[Cite as *Trans Rail Am., Inc. v. Enyeart,* 2007-Ohio-7144.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Trans Rail America, Inc.,	:	
Appellant-Appellant,	:	Nos. 07AP-273 and 07AP-284
v.	:	(ERAC No. 785917)
James J. Enyeart, M.D., Health Commissioner, Trumbull County Health Department,	:	(ACCELERATED CALENDAR)
Appellee-Appellee.	:	

O P I N I O N

Rendered on December 31, 2007

Walter & Haverfield, LLP, *Michael A. Cyphert*, *Leslie G. Wolfe*, and *Jonathan R. Goodman*, for appellant.

Ronald James Rice Co., LPA, and *Robert C. Kokor*, for appellee.

APPEAL from the Environmental Review Appeals Commission

KLATT, J.

{¶1} Appellant, Trans Rail America, Inc. ("Trans Rail"), appeals from an order of the Environmental Review Appeals Commission ("ERAC") dismissing its appeal against appellee, James J. Enyeart, M.D., Health Commissioner of the Trumbull County Health Department ("Commissioner"). For the following reasons, we reverse.

{¶2} On May 21, 2004, Trans Rail applied to the Trumbull County Health Department ("Health Department") for a license to establish a construction and demolition

debris facility in Hubbard, Ohio.[1] In a July 16, 2004 letter, the Commissioner stated that the Health Department could not consider Trans Rail's application because it was incomplete. To assist Trans Rail in the application process, the Commissioner identified the parts of the application that did not comply with Ohio Adm.Code 3745-37-02(E), which enumerates the items that a construction and demolition debris facility license application must include.

{¶3} Representatives of CT Consultants, Inc. ("CT Consultants"), an engineering firm that Trans Rail hired to oversee the application process, met with the Commissioner to discuss the application. On December 16, 2005, CT Consultants delivered to the Commissioner written responses and additional documents to resolve the deficiencies in Trans Rail's application. In a letter dated February 15, 2006, the Commissioner acknowledged receipt of the additional information, but he again found that the application was incomplete and refused to consider it. The Commissioner attached to the February 15, 2006 letter a report generated by Bennett & Williams Environmental Consultants, Inc. ("Bennett & Williams"), a firm that the Health Department hired to evaluate Trans Rail's application. The Commissioner directed Trans Rail to address those areas of the application that the report found were lacking the necessary information.

{¶4} In two letters dated March 30, 2006, CT Consultants replied to the comments in Bennett & Williams' report and submitted further information regarding the proposed construction and demolition debris facility. In a response letter dated May 31,

[1] Former R.C. 3714.06(A) required applicants to submit their construction and demolition debris facility applications to the local board of health if that local board of health appeared on the "approved list." If it did not, then former R.C. 3714.06(A) directed applicants to apply to the Director of the Ohio Environmental Protection Agency. As the Health Department is on the "approved list," Trans Rail applied there.

2006, the Commissioner concluded that Trans Rail's application still failed to comply with Ohio Adm.Code 3745-37-02(E), and he again deemed the application incomplete. The Commissioner attached to his letter a second report from Bennett & Williams that characterized CT Consultants' March 30, 2006 replies as an inadequate answer to the concerns listed in the first report.

{¶5} On June 30, 2006, Trans Rail filed an appeal before the ERAC asserting one assignment of error:

> The Health Department erred in determining that Trans Rail's [Construction Demolition and Debris] License Application was incomplete and could not be considered under the requirements of Ohio Administrative Code ("O.A.C.") Rule 3745-37-02(A)(2).

Trans Rail asked the ERAC to find that its application was complete and to order the Health Department to consider it. The Commissioner moved to dismiss Trans Rail's appeal for lack of subject matter jurisdiction. The Commissioner argued that the May 31, 2006 letter was not an appealable action under R.C. 3745.04, which delineates the scope of the ERAC's jurisdiction. The ERAC agreed with the Commissioner's argument, concluding that the May 31, 2006 letter was an intermediate step in the continuing application process (and not an appealable action). In reaching this conclusion, the ERAC evaluated the evidence and held that it was reasonable for the Commissioner to determine that Trans Rail's application was incomplete. Pursuant to its decision, the ERAC issued a final order dismissing Trans Rail's appeal on March 8, 2007.

