[Cite as *Cravat Coal Co. v. Div. of Mineral Resources Mgt.*, 2006-Ohio-7071.]

STATE OF OHIO, HARRISON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

CRAVAT COAL COMPANY, APPELLANT-APPELLEE, VS. DIVISION OF MINERAL RESOURCES MANAGEMENT, APPELLEE-APPELLANT.	))))))))))	CASE NO. 05-HA-577 OPINION

CHARACTER OF PROCEEDINGS: Administrative Appeal from the Ohio Reclamation Commission
Case Nos. RC-04-020, RC-04-021

JUDGMENT: Affirmed

APPEARANCES:

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JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: December 26, 2006

[Cite as *Cravat Coal Co. v. Div. of Mineral Resources Mgt.*, 2006-Ohio-7071.]
DONOFRIO, J.

{¶1} Appellant, the Division of Mineral Resources Management, appeals from an Ohio Reclamation Commission decision vacating two civil penalties assessed against appellee, Cravat Coal Company, for violations of Ohio's coal mining laws.

{¶2} On October 22, 2003, appellant's mineral resources inspector conducted an inspection of appellee's permit D-2131 site, which is a surface coal mining operation located in Harrison County. The inspector noticed a breached diversion ditch where the drainage was not passing through a siltation structure, a violation of R.C. 1513.16(A). Appellant subsequently issued a Notice of Violation (NOV) to appellee, designated as NOV 24433, and ordered appellee to repair the diversion ditch by November 12, 2003. Appellee completed the repairs in a timely manner.

{¶3} On February 18, 2004, appellant's inspector conducted an inspection of appellee's permit D-2183 site, also a surface coal mining operation in Harrison County. The inspector noticed that appellee had improperly cut a trench in the ground so that water in a pit would drain from the mine site into a stream channel, a violation of R.C. 1513.16(A). Appellant thereafter issued NOV 24491 to appellee for failing to direct all surface drainage to a siltation structure and ordered appellee to repair the situation. Appellee again completed the repairs in a timely manner.

{¶4} On July 1, 2004, appellant issued a Civil Penalty Assessment (CPA) to appellee, designated as CPA 12280, in the amount of $600, for NOV 24433. Appellant issued this CPA 252 days after it issued NOV 24433. That same day, appellant issued CPA 12283, in the amount of $900, for NOV 24491. Appellant issued this second CPA 134 days after it issued NOV 24491.

{¶5} Appellee filed administrative appeals of the two CPAs. The basis for the appeals was the excessive delay in issuing the CPAs. Appellee did not contest the violations themselves. The Reclamation Commission (Commission) consolidated the two appeals for its review.

{¶6} The Commission conducted a hearing on the appeals on January 20, 2005. At the hearing, appellee argued that appellant was untimely in issuing the

CPAs because it did not do so until well past the 30-day time frame set out in R.C. 1513.02(E)(3). Appellant asserted that the unexpected retirement of an assistant regional manager resulted in the long delay in issuing the CPAs.

{¶7} The Commission ultimately vacated both CPAs. Appellant filed a timely notice of appeal on March 3, 2005.

{¶8} Appellant raises two assignments of error. The assignments of error share a common basis in law and fact and, therefore, we will address them together. They state:

{¶9} "THE RECLAMATION COMMISSION ERRED WHEN IT VACATED CIVIL PENALTY ASSESSMENTS BECAUSE THE PENALTY ASSESSMENTS WERE DELAYED – A FACTOR NOT AUTHORIZED BY THE GENERAL ASSEMBLY."

{¶10} "THE RECLAMATION COMMISSION ERRED WHEN IT FAILED TO FOLLOW ESTABLISHED CASE LAW THAT STATUTES, SUCH AS R.C. 1513.02(E)(3), PROVIDING A TIME FOR THE PERFORMANCE OF AN OFFICIAL DUTY ARE TO BE CONSTRUED AS DIRECTORY, NOT MANDATORY."

