

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

MARION COUNTY SUPERIOR COURT
CAUSE NO. 49D02-0801-CC-003680

COMMISSIONER, INDIANA)
DEPARTMENT OF ENVIRONMENTAL)
MANAGEMENT,)

Petitioner,)

v.)

CHARLES G. HUNGLER, JR.,)

Respondent.)

FILED

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MAY 08 2009

Elizabeth J. White
CLERK OF THE MARION CIRCUIT COURT

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND JUDGMENT

This cause comes before the Court on a Verified Petition for Judicial Review filed by the Petitioner. The issues having been heard before the Court, the Court now enters its Findings of Fact, Conclusions of Law and Judgment.

FINDINGS OF FACT

1. Petitioner, the Indiana Department of Environmental Management ("IDEM") is charged with the implementation and enforcement of the environmental laws, and rules promulgated thereunder, for the State of Indiana. Ind. Code § 13-13-1-1 *et seq.*
2. Respondent, Charles G. Hungler, Jr., was issued Class I Operator's Certificate No. 10045 in 1988 and Class A Operator's Certificate No. 017131 ("Certificates") in 2005 by IDEM in accordance with 320 IAC 3-10.1, subsequently recodified as 327 IAC 5-22.
3. Respondent was also a certified operator in Kentucky and was the wastewater treatment plant certified operator of record and person in direct or responsible charge of the Edgewood Sewage Treatment Plant located in Franklin County, Kentucky.

EXHIBIT A

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4. On November 17, 2006, in the *United States of America v. Charles G. Hungler, Jr.*, Case Number Frankfort 3:06-cr-14-KSF, filed in the United States District Court in the Eastern District of Kentucky, the Respondent plead guilty to one (1) count of making a false statement on a report required to be filed under provisions of the Clean Water Act ("CWA") in violation of 33 U.S.C. 1319(c)(4) regarding falsification of a Discharge Monitoring Report ("DMR") submitted on July 28, 2005 for the Edgewood Sewage Treatment Plant.

5. On April 9, 2007, IDEM filed a Request for an Administrative Hearing with the Office of Environmental Adjudication ("OEA"), under Cause No. 07-W-E-3901, seeking to have the Respondent's Certificates revoked because he had practiced fraud or deception in violation of Ind. Code. § 13-18-11-8.

6. On September 4, 2007, the Respondent filed a Motion for Summary Judgment and supporting brief arguing that IDEM could not rely on conduct outside the State of Indiana to revoke an operator's certificates.

7. On January 9, 2008, after the parties had fully briefed the issues on summary judgment, the Environmental Law Judge ("ELJ") issued the Final Order in this matter granting summary judgment to the Respondent.

8. The ELJ found that "without express statutory language allowing the use of out-of-state convictions as grounds for revocation, the IDEM may not use Respondent's Kentucky conviction as the basis for revocation."

9. Pursuant to Ind. Code § 4-21.5-5-1 *et seq.*, IDEM filed a Verified Petition for Judicial Review seeking judicial review of the January 9, 2008 Final Order.

10. IDEM alleges that the Final Order is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, short of statutory right, and unsupported by substantial evidence in the record.

11. The issues on judicial review have been fully briefed by the parties. Oral arguments were heard on April 1, 2009.

12. To the extent any of these findings of fact are construed to be conclusions of law, they are hereby included as additional conclusions of law. To the extent that the conclusions of law are construed to be findings of fact, they are hereby included as additional findings of fact.

CONCLUSIONS OF LAW

1. This case involves judicial review of an agency determination under the Administrative Orders and Procedures Act ("AOPA"). Ind. Code 4-21.5-5-1 *et seq.*

2. The Supreme Court set forth the standard of review under AOPA in *LTV Steel Co. v. Griffin*, 730 N.E.2d 1251, 1257 (Ind. 2000): A court may only set aside agency action that is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence. *Id.*

3. A reviewing court is not required to accept erroneous legal conclusions of administrative agencies. *Ind. Dep't of Public Welfare v. Payne*, 622 N.E.2d 461, 465 (Ind. 1993).

4. The Indiana Court of Appeals held that

[t]he cardinal rule of statutory construction is to ascertain the intent of the legislature by giving effect to the ordinary and plain meaning of the language used. *T.W. Thom Const., Inc. v. City of Jeffersonville*, 721 N.E.2d 319, 324 (Ind. Ct. App. 1999), *trans. denied*. However, when the language is reasonably susceptible to more than one construction, we must construe the statute to

determine the apparent legislature intent. *Id.*

Bourbon Mini Mart, inc. v. Commissioner, Indiana Department of Environmental Management, 806 N.E.2d 14 (Ind. Ct. App. 2004).

