

STATE OF INDIANA)	IN THE MARION SUPERIOR COURT
) SS:	
COUNTY OF MARION)	CAUSE No. 49D13-2107-PL-022351
HOOSIER ENVIRONMENTAL COUNCIL,)	
)	
Petitioner,)	
)	
v.)	
)	
INDIANA OFFICE OF ENVIRONMENTAL)	
ADJUDICATION, INDIANA DEPARTMENT)	
OF ENVIRONMENTAL MANAGEMENT, and)	
TANNERS CREEK DEVELOPMENT, LLC,)	
)	
Respondents.)	

ORDER DENYING RELIEF ON JUDICIAL REVIEW

Petitioner Hoosier Environmental Council seeks judicial review of the decision of Respondent Indiana Office of Environmental Adjudication to dismiss the “Petition For Administrative Review” of the agency action of Co-Respondent Indiana Department of Environmental Management. The OEA dismissed the Council’s Petition because an attorney who was not licensed to practice law in Indiana signed the Council’s Petition. For the reasons set forth below, the Court DENIES the Council’s request for relief on judicial review.

With its Petition, the Council sought to challenge IDEM’s approval of an Amended Monitoring Well Installation Plan for a 71-acre coal combustion waste impoundment owned by Co-Respondent Tanner Creek Development, LLC. IDEM served its approval decision on February 9, 2021. The Council’s deadline to file any petition for administrative review of IDEM’s approval decision was February 24, 2021.

On February 24, 2021, the Council filed its Petition for Administrative Review. The attorney who electronically “signed” the Petition on behalf of the Council was Mandy DeRoche,

an attorney not admitted to practice law in Indiana, even on a temporary basis.¹ Kim Ferraro, an attorney licensed to practice law in Indiana, was included on the typed signature block of the Petition, but Ms. Ferraro had not affixed her electronic signature to the Council's Petition. Two days later, on February 26, 2021, the Council filed an Amended Petition for Administrative Review. The only change to the Amended Petition was the signature line, which contained the electronic signature of Ms. Ferraro.

On April 5, 2021, Tanner Creek filed a Motion to Dismiss Petition for Administrative Review, arguing that the Council's original Petition was a nullity because it was not signed by an Indiana-licensed attorney. Tanner Creek further argued that the Council's Amended Petition was filed beyond the 15-day deadline for challenging an IDEM action, and that the Amended Petition could not relate back to the original Petition, which was a nullity due to the lack of a proper signature. On June 3, 2021, the OEA issued its Findings of Fact, Conclusions of Law and Final Order, in which the OEA granted Tanner Creek's Motion to Dismiss for the reasons stated.

The Council's request for judicial review challenges the OEA order dismissing the Council's petition for administrative review. Tanner Creek opposes the Council's judicial review petition. Neither OEA nor IDEM responded to the Council's request for judicial review.

"The burden of demonstrating the invalidity of agency action is on the party to the judicial review proceeding asserting invalidity." IND. CODE § 4-21.5-5-14(a). A court:

shall grant relief . . . only if it determines that a person seeking judicial relief has been prejudiced by an agency action that is:

- (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

¹ The Council tendered its Petition to the OEA electronically. The Indiana Trial Rules provide that for electronically-filed documents that require a signature, the signature must be either a graphic image of a handwritten signature or the indicator "/s/" followed by the person's name. Ind. Rule of Trial Procedure 87(G)(1). Here, Ms. DeRoche utilized the "/s/" method for signing her name on the Petition.

- (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.

IND. CODE § 4-21.5-5-14(d).

In its dismissal order, the OEA's Environmental Law Judge concluded the following:

The timely-filed Petition for Review was not signed by an attorney admitted to practice law in the State of Indiana and is therefore a nullity and cannot be amended. The amended Petition, although signed by an attorney admitted to practice in Indiana, was not timely filed. Although there is no evidence that the Petition for Review was sham or false or that there was any intent to deceive on Ms. DeRoche or Ms. Ferraro's parts, the Petition for Review should be dismissed. The Motion to Dismiss is granted.

Conclusions of Law ¶ 10, OEA Findings of Fact, Conclusions of Law and Final Order, issued June 3, 2021. In this judicial review action, the facts material to the OEA's dismissal of the Council's administrative petition are not in dispute. This Court only reviews OEA's dismissal for correctness as a matter of law. On judicial review, a court reviews an administrative agency's determinations of questions of law *de novo*. *Bd. Of Comm'rs of LaPorte Cnty. v. Great Lakes Transfer, LLC*, 888 N.E.2d 784, 789 (Ind. Ct. App. 2008).