{¶6} Trans Rail now appeals from the March 8, 2007 final order and assigns the following errors:

> 1. THE ENVIRONMENTAL REVIEW APPEALS COMMISSION ERRED IN FINDING THAT IT LACKED

> SUBJECT MATTER JURISDICTION TO HEAR THE APPEAL ON THE GROUNDS THAT THE APPELLEE HEALTH DEPARTMENT'S DETERMINATION OF INCOMPLETENESS OF APPELLANT'S LICENSE APPLICATION WAS NOT A FINAL APPEALABLE ACT OR ACTION.
>
> 2. THE ENVIRONMENTAL REVIEW APPEALS COMMISSION ERRED IN FINDING THE APPELLEE HEALTH DEPARTMENT'S DETERMINATION OF INCOMPLETENESS TO BE REASONABLE DESPITE THE COMMISSION'S FINDING THAT IT LACKED JURISDICTION TO HEAR THE APPEAL.

{¶7} By its first assignment of error, Trans Rail argues that the ERAC erred in dismissing its appeal for lack of subject matter jurisdiction. We agree.

{¶8} An administrative agency has only those powers that the General Assembly expressly confers upon it. *Shell v. Ohio Veterinary Med. Licensing Bd.*, 105 Ohio St.3d 420, 2005-Ohio-2423, at ¶32; *State ex rel. Lucas Cty. Bd. of Commrs. v. Ohio Environmental Protection Agency* (2000), 88 Ohio St.3d 166, 171. When the General Assembly invests an administrative agency with the power to hear appeals, statutory language determines the parameters of the agency's jurisdiction. *Waltco Truck Equip. Co. v. Tallmadge Bd. of Zoning Appeals* (1988), 40 Ohio St.3d 41, 43; *Cordial v. Ohio Dept. of Rehab. & Corr.*, Franklin App. No. 05AP-473, 2006-Ohio-2533, at ¶20. In interpreting a jurisdictional statute, courts cannot ignore portions of the statute, nor can they insert words or phases into the statute. *State v. Craig*, 116 Ohio St.3d 135, 2007-Ohio-5752, at ¶14; *Hall v. Banc One Mgt. Corp.*, 114 Ohio St.3d 484, 2007-Ohio-4640, at ¶24. Rather, where the statute is plain and unambiguous, courts are obligated to apply it as written. *Davis v. Davis*, 115 Ohio St.3d 180, 2007-Ohio-5049, at ¶15; *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, at ¶11.

{¶9} The parameters of the ERAC's jurisdiction are set forth in R.C. 3745.04(B), which reads:

> 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 or a local board of health, or ordering the director or board of health to perform an act.

We have previously found that this provision allows the appeal of "actions" to the ERAC. *Dayton Power and Light Co. v. Schregardus* (1997), 123 Ohio App.3d 476, 478. However, in addition to empowering the ERAC with the ability to review actions, the statute also authorizes the ERAC to order the performance of acts. Thus, the statute invests the ERAC with jurisdiction over two types of appeals: (1) an appeal from an "action" that the ERAC may vacate or modify, and (2) an appeal requesting that the ERAC order the performance of an "act." R.C. 3745.04(A) defines "action" and "act" to include "the issuance, denial, modification, or revocation of a license, permit, lease, variance, or certificate."

{¶10} In the case at bar, Trans Rail's appeal requests that the ERAC order the Health Department to either issue or deny it a license to establish a construction and demolition debris facility. R.C. 3745.04(B) grants the ERAC the power to order the Health Department to perform an "act," which includes the ability to order the issuance or denial of a license. Therefore, the ERAC has the authority to consider whether the application is complete and, if it is, to order the Health Department to issue or deny Trans Rail a license.

{¶11} Our analysis does not require consideration of whether the Commissioner's May 31, 2006 letter constitutes a "final" action. The ERAC and, if necessary, this court

must determine whether an action is final only if the aggrieved party requests that the ERAC vacate or modify the action. See *US Technology Corp. v. Korleski*, Franklin App. No. 07AP-383, 2007-Ohio-5922. Because Trans Rail seeks an order requiring the performance of an act, i.e., the issuance or denial of a license, Trans Rail's appeal does not depend upon the finality of the May 31, 2006 letter.

{¶12} Having concluded that the ERAC has jurisdiction over Trans Rail's appeal, we sustain Trans Rail's first assignment of error.

{¶13} By Trans Rail's second assignment of error, it argues that the ERAC prematurely determined the merits of its appeal. We agree.

