

BEFORE THE ENVIRONMENTAL BOARD OF REVIEW

STATE OF OHIO

*failure to act on action?*

DAVID G. MILLER

Appellant,

v.

DONALD SCHREGARDUS, DIRECTOR  
OF ENVIRONMENTAL PROTECTION

AEROMEX, INC.

CITY OF LOVELAND

Appellees.

Case No. EBR 132470

Issued: December 11, 1991

RULING ON MOTION TO DISMISS,  
FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND FINAL ORDER

Issued by:

Peter A. Precario, Chairman  
Julianna F. Bull, Vice-Chairwoman  
Jerry Hammond, Member

236 East Town Street, Room 300  
Columbus, Ohio 43215  
Telephone: (614) 466-8950

APPELLANT REPRESENTED PRO SE:

David G. Miller  
251 Wall Street  
Loveland, Ohio 45140-2346

COUNSEL FOR APPELLEE DIRECTOR:

Cheryl Roberto, Esq.  
Lori A. Massey, Esq.  
Assistant Attorney Generals  
Environmental Enforcement Section  
30 East Broad Street, 25th Floor  
Columbus, Ohio 43215

COUNSEL FOR APPELLEE LOVELAND:

Richard Melfi, Esq.  
City Solicitor  
City of Loveland  
225 West Court Street  
Cincinnati, Ohio 45202

This matter comes before the Board upon the Motion of the Director of the Ohio Environmental Protection Agency for an Order dismissing the present appeal for lack of jurisdiction of the subject matter in the Board. The Board notes that the Motion was filed on July 11, 1991. A response was received to the Motion on behalf of the Appellant on September 3, 1991. The Appellant in this matter, David G. Miller, has filed the Notice of Appeal and all pleadings in this case pro se. The Ohio Environmental Protection Agency is represented by Ms. Cheryl Roberto and Ms. Lori A. Massey, Assistant Attorneys General.

Summarizing the issues in the present case, Appellant has appealed an alleged "decision" on the part of the Director of the Environmental Protection Agency not to take follow-up enforcement action on certain findings and orders which the Director had previously issued to Appellee Aeromex on May 31, 1990. In essence, the Notice of Appeal alleges that certain requirements of the findings and orders had not been followed by Appellee Aeromex and that the Director has failed or refused to enforce the previously issued findings and orders. Appellant alleges that this failure to enforce was in fact a "decision" or action of the Director and consequently appealable to this Board.

Section 3745.04 of the Ohio Revised Code provides, in relevant part, as follows:

...

As used in this Section, "action" or "act" includes the adoption, modification, or repeal of a rule or standard, the issuance, modification, or revocation of any lawful order other than an emergency order, and the issuance, denial, modification, or revocation of a license, permit, lease, variance, or certificate, or the approval or disapproval of plans and specifications pursuant to law or rules adopted thereunder.

Any person who was a party to a proceeding before the Director may participate in an appeal to the Environmental Board of Review for an Order vacating or modifying the action of the Director of

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Environmental Protection or local Board of Health, or ordering the Director or Board of Health to perform an act. The Environmental Board of Review has exclusive original jurisdiction over any matter which may, under this section, be brought before it.

...

Under this Section, it is clear that the Board has jurisdiction only over those things that constitute either an action or are an act of the Director. Thus, unless the failure or refusal of the Director to take a particular enforcement action constitutes an act or action, it is not appealable to this Board.

Upon a review of the Notice of Appeal, the pleadings of the parties and the certified record, it is clear that the allegations regarding the so-called decision of the Director are in fact assumptions and conclusions arrived at by the Appellant rather than being events or actual conclusions reached by the Director. The observation that the Director has not taken a specific enforcement action desired by a party does not necessarily demonstrate that the Director is taking no action nor does it demonstrate that the Director will not take some action at a time determined to be appropriate by the Director.

