

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION  
STATE OF OHIO

PATRICIA GORCHEFF, : Case No. ERAC 13-506781  
: :  
Appellant, : :  
: :  
v. : :  
: :  
SCOTT NALLY, DIRECTOR OF : :  
ENVIRONMENTAL PROTECTION : :  
: :  
and : :  
: :  
PENNANT-MIDSTREAM, LLC, : :  
: :  
Appellees. : :

---

Ruling on Appellees' Joint Motion to Dismiss

Rendered on January 30, 2014

---

Patricia Gorcheff, pro se Appellant

*Michael DeWine*, Attorney General, *Elizabeth R. Ewing*, and  
*Clint R. White* for Appellee Scott Nally, Director of  
Environmental Protection

*Daniel J. Deeb* and *David M. Loring* for Appellee Pennant-  
Midstream, LLC

---

{¶1} This matter comes before the Environmental Review Appeals Commission (“Commission”) upon a Notice of Appeal filed by Appellant Patricia Gorcheff on July 5, 2013. Ms. Gorcheff challenges a final air pollution Permit-to-Install and Operate (“PTIO”) issued by Appellee Scott Nally, Director of Environmental Protection (“Director,” “Ohio EPA”), to Appellee Pennant Midstream, LLC (“Pennant”) (collectively “Appellees”) on June 5, 2013.

{¶2} On November 26, 2013, Appellees filed a Joint Motion to Dismiss (“Motion”). Ms. Gorcheff filed a Response to Appellees’ Motion on December 17, 2013. Appellees filed their Reply on January 8, 2013.

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

### **FINDINGS OF FACT**

{¶4} On July 5, 2013, Ms. Gorcheff filed a Notice of Appeal with the Commission, in which she challenged the Director’s issuance of a final air pollution PTIO to Pennant.<sup>1</sup> Case File Item A.

{¶5} In their Motion, Appellees argued that Ms. Gorcheff’s appeal should be dismissed for multiple reasons. First, Pennant claimed that Ms. Gorcheff’s appeal should be dismissed because her Notice of Appeal did not include a statement of “jurisdictional predicate.”<sup>2</sup> Second, both Pennant and the Director argued that Ms. Gorcheff’s Notice of Appeal did not articulate the specific manner in which she is aggrieved or adversely affected by the Director’s action, and thus her appeal should be dismissed for lack of standing. And finally, Appellees contended that even if the Commission finds that Ms. Gorcheff has standing, several assignments of error should be dismissed for failure to state a claim upon which relief can be granted. Case File Item CC.

---

<sup>1</sup> Ms. Gorcheff’s Notice of Appeal does not articulate specific facts relating to her standing in this appeal. Case File Item A.

<sup>2</sup> The Director did not join the portion of Appellees’ Motion arguing that Ms. Gorcheff’s appeal should be dismissed because her Notice of Appeal did not include a statement of “jurisdictional predicate.” Case File Item CC.

{¶6} In response to Appellees' Motion, Ms. Gorcheff cited several studies regarding the hazards of hydrogen sulfide and restated the various assignments of error contained in her Notice of Appeal. Further, regarding standing, Ms. Gorcheff offered the following statement:

#### LEGAL STANDING

VII. "Taxpayer" for the purposes of [standing] contemplates any person who, in a private capacity as a citizen, elector, freeholder, or taxpayer, volunteers to enforce a right of action on behalf [of] and for the benefit of the public[.]

The word, "taxpayer," as used in this section, contemplates and includes any person who, in a private capacity as a citizen, elector, freeholder or taxpayer, volunteers to enforce a right of action on behalf of and for the benefit of the public, and any such person is subject to the conditions imposed by that section, unless waived[.]

Where the statutory requirements necessary to maintain a taxpayers action, pursuant to [this section] are met or waived, and the action has been brought on behalf of the public and resulted in a public benefit, the equity of the case demands that the trial court exercise its discretion in considering the allowance of attorney fees to the successful taxpayers[.]

Case File Item FF.<sup>3</sup>

---

<sup>3</sup> With regard to standing, Ms. Gorcheff's Response simply contains excerpts from two Ohio Supreme Court cases: *State ex rel. Nimon v. Springdale*, 6 Ohio St.2d 1 (1966) and *State ex rel. White v. Cleveland*, 34 Ohio St.2d 37 (1973).