{¶14} If neither the Director of the Ohio Environmental Protection Agency nor a board of health conducts an adjudicatory hearing, then the ERAC must conduct a hearing de novo on the appeal. R.C. 3745.05. In the case at bar, no hearing has ever occurred. Nevertheless, the ERAC ruled upon the merits of Trans Rail's appeal, holding that Trans Rail's application was incomplete. We conclude that the ERAC erred in making a substantive ruling without a hearing, and thus, we sustain Trans Rail's second assignment of error.

{¶15} For the foregoing reasons, we sustain Trans Rail's first and second assignments of error. Further, we reverse the March 8, 2007 final order of the Environmental Review Appeals Commission, and we remand this matter to that commission for further proceedings in accordance with law and this opinion.

Order reversed and matter remanded.

TYACK, J., concurs.
FRENCH, J., dissents.

FRENCH, J., dissenting.

{¶ 16} In its opinion, the majority concludes that the Environmental Review Appeals Commission ("ERAC") has jurisdiction over an appeal from a letter finding a license application incomplete. The majority reaches this conclusion based solely on ERAC's authority under R.C. 3745.04(B) to order the director of the Ohio Environmental Protection Agency ("director" or "Ohio EPA") or a board of health "to perform an act" and with no consideration as to whether the letter constitutes a final act or action appealable under R.C. 3745.04. Because I strongly disagree with the majority's interpretation of applicable law, I dissent.

{¶ 17} The specific question in this case is whether ERAC has jurisdiction over an appeal by appellant, Trans Rail America, Inc. ("appellant"), from a finding by appellee, James J. Enyeart, M.D., Health Commissioner, Trumbull County Health Department ("appellee"), that appellant's application for a license to establish a construction and demolition debris ("C&DD") facility was incomplete. As detailed in the majority opinion, appellant first applied for the license in May 2004. Over the next two years, appellee twice found the application to be incomplete, despite appellant's submissions of additional information. Finally deciding that it had no remedy but to appeal to ERAC, appellant filed an appeal from appellee's May 31, 2006 letter, which indicated for the third time that appellant's application was incomplete.

{¶ 18} On appeal, ERAC analyzed whether the May 31, 2006 letter was a final action appealable under R.C. 3745.04. ERAC ultimately determined that appellee's requests were reasonable and that the letter was not appealable, and ERAC dismissed the appeal for lack of jurisdiction.

{¶ 19} Before this court, appellant's first assignment of error asserts that ERAC erred in finding that it had no jurisdiction. In support, appellant asserts that the letter constituted a final action appealable under R.C. 3745.04 because the circumstances surrounding the letter were indicative of a final appealable order and because it materially and adversely affected appellant's property rights. Following submission of briefs and oral argument, this court asked the parties to submit supplemental briefing regarding the jurisdictional impact of ERAC's authority under R.C. 3745.04(B) to issue an order "ordering the director or board of health to perform an act." In the end, without considering whether appellee's letter constituted a final action under R.C. 3745.04, the majority relies solely on ERAC's authority under R.C. 3745.04(B) and concludes that ERAC had jurisdiction. I disagree.

{¶ 20} R.C. 3745.04(B) provides, in pertinent part:

> Any person who was a party to a proceeding before the director of environmental protection may participate in an appeal to [ERAC] for an order vacating or modifying the action of the director or a local board of health, or ordering the director or board of health to perform an act. [ERAC] has exclusive original jurisdiction over any matter that may, under this section, be brought before it.

{¶ 21} Clearly, R.C. 3745.04(B) gives ERAC authority to order the director or board of health "to perform an act." This grant of power is not in isolation, however. References throughout R.C. 3745.04 make clear that there must first be a final "act" or "action" to trigger ERAC jurisdiction.

{¶ 22} For example, R.C. 3745.04(D) requires appeals to be in writing and to "set forth the action complained of." That same subsection provides that appeals must be

filed within 30 days after notice of the "action," and the filing of an appeal does not automatically suspend "the action appealed from."

{¶ 23} R.C. 3745.04(A) also provides that, as used in R.C. 3745.04:

> * * * "[A]ction" 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.

{¶ 24} For decades, this court has recognized that the terms "act" and "action" include, but are not limited to, the actions enumerated in R.C. 3745.04(A). As this court stated in *Youngstown Sheet & Tube Co. v. Maynard* (1984), 22 Ohio App.3d 3, 6:

> The General Assembly * * * in drafting R.C. 3745.04 chose to illustrate rather than define an appealable action, thereby vesting [ERAC's predecessor, the Environmental Board of Review] with jurisdiction over acts of the director beyond the adoption, modification or repeal of a rule. Past decisions of this court illustrate that the broad definition of appealable acts contained in the statute is to be liberally construed in favor of appeals to [ERAC]. See, e.g., *Cain Park Apts. v. Nied* (June 25, 1981), Franklin App. No. 80AP-817 et seq., unreported.

