

[Cite as *Spencer v. Korleski*, 2009-Ohio-4308.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Alonzo Spencer,	:	
	:	
Appellant-Appellant,	:	
	:	No. 08AP-1060
v.	:	(ERAC No. 155746)
	:	
Christopher Korleski, Director of	:	(REGULAR CALENDAR)
Environmental Protection et al.,	:	
	:	
Appellees-Appellees.	:	
	:	

D E C I S I O N

Rendered on August 25, 2009

Lipton Law, LLP, and Andrew S. Lipton; Simon & Associates Law Offices, and Ronald Simon, for appellant.

Richard Cordray, Attorney General, Brian A. Ball and James A. Carr, for appellee Christopher Korleski, Director of Environmental Protection.

Bricker & Eckler LLP, Charles H. Waterman III, for appellee Von Roll American, Inc.

APPEAL from the Environmental Review Appeals Commission.

McGRATH, J.

{¶1} Appellant, Alonzo Spencer, appeals from an order of the Environmental Review Appeals Commission ("ERAC"), that affirmed the decision of appellee Christopher Korleski, Director of the Ohio Environmental Protection Agency ("Director" or "OEPA"), granting an Ohio Hazardous Waste Facility Installation and Operation Permit Renewal ("renewal permit") for a hazardous waste incinerator.

{¶2} This litigation concerns a hazardous waste treatment and storage facility ("the facility") located in East Liverpool, Ohio. The facility is owned and operated by appellee Von Roll America, Inc. ("Von Roll"). In 1984, the initial operating permit for the facility was issued. In 1986, the Supreme Court of Ohio affirmed the issuance of the permit. *State of West Virginia v. Ohio Hazardous Waste Facility Approval Bd.* (1986), 28 Ohio St.3d 83. Von Roll submitted a permit renewal application to OEPA in 1994, and in 2002, Von Roll submitted an update to the application. The Director issued a draft renewal permit on January 24, 2003. After conducting a public meeting, the Director published a 300-page responsive summary to address community issues and concerns. On March 23, 2005, the Director issued the renewal permit.

{¶3} The Director's decision was appealed to ERAC, and on September 27 and 28, 2008, a de novo hearing was conducted. On November 6, 2008, ERAC rendered a decision rejecting appellant's challenge to the granting of the renewal permit. An appeal to this court followed, and appellant brings the following five assignments of error for our review:

I. ERAC ERRED BY USING AN UNLAWFUL STANDARD TO DETERMINE WHETHER THERE WAS A DEMONSTRATED HISTORY OF COMPLIANCE WITH ENVIRONMENTAL LAWS.

II. ERAC ERRED IN ITS [SIC] AND MADE ILLEGAL AND THEREFORE INVALID CONCLUSIONS WITH REGARD TO WHETHER THERE WAS A HISTORY OF COMPLIANCE WITH ENVIRONMENTAL LAWS.

III. ERAC ERRED IN REFUSING TO CONSIDER THE FACT THAT USEPA HAD DETERMINED THAT THE FACILITY WAS A SIGNIFICANT NON COMPLIER WITH ENVIRONMENTAL LAWS BECAUSE THE DETERMINATION THAT A PARTY IS A SIGNIFICANT NON COMPLIER WITH ENVIRONMENTAL LAW IS NOT A PART OF OHIO LAW.

IV. ERAC ERRED IN CONCLUDING THAT THE DIRECTOR HAD BEEN TOLD BY USEPA THAT THE FACILITY WAS IN SUBSTANTIAL COMPLIANCE WITH FEDERAL LAWS AND REGULATIONS.

V. ERAC ERRED IN EXPLICITLY REFUSING TO CONSIDER THE RECORDS OF FIRE MARSHALL ON THE GROUNDS THAT THEY ARE NOT ENVIRONMENTAL RECORDS.

{¶4} However, before addressing the merits of this appeal, we must first address Von Roll's motion to strike appendix G, M, and N, and the arguments premised thereon, contained in appellant's brief. It is Von Roll's argument that these appendices consist of documents not in the record as they were either not presented at the de novo hearing before ERAC or were otherwise excluded by ERAC. As appellant asserts, we cannot consider items not properly made part of the record. App.R. 9; *Wassenaar v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 07AP-712, 2008-Ohio-1220, ¶20. Consequently, Von Roll's motion to strike is granted.

