

TRANS RAIL AMERICA, INC.,

Appellant-Appellant,

v.

JAMES J. ENYEART, M.D.,
HEALTH COMMISSIONER,
TRUMBULL COUNTY HEALTH
DEPARTMENT

Appellee-Appellee.

CASE NO. ~~2007-1549~~

On Appeal from the Franklin County
Court of Appeals, Tenth Appellate
District

Court of Appeals
Case Nos. 07AP-273 and 07AP-284

**MEMORANDUM IN SUPPORT OF JURISDICTION OF
AMICUS CURIAE HUBBARD ENVIRONMENTAL AND LAND PRESERVATION**

Robert J. Karl* (0042292)
Sherry L. Hesselbein (0074494)
ULMER & BERNE, LLP
88 E. Broad Street, Suite 1600
Columbus, Ohio 43215
Phone: (614) 229-0000
Fax: (614) 229-0001
E-mail: bkarl@ulmer.com
*Counsel for Amicus Curiae
Hubbard Environmental and Land
Preservation*

Michael A. Cyphert*
Leslie G. Wolfe
Jonathon R. Goodman
WALTER & HAVERFIELD, LLP
The Tower at Erieview
1301 E. Ninth Street, Suite 3500
Cleveland, Ohio 44114-1821
Phone: (216) 781-1212
Fax: (216) 575-0911
E-mail: cgibbon@walterhav.com
*Counsel for Appellant-Appellant
Trans Rail America, Inc.*

Robert C. Kokor*
Ronald James Rice Co., LPA
48 West Liberty Street
Hubbard, Ohio 44425
Phone: (330) 534-1901
Fax: (330) 534-3933
*Counsel for Appellee-Appellee
James J. Enyeart, M.D., Health Commissioner*

* Counsel of Record

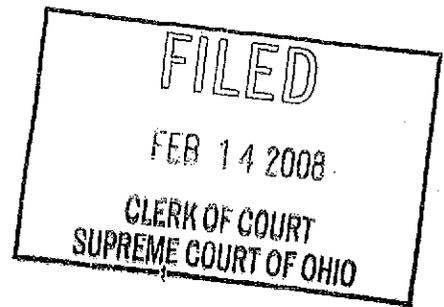


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INTRODUCTION

This case discusses the jurisdictional authority of the Environmental Review Appeals Commission (“ERAC”), an administrative tribunal established by statute to review “actions” of the director of the Ohio Environmental Protection Agency (“Ohio EPA”) and local boards of health. The Tenth District Court of Appeals in its decision imposed upon ERAC jurisdictional authority beyond that set forth in statute and granted ERAC with mandamus authority over the director and the boards of health. Expanding ERAC’s jurisdiction to hear appeals from all matters (not just jurisdictional “acts” or “actions”) of the director or board conflicts with the legislative language and could create chaos in the appeals procedure by overwhelming ERAC with unlimited appeals. This case merits the Court’s attention so that the Court can accurately define the scope of ERAC’s jurisdiction and protect the integrity of the appeals procedure.

EXPLANATION OF WHY A SUBSTANTIAL CONSTITUTIONAL QUESTION IS INVOLVED AND WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

A. Expansion of ERAC’s jurisdiction to include ordering the director or board in the absence of a final “action” conflicts with the statutory language.

ERAC’s subject matter jurisdiction is established by statute. For over thirty-five years, the courts (specifically the Tenth District Court of Appeals) have consistently interpreted the statute as giving ERAC jurisdiction over “acts” or “actions” of the director of Ohio EPA or local boards of health. For the first time, the Tenth District Court of Appeals has changed course and held that ERAC also has jurisdiction to order the director or board to act when no previous act or action has occurred. The law is clear that administrative tribunals have only the power that is given to them by statute. The court’s decision has improperly expanded the jurisdiction of ERAC well beyond its statutory authority. By granting ERAC jurisdiction beyond that provided

in statute, the Court of Appeals has disregarded the General Assembly's defined intent and upset the separation of powers between the branches of government.

B. Granting ERAC authority to order the director or board to act gives ERAC mandamus authority, which directly conflicts with the Ohio Constitution and Revised Code.

