

Commissioner, Indiana Department of Environmental Management, Complainant

v.

**Ronnie Scherb d/b/a Scherb Dairy, Respondent
2007 OEA 16 (05-S-E-3561)**

OFFICIAL SHORT CITATION NAME: When referring to 2007 OEA 16, cite this case as
IDEM v. Scherb Dairy II, 2007 OEA 16.

TOPICS:

Dismiss
motion to reconsider
modification of final order
jurisdiction
motion to correct error
Indiana Rules of Trial Procedure
Rule 53.4
Ind. Code § 4-21.5-3-31
rehearing

PRESIDING JUDGE:

Gibbs

PARTY REPRESENTATIVES:

Complainant, IDEM: Nancy Holloran
Respondent: Peter M. Racher, Esq., Todd J. Janzen, Esq.,
Plews, Shadley, Racher & Braun

ORDER ISSUED:

January 24, 2007

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

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6. On January 19, 2006, counsel for Respondent filed his Notice of Withdrawal of Counsel and Scherb's Motion for Extension. On January 26, 2006, this Environmental Law Judge (the "ELJ") granted counsel's request to withdraw and granted the Respondent an extension until February 7, 2006 to answer IDEM's discovery requests.
7. The Respondent did not answer the discovery requests.
8. On February 22, 2006, IDEM filed its Motion for Proposed Order of Dismissal and Suspension of Dispositive Motion Deadline. On February 24, 2006, this ELJ granted the motion for extension of time to file dispositive motions and ordered the Respondent to answer the IDEM's discovery requests within ten (10) business days of the receipt of the order. The IDEM's Requests for Admission were deemed admitted.
9. The Respondent failed to respond to the discovery requests.
10. On March 15, 2006, IDEM filed its Renewed Motion for Proposed Order of Dismissal.
11. On March 17, 2006, this ELJ issued its Notice of Proposed Order of Default to the Respondent allowing him seven (7) days from service of the Notice to respond or be held in default. The Respondent failed to respond.
12. On March 31, 2006, the Notice of Proposed Order of Default was re-issued by certified mail, return receipt requested. The Respondent received the notice on April 3, 2006.
13. On April 19, 2006, counsel for the IDEM filed its Request for Entry of Order of Dismissal or, in the Alternative, Motion for Suspension of Dispositive Motion Deadline.
14. On April 19, 2006, this ELJ issued its Order of Default and for Status Conference (April 19, 2006 Order). The Respondent was held in default and found to be in violation of the regulations specified in the CO. The amount of penalty and corrective actions were unresolved.
15. On April 26, 2006, the IDEM filed its Motion to Reconsider the April 19, 2006 Order of Default and for Status Conference.
16. A status conference was held on May 5, 2006 with the Respondent present and counsel for IDEM participating by telephone. The remaining issues were set for hearing on June 14, 2006.
17. On May 22, 2006, the IDEM filed another Motion to Reconsider.

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18. On June 14, 2006, a hearing was held. The IDEM presented evidence regarding the amount of the penalty and the corrective actions that the Respondent needed to undertake. The Respondent was present and offered testimony regarding the appropriate penalties and corrective actions.
19. On July 19, 2006, the ELJ issued Findings of Fact, Conclusions of Law and Final Order (a copy of which is attached and incorporated herein and hereinafter referred to as the "Final Order"). The Respondent was ordered to pay a civil penalty of \$7,500 (seven thousand, five hundred dollars) and to take corrective action.
20. The IDEM filed a Motion to Reconsider on August 7, 2006. On August 9, 2006, the ELJ ordered the Respondent to file his response, if any, on or before August 28, 2006.
21. Respondent filed an Unopposed Motion for Enlargement of Time to Respond to Motion to Reconsider was filed with the OEA on November 22, 2006. In this motion, IDEM's counsel agreed to extend the time for the Respondent to file his response to the Motion to Reconsider until September 27, 2006.
22. On September 27, 2006, the Respondent filed Ronnie Scherb's Motion to Reconsider and Response to IDEM's Motion to Reconsider and Ronnie Scherb's Motion to Withdraw Admissions and Request for a New Hearing.
23. A status conference was held on October 11, 2006. The ELJ set a deadline of November 13, 2006 for filing briefs on the issue of whether the ELJ continued to have jurisdiction of this matter.
24. The Respondent filed a Brief in Support of Jurisdiction on November 13, 2006.
25. No petition for judicial review pursuant to Ind. Code § 4-21.5-5 has been filed.¹ No other agency or court has assumed jurisdiction of the Final Order.
26. The OEA is the ultimate authority for decisions of the Commissioner of the IDEM.