{¶11} R.C. 1513.02(E)(3) provides in relevant part:

{¶12} "Upon the issuance of a notice or order charging that a violation of this chapter has occurred, the chief *shall* inform the operator within thirty days of the proposed amount of the penalty and provide opportunity for an adjudicatory hearing pursuant to section 1513.13 of the Revised Code." (Emphasis added.)

{¶13} The Commission determined that, in this case, where the statute provided that the chief will act within 30 days, yet the chief did not act for 134 or for 252 days, the chief's action was arbitrary, capricious, or otherwise inconsistent with law. Therefore, it concluded that the issuance of the CPAs was arbitrary, capricious, or otherwise inconsistent with law.

{¶14} Appellant argues that the Commission could not rely on R.C. 1513.02(E)(3)'s language as a basis for vacating the CPAs because R.C. 1513.02(E)(3) is directory, not mandatory. It asserts that appellee's remedy was to file a writ of procedendo against the chief to force it to comply with the statutory time

frame. Appellant argues that the 30-day time frame is only directory unless the General Assembly has indicated otherwise or prejudice can be established. Because R.C. 1513.02(E)(3) contains no penalty or particular result if the chief does not meet the 30-day time frame, appellant claims that it is not mandatory. Furthermore, it alleges that appellee was not prejudiced by the delay. Next, appellant argues that while the term "shall" is generally construed as mandatory, such is not the case when the term refers to the manner or time in which a public official is to exercise power or jurisdiction. Finally, appellant contends that federal courts have held that the same language in R.C. 1513.02(E)(3)'s federal counterpart, 30 U.S.C. 1268, is directory.

{¶15} This court uses a limited standard of review to review the Commission's order. *C. & T. Evangelinos v. Div. of Mineral Resources Mgmt.*, 7th Dist. No. 03-BE-70, 2004-Ohio-7061, at ¶18, citing *Pleasant City v. Ohio Dept. of Natl. Resources, Div. of Reclamation* (1993), 67 Ohio St.3d 312, 617 N.E.2d 1103. R.C. 1513.14 governs appeals from the Commission. R.C. 1513.14(A) provides in part: "The court shall affirm the decision of the commission unless the court determines that it is arbitrary, capricious, or otherwise inconsistent with law, in which case the court shall vacate the decision and remand to the commission for such further proceedings as it may direct."

{¶16} Under this standard of review, we presume that the agency's or board's actions are valid. Id., citing R.C. 1513.02. Furthermore, "[i]t is a well-settled rule that courts, when interpreting statutes, must give due deference to an administrative interpretation formulated by an agency that has accumulated substantial expertise, and to which the General Assembly has delegated the responsibility of implementing the legislative command." *Swallow v. Indus. Comm.* (1988), 36 Ohio St.3d 55, 57, 521 N.E.2d 778.

{¶17} Additionally, in reviewing the Commission's decision, an appellate court must confine its review to the record certified by the Commission. R.C. 1513.14(A).

{¶18} First, we must address whether appellee's appeal meets the requirements set out in R.C. 1513.02(E)(3). As to appeals, the statute provides:

{¶19} "The person charged with the penalty then shall have thirty days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, file a petition for review of the proposed assessment with the secretary of the reclamation commission pursuant to section 1513.13 of the Revised Code." R.C. 1513.02(E)(3).

{¶20} Thus, the statute appears to provide two grounds for appealing a CPA to the Commission: (1) to contest the amount of the penalty; and (2) to contest the fact of the violation.

{¶21} Appellee's appeal to the Commission meets these requirements. While appellee states in its brief that it did not contest the amount of the fines, in effect, it did. Appellee's basic argument was that appellant should not have issued the CPAs because it failed to abide by the 30-day time limit. Looked at another way, appellee argued that the fines should have been zero dollars based on appellant's tardy issuance of the CPAs. Furthermore, appellee's representative testified at the hearing that appellee's position was that the penalties should be "reduced or waived." (Tr. 54-55). Thus, at the hearing, appellee specifically argued that it was contesting the amount of the penalty, which brings it within the appeal criteria of R.C. 1513.02(E)(3).