Because the Court of Appeals held that ERAC has authority to order the director or board to act, the Court of Appeals has essentially provided ERAC mandamus authority. "Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." R.C. 2731.01. The Court of Appeals decision gives ERAC the authority to command the director or board of health to perform an act without an initial finding that ERAC has jurisdiction over the appeal. Original jurisdiction in mandamus actions is with the Ohio Supreme Court and the courts of appeals. (O Const IV Sec. 2(B)(1)(b) & Sec. 3(B)(1)(b).) "Writs of mandamus may be allowed by the supreme court, the court of appeals, or the court of common pleas." R.C. 2731.02. Neither the Ohio Constitution nor the governing statutes give ERAC jurisdiction in mandamus actions. ERAC cannot order the director or board to act unless ERAC is reviewing a final act or action of the director or board. If ERAC determines that the director or board's action was unreasonable or unlawful, then ERAC may, pursuant to statute, order the director or board to take an alternative action. But unless a final "act" or "action" has occurred, ERAC is without jurisdiction to hear the appeal.

C. Protecting the integrity of the ERAC appeals process is of public and great general interest.

If appeals such as this one are permitted to be heard without first considering whether a final "action" has been taken, ERAC will become so overwhelmed by the numerous additional appeals that it will be prevented from performing its true function, which is to

determine whether a final “act” or “action” of the director or board of health was reasonable and lawful. Without a limitation on the appeals to ERAC, the appeals process will be compromised and citizens will no longer be able to participate in the administrative permit process as currently contemplated by the statute. Applicants will file incomplete applications, receive letters from Boards of Health that their applications are incomplete, and then file to ERAC for review. Citizens will be prohibited from providing meaningful input to administrative agencies, but instead be required to intervene before ERAC to provide comments and public participation.

The roles of the agencies should not be mixed. The director and the boards of health process license and permit applications. ERAC reviews these agencies’ final issuance or denials of the applications for reasonableness and lawfulness. Ultimately, ERAC’s decisions have a great impact on regulating the director and board’s actions and balancing the protection of Ohio’s environment with Ohio’s economy and the success of Ohio’s natural resources; thus, it is of public and great general interest that ERAC be able to perform its function.

Because the Tenth District Court of Appeals is the court that hears most appeals from ERAC, its precedent weighs greatly in ERAC’s decisions. This Court must consider that any incorrect application of the law by the Tenth District Court of Appeals would have substantial consequences on future ERAC decisions. As the dissent noted in the court below, “Not only is [the majority’s] interpretation contrary to past decisions of this court, it creates a dangerous precedent for interference in the comprehensive statutory scheme for the issuance of environmental licenses and permits, a precedent with the potential to extend well beyond the facts of this case before us.” *Trans Rail America, Inc. v. Enyeart* (2007), 10th App. Dist. Case Nos. 07AP-273 and 07AP-284, 2007-Ohio-7144, ¶ 12 (French, J., dissenting). For this reason and all of the reasons set forth above, this Court should accept certiorari.

STATEMENT OF THE CASE AND FACTS

Amicus curiae Hubbard Environmental and Land Preservation (“HELP”) is a non-profit corporation whose members reside in Hubbard Township and/or the City of Hubbard immediately adjacent to, and in the surroundings areas of, Trans Rail’s site for the proposed landfill. HELP was formed to protect and represent the interests of the entire community. The community does not want the landfill; but if the landfill is to be constructed, then HELP seeks assurance that all legal requirements for landfill construction, maintenance, monitoring and permitting are followed. These requirements protect the health and safety of the HELP members and the environment in which they live. Through statute, the Trumbull County Health Department is authorized to issue or deny construction and demolition debris landfill permits. The Health Department possesses the knowledge necessary to determine whether a proposed landfill has met the legal requirements, but all of the required information must be provided in the application before the Health Department can reach an informed decision. HELP members, through public participation, have in the past played a role in the permit completeness review process.

Trans Rail’s proposed location for the landfill is approximately 243 acres of land located at 6415 Mt. Everett Road, Hubbard Township, Ohio. Trans Rail filed a landfill permit application with the Health Department. Before the Commissioner of the Health Department can issue or deny the landfill permit, Trans Rail must provide in the application all of the information required by law. See, Ohio Adm. Code 3745-37-02.