Conclusions of Law

1. The Office of Environmental Adjudication ("OEA") has jurisdiction and is the ultimate authority over the decisions of the Commissioner of the IDEM and the parties to the controversy pursuant to Ind. Code §4-21.5-7-3 and 4-21.5-7-5.
2. Findings of fact that may be construed as conclusions of law and conclusions of law that may be construed as findings of fact are so deemed.

¹ The OEA has not been served with a copy of a petition for judicial review nor has it been requested to prepare a record.

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3. The issue in this matter is whether this ELJ has the authority to modify the final order in this cause. Proceedings in the Office of Environmental Adjudication (the “OEA”) are governed by the Administrative Orders and Procedures Act (AOPA), Ind. Code § 4-21.5-3 and by the procedural rules promulgated by OEA at 315 IAC 1.
4. Ind. Code § 4-21.5-3-31 provides that a final order may be modified as follows:
 - (a) An agency has jurisdiction to modify a final order under this section before the earlier of the following:
 - (1) Thirty (30) days after the agency has served the final order under section 27, 29, or 30 of this chapter.
 - (2) Another agency assumes jurisdiction over the final order under section 30 of this chapter.
 - (3) A court assumes jurisdiction over the final order under IC 4-21.5-5.
 - (b) A party may petition the ultimate authority for an agency for a stay of effectiveness of a final order. The ultimate authority or its designee may, before or after the order becomes effective, stay the final order in whole or in part.
 - (c) A party may petition the ultimate authority for an agency for a rehearing of a final order. The ultimate authority or its designee may grant a petition for rehearing only if the petitioning party demonstrates that:
 - (1) the party is not in default under this chapter;
 - (2) newly discovered material evidence exists; and
 - (3) the evidence could not, by due diligence, have been discovered and produced at the hearing in the proceeding.The rehearing may be limited to the issues directly affected by the newly discovered evidence. If the rehearing is conducted by a person other than the ultimate authority, section 29 of this chapter applies to review of the order resulting from the rehearing.
 - (d) Clerical mistakes and other errors resulting from oversight or omission in a final order or other part of the record of a proceeding may be corrected by an ultimate authority or its designee on the motion of any party or on the motion of the ultimate authority or its designee.
 - (e) An action of a petitioning party or an agency under this section neither tolls the period in which a party may object to a second agency under section 30 of this chapter nor tolls the period in which a party may petition for judicial review under IC 4-21.5-5. However, if a rehearing is granted under subsection (c), these periods are tolled and a new period begins on the date that a new final order is served.
5. The rules of statutory construction provide that statutory language must be given its plain and ordinary meaning. “When construing the language of a statute, the Court of Appeals is bound to apply the plain and ordinary meaning of words and phrases.” *Miller Brewing Co. v. Bartholomew County Beverage Cos., Inc.*, 674 N.E.2d 193, 205 (Ind. Ct. App. 1996).

