

BEFORE THE ENVIRONMENTAL BOARD OF REVIEW

STATE OF OHIO

THERMAL-TRON, INC. :
: Case No. EBR 182535
: Appellant, :
: v. :
DONALD SCHREGARDUS, DIRECTOR :
OF ENVIRONMENTAL PROTECTION, ET AL. :
: Appellees. : Issued: February 9, 1993

FINDINGS OF FACT, CONCLUSIONS OF LAW AND
FINAL ORDER

Issued By:

ENVIRONMENTAL BOARD OF REVIEW
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Jerry Hammond, Member

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BACKGROUND

This matter comes before the Environmental Board of Review (EBR) upon appeal by Appellant Thermal-Tron, Inc. from an order of the Director of the Ohio Environmental Protection Agency (OEPA) dated September 3, 1991. This order denied Thermal-Tron's application for a permit to operate an infectious waste incinerator in Cleveland, Ohio. Prior to this order, the Director had issued a proposed denial in June, 1990. Appellant requested, and was given, an adjudication hearing before of the Agency. Following that hearing, the hearing officer recommended that the Director issue the permit; however, this recommendation notwithstanding, the Director denied the permit, by order entered in his Journal on September 3, 1991. Appellant Thermal-Tron timely filed its appeal with the EBR on October 4, 1991. Both the City of Cleveland and the NEC had filed motions to intervene in the proceeding before the Agency (involving the Director's proposed permit denial), but were denied intervention as the filing of each motion post-dated the actual hearing. Both the City and the NEC separately appealed the intervention denials to the EBR. Both also moved to intervene in Thermal-Tron's appeal of its permit denial before the Board. The Board granted these motions, at which time both the City and the NEC voluntarily withdrew their appeals of intervention denials before the Agency. Thus, the instant appeal moved forward as one case, with parties as captioned above. Parties agreed to submit the matter on stipulations, the Certified Record, briefs and oral arguments. Briefs were filed, and oral argument was held on April 29, 1992.

Appellant was represented by Ms. Blair Hodgman and Mr. Bruce Allen,

Attorneys at Law of Allen and Hodgman, Cleveland, Ohio. Appellee-Intervenor City of Cleveland was represented by Mr. William M. Ondrey Gruber, City Law Director. Appellee-Intervenor Neighborhood Environmental Council (NEC) was represented by Mr. Joseph P. Meissner, Esq. of the Legal Aid Society. Appellee Director of the OEPA was represented by Ms. Patricia Delaney and Mr. Christopher Korleski, Assistant Attorneys General.

Based upon the briefs and arguments of counsel, the record from the adjudication hearing below, as well as the record certified to the Board, the Board makes the following findings of fact, conclusions of law and final order.

FINDINGS OF FACT

1. Appellant Thermal-Tron, Inc. is an Ohio corporation which was formed in 1986 to construct and operate an infectious waste incinerator. This incinerator is located at 8300 Bessemer Avenue, Cleveland, Ohio. Thermal-Tron's operations are under the control of its president and majority stockholder, Ikram Habib. Mr. Habib, an environmental engineer by profession, was employed by the Cleveland Division of Air Pollution Control (CDAPC) until 1986, at which time he departed to form and operate Thermal-Tron. At the time of his departure, Mr. Habib was the Chief of Engineering Services for the CDAPC. (C.R.3).

2. On December 3, 1986, Thermal-Tron filed applications with the OEPA for a permit to install (PTI) as well a permit to operate (PTO) a medical waste incinerator.

3. On March 11, 1987, the Director issued Thermal-Tron an air permit to install (PTI) for Incinerator N001, the only one which actually operated in this dispute. The PTI imposed limits on the incinerator's total suspended particulate

matter (TSP), its hydrochloric acid (HCL) emissions, prohibited any visible emissions, and required the incinerator to meet certain best available technology (BAT) requirements, pursuant to OAC 3745-31-05. (C.R.14).

4. Pursuant to the PTI, the facility was constructed, and several stack tests were conducted to determine compliance with the terms of the PTI. This is standard procedure for air contaminant sources. Generally, once a facility is constructed pursuant to the PTI, it operates under interim operating conditions, and a conditional permit while adjustments are made to the equipment enabling the facility to comply with its permit terms and conditions. Following these adjustments, and stack tests, upon a showing of compliance, a PTO is normally issued.

5. Thermal-Tron never received a conditional permit, thus conducted its de-bugging procedures under interim operating conditions. The record demonstrates that Mr. Habib requested an application for a conditional operating permit at least twice (C.R.34, deposition of Habib pp89-93)

6. In response to this first letter termed "interim operating request" the Agency asked for certain information, all of which Mr. Habib supplied. The second request was never answered. (C.R. 34)

7. Mr. Habib continued to operate within what he believed to be interim operating conditions sanctioned by the Agency. (deposition, Habib p.91--St.Ex.B). In this case, that de-bugging process continued over a period of several years.