After twice receiving and reviewing the landfill permit application, the Health Department informed Trans Rail each time that its permit application contained numerous deficiencies; thereby, the applications were not considered to be complete applications. On or

about March 30, 2006, Trans Rail resubmitted its application, which the Health Department again reviewed for completeness. On May 31, 2006, the Health Department sent notice to Trans Rail that its application was still incomplete. The Health Department, while finding that some of the deficiencies from the previous versions of the application had been corrected, found that Trans Rail had not yet included, among other things, information in support of the new siting criteria for C&DD landfills. The Health Department informed Trans Rail that it could not process the application until the siting criteria information was submitted.

Rather than provide the siting criteria information, Trans Rail filed an appeal with ERAC. Trans Rail requested ERAC to find that the application was complete and to order the Health Department to issue or deny the permit. The Health Department filed a Motion to Dismiss with ERAC on the basis that ERAC lacked jurisdiction to hear Trans Rail's appeal.

ERAC's jurisdiction to hear an appeal is found in R.C. § 3745.04, which provides, in part:

(B) Any person who was a party to a proceeding before the director of environmental protection may participate in an appeal to the environmental review appeals commission for an order vacating or modifying the action of the director or a local board of health, or ordering the director or board of health to perform an act. * * *

* * *

(D) An appeal shall be in writing and shall set forth the action complained of and the grounds upon which the appeal is based.

The appeal shall be filed with the commission within thirty days after notice of the action. Notice of the filing of the appeal shall be filed with the appellee within three days after the appeal is filed with the commission.

R.C. 3745.04 (emphasis added).

Pursuant to R.C. § 3745.04, ERAC has jurisdiction to hear appeals from “acts” or “actions” of the director or a local board of health. ERAC granted the Health Department’s Motion to Dismiss holding that the Health Department’s permit incompleteness determination was not an “act” or “action” that was appealable to ERAC.

Trans Rail appealed ERAC’s decision to the Tenth District Court of Appeals. The majority reversed ERAC’s decision and held that Trans Rail could appeal the Health Department’s incompleteness determination letter to ERAC. The majority’s opinion relied solely on the language, “or ordering the director or board of health to perform an act,” found in R.C. 3745.04(B) as the basis for jurisdiction. *Trans Rail America, Inc.* at ¶ 9. From the language, the majority concluded that ERAC had jurisdiction to hear appeals in which appellants were requesting ERAC to order the director or board to act without first considering whether there had been a final, appealable action.

The dissent noted the majority’s failure to analyze the statute as a whole. The dissent identified language in R.C. 3745.04 requiring that the appeal set forth “the action complained of” and that the appeal be filed within thirty days after “notice of the action.” *Id.* at ¶ 7 (French, J., dissenting). Based on the totality of R.C. 3745.04, the dissent concluded that before ERAC could order the Health Department to approve or deny the permit, ERAC must first determine whether the Health Department’s incompleteness determination letter was a final, appealable “action.” *Id.* at ¶ 6 (French, J., dissenting). Only if the letter is an “action” of the Health Department would ERAC have jurisdiction over the appeal.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law:

The Health Department's determination that Trans Rail's permit application was incomplete is not an "act" or "action" appealable to ERAC; therefore, ERAC lacks jurisdiction to hear Trans Rail's appeal.

Appeals to ERAC are governed by R.C. Chapter 3745 and the procedural regulations located in Ohio Administrative Code ("OAC") Chapter 3746. ERAC's jurisdiction is established in R.C. 3745.04, which provides "Any person * * * may participate in an appeal to the environmental review appeals commission for an order vacating or modifying the action of the director or a local board of health, or ordering the director or board of health to perform an act." For years, ERAC and the Tenth District Court of Appeals have interpreted this statute as meaning that any person may appeal to ERAC from a final "act" or "action" of the director or board. *US Technology Corp. v. Korleski* (Nov. 6, 2007), 2007 Ohio 5922; *Dayton Power and Light Co. v. Schregardus* (1997), 123 Ohio App.3d 476; *Youngstown Sheet and Tube Co. v. Maynard* (1984), 22 Ohio App.3d 3; *General Motors Corp. v. McAvoy* (1980), 63 Ohio St.2d 232; *Aristech Chem Corp. v. Shank* (July 25, 1989), EBR No. 441977; *Inorganic Recycling of Ohio, Inc. v. Shank* (Nov. 30, 1989), EBR No. 252011.