{¶22} We must presume that the Commission's decision vacating the CPAs was valid. *Buckeye Forest Council v. Division of Mineral Resources Management*, 7th Dist. No. 01-BA-18, 2002-Ohio-3010, citing R.C. 1513.02. As noted above, when interpreting a statute, we must "give due deference to an administrative interpretation formulated by an agency that has accumulated substantial expertise, and to which the General Assembly has delegated the responsibility of implementing the legislative command." *Swallow*, 36 Ohio St.3d at 57.

{¶23} The Commission chose to proceed with appellee's appeal. Thus, it concluded that the appeal was proper and that it had jurisdiction to hear the appeal. Given our standard of review and appellee's argument regarding reduction or waiver of the penalties, we must defer to the Commission's decision on this matter.

{¶24} Next, we must move on to consider the merits of appellant's argument.

While appellant focuses its argument on whether R.C. 1513.02(E)(3)'s 30-day frame is mandatory or directory, we need not decide that issue.

{¶25} R.C. 1513.02(E)(3) provides that, "[u]pon the issuance of a notice or order charging that a violation of this chapter has occurred, the chief shall inform the operator within thirty days of the proposed amount of the penalty and provide opportunity for an adjudicatory hearing pursuant to section 1513.13 of the Revised Code." In this case, appellant did not inform appellee of the penalties until 252 and 134 days after the issuance of the underlying NOVs.

{¶26} The Commission did not rule on whether the 30-day requirement set out in the statute was mandatory or directory. Instead, it concluded that under the facts of this case, appellant's lengthy delays of 252 and 134 days in assessing the penalties were arbitrary and capricious. The evidence offered at the hearing supports the Commission's decision.

{¶27} As to CPA 12280, Wayne Shalk, appellant's assistant regional manager for the northern region and the person who issued the CPAs, testified as follows:

{¶28} "Q. Okay. Why did it take until July 1 of 2004 to assess this penalty?

{¶29} "A. The - - there was a manpower problem in the southern region. I work for the northern region, and the - - when the Division of Mines and Reclamation merged with the Division of Oil and Gas, the new duties were assigned to one of the assistant reginal [sic.] managers in each region. Not too long after the merger took place, one of the assistant managers in the southern region unexpectedly retired. His duties were to help manage the oil and gas program.

{¶30} "Q. And which - - I'm sorry, which person was this now?

{¶31} "A. That - - his name - - that was Dick Shockley.

{¶32} "Q. Okay.

{¶33} "A. The other regional - - assistant regional manager, Joe Hoerst, was assigned the duties of as - - processing the civil penalties assessments. However, his background in the oil and gas program through the day-to-day necessities required him to take on Mr. Shockley's duties in addition to what he was assigned.

So the processing of the civil penalty assessments took longer so we developed a large backlog. And in 2004, I started going down to the southern region to help get rid of this old backlog. So that's why it took such a long time to issue the Civil Penalty Assessment." (Tr. 43-44).

{¶34} As to CPA 12283, Shalk testified:

{¶35} "Q. Okay. Why did - - why did it take the Division until July 1, 2004 to assess this penalty? Was this essentially the same reasons as the other one?

{¶36} "A. Yes.

{¶37} "Q. Okay.

{¶38} "A. Lack of manpower causing a backlog in issuing the CPAs." (Tr. 51-52).

{¶39} Appellant did not deny that it took a long while to issue the penalties to appellee. Instead, appellant attempted to justify the long delay by blaming it on a manpower shortage caused by the retirement of one employee. Given this evidence, it was within the Commission's discretion to conclude that the CPAs should be vacated based on the long delay appellant took to issue them.

{¶40} Accordingly, appellant's two assignments of error are without merit.

