

BEFORE THE ENVIRONMENTAL REVIEW APPEALS COMMISSION
STATE OF OHIO

BARBARA A. LUND, : ERAC No. 11-016568
: :
Appellant, : :
: :
v. : :
: :
SCOTT NALLY, DIRECTOR OF : :
ENVIRONMENTAL PROTECTION, : :
: :
Appellee. : :

RULING ON DIRECTOR'S MOTION TO DISMISS

Rendered on July 12, 2012

Barbara A. Lund, pro se Appellant.

Mike DeWine, Attorney General, *Clint R. White*, and *Chris Kim* for Appellee Scott Nally, Director of Environmental Protection.

{¶1} This matter comes before the Environmental Review Appeals Commission (“Commission”) upon a Notice of Appeal filed on November 30, 2011 by Appellant Barbara Lund. Ms. Lund opposes a final action of Appellee Scott Nally, Director of the Ohio Environmental Protection Agency (“Director,” “Ohio EPA”), in which the Director dismissed Ms. Lund's verified complaint challenging prescribed forest fire activities conducted in Shawnee State Forest. Case File Item A.

{¶2} Currently before the Commission is the Director's Motion to Dismiss filed May 1, 2012, Ms. Lund's Memorandum in Opposition filed May 14,

2012, the Director's Reply filed May 22, 2012, and Ms. Lund's Surreply filed June 14, 2012. Case File Items P, Q, R, S.

{¶3} Upon a review of the pleadings and the relevant statutes, regulations, and case law, the Commission hereby GRANTS the Director's Motion to Dismiss and issues the following Findings of Fact, Conclusions of Law, and Final Order.

FINDINGS OF FACT

{¶4} On April 2, 2009, the Ohio Department of Natural Resources, Division of Forestry ("ODNR"), conducted a 283-acre prescribed burn in an area of the Shawnee State Forest known as the "Backcountry Unit." The burn was conducted pursuant to Permit #090304cds06, issued by the Portsmouth Local Air Agency ("PLAA"), an agency granted contractual authority by Ohio EPA to regulate air quality pursuant to Ohio Revised Code ("R.C.") 3704.111 and 3704.112. Case File Item A.

{¶5} On September 2, 2009, Ms. Lund filed a verified complaint with the Director alleging that the prescribed burn exceeded its permitted boundaries. On October 2, 2009, the Director initiated an investigation, but was unable to substantiate Ms. Lund's allegations. Consequently, on November 3, 2011, the Director dismissed the verified complaint stating, "PLAA and Ohio EPA have determined that ODNR did not violate the terms of burning permission #090304cds06 when it conducted open burning operations." Case File Item A.

{¶6} Ms. Lund timely appealed the dismissal to this Commission, arguing that the Director did not provide her with an opportunity to attend a

conference regarding the alleged violation as required by R.C. 3745.08(B).¹ As such, Ms. Lund contends the Director acted unlawfully and unreasonably in dismissing her verified complaint. Case File Item A.

{¶7} In his Motion to Dismiss, the Director argues that Ms. Lund's appeal should be dismissed for two reasons. First, the Director argues that Ms. Lund is not entitled to a conference pursuant to R.C. 3745.08(B) because the Director's final action dismissing the verified complaint is not an order. Second, the Director contends that even if the Commission finds such a right in R.C. 3745.08(B), Ms. Lund did, in fact, receive a conference according to the definition advanced by the Commission in *Lund v. Korleski*, ERAC No. 016373 (June 2, 2011). Case File Item P, R.

CONCLUSIONS OF LAW

{¶8} Traditionally, when determining the appropriate standard for reviewing a motion to dismiss, the Commission has applied the Ohio Rules of Civil Procedure ("Civ.R."). *Meuhfeld v. Boggs*, ERAC No. 356228 (Mar. 17, 2010). Here, the Director asserts that Ms. Lund failed to state a claim upon which relief can be granted. Therefore, the Commission finds that the present Motion to Dismiss is properly examined under the framework of Civ.R. 12(B)(6).

{¶9} 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.*

¹ In the present appeal, Ms. Lund does not challenge the Director's finding that ODNR did not violate the terms of Permit #090304cds06. Instead, Ms. Lund's Notice of Appeal challenges the dismissal only on the grounds that the Director failed to provide her with an opportunity to attend a conference. Case File Item A.

