Summit C.P. No. CV 2010-05-3469 (Nov. 8, 2010).

⁷ Journal Entry, *In re Greensburg Collection Dist.*, 9th Dist. No. 25723 (Apr. 27, 2011).

⁸ *In re Greensburg Collection Dist.*, 129 Ohio St.3d 1442, 2011-Ohio-4217 (Aug. 24, 2011).

ruled in favor of the petitioners (Mr. Burkett's position) and ordered the creation of the Greensburg Collection Sewer Sub-District. Case File Item I.

{¶11} To resolve this matter, Mr. Burkett requests that the Commission "vacate * * * the Director's *influence*" and issue a "declaration that only property owners class have rights of inclusion to incorporation public hearing and that any State opposition must wait for period after incorporation." (Emphasis added). Case File Item I.

CONCLUSIONS OF LAW

{¶12} Unlike courts of general jurisdiction, an administrative tribunal such as ERAC is a creature of statutory creation with jurisdiction limited to the scope of its authorizing statute. *Citizens Against American Landfill Expansion v. Koncelik*, ERAC Nos. 795947-78, 765939-46, 766079-82, 766192-93 (Aug. 2, 2012), at ¶380.

{¶13} Revised Code 3745.04(B) outlines the scope of the Commission's jurisdiction as follows:

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 * * * .

(Emphasis added).

{¶14} Thus, the Commission maintains jurisdiction only over appeals of final "actions" of the Director.

{¶15} "Action" is defined in R.C. 3745.04(A):

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.

{¶16} Final actions of the Director are journalized and maintained in a publicly-available register, as prescribed in R.C. 3745.01.⁹

{¶17} Relative to the present appeal, the Commission finds that neither participation in nor influence over a county court proceeding is among the examples of final actions listed in R.C. 3745.04(A).

{¶18} The list of “actions” contained in R.C. 3745.04(A), however, is illustrative rather than exhaustive. *Shelly Materials, Inc. v. Koncelik*, ERAC No. 645775 (Feb. 9, 2010), citing *Trans Rail America, Inc. v. Enyeart*, 123 Ohio St.3d 1, 2009-Ohio-3624, 913 N.E.2d 948. Where a document does not fall within the enumerated categories of “actions” under R.C. 3745.04(A), the Commission will examine both the form and substance of the document to determine whether it is nonetheless appealable. *Shelly Materials*, at ¶16.

{¶19} Taken together, R.C. 3745.04(A) and relevant case law determining what constitutes a final appealable action of the Director require that the action must, at a minimum, be written and communicated from Ohio EPA, even if the action was not journalized pursuant to R.C. 3745.01. Moreover, for an appeal to proceed before ERAC, R.C. 3745.04(D) requires the appellant to “set forth the action complained of.” Thus, the appellant bears the burden of producing a copy of the specific document at issue.

{¶20} Notably, the only document advanced by Mr. Burkett in support of his claim is a document composed by a petitioner in the action before the Summit County Court of Common Pleas. Mr. Burkett did not identify any order, or indeed, any

⁹ “* * * The director shall maintain and keep available for public inspection, at the director's principal office, a current register of all applications filed for permits, leases, licenses, variances, certificates, and approval of plans and specifications and of publicly owned treatment works pretreatment programs under the director's jurisdiction, hearings pending, the director's final action thereon, and the dates on which the filings, hearings, and final actions occur. * * *” R.C. 3745.01.

document, that bears the Director's signature, identifies it as a final appealable action of the Director, contains information regarding the right to appeal to ERAC, or indicates that it has been entered into the Director's journal as a final action. Contrary to Mr. Burkett's contention, final actions of the Director are not confidential or subject to attorney-client privilege. Rather, as discussed above, they are journalized and maintained in a publicly-available register pursuant to R.C. 3745.01. Thus, the Commission finds that Mr. Burkett is unable to produce a document that satisfies the precise language of R.C. 3745.04(A).

{¶21} Similarly, the Commission finds Mr. Burkett failed to produce any other document demonstrating that Ohio EPA issued a final appealable action that falls outside the scope of R.C. 3745.04(A), but within the well-established case law outlining the tenants of a final appealable action (i.e., one that substantially affects his property or other legal rights with finality). See *Shelly Materials, supra*.

{¶22} Rather, Mr. Burkett argues that the Director's final "action" consists of Ohio EPA's "influence" over proceedings relating to a petition filed before the Summit County Court of Common Pleas, as well as subsequent actions filed before the Ninth District Court of Appeals and the Ohio Supreme Court. (Emphasis added). The Commission finds that the Director's participation or even influence in matters, as described in Mr. Burkett's notice of appeal, amended notice appeal, and response to the Director's Motion, does not constitute a final appealable action within the meaning of R.C. 3745.04 and relevant case law.

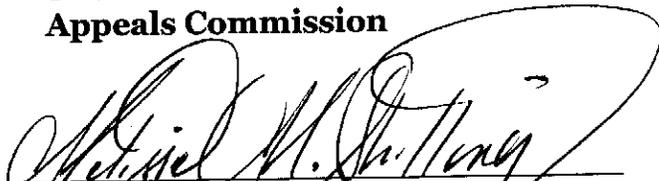
FINAL ORDER

{¶23} For the foregoing reasons, the Commission hereby GRANTS the Director's Motion to Dismiss and ORDERS that the above-captioned matter be DISMISSED.

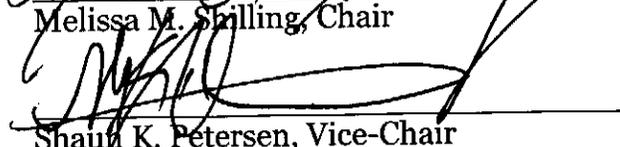
{¶24} In accordance with Ohio Adm.Code 3746-13-01, the Commission informs the parties of the following:

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. 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.

**The Environmental Review
Appeals Commission**



Melissa M. Shilling, Chair



Shaun K. Petersen, Vice-Chair



Michael G. Verich, Member

Entered into the Journal of the Commission this 19th day of March 2014

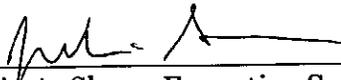
Copies Sent to:

BERNARD BURKETT
SCOTT NALLY, DIRECTOR OF
ENVIRONMENTAL PROTECTION
Kelly D. McCloud, Esq.
L. Scott Helkowski, Esq.

[CERTIFIED MAIL]
[CERTIFIED MAIL]

CERTIFICATION

I hereby certify that the foregoing is a true and accurate copy of the RULING ON DIRECTOR'S MOTION TO DISMISS in **Bernard Burkett v. Scott Nally, Director of Environmental Protection**, Case No. ERAC 13-766785 entered into the Journal of the Commission this 19th day of March 2014.



Julie A. Slane, Executive Secretary

Dated this 19th day of
March 2014