{¶41} For the reasons stated above, the Commission's judgment is hereby affirmed.

Waite, J., dissents. See dissenting opinion attached.
DeGenaro, J., concurs in judgment only.

Waite, J., dissenting.

{¶42} I must respectfully dissent from the majority opinion in this appeal. The Appellant, Division of Mineral Resources Management ("Division"), has appealed the decision of the Ohio Reclamation Commission ("Commission") vacating two civil penalties assessed against Appellee, Cravat Coal Company ("Cravat Coal") for violations of R.C. Chapter 1513, Ohio's coal mining laws. There is no dispute among the parties that Cravat Coal committed the two statutory violations, and that the Division had and has authority to issue Civil Penalty Assessments ("CPAs") for those

violations. Cravat Coal appealed the two CPAs to the Commission on the grounds that the penalties were not issued within 30 days from the date Cravat Coal was notified of the violations, as set forth in R.C. §1513.02(E)(3). The Commission agreed with Cravat Coal and vacated the CPAs because one had been issued 134 days and the other 252 days after notice. Both of these notices were well outside of the 30-day time limit found in the statute. Although this Court's standard of review of the Commission's order is a very deferential one, it appears from a careful reading of R.C. §1513.02(E)(3) that the Commission had no jurisdiction to consider the issue raised by Cravat Coal on administrative appeal. Therefore, I would vacate the Commission's order and reinstate the civil penalties imposed by the Division.

{¶43} The facts of this case are undisputed. The sole issue in this appeal has to do with the significance and effect of the delay in time by the Division in issuing the two CPAs.

{¶44} I agree with the majority that the standard of review that this Court uses to review a reclamation commission's order is a limited one, and that we should affirm the order unless it is arbitrary, capricious, or otherwise inconsistent with law. R.C. §1513.14(A)(3); *C. & T. Evangelinos v. Div. Of Mineral Resources Mgmt*., 7th Dist. No. 03 BE 70, 2004-Ohio-7061. In this case, it would appear that the reclamation commission's order is contrary to law because it does not have jurisdiction to review the issue that was raised by Cravat Coal.

{¶45} The statute at issue in this case, R.C. §1513.02(E)(3), states in part:

{¶46} "(3) Upon the issuance of a notice or order charging that a violation of this chapter has occurred, *the chief shall inform the operator within thirty days of the proposed amount of the penalty* and provide opportunity for an adjudicatory hearing pursuant to section 1513.13 of the Revised Code. The person charged with the penalty then shall have thirty days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, file a petition for review of the proposed assessment with the secretary of the reclamation commission pursuant to section 1513.13 of the Revised Code." (Emphasis added).

{¶47} The interpretation of the time provisions in R.C. §1513.02(E)(3) is a

case of first impression in this Court, and apparently with any appellate court in Ohio. The Division has raised the question as to whether it is permitted to assess civil penalties after 252 days and 134 days have passed even though the statute requires the Division to inform the violator of the proposed fine within 30 days, and when the statute contains no repercussions for failing to meet the 30-day deadline. Although the Division has not stated its argument in terms of a jurisdictional problem, the wording of R.C. §1513.02(E)(3) certainly appears to create a jurisdictional impediment with respect to Cravat Coal's appeal of the two CPAs. We would normally deal with this jurisdictional issue prior to addressing any other merits of the appeal.

{¶48} R.C. §1513.02(E)(3) states: "The person charged with the penalty then shall have thirty days to pay the proposed penalty in full or, *if the person wishes to contest either the amount of the penalty or the fact of the violation, file a petition for review* of the proposed assessment with the secretary of the reclamation commission pursuant to section 1513.13 of the Revised Code." (Emphasis added.)

