

**Commissioner, Indiana Department of Environmental Management: Complainant
v. Charles G. Hungler, Jr., Class I Operator's Certificate No. 10045 and
Class A Operator's Certificate No. 017131: Respondent.
2008 OEA 1 (07-W-E-3901)**

OFFICIAL SHORT CITATION NAME: When referring to 2008 OEA 1, cite this case as
IDEM v. Hungler, 2008 OEA 1.

TOPICS:

summary judgment
operator's certificate
wastewater operator
fraud
deception
revocation
statutory construction
legislative intent
out-of-state
conviction

PRESIDING JUDGE:

Gibbs

PARTY REPRESENTATIVES:

IDEM: Steven Griffin, Esq.
Respondent: Larry J. Kane, Esq.; Bingham McHale LLP.

ORDER ISSUED:

January 9, 2008

INDEX CATEGORY:

Water

FURTHER CASE ACTIVITY:

[none]

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5. Thereafter, the Respondent filed his Reply to IDEM's Brief in Opposition to Motion for Summary Judgment on October 26, 2007.
6. The IDEM bases its contention that the Respondent practiced fraud or deceit on the following facts: On November 17, 2006, a Judgment in a Criminal Case was entered in the United States District Court for the Eastern District of Kentucky, in a case captioned as *United States of America v. Charles G. Hungler, Jr.*, Case No. FRANKFORT 3:06-CR-14-KSF. This Judgment stated that Hungler had been "adjudicated guilty", based on a guilty plea by the Defendant, of 33 U.S.C. 1319(c)(4), "Making false statement on report required to be filed under provisions of the Clean Water Act." The Respondent was sentenced to probation for a term of one (1) year and fined \$10,000.

Conclusions of Law

1. The Office of Environmental Adjudication ("OEA") has jurisdiction over the decisions of the Commissioner of the Indiana Department of Environmental Management ("IDEM") and the parties to this controversy pursuant to Ind. Code § 4-21.5-7, *et seq.* The OEA has jurisdiction over this particular type of case pursuant to IC 13-18-11-8.
2. This is a Final Order issued pursuant to Ind. Code § 4-21.5-3-27. 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.
3. This Court must apply a *de novo* standard of review to this proceeding when determining the facts at issue. *Indiana Dept. of Natural Resources v. United Refuse Co., Inc.*, 615 N.E.2d 100 (Ind. 1993), *Indiana-Kentucky Electric v. Commissioner, Indiana Department of Environmental Management*, 820 N.E.2d 771 (Ind. Ct. App. 2005). Findings of fact must be based exclusively on the evidence presented to the ELJ, I.C. 4-21.5-3-27(d). Deference to the agency's initial determination is not allowed. *Id.*; "*De novo* review" means that:

all are to be determined anew, based solely upon the evidence adduced at that hearing and independent of any previous findings.

Grisell v. Consol. City of Indianapolis, 425 N.E.2d 247 (Ind. Ct. App. 1981).

4. The OEA may enter judgment for a party if it finds that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that a genuine issue as to any material fact does not exist and that the moving party is entitled to judgment as a matter of law." IC 4-21.5-3-23. The moving party bears the burden of establishing that summary judgment is appropriate. All facts and inferences must be construed in favor of the non-movant. *Gibson v. Evansville Vanderburgh Building Commission, et al.*, 725 N.E.2d 949 (Ind. Ct. App. 2000). All evidence must be construed in favor of the opposing party, and all doubts as to the existence of a material issue must be resolved against the moving party. *City of North Vernon v. Jennings Northwest Regional*

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Utilities, 829 N.E.2d 1, (Ind. 2005), *Tibbs v. Huber, Hunt & Nichols, Inc.*, 668 N.E.2d 248, 249 (Ind. 1996).”

5. The sole issue in this matter is whether the IDEM may rely on acts that occur out of the state of Indiana as grounds for the revocation of a wastewater operator's license. IC 13-18-11-8 states that an operator's license may be revoked under the following conditions:
 - (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.
 - (b) A hearing and further proceedings shall be conducted in accordance with IC 4-21.5-7.
6. The IDEM argues that the statute is clear and unambiguous that any acts committed in any jurisdiction, which constitute fraud or deception, can be the basis for revocation. However, the Respondent argues that the statute is ambiguous. Under the Respondent's interpretation, the statute does not allow the IDEM to revoke an operator license based on acts committed outside of the State of Indiana.
7. “The 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.” *Bourbon Mini-Mart, Inc. v. Commissioner, Indiana Department of Environmental Management*, 806 N.E.2d 14, 20 (Ind. Ct. App. 2004).
8. If 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). There is also a strong presumption that the legislature is aware of existing statutes relating to the same subject matter. *Burd Management LLC v. State of Indiana*, 831 N.E.2d 104 (Ind. 2005).
9. It is self-evident that the IDEM's regulatory jurisdiction cannot extend beyond the state of Indiana. A license granted by Indiana does not confer the authority to act in another state and vice versa. Each state has its own set of standards with which a licensee must comply. The IDEM argues that the statute should be construed to give the agency broad discretion to grant, deny or revoke licenses. This certainly is the case when the licensed activities take place in the state. However, the ELJ questions whether the legislature intended to give the IDEM broad authority to regulate activities that occur outside of the state.