Both *Springdale* and *Cleveland* analyze Revised Code ("R.C.") 733.59, which governs taxpayer suits brought against municipal corporations.

In *Springdale*, the second paragraph of the Court's syllabus provides as follows:

2. The word, "taxpayer," as used in Section 733.59, Revised Code, contemplates and includes any person who, in a private capacity as a citizen, elector, freeholder or taxpayer, volunteers to enforce a right of action on behalf of and for the benefit of the public, and any such person is subject to the conditions imposed by that section, unless waived.

*Springdale*, 6 Ohio St.2d 1, paragraph two of syllabus (emphasis added).

Similarly, the third paragraph of the Court's syllabus in *Cleveland* states as follows:

3. Where the statutory requirements necessary to maintain a taxpayer's action, pursuant to R.C. 733.59, are met or waived, and the action has been brought on behalf of the public and resulted in a public benefit, the equity of the case demands that the trial court exercise its discretion in considering the allowance of attorney fees to the successful taxpayers.

*Cleveland*, 34 Ohio St.2d 37, paragraph three of syllabus (emphasis added).

### CONCLUSIONS OF LAW

{¶7} Although not strictly bound by the Ohio Rules of Civil Procedure (“Civ.R.”), the Commission has historically applied those rules when appropriate to assist in the resolution of appeals. *Meuhlfeld v. Boggs*, ERAC No. 356228 (Mar. 17, 2010).

{¶8} A Civ.R. 12(B)(6) motion to dismiss is a procedural motion designed to test the sufficiency of a complaint or cause of action. *Thompson v. Central Ohio Cellular, Inc.*, 93 Ohio App.3d 530, 538, 639 N.E.2d 462 (8th Dist. 1994), citing *Hanson v. Guernsey Cty. Bd. Of Commrs.*, 65 Ohio St.3d 545 (1992).

{¶9} The Ohio Supreme Court explained, “\* \* \* [a] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Obrien v. University Comm. Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975). Further, “[u]nder Ohio law, when a party files a motion to dismiss for failure to state a claim, all the factual allegations of the complaint must be taken as true and all reasonable inferences must be drawn in favor of the nonmoving party.” *Byrd v. Faber*, 57 Ohio St.3d 56, 60, 565 N.E.2d 584 (1991), citing *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3rd 190, 532 N.E.2d 753 (1988).

{¶10} The question of standing is a threshold issue of jurisdiction, which must be resolved before an appellant may proceed with an appeal before the Commission. *Helms v. Koncelik*, 10th Dist. No. 08AP-323, 2008-Ohio-5073, ¶122, citing *New Boston Coke v. Tyler*, 32 Ohio St.3d 216 (1987). The standing requirement ensures that each appellant has a personal stake in the outcome of the controversy. *Merkel v. Jones*, ERAC Case Nos. 185274-75 (Oct. 23, 2003).

{¶11} Two avenues exist for a person to establish individual standing before the Commission. First, under Revised Code (“R.C.”) 3745.04, a person may establish standing to appeal a final action of the Director by showing that he is “affected” by the Director’s action and that he was a “party to a proceeding before the director.” *Girard Bd. of Health v. Korleski*, 193 Ohio App.3d 309, 2011-Ohio-1385, ¶13. To be a “party to a proceeding before the director,” a person must have “appeared” before the Director. *Id.*

{¶12} Second, pursuant to R.C. 3745.07, certain circumstances allow persons who are “aggrieved or adversely affected” by the Director’s final action to establish standing. In such circumstances, a person need not be a “party to a proceeding before the Director.”

{¶13} Here, the parties do not dispute that Ms. Gorcheff was a party to a proceeding before the Director. Thus, Appellant’s ability to survive a standing challenge rests on whether she is “affected” or “aggrieved or adversely affected” by the Director’s action.

{¶14} The Tenth District stated that a person is “affected,” or “aggrieved or adversely affected,” by the Director’s final action if: “(1) the challenged action will cause injury in fact, economic or otherwise, and (2) the interest sought to be protected is within the realm of interests regulated or protected by the statute being challenged.” *Girard*, at ¶15, quoting *Citizens Against Megafarm Dairy Dev., Inc. v. Dailey*, 10th Dist. No. 06AP-836, 2007-Ohio-2649.

