[Cite as *Washington Environmental Servs., L.L.C. v. Morrow Cty. Dist. Bd. of Health*, 2010-Ohio-2322.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Washington Environmental Services, LLC,	:	
	:	
Appellant-Appellee,	:	No. 09AP-920
	:	(ERAC No. 256170)
v.		
	:	(REGULAR CALENDAR)
Morrow County District Board of Health,		
	:	
Appellee-Appellant.	:	

D E C I S I O N

Rendered on May 25, 2010

Bott Law Group, LLC, *April Bott*, and *Sarah Herbert*, for appellee.

Eastman & Smith, Ltd., *Joseph R. Durham*, *Rene L. Rimelspach*, and *Albin Bauer*, for appellant.

APPEAL from the Environmental Review Appeals Commission

KLATT, J.

{¶1} Appellant, the Morrow County District Board of Health ("Board"), appeals from a final order of the Environmental Review Appeals Commission ("ERAC") that: (1) vacated the Board's denial of the request to transfer the construction and demolition debris facility license from Washington Environmental Ltd. ("WEL") to appellee, Washington Environmental Services, LLC ("WES"), and (2) remanded the matter to the Board with instructions to grant the license transfer request. For the following reasons,

we affirm in part, reverse in part, and remand this matter to the ERAC for further consideration.

{¶2} On April 17, 2006, the Board issued a construction and demolition debris facility license to WEL. Approximately a year later, WEL requested that the Board transfer that license to WES. Pursuant to R.C. 3714.052(D), a request to transfer a construction and demolition debris facility license must include all the information required by R.C. 3714.052(A). In compliance with R.C. 3714.052(A), WEL's request to transfer identified the key employees that would operate the construction and demolition debris facility. As stated in the request:

> Joseph Rutigliano, Martin Sternberg, Frank Antonacci and Gerald Antonacci will have complete decision-making authority for all aspects of the landfill. Jonathan Murray will have decision-making authority in connection with the day-to-day aspects of the operations of the landfill.

The request also informed the Board that: (1) one or more of the key employees owned and/or operated solid waste transfer stations and processing facilities in Connecticut and New York, and (2) Murray operated, but did not own, four waste disposal facilities in Massachusetts. Additionally, the request indicated that neither WES nor its key employees had ever been involved in an enforcement action, a civil action in which damages, injunctive relief, or other civil relief was imposed, or a criminal action resulting in a guilty plea or conviction in connection with any violation of environmental protection law. Moreover, according to WEL, no such actions were pending at the time it submitted the request.

{¶3} Krista Wasowski, the Morrow County Health Commissioner, responded to WEL's request with a letter asking for more information about the waste-related facilities

identified in the request, including a list of any administrative enforcement orders arising from those facilities' violations of environmental protection laws. Wasowski also requested that WEL provide her with information about any criminal actions instigated against WES' key employees.

{¶4} WES (not WEL) replied to Wasowski's letter. In its September 4, 2007 reply, WES asserted that Wasowski's request for information about the transfer and transload stations owned and operated by one or more of its key employees exceeded the scope of R.C. 3714.052(A). WES contended that R.C. 3714.052(A) only required WES to disclose information about construction and demolition debris facilities and other waste disposal facilities. According to WES, transfer and transload stations did not fall within either of these two categories. Nevertheless, WES listed 13 transfer and transload stations that were or had been owned or operated by a key employee. WES also admitted that one of these facilities, F&G Recycling, had entered into a consent order with the Connecticut Department of Environmental Protection to resolve violations of that state's environmental laws.

{¶5} The September 4, 2007 letter also sought to clarify Murray's role in the operation of the four Massachusetts waste disposal facilities. WES explained that:

> All four of [the] facilities are owned and operated by Waste Management, Inc., the largest waste disposal handler in the nation. Jonathan Murray, who has been listed as a key employee of these facilities, was employed at these facilities at different times to oversee the daily operations of the landfill. Mr. Murray had no ownership interest in the landfills or in Waste Management. Mr. Murray had no discretionary authority over the manner in which the landfills were operated, nor did he make or set policy for the landfill. At all times while employed by Waste Management, Mr. Murray was supervised administratively by at least six superiors in the company.

