

BEFORE THE
OHIO ENVIRONMENTAL PROTECTION AGENCY

OHIO E.P.A.

MAR 14 2011

ENTERED DIRECTOR'S JOURNAL

In the Matter of:

Shirley Massarelli, Owner
(The Red Onion Bar/The Red
Onion Party Center)

Applicant.

Director's Final Findings of
Fact, Conclusions of Law
and Orders

I. JURISDICTION

This matter is before the Director of Environmental Protection ("Director") and these Director's Final Findings of Fact, Conclusions of Law and Orders, ("Orders"), are issued to Shirley Massarelli ("Applicant"), pursuant to the authority vested in the Director under Ohio Revised Code ("ORC") Chapters 119, 3745, and 6109 and the rules adopted thereunder.

II. DEFINITIONS

Unless otherwise stated, all terms used in these Orders shall have the same meaning as defined in ORC Chapter 6109 and the rules adopted thereunder.

III. FINDINGS OF FACT

The Director, after review and consideration of the entire record of this proceeding, determines the following findings of fact:

1. Applicant Shirley Massarelli is the owner and operator of the Red Onion Bar ("Bar") located at 2352 State Route 39 NE, New Philadelphia, Ohio.
2. Applicant is also the owner and operator of the Red Onion Party Center ("Party Center") located at 2397 State Route 39 NE, New Philadelphia, Ohio.
3. The Public Water System ("PWS") ID No. for the Bar is OH7936112.
4. The PWS ID No. for the Party Center is OH7937812. (The Red Onion Party Center was previously known as The Place on 39.)

I certify this to be a true and accurate copy of the official documents as filed in the records of the Ohio Environmental Protection Agency.

By: Donna Cassider Date: 3-14-11

5. The Bar is a commercial establishment that provides "water for human consumption" as that term is defined by Ohio law under Ohio Administrative Code ("OAC") 3745-81-01(OO).
6. The Party Center is a commercial establishment that provides "water for human consumption" as that term is defined by OAC 3745-81-01(OO).
7. The Bar regularly served in excess of 25 people at least 60 days of the year. The Bar had a capacity of 35-40 people, and served a capacity crowd on weekends and 25-35 people during the week. (Massarelli, Tr. Pgs. 37-38.)
8. The Party Center regularly served in excess of 25 people at least 60 days of the year. The Party Center was both a restaurant and catering operation, which served large crowds throughout the year, including as many as 1,800 people in a single day. (Massarelli, Tr. Pgs. 38-39.)
9. Applicant submitted applications and fees to renew the 2009 licenses to operate ("LTO") for the Bar and Party Center in August of 2009 (Massarelli, Tr. Pg. 40.)
10. On September 18, 2009, the Director issued a proposed action denying both the Bar's 2009 LTO and the Party Center's 2009 LTO.
11. The Director's September 18, 2009 proposed denial listed the failure to monitor for total coliform bacteria, nitrate, and nitrite, and the failure to comply with a September 29, 1999 Bilateral Compliance Agreement and an August 7, 2001 Director's Final Findings and Orders as the reasons for the denials.
12. On October 16, 2009, Applicant by and through her attorney, filed a request for an adjudication hearing.
13. Applicant failed to sample the drinking water at the Bar for total coliform during the following quarters:

April through June, 2000; July through September, 2000; April through June, 2003; October through December, 2003; January through March, 2004, April through June, 2004; January through March, 2005; July through September, 2005; October through December, 2005; January through March, 2006; April through June, 2006; July through September, 2006; January through March, 2007; April through June, 2007; July through September, 2007; January through March, 2008; April through June, 2008; July through September, 2008; January through March, 2008; July through September, 2008; January through March, 2009; April through June, 2009; January through March, 2010; and April through June, 2010.

14. Applicant failed to complete yearly sampling for nitrate at the Bar in at least 2001, 2003, 2004, and 2005. (See Staff's Exhibits O-3 through O-7.)
15. Applicant also failed to complete the sampling at the Bar for nitrite in 2005 (See Staff's Exhibit O-7.)
16. Applicant became the owner of the Party Center in 2002 (Massarelli, Tr. Pg. 25; Staff's Exhibit Q-1.)
17. Applicant failed to sample for total coliform at the Party Center during the following quarters:

October through December, 2002; April through June, 2003, October through December, 2003; January through March, 2004; April through June, 2004; January through March, 2005; July through September, 2005; October through December, 2005; January through March, 2006; April through June, 2006; July through September, 2006; January through March, 2007; April through June, 2007; July through September, 2007; January through March, 2008, April through June, 2008; July through September, 2008; January through March, 2009; April through June, 2009; and January through March, 2010. (See Staff Exhibits Q-1 through Q-20.)
18. Applicant failed to complete the yearly sampling for nitrate at the Party Center in 2002, 2003, 2004, 2005, 2006, and 2007. (See Staff's Exhibit's N-1 through N-6.)
19. Applicant also failed to complete the sampling at the Party Center for nitrite in 2005. (See Staff's Exhibit N-4.)
20. Applicant entered into a Bilateral Compliance Agreement on September 29, 1999 and Director's Final Findings and Orders on August 7, 2001. (See Staff's Exhibits G and H.) Applicant was in violation of both the Bilateral Agreement and the Director's Final Findings and Orders and was informed of the noncompliance. (See Massarelli Tr. Pgs. 84-103.)
21. On August 12, 2010, an adjudication hearing was held in this matter.
22. On December 16, 2010, the Hearing Officer filed a Report, recommending that the Director issue a final action denying Applicant's application for the 2009 renewal LTOs for the Bar and Party Center because Applicant failed to substantially comply with R.C. Chapter 6109 and the rules adopted thereunder.
23. However, the Hearing Officer also recommended in the Report and Recommendation that the Director not prohibit Applicant from applying for a

license to operate for a period of one to five years thereafter, because R.C. 6109.21(B) did not allow the Director the authority to do this.

24. Applicant and the staff of the Ohio EPA ("Staff") were provided with an opportunity to file objections to the Report and Recommendation of the Hearing Officer, with Staff's Objections filed on January 10, 2011. The Staff's Objections stated that although Staff agreed with the Hearing Officer's recommendation that the Director issue the denial of Ms. Massarelli's applications for LTOs as final, the Staff objected to the Hearing Officer's recommendation that the Director not prohibit Ms. Massarelli from reapplying for five years. The Staff also objected to the Hearing Officer's failure to consider Ms. Massarelli's compliance with a 1999 Bilateral Compliance Agreement and Director's Final Findings and Orders in determining her eligibility for a renewal of the LTO for the Bar.

IV. CONCLUSIONS OF LAW

The Director, after review and consideration of the entire record of this proceeding, makes the following conclusions of law:

1. The burden of proof in this proceeding is upon the Staff with the standard of proof being the preponderance of the evidence.
2. "Preponderance of the evidence" means evidence that is more probable, more persuasive or of greater probative value. *In re N.F.* (2009), 2009 WL 1798146, 2 (Ohio App. 10 Dist.).
3. Both the Bar and the Party Center are commercial establishments that operate "public water systems" providing "water for human consumption" as those terms are defined by Ohio law. (See R.C. 6109.01(A); OAC 3745-81-01(FFF); OAC 3745-81-01(OO) and Massarelli Tr. Pgs. 25-26.)
4. Ms. Massarelli is a "supplier of water" as defined by OAC 3745-81-01(TTT).
5. Each of Ms. Massarelli's PWS's is a "transient non-community water system" that receives water from "ground water". (See OAC 3745-81-01(FFF)(2)(b) and OAC 2745-81-01(JJ).)
6. As statutorily defined PWS's, both the Bar and the Party Center are required to obtain annual LTOs from the Ohio EPA. (See R.C. 6109.21; OAC 3745-84-02(A).)
7. This case involves the Director's September 18, 2009 Proposed Denial of Applicant's 2009 LTOs and whether the Director is authorized by R.C. 6109.21(B) to deny the LTOs and, if so, whether the Director is authorized to prohibit Applicant from applying for a LTO for five years after the denial.