{¶15} Further, the injury in fact must be “concrete, rather than abstract or suspected.” *Id.* In other words, a party must show “that he or she will suffer a specific injury, even slight, from the challenged action or inaction, and that the injury is likely to be redressed if the court invalidates the action or inaction.” *Id.* The alleged injury may

be actual and immediate, or threatened. *Stark-Tuscarawas-Wayne Joint Solid Waste Mgt. Dist. v. Republic Waste Servs. of Ohio, II, L.L.C.*, 10th Dist. No. 07AP-599, 2009-Ohio-2143, at ¶24, quoting *Johnson's Island Property Owners' Ass'n v. Shregardus*, 10th Dist. No. 96APH10-1330 (June 30, 1997). However, a party who alleges a threatened injury "must demonstrate a realistic danger arising from the challenged action." *Id.*

{¶16} As an initial matter, the Commission notes that Ms. Gorcheff's Notice of Appeal contains no language upon which the Commission could rely that demonstrates she is aggrieved or adversely affected.

{¶17} In response to Appellees' Motion, however, Ms. Gorcheff asserts that she is aggrieved or adversely affected by the Director's action because she is a taxpayer.

{¶18} Regarding taxpayer standing, the Commission, citing well established state and federal case law, has consistently held that mere generalized status as a taxpayer is insufficient to establish standing. E.g., *Helms v. Jones*, Case Nos. ERAC 765613 & 765618 (Aug. 25, 2005), citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); see also *Bohne v. Koncelik*, Case No. ERAC 225990 (Aug. 7, 2008). Rather, the Commission has noted that a person must articulate an individualized interest distinct from those common to all members of the public. *Id.*

{¶19} Here, Ms. Gorcheff's response fails to indicate that she maintains an interest in the Director's action that differs in any way from the interests of the general public. Accordingly, the Commission finds that Ms. Gorcheff has not met her burden of establishing standing in the present appeal.

{¶20} Having found that Ms. Gorcheff lacks standing in this appeal, the Commission declines to address the remainder of the arguments raised in Appellees' Motion.

**FINAL ORDER**

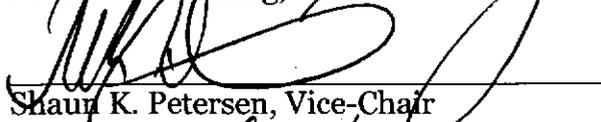
{¶21} For the foregoing reasons, the Commission hereby GRANTS Appellees' Joint Motion to Dismiss and ORDERS that the present appeal be DISMISSED.

{¶22} 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. Stilling, Chair

  
\_\_\_\_\_  
Shaun K. Petersen, Vice-Chair

  
\_\_\_\_\_  
Michael G. Verich, Member

Entered into the Journal of the Commission this 30<sup>th</sup> day of January 2014.

Copies Sent to:

PATRICIA GORCHEFF  
SCOTT NALLY, DIRECTOR OF  
ENVIRONMENTAL PROTECTION  
PENNANT-MIDSTREAM, LCC

[CERTIFIED MAIL]

[CERTIFIED MAIL]

Elizabeth R. Ewing, Esq.

[CERTIFIED MAIL]

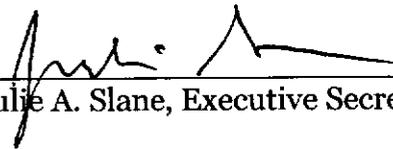
Clint R. White, Esq.

Daniel J. Deeb, Esq.

David M. Loring, Esq.

**CERTIFICATION**

I hereby certify that the foregoing is a true and accurate copy of the RULING ON APPELLEES' JOINT MOTION TO DISMISS in **Patricia Gorcheff v. Scott Nally, Director of Environmental Protection and Pennant-Midstream, LLC**, Case No. ERAC 13-506781 entered into the Journal of the Commission this 30<sup>th</sup> day of January, 2014.

  
\_\_\_\_\_  
Julie A. Slane, Executive Secretary

Dated this 30<sup>th</sup> day of  
January 2014