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6. The statute expressly allows for the modification of a final order within thirty (30) days if another agency or a court has not assumed jurisdiction. In this case, as the OEA is the ultimate authority and no party has petitioned for judicial review, the OEA has the authority to modify the final order for thirty (30) days.
7. The IDEM filed a motion to reconsider within thirty (30) days of the final order being issued. Ind. Code § 4-21.5-3-31 does not specify how motions to reconsider should be treated under AOPA. However, under the Indiana trial rules, motions to reconsider are not proper after a final judgment has been entered. *Hubbard v. Hubbard*, 690 N.E.2d 1219 (Ind. Ct. App. 1998). The Court in *Citizen's Industrial Group v. Heartland Gas Pipeline*, 856 N.E.2d 734 (Ind. Ct. App. 2006), ruled that a motion to reconsider should be treated as a motion to correct error. In this case, the Citizen's Industrial Group (the "CIG") had filed a motion to reconsider a final order issued by the Indiana Utility Regulatory Commission (the "IURC"). The parties briefed the issues raised in the Motion to Reconsider, at which point, the IURC issued an order denying the motion. The CIG filed an appeal of the order denying the motion to reconsider.² The Court, in discussing the proper appellate procedure stated, "Therefore, in an administrative proceeding, a motion to reconsider or a motion for rehearing filed with the administrative agency serves the same function as a motion to correct error filed with the trial court."³ At 737.
8. Under Indiana Rule of Trial Procedure 53.4,⁴ a Motion to Correct Error shall be deemed denied if the Court does not rule on it within forty-five (45) days. This time limitation does not apply if "the parties who have appeared or their counsel stipulate or agree on the record the time limitation . . . shall not apply." T.R. 53.4(B). In this case, the parties agreed that the Respondent could have until September 27, 2006 to file a response to the Motion to Reconsider.
9. Because IDEM filed its Motion to Reconsider within the thirty (30) days allowed for modification and because the parties agreed to extend the time limitation for the filing of a response, this ELJ has jurisdiction to decide the Motion to Reconsider and subsequent filings.

² More than thirty (30) days had passed since the underlying final order was issued. The Court ultimately decided that the appeal was not timely filed because the Appellate Rules expressly state that a motion to reconsider will not toll the time period for initiating an appeal. However, the appellate rules are not applicable in this matter as Scherb has not filed a petition for judicial review of the final order issued in this matter.

³ The applicable rule cited by the Court says "[f]ollowing a *final order*, any party to a proceeding may file with the commission and serve upon all parties of record a petition for rehearing and reconsideration within twenty (20) days of the entry of the final order, unless an applicable statute shall specifically fix a longer period." 170 IAC 1-1.1-22(3).

⁴ Pursuant to 315 IAC 1-3-1(b)(18), the ELJ may apply the Indiana Rules of Trial Procedure where not inconsistent with AOPA or Title 315.

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10. The Motion to Reconsider should be treated as a motion to correct errors under the Indiana trial rules. As more than forty-five (45) days has passed since the Motions to Reconsider were filed and no further extensions were agreed to or granted, this ELJ could consider these motions to be automatically denied pursuant to the trial rule.
11. While the trial rule sets out the *procedure* for acting on motions to correct errors, Ind. Code § 4-21.5-3-31 sets out the *standards* for the modification of final orders. The applicable portion of Ind. Code § 4-21.5-3-31(c) allows the agency to grant a rehearing only if:
- (1) the party is not in default under this chapter;
 - (2) newly discovered material evidence exists; and
 - (3) the evidence could not, by due diligence, have been discovered and produced at the hearing in the proceeding.
12. These standards have not been met because (1) the Respondent was found to be in default and (2) neither party alleges that new evidence exists. Therefore, the Motions to Reconsider should be denied.

Final Order

AND THE COURT, being duly advised, hereby **ORDERS, ADJUDGES AND DECREES** that the IDEM's Motion to Reconsider and the Respondent's Motion to Reconsider are **DENIED**. The Findings of Fact, Conclusions of Law and Final Order issued by this Court on July 19, 2006 is affirmed.

IT IS SO ORDERED THIS 24th day of January, 2007.

Hon. Catherine Gibbs
Environmental Law Judge