

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Constantine N. Polites, :
 Petitioner :
 :
 v. : No. 2148 C.D. 2007
 : Submitted: June 27, 2008
Department of Environmental :
Protection, :
 Respondent :

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
 HONORABLE DAN PELLEGRINI, Judge
 HONORABLE RENÉE COHN JUBELIRER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: July 25, 2008

Constantine N. Polites (Complainant) appeals *pro se* from an order of the Pennsylvania Department of Environmental Protection (Department) dismissing his appeal from a letter sent by the Department because the letter did not represent a final, appealable action. For the following reasons, we affirm.

In June 2007, Complainant sent a letter to the Department in which he requested that commercial firms that operated as residential users be treated as residential users and exempted from the requirement that backflow prevention devices be tested by certified technicians. Complainant instead suggested a

method through which commercial users operating in a manner similar to residential users could perform their own testing of backflow prevention devices.¹

The Department responded to Complainant's letter in July 2007. The Department's letter noted that it would consider Complainant's suggestions with its upcoming update to the Pennsylvania Safe Drinking Water Act,² and further explained that backflow devices were presently addressed at 25 Pa. Code §109.709. The Department also referred Complainant to a guidance manual for information on cross-connection control and backflow prevention programs and noted that those manuals recommended annual testing of backflow devices by a certified person.

In August 2007, Complainant appealed the Department's July 2007 letter to the Environmental Hearing Board (Board). The Department filed a motion to dismiss, maintaining that the July letter did not constitute an appealable order of the Department. Complainant's response to the motion to dismiss did not include a legal argument, but rather restated the contentions listed in his appeal. In October 2007, the Board dismissed the appeal, noting that it only had the power to consider final actions of the Department which had an adverse affect upon personal or property rights, privileges, immunities, duties, liabilities or obligations of a person,

¹ Backflow prevention devices are used to isolate contaminants or pollutants within a user's water system which could potentially backflow through the user's service connection and into the public water supply system resulting in a public health risk.

² Act of May 1, 1984, P.L. 206, *as amended*, 35 P.S. §§721.1-721.17

and the July letter did not constitute such a final action because it was advisory and not imperative. Complainant then appealed to this Court.³

On appeal, Complainant does not advance any argument, but merely requests that this Court evaluate his proposed plan for the testing of backflow prevention devices, and if we deem his test reasonable, asks that we “direct the respondent [Department] to amend the testing requirements for backflow valves.” (Complainant’s Brief at p. 10.)

We decline to do so because the July 2007 letter sent by the Department did not direct the Complainant to do anything, but instead, merely set forth the present state of the law regarding backflow devices and directed Complainant to manuals describing such procedures. Where all that an agency has done is send a letter setting forth what the law presently requires, such an action is not a final action or adjudication and, therefore, is not appealable. *Gateway Coal v. Department of Environmental Resources*, 399 A.2d 802 (Pa. Cmwlth. 1997); *Sandy Creek Forest, Inc. v. Department of Environmental Resources*, 505 A.2d 1091 (Pa. Cmwlth. 1985). In order for an action to be an appealable adjudication, it must directly affect the person in question, such that the individual is aggrieved. *Bethlehem Steel v. Department of Environmental Resources*, 390 A.2d 1383 (Pa. Cmwlth. 1978). Because all that the July 2007 letter did was set forth the present

³ Our scope of review of a Board order deciding a motion to dismiss is limited to determining whether the Board committed an error of law or an abuse of discretion. *Scoppic v. Johns*, 780 A.2d 808 (Pa. Cmwlth. 1998).

state of the law, the Board did not commit an error of law or an abuse of discretion in dismissing Complainant's appeal, as no jurisdiction to review arises from an appeal of a non-appealable agency action.⁴

Accordingly, the order of the Board is affirmed and Complainant's appeal is dismissed.

DAN PELLEGRINI, JUDGE

⁴ We recognize that Complainant's main goal is to change the regulations which deal with the testing of backflow prevention devices. As the Department notes in its brief, any person may petition the Environmental Quality Board to initiate a rulemaking proceeding for the issuance, amendment or repeal of a regulation administered and enforced by the Department.

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ORDER

AND NOW, this 25th day of July, 2008, the October 11, 2007 Order of the Environmental Hearing Board at 2007-196-MG is affirmed.

DAN PELLEGRINI, JUDGE