An administrative review proceeding is initiated when a petition for administrative review is filed, in writing, with the Office of Environmental Adjudication. 315 IND. ADMIN. CODE 1-3-2(a). However, "where a legal proceeding has been instituted on behalf of another in a court of record by one not licensed to practice law, the action should be dismissed, and if the suit has proceeded to judgment, the judgment is void." *Simmons v. Carter*, 576 N.E.2d 1278, 1280 (Ind. Ct. App. 1991) (cited in *Professional Laminate & Millwork, Inc. v. B&R Enterprises*, 651 N.E.2d 1153, 1156 (Ind. Ct. App. 1995)). The reasoning set forth in *Simmons* and *Professional Laminate* is equally applicable in this case. Although those cases involved the validity of

pleadings filed in a trial court and this case involves validity of an administrative review petition, all three cases address the filing of a legal document by an attorney not licensed to practice law in Indiana. The holdings of *Simmons* and *Professional Laminate* make clear that attorneys not licensed to practice law in Indiana, as a general rule, may not file legal papers on behalf of clients in adjudicative proceedings. Here, only Ms. DeRoche signed the Petition filed before the deadline. At the time of filing the Council's Petition, however, Ms. DeRoche was not admitted to practice law in Indiana nor was she temporarily admitted to practice law. Applying the reasoning set forth in *Simmons* and *Professional Laminate*, the OEA properly dismissed the Council's Petition.

Even if Ms. DeRoche had been temporarily admitted to practice law in Indiana, the signature of an Indiana-licensed attorney was also required on the administrative review petition. When an out-of-state attorney receives temporary admission to the Indiana bar, the member of the Indiana bar who is serving as co-counsel under this rule "shall sign all briefs, papers and pleadings in the cause and shall be jointly responsible therefore." IND. RULES FOR ADMISSION TO THE BAR AND THE DISCIPLINE OF ATTORNEYS 2(B). The Council's original Petition was defective because it lacked the signature of an attorney who was a regular active member of the Indiana bar.

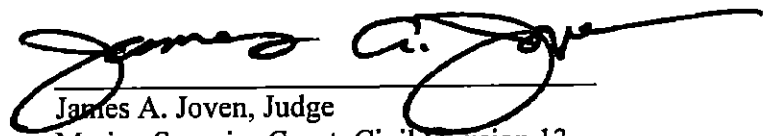
Likely recognizing that the Council's original Petition lacked a proper signature, the Council tendered an Amended Petition on February 26, 2021, this time with a proper signature – that of Ms. Ferraro. That Amended Petition, however, was tendered too late. A challenger to an IDEM order has 15 days after being served with such order to petition for administrative review. IND. CODE § 4-21.5-3-7(a)(3) and § 13-15-6-1(a). As the OEA determined, IDEM served its approval decision on February 9, 2021, making the Council's petition for administrative review

due February 24, 2021. The OEA determined that the Council's Amended Petition was tendered two days late, thus leading to the dismissal of the Council's administrative review case.

Moreover, the Council's argument that the filing of the Amended Petition ought to relate back to the time of the filing of the original Petition is contrary precedent. In *Professional Laminate*, the Indiana Court of Appeals held that court filings were a nullity where they (1) were filed by an out-of-state attorney who had not sought temporary admission, and (2) lacked the signature of an Indiana attorney. *Professional Laminate*, 651 N.E.2d at 1157. The Council's Amended Petition cannot relate back to a filing that is a nullity. The Amended Petition was filed too late. The OEA Environmental Law Judge properly decided this issue.

Having reviewed the Council's Verified Petition for Judicial Review of Final Agency Order, the parties' respective filings, and the OEA record, this Court finds that the Petitioner, the Hoosier Environmental Council, has not met its burden to show that Respondent Indiana Office of Environmental Adjudication acted contrary to law or contrary to constitutional right in dismissing the Council's administrative review petition. Accordingly, this Court DENIES the Verified Petition for Judicial Review of Final Agency Order, and AFFIRMS the OEA's Findings of Fact, Conclusions of Law and Final Order, issued June 3, 2021.

ENTERED: 10/5/2022


James A. Joven, Judge
Marion Superior Court, Civil Division 13

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