5. The Court of Appeals also held, “[i]f the statute is ambiguous, there are other rules of construction that may be applied. It is a well-established rule of statutory construction that a court may not read into a statute that which is not the expressed intent of the legislature.”

State v. Derossett, 714 N.E.2d 205 (Ind. Ct. App. 1999).

6. Ind. Code § 13-18-11-8 states,

(a) The commissioner may suspend or revoke the certificate of an operator, following a hearing under IC 13-15-7-3 and IC 4-21.5, if any of the following conditions are found:

- (1) The operator has practiced fraud or deception.
- (2) Reasonable care, judgment, or the application of the operator’s knowledge or ability was not used in the performance of the operator’s duties.
- (3) The operator is incompetent or unable to properly perform the operator’s duties.

7. The statute in question is not ambiguous; therefore, the intent of the legislature can be ascertained by “giving effect to the ordinary and plain meaning of the language used.”

Bourbon Mini-Mart, Inc., 806 N.E.2d at 20. If the operator is found to have practiced fraud or deception then he/she can lose his/her certificates.

8. “[W]hen a statute is clear and unambiguous on its face, the court need not and indeed may not interpret the statute.” *Whitacre v. State*, 619 N.E.2d 605, 606. (Ind. App. Ct. 1993) *trans. denied* [citing *Economy Oil Corp. v. Indiana Dept. of State Revenue*, 321 N.E.2d 215, 218 (Ind. Ct. App. 1974)]. In this matter, the statute is clear; therefore, the ELJ should not have interpreted the statute.

9. Courts are to “examine the statute as a whole, giving common and ordinary meaning to the words.” *Matter of Lawrance*, 579 N.E.2d 32, 38 (Ind. 1991) [citing *Foremost Life Ins. v. Department of Insurance*, 409 N.E.2d 1092 (Ind. 1980)]. “In determining the plain and ordinary meaning of a statutory term, courts may use English language dictionaries as well as consider the relationship with other words and phrases.” *D.R. v. State*, 729 N.E.2d 597, 599 [citing *State v. Eilers*, 697 N.E.2d 969, 971 (Ind. Ct. App. 1998)].

10. Fraud is defined as “deceit or trickery” or “a particular instance of deceit or trickery.” Random House Webster’s Dictionary, Third Edition, 1998. Deception is defined as “the act of deceiving or state of being deceived” or “a trick; ruse.” *Id.*

11. Applying the common and ordinary words to Ind. Code § 13-18-11-8, IDEM may revoke an operator’s certificates if the operator has practiced “deceit or trickery” or “the act of deceiving.”

12. Examining Ind. Code § 13-18-11-8 as a whole reveals that all the conduct that is to be used to suspend or revoke an operator’s certificates is listed generally. The general nature of all three (3) elements supports the conclusion that the legislature intended the phrase “practiced fraud or deception” to be general and broad.

13. The law was written in a general and broad manner to allow IDEM to suspend or revoke a license for the mere practice of fraud or deception, failure to use reasonable care, judgment, knowledge, or ability when performing his or her duties as an operator, or incompetence. Any reliable evidence of fraud or deception is sufficient for de-certifying an operator without following the unwritten, and unintended, steps of limiting de-certification to criminal convictions and in-state activity.

14. The ELJ erred when she held that “IDEM is relying solely on the Respondent’s conviction in Kentucky as the basis for this action. Without express statutory language allowing the use of the out-of-state convictions as grounds for revocation, the IDEM may not use the Respondent’s Kentucky conviction as the basis for revocation.” IDEM did not rely on the Respondent’s conviction as the basis for the revocation because a conviction is not an element or requirement of Ind. Code § 13-18-11-8(a)(1). IDEM relied on the Respondent’s fraud or deception for the revocation.

15. By focusing on the conviction, the ELJ erroneously narrowed the application of a broadly worded civil statute and turned this matter into an issue of criminal procedure requiring a final adjudication of criminal wrongdoing within Indiana instead of one in which the Respondent by his own admission has practiced fraud or deception. IDEM is not required by any statute or rule to only pursue de-certification of those individuals criminally adjudicated in Indiana.

16. The laws and case law relied on by the ELJ all involve some jurisdictional element; however, the practice of fraud or deception has no jurisdictional boundaries.