8. Because of medical waste's unpredictable and varied composition as well as the different burning characteristics of its components, the burning of medical wastes presents particular problems for emission control. These problems

often result in unsuccessful stack tests. (C.R. 14)

9. Thermal-Tron conducted three unsuccessful stack tests in November, 1987, June, 1988, and October 1988.

9. The first test failed both the HCL and total suspended particulates (TSP) emission limitation standards. The second and third tests failed only the TSP emission limits.

10. Following each unsuccessful test, Thermal-tron, Inc. made substantial changes to the unit in an effort to improve the test results. After the first test, it installed a scrubber, which facilitated a successful HCL result on the second and subsequent tests. After the second test, Thermal-Tron put modulating valves on the unit for the combustion, rerouted the water lines and the configuration of the water nozzles, added scrubber packing materials, and made the drain lines larger. After the third test, because of the particulate emission test results, Thermal-Tron decided to add an ash removal system and make other changes to the unit. (C.R.14).

11. On August 21, 1989, 10 months after beginning operation, Thermal-Tron passed its stack tests.

12. In the interim months, however, the Attorney General's office had initiated an enforcement action against both Thermal-Tron and Mr. Habib in the Common Pleas Court in Cuyahoga County.

13. Within five days of the filing of the enforcement action (about February 7, 1989) Thermal-Tron suspended operation of the subject incinerator. The unit was only operated for limited "debugging" purposes until the August stack test. Prior to this time it had operated similarly for debugging and refinement and adjustment purposes, but from this point on only with permission and prior authorization from the Agency.

14. On August 21, 1989, with the permission of the Cuyahoga County Common Pleas Court, Thermal-Tron conducted the fourth stack test. The test results demonstrated compliance with permit limitations.

15. The staff of the OEPA by letter from Mr. Thomas Rigo, dated October 10, 1989, notified applicant that a staff determination recommending that the Director issue the permit had been made, and that public comments would next be solicited on the proposed installation. (C.R.34)

16. Public hearings were held on the proposed installation on November 13, 1989, January 18, 1990 and January 19, 1990. Citizen testimony overwhelmingly opposed the issuance of a permit for this facility. (C.R. 53, 54, 55, 56.)

17. The enforcement action was tried in the Cuyahoga Court of Common Pleas January 8-11, 1990. The Court found that Mr. Habib had operated without a permit and ordered him to pay a fine. (applicant Ex.18 from adj.hrg.)

18. By letter dated June 4, 1990, and, again signed by Mr. Thomas Rigo, the Director proposed to deny Thermal-Tron, Inc.'s permit to operate its air contaminant source. (C.R.34)

19. On September 3, 1990, the Director denied the permit to operate, stating that:

"The Director is unable to determine this air contaminant source has been or will be operated, on a continuous basis in compliance with applicable emission standard....most notably the requirement that the facility have a permit to operate in advance of its operation...."

CONCLUSIONS OF LAW

1. Where the Appellee Director has conducted an adjudication hearing

below, the Environmental Board of Review is an appellate reviewing body only and not a de novo fact finder. Pursuant to O.R.C Sec. 3645.05 the Board is confined in its review to the record as certified to it by the Director. (CEI v. Williams, 76-AP-929, Franklin County Court of Appeals, December 8, 1977).

2. In an appeal from an adjudication hearing, the burden is upon the Appellant to demonstrate that the action of the Director is unreasonable or unlawful. (City of Garfield Heights v. Williams, 77-AP-449, Franklin County Court of Appeals, September 29, 1977)

3. The statutory authority to deny a permit, as it is used in this case, is found in R.C.Sec.3704.03(G). That section, in pertinent part, provides:

Operating permits may be denied...for failure to comply with Chapter 3704 of the Revised Code or the rules adopted thereunder. An operating permit shall be issued only upon a showing satisfactory to the director or his representative, that the air contaminant source is being operated in compliance with applicable emission standards and other rules." (emphasis added)

4. The General Assembly's use of the discretionary "may" in this paragraph leads this Board to conclude, as did the hearing officer below, that the decision to deny air permits is discretionary with the Director.

5. In exercising this discretion, past operating history is one factor which the Director may consider.

6. The Tenth District Court of Appeals has instructed that the Court, the Board (and thus, presumably the Director) must "presume that [an applicant] will comply with the conditions of the permit once the permit has been issued in the absence of reliable, probative, and substantial evidence reasonably permitting a finding otherwise." (CECOS International, Inc. v.. Shank et.al., 91AP-599, Franklin County Court of Appeals)

7. Thus, affirmative evidence that applicant would violate its permit once

issued must exist.