In order to determine whether a decision of the director or the board is a final, appealable "action," ERAC applies a three-part test. First, ERAC determines whether the document falls within the types of acts or actions enumerated in R.C. 3745.04 and Ohio Adm. Code 3746-1-01. If the letter is not specifically enumerated in the definition of act or action, the letter may still be a final, appealable "action" if the form of the document contains the traditional indicia of a final action. If the document contains none of the traditional indicia of a final act or action, ERAC then considers whether the substance of the document adjudicates with finality

any legal rights. If the document does not adjudicate with finality any legal rights of the party, then the document is not a final appealable act or action. See, *Dr. Kevin Lake v. Jones* (2003), ERAC 255300, 2003 Ohio ENV LEXIS 11.

In this case, the Court of Appeals did not apply the three-part test to determine whether the Health Department's incompleteness determination was a final, appealable "action." Instead, the court disregarded court precedent and concluded that a final, appealable action was not necessary for a party to invoke ERAC's jurisdiction. R.C. 3745.04 and the case law establish that ERAC only has jurisdiction to hear an appeal from "acts" or "actions" of the director or board of health. Without this most basic of requirement, ERAC would possess jurisdiction over every matter involving Ohio EPA and every landfill-related matter before a board of health.

A. Based upon the totality of the language in R.C. 3745.04, ERAC has jurisdiction over final "actions" of the director or board of health.

The statutory language clearly provides that ERAC has jurisdiction only over final "actions" of the director or board of health. In addition to the jurisdiction language of R.C. 3745.04(B), paragraph (D) of R.C. 3745.04 provides that the appeal must set forth the action complained of and must be filed within thirty days after notice of the action. In this case, the Health Department sent a letter to Trans Rail on May 31, 2006, that its application was incomplete. It is from this letter that Trans Rail filed its appeal with ERAC. Trans Rail's written notice of appeal complained of the Health Department's determination that the application was incomplete. Trans Rail filed its appeal within thirty days of notice of this letter. Because R.C. 3745.04(D) states that the appeal must set forth the action complained of and be filed within thirty days of the action, the Health Department's incompleteness determination in the May 31, 2006 letter must be an "action" of the Health Department in order for ERAC to have jurisdiction over the appeal.

ERAC's statutory authority in ruling upon appeals also provides conclusive language that ERAC only has jurisdiction over final "actions" of the director or board of health. See, R.C. 3745.05. R.C. 3745.05 provides, in part, "If * * * 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." Thus, in every appeal, ERAC will make a determination of whether the final action was reasonable and lawful. In this case, ERAC will not be able to make its reasonable or lawful determination because there is no final action under appeal.

- B. Prior case law demonstrates that ERAC may order the director or board of health to act after it determines that the director or board's prior act was unreasonable or unlawful.**

The dissent in the court below discussed the instances in which ERAC could exercise its authority to order the director to act. The dissent's example posited an instance in which ERAC had concluded that the director or board had unreasonably or unlawfully denied an approval, in which case, ERAC could order the director or board to grant the approval. The denial of the approval is a final, appealable "action" giving ERAC jurisdiction over the appeal. If ERAC concluded that the denial was unreasonable or unlawful, then ERAC could use its authority in R.C. 3745.04 to order the director or board to grant the approval.

This Court has decided a case similar to the example illustrated by the dissent. See, *General Motors Corp. v. McAvoy* (1980), 63 Ohio St. 2d 232. General Motors had appealed to EBR (predecessor of ERAC) the director's denial of four air permits. General Motors argued that the director had impermissibly denied the permits without holding an adjudicatory hearing at Ohio EPA. EBR vacated the director's denial and ordered the director to reissue its decision so

as to allow General Motors the opportunity to request an adjudicatory hearing. The director's denial was the final, appealable "action" giving EBR jurisdiction over the appeal. The phrase noted by the 10th in R.C. 3745.04 as so critical to its holding, "or ordering the director or board of health to perform an act," was used properly in this instance which provided EBR the authority to order the director to hold a hearing.

In another similar case, the Tenth District Court of Appeals held EBR could reverse an action of the director based on EBR's authority to modify the action and order the director to act. *Ontario v. Whitman* (1973), 47 Ohio App. 2d 81. In its decision, the Ontario Court noted that the first paragraph of R.C. 3745.04 sets out who may appeal and the second paragraph of R.C. 3745.04 defines the subject of appeal being an action or act. The next paragraph then provides EBR with the authority to vacate or modify the director's action or order the director to act. The Ontario Court reasoned that EBR had authority to reverse the director's decision because R.C. 3745.04 and 3745.05 permitted EBR to "modify" the director's denial of a permit and R.C. 3745.04 permitted EBR to "order" the director to issue the permit. Both actions combined to result in a reversal of the director's decision.