17. The only statute relied on by the ELJ dealing with an environmental law is Ind. Code § 13-19-4-3; however, that statute specifically refers to criminal complaints, violations, and convictions, which contain a jurisdictional element.

18. Relying on the Indiana Supreme Court’s decision that “[t]here is also a strong presumption that the legislature is aware of existing statutes relating to the same subject matter”, the legislature would have been aware of Ind. Code § 13-19-4-3 and would have limited Ind. Code § 13-18-11-8 in the same fashion, if that was their intent. *See, Burd Management LLC v. State of Indiana*, 831 N.E.2d 104 (Ind. 2005).

19. The ELJ erroneously questioned “whether the legislature intended to give the IDEM broad authority to regulate activities that occur outside of the state”, because IDEM is not seeking to “regulate activities that occur outside of the state.” IDEM is merely trying to regulate the activities of the operator within the State of Indiana. IDEM clearly has the authority to regulate in-state activities.

20. Protecting the public health, safety, and welfare, as well as the environment, are well-established public policies of utmost importance as evidenced by the legislature’s findings codified by Indiana statute. *See, e.g.*, Ind. Code §§§ 13-12-2-1, 13-12-3-1 and 13-18-3-11. This matter deals with the water pollution control laws in Indiana, which are necessary for the protection of public health, safety, and welfare. Ind. Code § 13-18-3-11. The laws are also need for the protection of the environment. The purpose of Title 13 (Environmental Policy) is “to preserve, protect, and enhance the quality of the environment so that, to the extent possible, future generations will be ensured clean air, clean water, and a healthful environment.” Ind. Code § 13-12-3-1(3).

21. Pursuant to Ind. Code § 13-18-3-11, the General Assembly mandated that “[s]ince the water pollution control laws are necessary for the public health, safety, and welfare, the water pollution control laws shall be liberally construed to effectuate the purposes of the water pollution control laws.”

22. The legislature specifically addressed statutory construction of all statutes in Title 13 in Ind. Code § 13-12-2-1. Ind. Code § 13-12-2-1 states, “[b]eing necessary for the public health, safety, and welfare, this title [13] shall be liberally construed to effectuate the purpose of this title.”

23. It is a well-established principle of statutory construction that “the primary goal in interpreting the meaning of a statute is to determine and effectuate the legislative intent.” *D.R.*, 729 N.E.2d at 599 [citing *Woods*, 703 N.E.2d at 1117]. See also *Durham and Wade v. U-Haul International*, 745 N.E.2d 755, 759 (Ind. 2001) and *Chambliss v. State*, 746 N.E.2d 73, 77 (Ind. 2001). “To determine the legislative intent, courts must consider the objectives and the purposes of the statute in question and the consequences of the statute’s interpretation.” *Id.* [citing *Miller v. State*, 641 N.E.2d 64, 68 (Ind. Ct. App. 1994), *trans. denied.*].

24. Since the purpose of the statute is to protect the public health, safety, and welfare, the intent of the legislature clearly is to protect the public health, safety, and welfare from an operator who is deceitful, who does not use his/her best ability to perform duties, or who is incompetent from operating a wastewater treatment plant; or, more specifically to the matter at hand, from a man who was federally convicted of directly violating the Clean Water Act, the water pollution control laws of the United States. The legislature intends for IDEM to protect the public from an operator who is deceitful, no matter where that deceit occurred.

25. Further, pursuant to Ind. Code § 13-18-3-9, IDEM may issue a certificate without examination to any person who holds a comparable classification in any state of the United States if certain factors are met. If IDEM is allowed to rely upon an individual’s certificate in another state to qualify that individual for a comparable certificate in Indiana, it stands to reason that the legislature would not limit IDEM from using an act of fraud or deceit committed in the course of the person’s duties in a comparable position in another state to de-qualify an individual.

26. One of the fundamental principles of statutory interpretation is that the court will construe a statute to avoid an absurd result or a result that the legislature could not have intended. *Raider v. Pea*, 613 N.E.2d 870 (Ind. Ct. App. 1993); *Koester Contracting, Inc. v. Board of*

Com'rs of Warrick Co., 619 N.E.2d 587 (Ind. Ct. App. 1993). "Courts do not presume that the legislature intended language used in a statute to be applied illogically or to bring about an unjust or absurd result", *Riley v. State*, 711 N.E.2d 489, 495 (Ind.1999) [citing *State ex rel. Hatcher v. Lake Superior Court, Room Three*, 500 N.E. 2d. 737, 739 (Ind. 1986)].