WES went on to state that Murray had ended his employment with Waste Management, and thus, he no longer had access to its records regarding administrative actions or environmental compliance. However, to the best of Murray's knowledge, during his tenure at the four waste disposal facilities, the facilities were in compliance with environmental laws. WES also provided Wasowski with the names and contact information for the various agencies that regulated the four facilities.

{¶6} Finally, in the September 4, 2007 letter, WES represented to Wasowski that neither it nor its key employees had any past criminal convictions for the offenses listed in R.C. 3734.44(B)(1) through (16). R.C. Chapter 3734 governs solid and hazardous wastes, and R.C. 3734.44(B) enumerates the crimes that, if committed by an individual who is listed in an applicant's disclosure statement or who has a beneficial interest in the applicant, bar the issuance of a license or permit under that chapter.

{¶7} To supplement the information received from WEL and WES, Wasowski conducted research of public sources and gathered information through public records requests. In her investigation, Wasowski uncovered three administrative consent orders arising from violations of environmental laws committed at two of the solid waste facilities that Murray managed. The Massachusetts Department of Environmental Protection ("Massachusetts DEP") mailed executed copies of each consent order to Murray, and in one instance, Murray signed the consent order on behalf of the facility. Murray was also the recipient of eight notices of noncompliance from the Massachusetts DEP regarding the two facilities' violations of Massachusetts environmental laws. Additionally, Wasowski discovered that Rutigliano had a 1998 conviction for petit larceny in New York.

{¶8} After concluding a review of the information that she had collected, Wasowski drafted her report and recommendation to the Board. In that report, Wasowski recommended that the Board deny WEL's request to transfer. Wasowski opined that the consent orders and conviction, in addition to WES' failure to disclose this information, indicated that WES lacked sufficient reliability, expertise, and competence to operate the construction and demolition debris facility in substantial compliance with Ohio law.

{¶9} On December 17, 2007, the Board adopted a resolution to issue a notice of intent to deny the transfer of the construction and demolition debris facility license from WEL to WES. The Board gave WEL 30 days in which to request an adjudicatory hearing. Absent a hearing request, the Board indicated that it would deny the request to transfer at its next regularly scheduled meeting.

{¶10} Both WEL and WES requested a hearing. Prior to the hearing, WES submitted to the Board testimony from Murray and Rutigliano. Murray testified that during his employment with Waste Management, he served as a district manager. His duties included managing the Chicopee Sanitary Landfill ("Chicopee") and the Granby-Holyoke Landfill ("Granby-Holyoke")—the two waste disposal facilities subject to the consent orders and notices of noncompliance that Wasowski had discovered. With regard to these facilities, Murray stressed that he had no supervisory or discretionary authority to make decisions, absent direction from his supervisors.

{¶11} Rutigliano testified that he pleaded guilty to petit larceny in 1998, but he maintained that his conviction did not arise from a violation of any environmental protection law. He also stated that the New York Supreme Court had issued him a

Certificate of Relief from Disabilities, which removed all disabilities and bars to employment and represented complete rehabilitation.