{¶ 25} When faced with an action not enumerated in R.C. 3745.04(A), this court has analyzed the challenged action or failure to act and considered whether it affects the appellant's rights, privileges or property. For example, in *Dayton Power & Light Co. v. Schregardus* (1997), 123 Ohio App.3d 476, this court considered whether ERAC properly dismissed an appeal from the director's decision to place a site on a master site list of contaminated properties. The court found that the site owner had no opportunity to contest the listing, which government officials and businesses would rely on when evaluating property. The court ultimately remanded the matter to ERAC for a hearing to

determine whether the listing "affected a substantial legal right with finality and/or that Ohio EPA exceeded its authority by promulgating" the list. Id. at 481.

{¶ 26} This court recently distinguished *Dayton Power & Light* in *US Technology Corp. v. Korleski*, Franklin App. No. 07AP-383, 2007-Ohio-5922. In *US Technology*, this court considered whether a letter issued by an Ohio EPA employee was a final action appealable to ERAC under R.C. 3745.04. While concluding that "the letter, in form," was not a final action, the court acknowledged "that the letter nonetheless may constitute final action if in substance it finally adjudicates [the appellant's] legal rights." Id. at ¶7. After considering the course of conduct between Ohio EPA employees and the appellant, the content of Ohio EPA's communications with the appellant, and the status of Ohio EPA's findings with respect to alleged violations of environmental laws, the court concluded that the letter was not a final action appealable to ERAC. Rather, it "was the latest in a series of meetings and letters addressing issues" between the two parties. Id. at ¶11. Therefore, ERAC had no jurisdiction to review it.

{¶ 27} In contrast, here, the majority does not analyze whether ERAC properly determined that it lacked jurisdiction over appellee's May 31, 2006 letter because it was not a final action appealable under R.C. 3745.04. Instead, the majority relies solely on ERAC's authority under R.C. 3745.04(B) to order the director or the board "to perform an act." Not only is this interpretation contrary to past decisions of this court, it creates a dangerous precedent for interference in the comprehensive statutory scheme for the issuance of environmental licenses and permits, a precedent with the potential to extend well beyond the facts of the case before us.

{¶ 28} R.C. 3745.07 establishes the process Ohio EPA must follow when issuing, denying, modifying, revoking or renewing a license, including a C&DD facility license under R.C. Chapter 3714. R.C. 3745.07 provides that the director may issue a "proposed action" indicating the director's intended action. If the director receives an objection to the proposed action, the director must hold an adjudication hearing before issuing a final decision, which triggers appeal rights under R.C. 119.09. If the director issues or denies a license without first issuing a proposed action, then "any person who would be aggrieved or adversely affected thereby" may appeal to ERAC within 30 days of the issuance or denial. R.C. 3745.07.

{¶ 29} R.C. 3714.09 grants to approved boards of health the specific authority to issue, deny, suspend, and revoke C&DD facility licenses. R.C. 3714.10 states: "Appeal from any suspension, revocation, or denial of a license shall be made in accordance with" R.C. 3745.02 to 3745.06.

{¶ 30} Nowhere in these statutes authorizing the issuance and denial of licenses generally, or even C&DD facility licenses specifically, is there authority for an appeal to ERAC before a final action by Ohio EPA or the board of health, and allowing a premature appeal, i.e., an appeal prior to a final action that adjudicates the rights of the applicant, interferes with this legislative scheme. Rather than requiring an applicant to complete the statutory process, the majority opinion allows an applicant to circumvent the process by prematurely appealing an agency's request for additional information or finding that an application is incomplete.

{¶ 31} Here, ERAC clarified that it did "not intend to imply that repeated, unreasonable requests for additional information by a licensing authority could never"

give rise to a final appealable action under R.C. 3745.04. (Final Order at 19, fn. 9.) In fact, the appropriate analysis for determining whether such repeated requests do give rise to a final action appealable under R.C. 3745.04 is the analysis used by this court in its prior decisions and articulated by ERAC in this case, i.e., consideration of whether the form of the action indicates finality and whether the action materially and adversely affects the rights of the appellant, not simple reliance on ERAC's authority to order the director or the board "to perform an act."