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).

{¶10} 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).

{¶11} With this standard in mind, the Commission GRANTS the Director's Motion to Dismiss.

{¶12} Revised Code 3745.08(B) governs the procedures the Director must follow after an investigation into verified complaints. The relevant portion of the statute provides:

Upon receipt of a complaint authorized by this section, the director shall cause a prompt investigation to be conducted such as is reasonably necessary to determine whether a violation, as alleged, has occurred, is occurring, or will occur. The investigation shall include a discussion of the complaint with the alleged violator. If, upon completion of the investigation, the director determines that a violation, as alleged, has occurred, is occurring, or will occur, the director may *enter such order as may be necessary*, request the attorney general to commence appropriate legal proceedings, or, where the director determines that prior violations have been terminated and that future violations of the same kind are unlikely to occur, the director may dismiss the complaint. *If the director does not determine that a violation, as alleged, has occurred, is occurring, or will occur, the director shall dismiss the complaint.*

Before taking any action under this division, the director may commence a hearing. Twenty days prior to any hearing, the director shall cause publication of notice of the hearing in a newspaper with general circulation in the county wherein the alleged violation has occurred, is occurring, or will occur, and also shall mail written notice by certified mail, return receipt requested, to the person who filed the complaint and to the alleged violator. *If the director enters an order pursuant to this division without having commenced a hearing, the director or the director's delegate, prior to entry of the order, shall provide an opportunity to the complainant and the alleged violator to attend a conference with the director or the director's delegate concerning the alleged violation.*

(Emphasis added).

{¶13} The statute requires the Director, upon receipt of a verified complaint, to commence an investigation. If through the investigation the Director determines a violation has occurred, the statute provides the Director with three options: (1) enter such order as may be necessary, (2) request the attorney general to commence appropriate legal proceedings, or (3) dismiss the complaint if future violations of the same kind are unlikely to occur. Conversely, R.C. 3745.08(B) requires the Director to dismiss the complaint if, after investigating, he determines a violation has not occurred.

{¶14} At issue is the last sentence of R.C. 3745.08(B), which requires the Director to provide the complainant with an opportunity for a conference “[i]f the [D]irector enters an order * * * without having commenced a hearing * * *.” The Director argues that the word “order,” as used in the third sentence of R.C. 3745.08(B), creates a distinction between an “order” and a “dismissal.” The Director argues the same distinction must be made in connection with the conference requirement, reasoning that because he “dismissed” Ms. Lund’s verified complaint and did not issue an “order,” Ms. Lund was not entitled to a conference. Case File Items R, T.

{¶15} The Commission agrees and finds that R.C. 3745.08(B) differentiates between an “order” and a “dismissal.” Specifically, the third sentence of the statute authorizes the Director, upon finding that a violation occurred, to enter such order as may be necessary, request the attorney general to commence appropriate legal proceedings, *or* dismiss the complaint if future violations of the same kind are unlikely to occur. In this context, an “order” and a “dismissal” are two separate, alternative actions.

{¶16} Here, the Director conducted an investigation, found that no violation occurred, and accordingly “dismissed” the complaint. The Director did not enter an “order.” As such, the Commission finds that Ms. Lund was not entitled to a conference because the dismissal of her verified complaint did not constitute an “order” within the meaning of R.C. 3745.08(B).

{¶17} Having found that Ms. Lund was not entitled to a conference under R.C. 3745.08(B), the Commission need not address the Director's second argument that she did, in fact, receive one.

{¶18} Accordingly, for the foregoing reasons, the Director's Motion to Dismiss is well-taken. The Commission finds that the Director acted lawfully and reasonably in dismissing Ms. Lund's verified complaint.

FINAL ORDER

{¶19} Having found the Director acted lawfully and reasonably, the Commission hereby GRANTS the Director's Motion to Dismiss and ORDERS the present appeal be DISMISSED.

{¶20} The Commission, in accordance with Ohio Adm.Code 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. 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**

Entered into the Journal of the
Commission this _____ day of
July 2012.

Lisa L. Eschleman, Chair

Melissa M. Shilling, Vice Chair

Shaun K. Petersen, Member

Copies Sent to:
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