{¶12} At the hearing, Wasowski and attorneys for WEL and WES presented their arguments to the Board. The Board subsequently issued a final order denying the request to transfer. In the final order, the Board cited four reasons for denying the request. First, the Board found that WEL had falsely stated that Murray had not been involved in administrative enforcement actions. Additionally, the Board found that WES misrepresented to Wasowski that, during Murray's tenure at the Chicopee and Granby-Holyoke facilities, the facilities were in compliance with all environmental laws. According to the Board, "[s]uch false statements indicate that Jonathan Murray lacks sufficient reliability, expertise, and competence to operate a construction and demolition debris facility in substantial compliance with the Ohio Revised Code and rules adopted under it." Board order, at ¶35. Second, the Board found that Murray was involved in operating waste disposal facilities with a history of substantial noncompliance with Massachusetts environmental law, which indicated that Murray lacked sufficient reliability, expertise, and competence to operate a construction demolition and debris facility in substantial compliance with Ohio law. Third, the Board found that WES falsely represented that none of its key employees had a criminal conviction for the offenses listed in R.C. 3734.44(B)(1) through (16). The Board concluded that Rutigliano's conviction for petit larceny constituted a theft offense, which is an offense named in R.C. 3734.44(B)(10). Consequently, based upon WES' misrepresentation regarding Rutigliano's criminal background, the Board found that WES lacked sufficient reliability, expertise, and competence to operate a construction and demolition debris facility in substantial

compliance with Ohio law. Fourth, the Board found that "there [was] additional evidence of noncompliance with environmental laws [ ] involving transfer or transload stations owned or operated by Frank Antonacci and Gerald Antonacci to indicate that the proposed transferee lack[ed] sufficient reliability, expertise and competence to operate in substantial compliance with Ohio statutes and regulations." Board order, at ¶43.

{¶13} WES appealed the Board's order to the ERAC. On September 2, 2009, the ERAC issued its decision. Preliminarily, the ERAC recognized that the Board could deny the request to transfer if:

> [T]he applicant or any other person listed on the application, in the operation of construction and demolition debris facilities or other waste disposal facilities, has a history of substantial noncompliance with state and federal laws pertaining to environmental protection * * * that indicates that the applicant lacks sufficient reliability, expertise, and competence to operate [a] * * * construction and demolition debris facility in substantial compliance with this chapter and rules adopted under it.

R.C. 3714.052(B). Analyzing the evidence in light of the standard set forth in R.C. 3714.052(B), the ERAC found that none of the Board's reasons for denying the request to transfer withstood scrutiny. First, the ERAC found that the evidence did not establish that Murray was involved in the operation of the Chicopee or Granby-Holyoke waste disposal facilities at the time of the noted compliance issues. Second, the ERAC concluded that WES' false statement about Rutigliano's conviction could not serve as a basis for denying the transfer because R.C. 3714.052(B) did not permit denial because of a misrepresentation contained in a request to transfer. Finally, the ERAC found that a single consent order, issued more than five years prior to the filing of the request to transfer and which the Board failed to evaluate, did not demonstrate that F&G Recycling,

which the Antonaccis owned and operated, had a history of substantial noncompliance with environmental law. Consequently, the ERAC vacated the Board's order and remanded the matter to the Board for it to grant the request to transfer.

{¶14} The Board now appeals to this court, and it assigns the following errors:

> [1.] The Environmental Review Appeals Commission erred when it reversed the decision of the Morrow County Board of Health denying the transfer of a license to operate a construction and demolition debris facility to Appellant-Appellee.
>
> [2.] The Environmental Review Appeals Commission erred when it determined that misrepresentations or omissions of material fact contained in a license transfer application [are] an insufficient basis to deny a license transfer request to operate a construction and demolition debris facility.

{¶15} We will address the Board's second assignment of error first. By that assignment of error, the Board argues that R.C. 3714.052(B) allows it to deny a request to transfer if, for any reason, it determines that an applicant lacks sufficient reliability, expertise, and competence to operate a construction and demolition debris facility in substantial compliance with Ohio law. We disagree.