8. OAC 3745-81-21 requires the PWS's at the Bar and the Party Center to sample for total coliform with one routine sample per quarter.
9. Pursuant to OAC 3745-81-23, both the Bar and the Party Center PWS's are required to be sampled for nitrate once per year and nitrite once every nine years.
10. In light of the violations listed in Paragraphs 13 through 20 of the Findings of Fact, the Director determines that the PWS's at the Bar and Party Center were not operated in substantial compliance with R.C. Chapter 6109 and the rules adopted thereunder.
11. In Fairfield Sanitary Landfill, Inc. v. Fairfield County Dist. Bd. of Health (1990), 68 Ohio App. 3d 761, 773-774, 589 N.E.2d 1334, 1342, the Ohio Tenth District Court of Appeals discussed what it meant to be in substantial compliance with a statute or rule. The Court stated that a person is in substantial compliance when there is an absence of a material or significant deviation from a statute, rule, or other legal requirement. The Court of Appeals stated that "a deviation from a requirement is not substantial unless it defeats or undermines some purpose for which the requirement is imposed." *Id.* At 773-774.
12. The purpose of the federal Safe Drinking Water Act and Ohio's statutes and the rules governing public water systems is to ensure that the public is protected from contaminants in the water they consume.
13. Applicant's failure to take numerous quarterly samples for total coliform and/or failure to take numerous yearly samples for nitrate and nitrite at both the Bar and Party Center as set forth in the Findings of Fact constitutes a failure to substantially comply with R.C. Chapter 6109 and the rules adopted thereunder.
14. These numerous deviations from law over the past 7-10 years at both the Bar and the Party Center are substantial because the Applicant's failure to consistently and timely monitor for total coliform, nitrates, and nitrites defeats or undermines the purpose of the law to protect the public from consuming contaminated water. (See Fairfield Sanitary Landfill, Inc. v. Fairfield County Dist. Bd. of Health (1990), 68 Ohio App.3d 761, 773-774, 589 N.E.2d 1334, 1342.
15. Applicant's failure to comply with the Bilateral Compliance Agreement of September 29, 1999 and the Director's Final Findings and Orders of August 7, 2001 constitutes additional evidence that Applicant was not in substantial compliance with R.C. Chapter 6109 and the rules adopted thereunder.
16. Because of the significant and substantial deviations from the law regarding sampling and monitoring total coliform, nitrate, and nitrites at both the PWS's at

the Bar and the Party Center, as well as the failure to comply with both the 1999 Bilateral Compliance Agreement and 2001 Director's Final Findings and Orders, and because these significant and substantial deviations constitute a failure to substantially comply with R.C. Chapter 6109 and the rules thereunder, the Director is required by R.C. 6109.21(B)(3) to deny the Applicant's license to operate renewal applications for the PWS's at both the Bar and the Party Center.

V. ORDERS

1. To the extent that the findings of fact of the Hearing Officer are inconsistent with the findings of fact in these Orders, the findings of fact of the Hearing Officer are disapproved. The reasons for said disapproval are set forth herein and in Staff's Objections to the Report and Recommendation, filed January 10, 2011, which document is attached hereto and incorporated by reference as if fully rewritten herein.
2. To the extent that the conclusions of law of the Hearing Officer are inconsistent with the conclusions of law in these Orders, the conclusions of law of the Hearing Examiner are disapproved. The reasons for said disapproval are set forth herein and in Staff's Objections to the Report and Recommendation, filed January 10, 2011.
3. Ms. Massarelli's application for a 2009 license to operate the public water system at the Red Onion Bar (PWS ID#OH7936112) located at 2352 State Route 39 NE, New Philadelphia, Ohio is hereby denied.
4. Ms. Massarelli's application for a 2009 license to operate the public water system at the Red Onion Party Center (PWS ID#OH7937812) located at 2397 State Route 39 NE, New Philadelphia, Ohio is hereby denied.
5. For the reasons set forth herein and in the Staff's Objections to the Hearing Officer's Report and Recommendation, the Recommendation of the Hearing Examiner that Applicant not be prohibited from submitting another application for a period of five years is disapproved.
6. Pursuant to R.C. 6109.21(B) and (C), OAC 3745-84-06(C) and the arguments set forth in the Staff's Objections to the Hearing Officer's Report and Recommendation, Applicant is prohibited from filing another application for a LTO for a period of five years from the date of the denial.
7. These Orders shall be entered into the Director's Journal and served upon the parties to the proceeding and public noticed as is required by law.

VI. APPEAL RIGHTS

You are hereby notified that this action of the Director is final and may be appealed to the Environmental Review Appeals Commission pursuant to ORC § 3745.04. The appeal must be in writing and set forth the action complained of and the grounds upon which the appeal is based. The appeal must be filed with the Commission within thirty (30) days after notice of the Director's action. The appeal must be accompanied by a filing fee of \$70.00 made payable to "Ohio Treasurer Josh Mandel", which the Commission, in its discretion, may reduce if by affidavit you demonstrate that payment of the full amount of the fee would cause extreme hardship. Notice of the filing of the appeal shall be filed with the Director within three (3) days of filing with the Commission. Ohio EPA requests that a copy of the appeal be served upon the Ohio Attorney General's Office, Environmental Enforcement section. An appeal may be filed with the Environmental Review Appeals Commission at the following address:

Environmental Review Appeals Commission
309 South Fourth Street, Room 222
Columbus, OH 43215

VII. EFFECTIVE DATE

The effective date of these Orders is the date these Orders are entered into the Ohio EPA Director's journal.