{¶5} We now turn to the merits of appellant's assigned errors. Because they are interrelated, appellant's five assignments of error will be addressed together. Reduced to their essence, these assigned errors challenge the granting of the renewal permit and contend Von Roll did not demonstrate the statutorily required "history of compliance" to allow permit renewal.

{¶6} R.C. 3745.05 sets forth the standard ERAC must employ when reviewing a final action of the Director. That statute provides, in relevant part, that "[i]f, upon completion of the hearing, the commission finds that the action appealed from was lawful and reasonable, it shall make a written order affirming the action, or if the commission finds that the action was unreasonable or unlawful, it shall make a written order vacating

or modifying the action appealed from." This standard does not permit ERAC to substitute its judgment for that of the Director as to factual issues. *CECOS Internatl., Inc. v. Shank* (1992), 79 Ohio App.3d 1, 6. The term "unlawful" means "that which is not in accordance with law," and the term "unreasonable" means "that which is not in accordance with reason, or that which has no factual foundation." *Citizens Committee to Preserve Lake Logan v. Williams* (1977), 56 Ohio App.2d 61, 70. "It is only where [ERAC] can properly find from the evidence that there is no valid factual foundation for the Director's action that such action can be found to be unreasonable. Accordingly, the ultimate factual issue to be determined by [ERAC] upon the De novo hearing is whether there is a valid factual foundation for the Director's action and not whether the Director's action is the best or most appropriate action, nor whether the board would have taken the same action." *Id.*

{¶7} R.C. 3745.06 provides the standard this court must employ when reviewing a final order of ERAC. That statute provides, as pertinent here, that "[t]he court shall affirm the order complained of in the appeal if it finds, upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law. In the absence of such a finding, it shall reverse, vacate, or modify the order or make such other ruling as is supported by reliable, probative, and substantial evidence and is in accordance with law."

{¶8} In *Tube City Olympic of Ohio, Inc. v. Jones*, 10th Dist. No. 03AP-295, 2004-Ohio-1464, this court discussed the terms "reliable," "probative," and "substantial." "Reliable evidence is evidence which can be trusted. In order for evidence to be reliable, there must be a reasonable probability that it is true. Probative evidence is evidence

which tends to prove the issue in question, while substantial evidence is evidence which carries weight, or evidence which has importance or value.' " Id., at ¶25, quoting *City of Perrysburg v. Schregardus*, 10th Dist. No. 00AP-1403, 2001-Ohio-4085.

{¶9} In determining whether ERAC's decision is supported by the requisite quantum of evidence, we must weigh and evaluate the credibility of the evidence presented to ERAC. Id. at ¶26, citing *Perrysburg*. This process involves a consideration of the evidence and, to a limited extent, would permit a substitution of judgment by the reviewing court. Id. citing *Perrysburg*. However, we must bear in mind that the General Assembly created administrative bodies to facilitate certain areas of the law by placing the administration of those areas before boards or commissions composed of individuals who possess special expertise. *Club 3000 v. Jones*, 10th Dist. No. 07AP-593, 2008-Ohio-5058, ¶29, citing *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 1993-Ohio-122, paragraph one of the syllabus. Accordingly, this court must afford due deference to ERAC's interpretation of rules and regulations, as well as its resolution of evidentiary conflicts. Id.

{¶10} In challenging the granting of the renewal permit, appellant sets forth two arguments: (1) ERAC erred in failing to consider records from the United States Environmental Protection Agency ("USEPA"); and (2) ERAC erred in failing to consider records from the Ohio Fire Marshal. According to appellant, consideration of this evidence leads to the inescapable conclusion that Von Roll did not demonstrate a history of compliance to allow permit renewal, and, therefore, ERAC's decision must be reversed.

{¶11} Pursuant to R.C. Chapter 3734, the Director is charged with the responsibility of regulating and licensing hazardous waste facilities located in the State of

Ohio. When an existing hazardous waste facility, such as Von Roll, seeks a permit renewal, the Director must review the application and accompanying information to determine whether the application complies with the requirements of R.C. 3734.05(H)(2), which provides, in relevant part:

The director shall not issue a renewal permit unless the director determines that the facility under the existing permit has a history of compliance with this chapter, rules adopted under it, the existing permit, or orders entered to enforce such requirements that demonstrates sufficient reliability, expertise, and competency to operate the facility henceforth under this chapter, rules adopted under it, and the renewal permit.