{¶16} A person who has received a construction and demolition debris facility operation license may request to transfer that license to another person upon the sale of the construction and demolition debris facility. R.C. 3714.06(B). A board of health may deny the transfer of the license "for any of the reasons specified in division (B) of section 3714.052 of the Revised Code for the denial of an application for a permit to install." Id. See also R.C. 3714.052(D) (permitting the denial of a request to transfer "if the information regarding the transferee indicates any of the reasons specified in division (B)

of this section for the denial of an application for a permit to install"). In its entirety, R.C. 3714.052(B) states:

> If the applicant for a permit to install has been involved in any prior activity involving the operation of a construction and demolition debris facility or other waste disposal facility, the director of environmental protection or a board of health, as applicable, may deny the application if the director or board finds from the application, the information submitted under divisions (A)(1) to (4) of this section, pertinent information submitted to the director or board, and other pertinent information obtained by the director or board at the director's or board's discretion that the applicant or any other person listed on the application, in the operation of construction and demolition debris facilities or other waste disposal facilities, has a history of substantial noncompliance with state and federal laws pertaining to environmental protection or the environmental laws of another country that indicates that the applicant lacks sufficient reliability, expertise, and competence to operate the proposed new construction and demolition debris facility in substantial compliance with this chapter and rules adopted under it.

{¶17} Interpreting R.C. 3714.052(B), the ERAC held that any finding that an applicant lacks sufficient reliability, expertise, and competence to operate a construction and demolition debris facility must be predicated on the applicant's previous involvement with a construction and demolition debris or other waste disposal facility and that facility's history of substantial noncompliance with state, federal, or international environmental laws. The ERAC also determined that:

> Nothing in [R.C. 3714.052(B)] authorizes a Board of Health to find that an applicant lacks reliability, expertise, and competence based on prior civil or criminal proceedings of a non-environmental nature or an applicant's failure to disclose such proceedings; this statutory provision is simply not that broad.

ERAC final order, at 59.

{¶18} When interpreting a statute, a court must first examine the plain language of the statute itself to determine the legislative intent. *Kraynak v. Youngstown City School Dist. Bd. of Edn.*, 118 Ohio St.3d 400, 2008-Ohio-2618, ¶10; *Cleveland Mobile Radio Sales, Inc. v. Verizon Wireless*, 113 Ohio St.3d 394, 2007-Ohio-2203, ¶12. If the statute's meaning is clear, unequivocal, and definite, then statutory interpretation ends, and the court applies the statute according to its terms. *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, ¶19; *Hubbell v. Xenia*, 115 Ohio St.3d 77, 2007-Ohio-4839, ¶11. This process requires the court to enforce an unambiguous statute as it is written, making neither additions to nor deletions from the statutory language. *Howard v. Miami Twp. Fire Div.*, 119 Ohio St.3d 1, 2008-Ohio-2792, ¶20. See also *Columbia Gas Transm. Corp.* at ¶19 ("Courts may not delete words used or insert words not used.")/

{¶19} Here, we find that the ERAC interpreted R.C. 3714.052(B) in accordance with the plain language of the statute. R.C. 3714.052(B) does not contain any ambiguity. According to that division, a county board of health may deny a request to transfer if: (1) any person listed in the request "has been involved in any prior activity involving the operation of a construction and demolition debris facility or other waste disposal facility"; (2) while that person was participating in the operation of such a facility, the facility accrued "a history of substantial noncompliance with" state, federal, or international environmental protection laws; and (3) that history of substantial noncompliance "indicates that the applicant lacks sufficient reliability, expertise, and competence to operate [a] * * * construction and demolition debris facility in substantial compliance with [R.C. Chapter 3714] and rules adopted under it."

{¶20} The Board, however, champions its much broader interpretation of R.C. 3714.052(B) as more closely capturing the true legislative intent. To the contrary, we find that the Board's interpretation would require this court to delete a large portion of the division, so that it would instead read:

> The director of environmental protection or a board of health, as applicable, may deny the application if the director or board finds that the applicant lacks sufficient reliability, expertise, and competence to operate a construction and demolition debris facility in substantial compliance with R.C. Chapter 3714 and the rules adopted under it.

To so rewrite the division would subvert—not advance—legislative intent.