{¶49} The statute provides two grounds for appealing a CPA to the Commission: a) to contest the amount of the penalty; and b) to contest the fact that there was a violation. Cravat Coal did not raise either of these two issues as grounds on appeal. Both CPAs were appealed solely on the grounds that the Division was without authority to issue each CPA after the 30-day time limit found in the statute had expired. Appellee's brief on appeal states quite explicitly that it has not and is not contesting that the violations occurred and that it, "did not, is not, and will not contest the amount of the penalties." (Appellee's brief, p. 7.) Since there are no other grounds permitted by statute for appealing the CPAs to the Commission, and because Cravat Coal clearly does not assert either of the only two grounds for appeal as listed, the logical conclusion is that the Commission had no jurisdiction to hear or decide this administrative appeal.

{¶50} The right to an appeal to the Commission is created by statute, and the statutory requirements governing an administrative appeal must be strictly followed in order to effectuate the appeal. See, e.g., *Manfredi Motor Transit Co. v. Limbach*

(1988), 35 Ohio St.3d 73, 76, 518 N.E.2d 936. The Ohio Supreme Court has often reaffirmed the proposition that: "[a]n appeal, the right to which is conferred by statute, can be perfected only in the mode prescribed by statute. The exercise of the right conferred is conditioned upon compliance with the accompanying mandatory requirements." *Zier v. Bureau of Unemployment Compensation* (1949), 151 Ohio St. 123, 84 N.E.2d 746, paragraph one of the syllabus; reaffirmed by *Hansford v. Steinbacher* (1987), 33 Ohio St.3d 72, 72, 514 N.E.2d 1385; further reaffirmed by *Ramsdell v. Ohio Civ. Rights Comm.* (1990), 56 Ohio St.3d 24, 27, 563 N.E.2d 285.

{¶51} The Ohio Supreme Court has found certain aspects of R.C. §1503.02(E)(3) to be jurisdictional, such as the provision requiring the party appealing a CPA to forward the amount of the penalty to the secretary of reclamation commission. See *Lyle Const., Inc. v. Ohio Dept. of Natural Resources, Div. of Reclamation* (1987), 34 Ohio St.3d 22, 27, 516 N.E.2d 209 (reviewing former R.C. §1503.02(F)(3), now redesignated as §1503.02(E)(3)). Furthermore, the statutory limits of subject matter jurisdiction of a state agency or board cannot be waived or expanded upon by mutual agreement of the parties. *Painesville v. Lake Cty. Budget Comm.* (1978), 56 Ohio St.2d 282, 284, 10 O.O.3d 411, 383 N.E.2d 896. Based on these authorities, the Commission was required to dismiss Cravat Coal's attempt at administrative appeal due to lack of subject matter jurisdiction, at least once it became clear that Appellee was challenging neither the amount of the penalty nor the fact that a violation had occurred, the only two reasons on which an aggrieved person may base an appeal.

{¶52} The statutory restrictions on the types of issues that may be appealed to the Commission are consistent with other types of administrative appeals. Workers' compensation cases provide the most obvious examples of highly restricted administrative appeals: "The claimant or the employer may appeal an order of the industrial commission made under division (E) of section 4123.511 of the Revised Code in any injury or occupational disease case, *other than a decision as to the extent of disability* to the court of common pleas * * *." (Emphasis added.) R.C. §4123.512(A). The Ohio Supreme Court has routinely interpreted this language to

mean that parties in workers' compensation cases are limited to appealing whether or not the employee has a right to participate in the workers' compensation fund, or more specifically, whether the injury, disease, or death occurred in the course of and arising out of employment. *State ex rel. Liposchak v. Indus. Comm.* (2000), 90 Ohio St.3d 276, 279, 737 N.E.2d 519; *Felty v. AT&T Technologies, Inc.* (1992), 65 Ohio St.3d 234, 602 N.E.2d 1141; *State ex rel. Evans v. Indus. Comm.* (1992), 64 Ohio St.3d 236, 594 N.E.2d 609. Although parties would often prefer to appeal other issues to the court of common pleas, they are prevented from doing so on jurisdictional grounds. This Court itself has affirmed the dismissal, on jurisdictional grounds, of a workers' compensation appeal in which the City of Youngstown argued that its workers' compensation account should not be charged for the employee's injuries because the employee was, in fact, employed somewhere else at the time of the injury. *City of Youngstown v. DeSalle* (June 23, 1987), 7th Dist. No. 86 C.A. 177. Even though the identity of the employer might be considered as a fairly basic and fundamental aspect of any workers' compensation claim, R.C. §4123.512 does not permit such a question to be appealed, and therefore, *DeSalle* ruled that the issue could not be appealed.