{¶ 32} In my view, the better reading of R.C. 3745.04(B) is that the General Assembly intended to grant ERAC authority to order the director or the board of health to perform an act where, for example, the director or board denied an approval that ERAC determines should have been granted. In that scenario, ERAC would not rely on its authority to issue an order "vacating or modifying the action," but would rely on its authority to issue an order "ordering the director or board of health to perform an act," i.e., to grant the approval it deems appropriate. This reading of R.C. 3745.04(B) maintains the integrity of both the legislative scheme and the administrative process for considering license and permit applications, and it ensures that ERAC will not be burdened with premature appeals.

{¶ 33} In the end, I would find that ERAC properly identified the factors it must consider in determining whether it has jurisdiction over the appeal. Specifically, having concluded that the May 31, 2006 letter did not reflect an "act" or "action" enumerated in R.C. 3745.04(A), ERAC considered the form and substance of the document. I agree with ERAC's determination that, in form, the letter does not constitute a final action: the letter does not indicate that it is a final action; it does not advise appellant of a right to

appeal; and it contains no indication that appellee understood, journalized or documented the letter as a final action.

{¶ 34} ERAC also recognized correctly that the May 31, 2006 letter still could constitute a final action if it met certain substantive criteria, as follows:

> Even if a document does not, in form, constitute a final action it may still be a final action if the substance of the document adjudicates with finality any legal right or privilege of the appealing party. Conversely, if the document represents an intermediate step in a continuing process, or if the contents of the document indicate that it is only a segment of an evaluation that will ultimately lead to a final action, then, at that juncture, no final appealable action has occurred. Thus, the final inquiry [ERAC] must make is whether [appellee's] May 31, 2006 letter adjudicates with finality any legal right or privilege of [appellant]. * * *

(Final Order at 14, ¶8.)

{¶ 35} I concur in ERAC's articulation of the test for determining whether the letter was appealable under R.C. 3745.04. Nevertheless, I would remand this matter to ERAC for further consideration of the jurisdictional question. Specifically, I would conclude that ERAC improperly relied on *CECOS Internatl., Inc. v. Shank* (1991), 74 Ohio App.3d 43, to conclude that appellee's "determination that [appellant's] application was incomplete was reasonable and its request for additional information was well within its regulatory authority." (Final Order at 18-19, ¶14.) In *CECOS*, the director had denied a hazardous waste permit renewal, in part because the director found that CECOS had failed to submit a complete and adequate application in compliance with administrative rules. ERAC's predecessor affirmed the determination, and this court affirmed. Here, ERAC relied on *CECOS* to conclude in this case that appellee has discretion to determine whether an

application is complete and that appellee's requests for additional information were reasonable under the circumstances.

{¶ 36} In contrast to the case before us, however, in *CECOS*, neither ERAC nor this court had to determine whether the director's finding that the application was incomplete was a final action appealable under R.C. 3745.04. Rather, in *CECOS*, ERAC and this court considered the merits of that finding on appeal from the director's final action denying the application. See, also, *Harmony Environmental Ltd. v. Morrow Cty. Dist. Bd. of Health*, Franklin App. No. 04AP-1338, 2005-Ohio-3146 (decision regarding completeness of C&DD license application on appeal from board's final action denying application).

{¶ 37} Here, ERAC correctly stated that, in order to determine whether it has jurisdiction over appellant's appeal, ERAC must first determine whether the May 31, 2006 letter "adjudicates with finality any legal right or privilege" of appellant. Only after finding jurisdiction proper may ERAC proceed to the merits, i.e., deciding whether the application is complete.

{¶ 38} Admittedly, ERAC concluded that the May 31, 2006 letter "was not a final appealable action, but rather, represents an intermediate step in a continuing process." (Final Order at 19, ¶15.) However, ERAC reached that conclusion without analyzing the factors it had identified previously. Therefore, while I would overrule the substance of appellant's first assignment of error, I would remand this case for further consideration in accordance with the appropriate jurisdictional test, as articulated by ERAC and this court.

{¶ 39} In its second assignment of error, appellant asserts that ERAC erred by finding the May 31, 2006 incompleteness determination to be reasonable without an

evidentiary hearing. Having concluded that ERAC must consider the jurisdictional question further, I would conclude that appellant's second assignment of error is moot.

{¶ 40} In conclusion, the majority having determined that ERAC has jurisdiction under the express terms of R.C. 3745.04(B) and having sustained appellant's assertion that ERAC erred by addressing the merits of the appeal without a hearing, I respectfully dissent.

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