{¶21} Moreover, we reject the Board's attempt to divine the legislative intent behind R.C. 3714.052(B) by comparing the current statute with a previous regulation or deriving meaning from an unrelated directive contained in uncodified law. When a statute is unambiguous, a court should merely apply the law as written, not examine secondary sources to contrive the legislature's "real" intent. *WCI, Inc. v. Ohio Liquor Control Comm.*, 116 Ohio St.3d 547, 2008-Ohio-88, ¶11.

{¶22} Finally, we conclude that not only did the ERAC properly interpret R.C. 3714.052(B), it also applied that division appropriately when it held that misrepresentations in a request to transfer do not constitute a reason to deny that request. A denial must arise from "a history of substantial noncompliance" with environmental laws "that indicates that the applicant lacks sufficient reliability, expertise, and competence." R.C. 3714.052(B). Consequently, R.C. 3714.052(B) did not authorize the Board to deny the transfer of the construction and demolition debris facility license from WEL to WES on the basis that: (1) WES misrepresented Rutigliano's criminal history, or (2) WEL and WES misrepresented the extent of Murray's involvement with

administrative enforcement actions and the history of noncompliance with environmental laws at the waste disposal facilities Murray managed. Given that the ERAC properly interpreted and applied R.C. 3714.052(B), we overrule the Board's second assignment of error.

{¶23} By the Board's first assignment of error, it argues that the ERAC exceeded the scope of its review authority when it concluded that the Board's factual findings regarding Murray and the Antonaccis were unreasonable. We concur with the ERAC's evaluation of the evidence regarding the history of compliance at the Antonaccis' transfer facility. However, we find that the ERAC erred in its review of the evidence pertaining to Murray's involvement "in any prior activity involving the operation of a * * * waste disposal facility."

{¶24} Pursuant to R.C. 3745.05(F), the ERAC must affirm actions appealed to it if those actions are "lawful and reasonable," and it must vacate or modify actions that are "unreasonable or unlawful." The reasonableness standard requires the ERAC to consider whether the actions it reviews have a valid factual foundation. *Citizens Commt. to Preserve Lake Logan v. Williams* (1977), 56 Ohio App.2d 61, 70. "In conducting this inquiry, [the] ERAC must determine whether the evidence is of such quantity and quality that it provides a sound support for the [ ] action." *Ohio Fresh Eggs, LLC v. Wise*, 10th Dist. No. 07AP-780, 2008-Ohio-2423, ¶32. This court reviews the ERAC's orders to determine whether they are "supported by reliable, probative, and substantial evidence and [are] in accordance with law." R.C. 3745.06.

{¶25} In the case at bar, the ERAC found no valid factual foundation for the Board's finding that WES lacked reliability, expertise, and competence because F&G

Recycling, which the Antonaccis owned and operated, had entered into a consent order to resolve violations of Connecticut environmental law. As we discussed above, the Board could deny the request to transfer under R.C. 3714.052(B) if F&G Recycling had a "history of substantial noncompliance" with environmental protection laws that indicated that WES lacked sufficient reliability, expertise, and competence to overtake operation of WEL's construction and demolition debris facility. The ERAC found that the Board failed to document that it conducted any evaluation of the substance or severity of the violations cited in F&G Recycling's consent order. The ERAC believed such an evaluation was essential to support a finding that the Antonaccis' facility has a "history of substantial noncompliance." Additionally, the only evidence regarding whether the consent order amounted to "substantial noncompliance" was Wasowski's comment that the consent order, "on its own[,] does not show substantial non-compliance." (Board R. 1673.)

{¶26} Initially, we note that the Board never made the requisite finding that F&G Recycling had a history of *substantial* noncompliance. Rather, the Board merely stated that the record contained evidence of noncompliance. Mere noncompliance cannot serve as a basis for denial of the request to transfer. Moreover, assuming that the Board had made the necessary finding, we agree with the ERAC that the evidence does not support the conclusion that F&G Recycling had a "history of substantial noncompliance." To the contrary, the only evidence available to gauge the severity of F&G Recycling's noncompliance is Wasowski's statement that the consent order did *not* demonstrate "substantial noncompliance."