{¶12} Relevant to this inquiry is R.C. 3734.05(H)(1), which provides that when reviewing an application for permit renewal, "[t]he director shall consider the application and accompanying information, inspection reports of the facility, results of performance tests, a report regarding the facility's compliance or noncompliance with the terms and conditions of its permit and rules adopted by the director under this chapter, and such other information as is relevant to the operation of the facility[.]" Also relevant to the matter before us is R.C. 3734.44 that governs off-site facilities¹ such as Von Roll. Said provision provides, in pertinent part:

Notwithstanding the provisions of any law to the contrary, no permit or license shall be issued or renewed by the director of environmental protection * * *:

(A) Unless the director * * * finds that the applicant, in any prior performance record in the transportation, transfer, treatment, storage, or disposal of solid wastes, infectious wastes, or hazardous waste, has exhibited sufficient reliability, expertise, and competency to operate the solid waste, infectious waste, or hazardous waste facility, given the

¹ An off-site facility is one that is located off premises where the solid wastes, infectious wastes, or hazardous waste is generated. R.C. 3734.41(G).

potential for harm to human health and the environment that could result from the irresponsible operation of the facility[.]

* * *

(D) Unless the director * * * finds that the applicant has a history of compliance with environmental laws in this state and other jurisdictions and is presently in substantial compliance with, or on a legally enforceable schedule that will result in compliance with, environmental laws in this state and other jurisdictions[.]

{¶13} At the de novo hearing, ERAC heard testimony from appellant, Theresa Mills, appellant's environmental investigator, Edwin Lim, Manager of Engineering and Remediation Assistance Section in the Division of Hazardous Waste Management ("DHWM") of the OEPA, and Harry Sarvis, Manager in the Environmental Assurance Section of DHWM of the OEPA.

{¶14} Appellant testified he has been a resident of East Liverpool, Ohio for 78 years and lives a few blocks from the facility. Appellant explained foul odors often emanate from the facility, as do emissions that are white, pink, or yellowish in color. Appellant also described a large explosion at the facility that occurred approximately a year prior to the hearings. According to appellant, this explosion caused his house to shake, cracked the ceilings in his neighbor's house, and "knocked out" the stop light in front of his house.

{¶15} Ms. Mills testified she reviewed the certified record, as well as USEPA internet files, OEPA records, and records from the Ohio Fire Marshal. Ms. Mills prepared several spreadsheets from the information she obtained from these various sources. Included in the internet records of the USEPA was information from the ECHO database.²

² The ECHO database is the Enforcement Compliance History On-Line database found on the internet at USEPAECHO.gov.

Ms. Mills testified Von Roll appeared on the ECHO database as a "significant noncomplier" ("SNC") in the months following the permit renewal in March 2005.

{¶16} Mr. Lim testified regarding the standard the Director employs for renewing permits for hazardous waste facilities, including the applicable code sections set forth above. According to Mr. Lim, once the permit renewal application is submitted, there is a concerted effort between his office, the district office, and the compliance assurance section to complete compliance and financial assurance reviews. The district office ensures there is a complete application and will assess permit conditions if such are required. The compliance section looks into the environmental background investigation unit report and prepares findings with respect to the facility's compliance history. Thereafter, if appropriate, a "package" is prepared and the matter proceeds to a draft permit stage. The package consists of the application, the permit, and various checklists that include reports of the reviews conducted. If a draft permit is issued, a period for public comment is set and a public hearing may be held. At the conclusion of this stage, a responsive summary is prepared, and the final decision is issued.

{¶17} In this case, the administrative checklist consisted of a 44-page document, and the renewal application consisted of over 3000 pages. Additionally, Mr. Lim explained OEPA and Von Roll engaged in numerous, routine communications regarding the permit renewal application.

{¶18} Mr. Sarvis testified with respect to the permit renewal process as well. Mr. Sarvis explained Von Roll has two compliance evaluation inspections performed each year. Additionally, there are two on-site inspectors at Von Roll that conduct daily

evaluations as part of their routine job duties. There is also an annual review of financial assurance that is limited to the financial instruments themselves.

{¶19} Mr. Sarvis was asked about the USEPA's designation of Von Roll as an SNC on the ECHO database that occurred in 2005. According to Mr. Sarvis, this designation and subsequent enforcement action were not taken into account by the Director because the enforcement action was initiated *after* the renewal permit was issued. Additionally, Mr. Sarvis explained he is in regular contact with the USEPA and at the time he was conducting his review for the renewal permit, USEPA indicated "there was a history of compliance, and that [Von Roll was] in substantial compliance at that time." (Sept. 28, 2007 Tr. at 312.)