IT IS SO ORDERED



Scott J. Nally
Director of Environmental Protection



Date

BEFORE THE ENVIRONMENTAL PROTECTION AGENCY
STATE OF OHIO

OHIO EPA
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LEGAL RECORDS
SECTION
CASE NO.: 09-DW-28

In The Matter of :
:
SHIRLEY MASSARELLI, Owner :
(The Red Onion/The Red :
Onion Party Center) :
:
:
Applicant. :

Hearing Officer
W. Samuel Wilson

STAFF'S OBJECTIONS TO REPORT AND RECOMMENDATION

I. INTRODUCTION

Now comes the Staff of the Ohio Environmental Protection Agency (hereinafter "Staff"), by and through counsel, and hereby respectfully submits the following Staff's Objections to the Report and Recommendation issued in this matter. In the Report and Recommendation, the Hearing Officer included a Recommendation that the Director issue a final action denying Applicant Shirley Massarelli's applications for licenses to operate ("LTO") public water systems ("PWS") at the Red Onion Bar ("Bar") and the Red Onion Party Center ("Party Center"). The Hearing Officer also recommended, however, that the Director should not prohibit Ms. Massarelli from reapplying for a period of five years. This Recommendation is based upon a misinterpretation of Ohio Revised Code 6109.21 and Ohio case law. Although Ohio EPA staff agrees with the Hearing Officer's Recommendation that the Director issue the denial as final, the Staff objects to the Hearing Officer's recommendation that the Director not prohibit Ms. Massarrelli from reapplying for five years.

In addition, the Hearing Officer limited his Report and Recommendation to Ms. Massarelli's failure to complete required sampling at both the Bar and Party Center, and excluded any consideration of Ms. Massarelli's failure to comply with the September 29, 1999 Bilateral Compliance Agreement and August 7, 2001 Director's Final Findings and Orders. Ohio EPA Staff objects to the exclusion of these items as a basis for determining whether Ms. Massarelli was entitled to renewal of her LTOs.

II. OBJECTIONS

A. **The Director Should Issue the Denial of Ms. Massarelli's Applications for a Period of Five Years as Final.**

The Director did not exceed the authority granted to him by R.C. 6109.21 in enacting Ohio Administrative Code section 3745-84-06, and thus it was properly applied in the Director's proposed action of September 18, 2009 to impose a five year denial period for Ms. Massarelli's LTO renewal applications. In the Report and Recommendation, the Hearing Officer states that O.A.C. 3745-84-06(C) was both unauthorized by and in conflict with R.C. 6109.21, and thus recommends that the Director should ignore this section of the administrative code and simply deny Ms. Massarelli's applications under R.C. 6109.21(B). The Hearing Officer's interpretation of the grant of authority in R.C. 6109.21 is incorrect, and his application of the rule in *State v. Heyden* (1992), 81 Ohio App.3d 27, 610 N.E.2d 1067 is inappropriate. Thus, the Director correctly applied O.A.C. 3745-84-06(C) to Ms. Massarelli's LTO renewal application, and the denial for a period of five years should be issued as final.

Ohio Adm. Code 3745-84-06(C) is a properly enacted rule outlining the procedure for revocation or denial of renewal LTO applications. Specifically, the Rule provides that "revocation or denial of renewal of a license to operate shall be for a time

period specified by the director, but no less than one year and no more than five years.” O.A.C. 3745-84-06(C). The Rule goes on to provide the procedure for reapplying after the period of denial is complete, and requires a certification that the violations upon which the revocation or denial was based have been corrected. *Id.* Pursuant to R.C. 6109.21(A), the Director “shall adopt, and may amend and rescind, rules in accordance with Chapter 119 of the Revised Code establishing *procedures governing* and information to be included on applications for licenses and license renewals under this section.” R.C. 6109.21(A) (Emphasis added). Revised Code 6109.21(B) goes on to provide three possible actions to be taken by the Director within 30 days of receipt of an application for renewal: issuance of the license, issuance of the license “subject to terms and conditions... necessary to ensure compliance,” or denial of the license for failure to operate the PWS in substantial compliance with R.C. Chapter 6109 or the rules adopted under it. Absent from R.C. 6109.21, however, is any mention of whether and when an LTO renewal applicant may reapply after his or her application has been denied, and what is required to do so. Thus, O.A.C. 3745-84-06 properly provides the procedures governing the denial of a renewal application, including the period of time for which an applicant may be prohibited from reapplying and what is required upon reapplication.