27. To allow an individual who has "practiced fraud or deception" or who has "practiced 'deceit or trickery' or 'the act of deceiving, '" to continue to operate a wastewater treatment plant in Indiana just because the fraud or deceit occurred in another state would "bring about an unjust or absurd result."

28. Since the legislature intended to protect the public and environment when it enacted Ind. Code § 13-18-11-8, it would not intend for IDEM to be unable to suspend or revoke an operator's certificate of a person who practices fraud or deception in one state then simply crosses the state boundary and continues the same conduct in Indiana.

29. Further, the Respondent's violation was of the water pollution control laws of the United States, which is the basis for Indiana's water pollution control laws. Since IDEM is the water pollution agency for the State of Indiana it is logical that IDEM can use a violation of the federal water pollution control laws to regulate the activities of the Respondent in Indiana.

30. In *Indiana Department of Environmental Management v. Boone County Resource Recovery Systems, Inc.*, 803 N.E.2d 267 (Ind. Ct. App. 2004), *trans. denied*, the Indiana Court of Appeals held,

"[w]hen a statute is subject to different interpretations, the interpretation of the statute by the administrative agency charged with the duty of enforcing the statute is entitled to great weight, unless that interpretation is inconsistent with the statute itself. When a court is faced with two reasonable interpretations of a statute, one of which is supplied by an administrative agency charged with enforcing the statute, the court should defer to the agency. When a court determines that an administrative agency's interpretation is reasonable, it should 'terminate its analysis' and not address the reasonableness of the

other party's interpretation. Terminating the analysis recognizes 'the general policies of acknowledging the expertise of the agencies empowered to interpret and enforce statutes and increasing public reliance on agency interpretations.'"

Id. at 273. See also *Peabody Coal Co. v. Ind. Dept. of Natural Resources*, 629 N.E.2d 925 (Ind. Ct. App. 1994); *Indiana Wholesale Wine and Liquor Co., Inc. v. State ex rel. Indiana Alcoholic Beverage Commission*, 695 N.E.2d 99 (Ind. 1998); *State Board of Registration for Professional Engineers v. Eberenz*, 723 N.E.2d 922 (Ind. 2000); and *LTV Steel Co. v. Griffin*, 730 N.E.2d at 1257 ("interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight."); *Dennistarr Environmental, Inc. v. Indiana Department of Environmental Management*, 741 N.E.2d 1284, 1288.

31. A reviewing court should pay great deference to an agency's reasonable interpretation of a silent or ambiguous statute if that agency has been charged with the statute's administration. *Indiana Dept. of Public Welfare v. Hupp*, 605 N.E.2d 768, (Ind. Ct. App. 1992), *trans. denied*. If there are multiple interpretations, the court should defer to the agency's interpretation. *Indiana Wholesaler Wine & Liquor Company, Inc.*, 695 N.E.2d at 103-04. If the agency's actions are based on a reasonable consideration of its governing statutes and regulations, then the court should defer to the agency's interpretation. *Peabody Coal Co.*, 629 N.E.2d at 930.

32. In this case, the Court is faced with two different interpretations of the same statute, Ind. Code § 13-18-11-8, which grants the commissioner authority to revoke an operator's certificate for the practice of fraud or deception. IDEM provided a clear and reasonable interpretation of the environmental rule it is charged with implementing. The Court will defer to the agency and not even address the reasonableness of the Respondent's interpretation. See *Boone County Resource Recovery Systems, Inc.*, 803 N.E.2d at 273. See also *Peabody Coal Co.*,

629 N.E.2d 925; *Indiana Wholesale Wine and Liquor Co., Inc.*, 695 N.E.2d 99; *State Board of Registration for Professional Engineers v. Eberenz*, 723 N.E.2d 922; and *LTV Steel Co.*, 730 N.E.2d at 1257.

33. IDEM has shown that the January 9, 2008 Final Order is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, short of statutory right and unsupported by substantial evidence and that IDEM is entitled to remand as a matter of law.

JUDGMENT

Based on the forgoing Findings of Fact, Conclusions of Law and legal precedent, the January 9, 2008 Findings of Fact, Conclusions of Law and Final Order of the Office of Environmental Adjudication is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, short of statutory right and unsupported by substantial evidence; the Indiana Department of Environmental Management's Verified Petition for Judicial Review is granted and the case is remanded to the Office of Environmental Adjudication to issue a new final order consistent with this Court's ruling.

Dated: 5/8/09


JUDGE, MARION SUPERIOR COURT

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