8. This affirmative evidence, has to be the type of violations that would preclude proper operation of a facility; that is, quantitative in nature. It must be more than a recitation by the Director of the number of violations, especially in this case where nearly 80% of the violations are for operating without a permit. The remainder of the violations, though technically substantive in nature, had little or no effect on the general air quality. (C.R.33 Ex G,H).

9. Under the facts of the present case and in accordance with the CECOS decision, the Director had an obligation to analyze the types of violations committed by the applicant. In so doing, it is obvious that those violations committed by Mr. Habib were judgmental errors. And while this Board is not justifying his decision to so operate, it finds that the quality of these violations do not rise to the level of proof required by the court in CECOS.

10. R.C. section 3704.03(G) also directs that a permit "shall be issued only upon a showing satisfactory to the Director that the source is being operated in compliance with the [law]". Much testimony and many theories have been offered by the parties on how best to construe those two sentences. It is the opinion of this Board that The General Assembly intended this second sentence to mandate that compliance with the applicable emission standards and rules is a minimum showing that an applicant must demonstrate before the Director can exercise his discretion on whether to issue or deny a permit. However, a mere showing of compliance may not assure permit issuance.

11. R.C. 3704.03 (G) also states that:

The rules shall provide for the issuance of conditional operating permits for such reasonable periods as the director may determine, to allow the holder of an

installation permit, who has constructed, installed, located, or modified a new air contaminant source in accordance with the provisions of an installation permit, to make adjustments or modifications necessary to enable the new air contaminant source to comply with applicable emission standards and other rules.

12. In this proclamation, the General Assembly acknowledges the realities of the business, and the precise facts of this case. It appears that Mr. Habib never actually received a conditional permit, but the record supports his claim that he believed he had properly requested such a permit several times, and that his facility was operating under "interim operating conditions" pending the Agency ruling on his PTO. These interim operating conditions included operating the facility for more times than the sanctioned stack tests normally attended by the agency personnel, but at all times within the limits of adjusting equipment in order to comply with permit standards.

13. Mr. Habib's conduct is consistent with the procedures always followed by the Agency in the past, and while, it is no defense to his actions, certainly in light of the decision the Board is today called upon to make these violations do not support a finding presuming non-compliance with the terms of a permit.

FINAL ORDER

Wherefore, it is the Order of this Board that the permit denial of the Director is unlawful, and is therefore vacated in accordance with this decision.

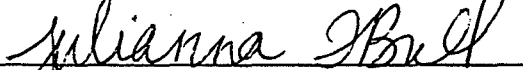
The Board, in accordance with Section 3745.06 of the Revised Code and Ohio Administrative Code 3746-13-01, informs the parties that:

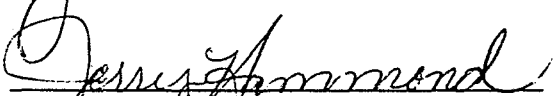
Any party adversely affected by an order of the Environmental Board of Review may appeal to the Court of Appeals of Franklin County, or, if the appeal arises from an alleged violation of a law or regulation to the court of appeals of the district in which the violation

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 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.

Entered in the Journal
of the Board this 9th
day of February, 1993.

THE ENVIRONMENTAL BOARD OF REVIEW


Julianna F. Bull, Chairwoman


Jerry Hammond, Member

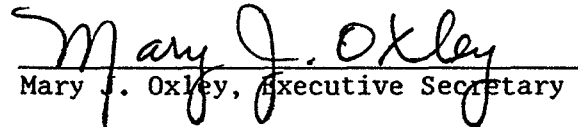
COPIES SENT TO:

THERMAL-TRON, INC. (CERTIFIED MAIL)
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FINDINGS OF FACT
AND FINAL ORDER
CASE NO. EBR 182535

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 FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER in THERMAL-TRON, INC. V. DONALD SCHREGARDUS, DIRECTOR OF ENVIRONMENTAL PROTECTION, Case No. EBR 182535, entered in the Journal of the Board this 9th day of February, 1993.


Mary J. Oxley, Executive Secretary

Dated this 9th day of
February, 1993, at Columbus, Ohio.



Attorney General

Lee Fisher

MEMORANDUM

TO: Kate O'Malley, Chief Counsel

FROM: Chris Korleski *CK*
Assistant Attorney General
Environmental Enforcement Section

DATE: March 1, 1993

RE: EBR decision vacating the Director'd decision
denying Thermal-Tron's permit to operate.

I belatedly attach a copy of the EBR decision which vacates the Director's decision denying Thermal-Tron's permit to operate its infectious waste incinerator. The EBR held, in seeming defiance of O.R.C. Section 3704.03(G), that a history of violations at the Thermal-Tron facility does not constitute a basis for denying the facility's application for a permit to operate in the future.

Please contact me if you have any questions.

cc: EES attorneys

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