When analyzing the authority of EBR under R.C. 3745.04, the *Ontario* Court stated the following:

It is emphasized again that while R.C. 3745.05 simply states that the board may issue an order 'vacating or modifying' the action appealed from, the far more significant and far-reaching authority of the board arises from the basic grant of power found in R.C. 3745.04, specifically, in addition to vacating or modifying, 'ordering the director * * * to perform an act,' such as to issue a permit when the board finds the order of the director to be 'unreasonable and unlawful' (R.C. 3745.05).

Id. at 89 (emphasis added).

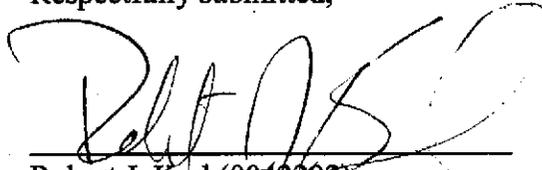
Thus, the court determined that the “far-reaching” language of R.C. 3745.04 applied in instances in which EBR had held an action of the director to be unreasonable or unlawful. Nowhere in the decision did the court take the more far-reaching interpretation and conclude that EBR had authority to order the director to act in any instance or without a director’s final action. The basis for ordering the director to act must always first be the conclusion that a prior final “action” of the director was unreasonable or unlawful.

The Tenth District Court of Appeals erred when it decided that ERAC had jurisdiction over the appeal even though the Health Department’s incompleteness determination was not a final “action” that is appealable to ERAC. By concluding that the phrase “or ordering the director or board of health to perform an act” in R.C. 3745.04 gave ERAC jurisdiction over this appeal, the court of appeals has greatly broadened the scope of ERAC’s authority and given ERAC mandamus authority to order the director or board of health to act in instances when the director or board has not yet acted.

CONCLUSION

For the reasons discussed above, this case involves a substantial constitutional question and involves matters of public and great general interest. Wherefore, *amicus curiae* Hubbard Environmental and Land Preservation respectfully requests that this Honorable Court accept jurisdiction over this case.

Respectfully submitted,



Robert J. Karl (0042292)

Sherry L. Hesselbein (0074494)

ULMER & BERNE, LLP

88 E. Broad Street, Suite 1600

Columbus, Ohio 43215

Phone: (614) 229-0000

Fax: (614) 229-0001

E-mail: bkarl@ulmer.com

shesselbein@ulmer.com

*Counsel for Amicus Curiae Hubbard
Environmental and Land Protection*

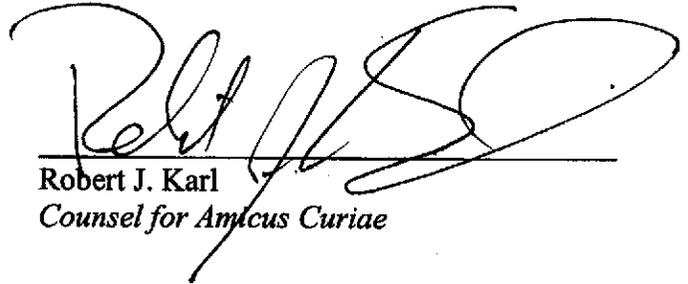
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction was sent by ordinary U.S. mail this 14th day of February, 2008, to:

Michael A. Cyphert
Leslie G. Wolfe
Jonathon R. Goodman
WALTER & HAVERFIELD, LLP
The Tower at Erieview
1301 E. Ninth Street, Suite 3500
Cleveland, Ohio 44114-1821
Phone: (216) 781-1212
Fax: (216) 575-0911
E-mail: cgibbon@walterhav.com
*Counsel for Appellant-Appellant
Trans Rail America, Inc.*

and

Robert C. Kokor*
Ronald James Rice Co., LPA
48 West Liberty Street
Hubbard, Ohio 44425
Phone: (330) 534-1901
Fax: (330) 534-3933
*Counsel for Appellee-Appellee
James J. Enyeart, M.D., Health Commissioner*



Robert J. Karl
Counsel for Amicus Curiae

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29492.00001