No authority has been cited to the Board which would lead to the conclusion that the Director is under a legal obligation to commence an enforcement action on the previously issued orders involved here within any specific time period or on a schedule deemed necessary by Appellant. The decision to take an action, the time frame within which to commence such an enforcement action and the authority to determine what events and which developments will precipitate such an enforcement action are decisions within the discretion of the Director. Unless the failure or the refusal of the Director to take a particular enforcement action adjudicates the rights or privileges of a party in some fashion, no "act"

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or "action" has occurred.

In the present case it does not appear from a review of the record and the pleadings of the parties, that any legal rights or privileges of the Appellant-- or any party to this proceeding -- have been determined or adjudicated by the events or lack of enforcement alleged by Appellant. Under the circumstances of this case, the mere fact that the Director has not brought an enforcement action does not in itself constitute an act or action of the Director which is appealable to this Board. On this basis, the Motion of the Appellee Director to dismiss the present action is well taken.

The Board further notes that while the allegations of the Appellant might very well constitute an appropriate basis for an action in mandamus, unless the pleadings and the record before the Board demonstrate that the failure to perform certain duties amounts to an act or action of the Director as those terms are defined in section 3745.04 ORC, this Board has no jurisdiction to consider the appeal.

ORDER

The Motion of the Appellee Director to dismiss the present action is well taken and is hereby sustained. The appeal is hereby overruled and dismissed.

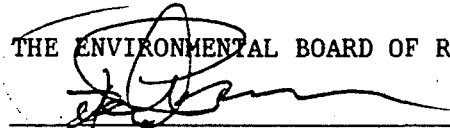
The Board, in accordance with Section 3745.06 of the Revised Code and Ohio Administrative Code 3746-13-01, informs the parties that:

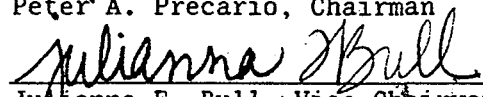
Any party adversely affected by an order of the Environmental Board of Review may appeal to the Court of Appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation to the court of appeals of the district in which the violation was alleged to have occurred. Any party desiring to so appeal shall file with the Board a Notice of Appeal designating the order appealed from. A copy of such notice shall also be filed by the Appellant with the

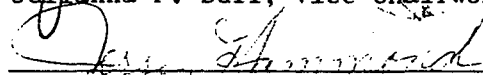
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court, and a copy shall be sent by certified mail to the Director of Environmental Protection. Such notices shall be filed and mailed within thirty days after the date upon which Appellant received notice from the Board by certified mail of the making of an order appealed from. No appeal bond shall be required to make an appeal effective.

THE ENVIRONMENTAL BOARD OF REVIEW

  
Peter A. Precario, Chairman

  
Julianna F. Bull, Vice-Chairwoman

  
Jerry Hammond, Member

Entered in the Journal of  
the Board this 11<sup>th</sup>  
day of December, 1991.

COPIES SENT TO:

DAVID G. MILLER  
DONALD SCHREGARDUS, DIRECTOR  
CITY OF LOVELAND  
AEROMEX, INC.  
Richard D. Melfi, Esq.  
Cheryl Roberto, Esq.  
Lori A. Massey, Esq.

(CERTIFIED MAIL)  
(CERTIFIED MAIL)  
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(CERTIFIED MAIL)

RULING ON MOTION TO DISMISS  
FINDINGS OF FACT  
AND FINAL ORDER  
CASE NO. EBR 132470

C E R T I F I C A T I O N

I hereby certify that the foregoing is a true and accurate copy of the RULING ON MOTION TO DISMISS, FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER in David G. Miller v. Donald Schregardus, Director of Environmental Protection, et al, Case No. EBR 132470 entered in the Journal of the Board this 11th day of December, 1991.

Mary J. Oxley  
Mary J. Oxley, Executive Secretary

Dated this 11th day of  
December, 1991, at Columbus, Ohio.

OHIO  
ATTY GENERAL  
APR 27 11 25 AM '93  
ENVIRONMENTAL  
ENFORCEMENT