{¶53} Other types of administrative decisions allow no right of appeal whatsoever: "The determination by STRS and its retirement board, STRB, of whether a person is entitled to disability retirement benefits is reviewable by mandamus because R.C. 3307.62 does not provide any appeal from the administrative determination." *State ex rel. Pipoly v. State Teachers Retirement Sys.*, 95 Ohio St.3d 327, 2002-Ohio-2219, 767 N.E.2d 719, ¶14. "[N]o appeal by way of R.C. 2506.01 is available to aggrieved parties in an annexation proceeding." *State ex rel. Painesville v. Lake Cty. Bd. of Commrs.* (2001), 93 Ohio St.3d 566, 571, 757 N.E.2d 347. "A decision by the State Employment Relations Board whether or not to issue a complaint in an unfair labor practice case is not reviewable pursuant to R.C. Chapter 119 or R.C. 4117.02(M) and 4117.13(D)." *Ohio Assn. of Pub. School Emp., Chapter 643, AFSCME/AFL-CIO v. Dayton City School Dist. Bd. of Edn.* (1991), 59 Ohio St.3d 159, 572 N.E.2d 80, syllabus.

{¶54} The fact that Appellee was not permitted, by statute, to appeal the delay in issuing the CPA does not mean that Appellee was without recourse. If Appellee had determined that time was of the essence in receiving a response from the Division, Appellee could have requested a prompt answer from the Division, or could have filed a writ of procedendo in order to force the Division to issue a response. A writ of procedendo is often the only legal device available to compel a public official to perform a duty after a deadline has passed. See, e.g., *State ex rel. Bunting v. Haas*, 102 Ohio St.3d 161, 2004-Ohio-2055, 807 N.E.2d 359, ¶9 (holding that a writ of procedendo is appropriate to force a trial judge to rule on a petition for postconviction relief after the 180-day deadline has passed); *State ex rel. Grove v. Nadel* (1998), 81 Ohio St.3d 325, 327, 691 N.E.2d 275 (a writ of procedendo is the appropriate procedure to compel a trial judge to journalize a judgment entry after the 30-day deadline in Sup.R. 7(A) has passed).

{¶55} There is no indication in the record that Appellee asked the Division to issue the CPAs in a timely manner or that Appellee filed a writ of procedendo to compel the issuance of the CPAs. We have recently ruled that a party who could have filed a writ of procedendo and did not has effectively waived the right to appeal any error arising out of the delay in proceedings: "The failure to seek the writ of procedendo during the pendency of the decision precludes the complaining party from challenging the delay on appeal after the decision is made." *El-Mahdy v. Mahoning Nat. Bank*, 7th Dist. No. 04 MA 41, 2005-Ohio-1341, ¶37, citing *In re Davis* (1999), 84 Ohio St.3d 520, 524, 705 N.E.2d 1219. Based on these cases, even before reaching the full substance of Appellant's argument, I must conclude that there was no jurisdiction to hear this appeal, and that even if there was, Cravat Coal waived the right to raise the alleged error on appeal by failing to file a writ of procedendo.