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10. Like other statutes dealing with the revocation of licenses or other types of permitted activity, this law establishes the general parameters of conduct that can lead to the revocation of an operator license. However, in the other statutes¹, the legislature has deemed it necessary to expressly state that out-of-state conduct or convictions may (or may not) be used as the grounds for sanctions. IC 13-19-4-3², IC 25-1-9-4(a)(7)³, IC 25-1-11-5(a)(7)⁴, and IC 35-50-2-1⁵ all specifically state that acts committed outside of the state may be used as grounds to deny a permit (IC 13-19-4-3), revoke a license (IC 25-1-9-4 and IC 25-1-11-5) or deem a person to be a habitual offender (IC 35-50-2-1). IC 9-30-10-3⁶ specifically limits the State's authority to deem a person as a habitual traffic offender to violations that occur in Indiana. In addition, Rule 23(2)(b) of the Rules for Admission to the Bar and Discipline of Attorneys as promulgated by the Indiana Supreme Court, also explicitly states that out-of-state acts may be used to revoke an attorney's license.⁷ The statute in question in this matter does not contain similar language. Therefore, the statute is ambiguous as to whether the state may rely on acts committed outside of the state as the basis for revocation. It is presumed that the legislature knew of these other laws when IC 13-18-11-8 was written and the legislature's failure to include an explicit statement that out of state acts may be used to revoke a license, when it has expressly chosen to do so in other statutes, is a clear indication of legislative intent. This supports an interpretation that the legislature did not intend to allow the IDEM to revoke an operator's license solely on a conviction for conduct that occurred outside of Indiana.

¹ The following list of statutes is not intended to be a complete list of all statutes that may govern this subject.

² The applicant shall set forth the following information: "(4) A description of all pending criminal complaints alleging the violation of any state or *federal environmental protection law* that have been filed against the applicant or responsible party within five (5) years before the date of submission of the application. (5) A description of all judgments of criminal conviction entered against the applicant or responsible party within five (5) years before the date of submission of the application for the violation of any state or *federal environmental protection law*. (6) A description of all judgments of criminal conviction of a felony constituting a crime of moral turpitude *under the laws of any state or the United States* that are entered against the applicant or responsible party within five (5) years before the date of submission of the application." Emphasis added.

³ A practitioner may have disciplinary action taken against him if "(7) a practitioner has had disciplinary action taken against the practitioner or the practitioner's license to practice *in any state or jurisdiction* on grounds similar to those under this chapter." Emphasis added.

⁴ A practitioner may have disciplinary action taken against him if "(7) a practitioner has had disciplinary action taken against the practitioner or the practitioner's license to practice *in any state or jurisdiction* on grounds similar to those under this chapter." Emphasis added.

⁵ This statute defines a conviction as including convictions "*in any other jurisdiction at any time*". Emphasis added.

⁶ This defines "violation" as "a felony, a misdemeanor, or an infraction *under the Indiana Code*; or (2) a violation of an ordinance of *an Indiana political subdivision*." Emphasis added.

⁷ An attorney may be disciplined "If an attorney admitted to practice in this State who is also admitted to practice in any other state *should be disbarred or suspended by the proper authority of such other state*, such disbarment or suspension shall constitute sufficient grounds for disbarment or suspension of said attorney in this State." Emphasis added.

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11. As the party taking action and as a party seeking summary judgment, the IDEM has the burden of proving that the Respondent has practiced fraud or deception. In this case, the 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 out-of-state convictions as grounds for revocation, the IDEM may not use the Respondent's Kentucky conviction as the basis for revocation.
12. There is no genuine issue as to a material fact in this case. The sole issue is the interpretation of IC 13-18-11-2. Summary judgment in favor of the Respondent is appropriate.

Final Order

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Respondent's Motion for Summary Judgment is **GRANTED**.

You are hereby further notified that pursuant to provisions of Indiana Code § 4-21.5-7.5, the Office of Environmental Adjudication serves as the Ultimate Authority in the administrative review of decisions of the Commissioner of the Indiana Department of Environmental Management. This is a Final Order subject to Judicial Review consistent with applicable provisions of IC 4-21.5. Pursuant to IC 4-21.5-5-5, a Petition for Judicial Review of this Final Order is timely only if it is filed with a civil court of competent jurisdiction within thirty (30) days after the date this notice is served.

IT IS SO ORDERED this 9th day of January, 2008 in Indianapolis, IN.

Hon. Catherine Gibbs
Environmental Law Judge