{¶27} With regard to Murray, the ERAC found that the evidence did not support the Board's conclusion that Murray had "been involved in any prior activity involving the

operation of a construction and demolition debris facility or other waste disposal facility." Because no valid evidence satisfied the threshold factor of R.C. 3714.052(B), the ERAC found that the Board erred in denying the request to transfer based upon Murray's involvement with the Chicopee and Granby-Holyoke waste disposal facilities and those facilities' substantial noncompliance with Massachusetts environmental laws.

{¶28} The ERAC's analysis of the evidence regarding Murray focused primarily on whether Murray was an operator of the Chicopee and Granby-Holyoke facilities. However, R.C. 3714.052(B) applies not just to owners and operators, but also to individuals who engaged in any prior activity involved in the operation of a waste disposal facility. Although Murray may not have had any discretionary authority over the operation of the Chicopee and Granby-Holyoke facilities, he admitted in his testimony that he managed those facilities. Additionally, WES' September 4, 2007 letter to Wasowski categorized Murray as a "key employee"[1] of the Chicopee and Granby-Holyoke facilities, who was responsible for overseeing those facilities' daily operations. Consequently, by virtue of his management of the Chicopee and Granby-Holyoke facilities, Murray was "involved in [a] prior activity involving the operation of * * * [a] waste disposal facility."

{¶29} Additionally, we reject the ERAC's conclusion that none of the evidence demonstrated a correlation between the time period Murray managed the Chicopee and Granby-Holyoke facilities and the documented instances of noncompliance at those facilities. As district manager for the Chicopee and Granby-Holyoke facilities, Murray received consent orders and notices of noncompliance related to the operations of those

[1] R.C. 3714.052(G) defines "key employee" as an individual employed "in a supervisory capacity or who is empowered to make discretionary decisions with respect to * * * operations."

facilities from March 2002 through April 2006. From this evidence, it is apparent that Murray was the manager of the Chicopee and Granby-Holyoke facilities from at least March 2002 to April 2006. The consent orders and notices of noncompliance referenced violations of environmental law that occurred from December 2001 through October 2005. Thus, for all but the earliest violation, the evidence demonstrates that Murray was managing the Chicopee and Granby-Holyoke facilities when those facilities violated Massachusetts environmental law.

{¶30} Based on the foregoing, we sustain the Board's first assignment of error in part, and we reverse it in part. Although we sustain the first assignment of error to the extent that it challenges the ERAC's findings regarding Murray's involvement with the Chicopee and Granby-Holyoke facilities, we note that WES' appeal to the ERAC also disputed whether the Board cited sufficient evidence to support its finding that the Chicopee and Granby-Holyoke facilities had "a history of substantial noncompliance" with environmental protection law. In a footnote, the ERAC expressed skepticism that the evidence would sustain the Board's finding that the Chicopee and Granby-Holyoke facilities actually had "a history of substantial noncompliance." However, in light of its determination regarding Murray's involvement with the Chicopee and Granby-Holyoke facilities, the ERAC declined to decide the issue. Given our rejection of the ERAC's analysis of the evidence regarding Murray's involvement with the Chicopee and Granby-Holyoke facilities, we remand this matter to the ERAC so that it can decide whether valid evidence establishes that those facilities had "a history of substantial noncompliance" while Murray managed them.

{¶31} For the foregoing reasons, we sustain in part and overrule in part the Board's first assignment of error, and we overrule the Board's second assignment of error. Consequently, we affirm in part and reverse in part the final order of the Environmental Review Appeals Commission, and we remand this matter to that body for further proceedings in accordance with law and this decision.

Order affirmed in part, reversed in part, and cause remanded.

BRYANT and CONNOR, JJ., concur.