{¶56} The jurisdictional issue in this case overlaps to a certain extent the Division's first assignment of error. The Division contends that the Commission was limited to a very narrow scope of review and should have restricted itself to examining the two appealable issues listed in R.C. §1513.02(E)(3), namely, the

existence of the violation and the amount of the penalty. The Commission reviews these two issues under an abuse of discretion standard: "The commission shall affirm the notice of violation, order, or decision of the chief unless the commission determines that it is arbitrary, capricious, or otherwise inconsistent with law[.]" R.C. §1513.13(B). Appellant argues that the Commission's decision is inconsistent with law because the 30-day deadline in R.C. §1513.02(E)(3) is advisory only, because there are no statutory consequences for violating the 30-day deadline, and because the Commission vacated the CPAs based on a factor not authorized by the statute.

{¶57} Appellant acknowledges that R.C. §1513.02(E)(3) uses that word "shall" when it directs the chief of the Division to issue a CPA within 30 days: "the chief shall inform the operator within thirty days of the proposed amount of the penalty * * *." Appellant acknowledges that the word "shall" is generally construed as a command, as a mandatory act. *Dept. of Liquor Control v. Sons of Italy Lodge 0917* (1992), 65 Ohio St.3d 532, 534, 605 N.E.2d 368. However, Appellant also cites the well-established exception to this general rule with regard to statutes, rules, or regulations dealing with the manner or time of performing an official act: "Statutes which relate to the manner or time in which power or jurisdiction vested in a public officer is to be exercised, and not to the limits of the power or jurisdiction itself, may be construed to be directory, unless accompanied by negative words importing that the act required shall not be done in any other manner or time than that designated." *Schick v. City of Cincinnati* (1927), 116 Ohio St. 16, 155 N.E. 555, paragraph one of syllabus; see also *State ex rel. Larkins v. Wilkinson* (1997), 79 Ohio St.3d 477, 683 N.E.2d 1139; *State ex rel. Smith v. Barnell* (1924), 109 Ohio St. 246, 142 N.E. 611.

{¶58} This exception to the general rule has been reaffirmed numerous times by the Ohio Supreme Court, as in the recent case of *State ex rel. Ragozine v. Shaker*, 96 Ohio St.3d 201, 2002-Ohio-3992, 772 N.E.2d 1192:

{¶59} " 'As a general rule, a statute providing a time for the performance of an official duty will be construed as directory so far as time for performance is concerned, especially where the statute fixes the time simply for convenience or orderly procedure.' " Id. at ¶13, quoting *State ex rel. Jones v. Farrar* (1946), 146

Ohio St. 467, 32 O.O. 542, 66 N.E.2d 531, paragraph three of the syllabus.

{¶60} The statute at issue in *Ragozine* stated that a trial court "shall" hold a hearing within a specified number of days after the filing of a complaint seeking the removal of a public officer. Although the trial court had missed the statutory deadline, the Ohio Supreme Court concluded that the deadline in the statute was directory, not mandatory, and that the trial court's failure to meet the statutory deadline did not deprive it of jurisdiction to hear the case.

{¶61} There is nothing in R.C. §1513.02(E)(3), other than its use of the word "shall," that would prevent the Division from issuing a CPA after the 30-day deadline has passed. Based on the longstanding and consistent interpretation of the Ohio Supreme Court in this matter, the word "shall" in this context is directory rather than mandatory, and the Division retained the authority to issue the belated CPAs. Because the CPAs were validly issued, and because Appellee had no right to challenge that tardiness of issuing the CPAs in a direct administrative appeal, it is apparent that the Commission should have dismissed Appellee's administrative appeal and should not have vacated the CPAs.

{¶62} Appellant's next argument is that the Commission conducted its review based on factors not found in R.C. §1513.02 or other related statutes. According to R.C. §1513.02(E)(1), the Division was required to consider four factors prior to issuing the CPA: "In determining the amount of the penalty, consideration shall be given to the person's history of previous violation at the particular coal mining operation; the seriousness of the violation, including any irreparable harm to the environment and any hazard to the health or safety of the public; whether the person was negligent; and the demonstrated diligence of the person charged in attempting to achieve rapid compliance after notification of the violation." These factors all relate to the amount of the penalty, and the amount of the penalty is something which may be appealed. The Commission, though, based its decision on the fact that the CPAs were issued after the 30-day deadline had passed, which is not a factor listed in R.C. §1513.02. Once again, the non-statutory factor that the Commission used was improper primarily because it was jurisdictional; it relates to a

matter that could not be appealed in the first place, namely, the authority of the Director to issue a CPA after the 30-day deadline in R.C. §1513.02(E)(3) had passed.