{¶20} Mr. Sarvis was also asked about the records from the Ohio Fire Marshal. According to Mr. Sarvis, such records are not specifically among those required to be considered by the Director when making a determination such as this. Mr. Sarvis made a recommendation for permit renewal, including a seven-page spreadsheet detailing Von Roll's compliance and incident history from November 1999 to June 2004. This report identified the type of inspection that was conducted, any violations that were noted during inspection, and the status of the violation; i.e., whether the facility abated the violation, returned to compliance, or was subject to an escalated enforcement action. Division Chief of DHWM, Michael Savage, also recommended that the Director review and sign the permit renewal.

{¶21} In sum, as set forth in ERAC's decision, the record reveals the Director considered: (1) a review of inspections of the facility, including annual and daily inspections; (2) a review of all environmental compliance issues at the facility, including

violation notices and enforcement actions; and (3) a review of the statutorily mandated background investigation reports prepared by the Ohio Attorney General, Bureau of Criminal Investigation.

{¶22} Appellant contends ERAC erred in failing to consider Von Roll's status as an SNC and the records of the Ohio Fire Marshal. This assertion, however, is clearly in error. While the Director did not consider the Ohio Fire Marshal records or the SNC designation, both of these issues were not only raised at the de novo hearing, but comprised the very basis of appellant's appeal to ERAC. Upon review, we do not find either issue requires reversal of the Director's decision.

{¶23} The Director did not consider the records from the Ohio Fire Marshal because, as explained by the testimony, such records are not included in what the Director is required to consider when reviewing an application for renewal of a hazardous waste permit. Indeed, appellant does not direct us to any provision in Ohio law that states otherwise. According to the testimony at the hearing, if there was information held by the Ohio Fire Marshal that weighed upon whether or not there was a history of compliance with applicable environmental laws, such information would already be contained within the records held by the OEPA because of other reporting mechanisms that are in place.

{¶24} The Director also did not consider Von Roll's formal designation as an SNC but, as explained at the de novo hearing, that is because the designation did not occur until *after* the Director granted renewal of the permit. Appellant suggests, however, that the timing of the formal designation is irrelevant because the acts of noncompliance leading up to the formal designation would have occurred prior to the renewal of the permit; therefore, granting the renewal permit was in error. Mr. Sarvis's testimony,

however, makes clear that he was in communication with USEPA and that he was advised by the same that Von Roll was in substantial compliance with federal laws and regulations.

{¶25} Moreover, as explained in ERAC's decision, Mr. Sarvis testified that the SNC term is unique to USEPA regulations and is not found in Ohio laws or regulations. Thus, an evaluation of whether or not a facility is an SNC, as that term is used in USEPA's ECHO database, is not required under Ohio law. Additionally, as we stated previously, ERAC was fully aware of this subsequent designation as this was one of the main challenges raised in appellant's appeal to ERAC. ERAC concluded, however, that despite this subsequent designation, the OEPA had communicated with USEPA prior to granting the renewal permit and that, therefore, the Director satisfied his obligation to ensure Von Roll had a history of compliance with applicable environmental laws. It is also clear from the testimony and the full record in this case that the facts underlying ECHO's designation would have been considered by the Director as the Director considered the compliance history of Von Roll as set forth in the submitted renewal application package. We also note that nothing in Ohio law requires absolute compliance. Instead, the statutory language contemplates that violations and/or enforcement proceedings may have occurred. R.C. 3734.05 (seeking a determination of a "history of compliance"); R.C. 3734.44 (requiring a "history of compliance" and "substantial compliance"). In fact, R.C. 3734.44 speaks to the Director's consideration of whether a facility is on a legally enforceable schedule that will result in compliance with applicable environmental laws. Thus, that violations may have occurred is clearly contemplated by the statutory scheme.

{¶26} We are obligated to affirm an ERAC decision if such decision is supported by reliable, probative, and substantial evidence and is in accordance with law. R.C. 3745.06. After review of the record, including the testimony and evidence presented at the de novo hearing before ERAC, we find ERAC's order is supported by reliable, probative, and substantial evidence and is in accordance with law. Accordingly, we overrule appellant's assigned errors.

{¶27} For the foregoing reasons, Von Roll's motion to strike is granted, appellant's five assignments of error are overruled, and the judgment of the Environmental Review Appeals Commission is hereby affirmed.

Motion to strike granted; judgment affirmed.

BROWN and CONNOR, JJ., concur.