{¶63} The Division cites a case from this Court, *C. & T. Evangelinos v. Div. Of Mineral Resources Mgmt.*, 7th Dist. No. 03 BE 70, 2004-Ohio-7061, that has some relevance to this appeal. The underlying dispute in *Evangelinos* concerned the validity of a mining permit after the Division had issued a renewal of the permit. The mining company that originally held the permit had filed notices that it was temporarily suspending operations, and then applied to the Division to transfer its permit to another mining company. The transfer was approved, but the new permit owner also filed notices requesting postponement of mining operations. According to R.C. §1513.07(A)(3), a mining permit shall terminate if mining has not commenced within three years after the permit is issued. However, R.C. §1513.07(A)(3) also provides that the chief of the Division may grant reasonable extensions for certain designated reasons.

{¶64} During the fourth year of the permit, the new mining company filed to renew the permit for another five years, and this renewal was retroactively granted 17 months later.

{¶65} After the permit was renewed, the owner of the land who had granted the mining rights filed an appeal to the Commission challenging the validity of the renewed mining permit. The landowner argued, in part, that the Division was required by R.C. §1513.07(l)(1) to rule on the renewal application within 60 days, and that there was no statutory authority to grant the renewal 17 months after the mining company had applied for it. Id. at ¶78.

{¶66} The Commission concluded that the statute in question did not establish a penalty for the Division's failure to act within 60 days, and that "[t]he Division's apparent disregard of time deadlines, while frustrating to both citizens and permittees, is simply not grounds for permit denial under the statute." Id. at ¶79. We agreed with the Commission's interpretation of the statute and affirmed their decision.

{¶67} The *Evangelinos* holding is completely consistent with our analysis in the instant case. Similar to our holding in *Evangelinos*, I would also conclude in this appeal that there are no statutory consequences set forth if the Division issues a CPA after the 30-day deadline, and thus, that the CPAs were validly issued even after 134 and 252 days. Appellee would have us further address the reasonableness of the delay, but as I stated earlier, Appellee has no right to appeal this issue since it does not pertain to the amount of the penalty or the fact of the violation itself. Thus, "reasonableness" should not be an issue.

{¶68} Even if the record did not clearly reflect, in my opinion, that the matter should have been dismissed on jurisdictional grounds, I would still reverse the decision of the Commission and reinstate the fines. The record reflects that Cravat Coal did not assert or prove that they were harmed by the delay in issuing the CPAs. Cravat Coal obviously knew that some sort of penalty would be forthcoming because it admitted from the beginning that it committed the violations. It was also to their advantage to ignore the fact that no CPAs were being issued because the delay allowed Cravat Coal to keep using the funds that would be needed to pay the fines that were ultimately imposed.

{¶69} The decision of the majority concerns me, also, because of the precedent it sets. The record clearly indicates that the delay in issuing the CPAs was due to a manpower shortage in the Division of Mineral Resources. If there is a manpower shortage, then it is likely there will be further delays in issuing CPAs, and further challenges to the validity of other CPAs based merely on how long it took to issue each CPA. It would appear that the best way to thwart the enforcement efforts of the Division is for mining companies to violate as many regulations as possible, thus overwhelming the Division with work and ensuring that no CPAs will be issued in a timely fashion.

{¶70} I am persuaded by Appellant's arguments and would vacate the order of the Commission based on its lack of subject matter jurisdiction to hear the issue raised by Appellee in the administrative appeal. Therefore, I must dissent from the majority opinion in this case.