The Hearing Officer reasons that O.A.C. 3745-84-06(C) is invalid because there is no specific mention in R.C. 6109.21 of denial of a renewal application for a particular period, but “the language of statutes is routinely generic, while that of administrative codes purposely provides specific detail.” *Satterfield v. Ohio State Bd of Registration for Prof. Engineers and Surveyors* (1999), 1999 Ohio App. LEXIS 2437, * 24. A statute need not specifically enumerate in detail what is to be enacted in the rules, but the rules

must instead “be consistent with and predicated on an express or implied grant of authority.” *Hunter v. Cuyahoga Cty Dept. of Human Svs.*(1992), 1992 Ohio App. LEXIS 5360, * 3; *see also Burger Brewing Co. v. Thomas* (1975), 42 Ohio St.2d 377, 380. As outlined above, O.A.C. 3745-84-06 is a procedural rule enacted pursuant to authority granted by R.C. 6109.21(A). Thus, it is not invalid and can properly be applied by the Director to instruct Ms. Massarelli as to when she may reapply after her renewal LTO application is denied.

Ohio Admin. Code 3745-84-06(C) is also not in conflict with R.C. 6109.21(B) as the Hearing Officer suggests. As the Hearing Officer correctly states, an administrative rule that conflicts with a statute is invalid. *State ex rel. Kroger Co. v. Stover* (1987), 31 Ohio St. 3d 229, 235, 510 N.E.2d 356. But an administrative rule “is not inconsistent with a statute unless the rule contravenes or is in derogation of some express provision of the statute.” *McAninch v. Crumbley* (1981), 65 Ohio St. 2d 31, 34, 417 N.E.2d 1252; *see also Kelly v. Accountancy Bd. of Ohio* (1993), 88 Ohio App. 3d 453, 624 N.E.2d 292.

For example, in *McAninch*, the Court held that an administrative rule was in conflict with a statute where the rule negated a definition within the statute. *Id.* Specifically, the statute defined “classified civil service” and provided specific positions that fell outside the definition; the administrative rule required the appointing authority to file an exemption for unclassified positions. *Id.* at 32. The Court held that the rule was in conflict with the statute because in practice, where an appointing authority failed to file the exemption, the rule would have placed an employee within the definition of classified civil service even though the position was specifically exempted by the statute. *Id.* at 33. Thus, the Court held that the rule was invalid because it completely undermined the

statutory definition.

Therefore, although the Hearing Officer correctly stated that a rule ought to be superseded when there is a conflicting statute, he did not apply the correct analysis to determine whether a conflict actually exists. Instead, the Hearing Officer misapplied the rule from *State v. Heyden* (1992), 81 Ohio App.3d 272, 610 N.E.2d 1067, which is very limited in its application, as the holding deals specifically with the Rules of Criminal Procedure and is based on a provision of the Ohio Constitution. *Id.* at 276. Thus, the holding in *Heyden* has no application to the validity of O.A.C. 3745-84-06 and should not be considered in determining whether the Director's action of September 18, 2009 should be issued as final.

Applying the analysis from *McCaninch*, it becomes clear that O.A.C. 3745-84-06(C) does not contravene and is not in derogation of any express provision of R.C. 6109.21(B). The Hearing Officer reasons that because R.C. 6109.21(B) provides the three potential actions the Director may take on a renewal application, the addition of a period during which an applicant may not reapply after a denial is in conflict. But as outlined above, without this additional procedural rule, an applicant for a renewal LTO would have no way of knowing whether and when he or she could reapply after a denial, nor what would be required in order to do so. In addition, there is a specific grant of authority in 6109.21(A) permitting the Director to enact rules governing the procedure related to applications. Thus, O.A.C. 3745-84-06(C) builds upon rather than conflicts with R.C. 6109.21(B).

- B. The Hearing Officer Should Have Considered Ms. Massarelli's Failure to Comply with the Bilateral Compliance Agreement and Director's Final Findings and Orders in Determining her Eligibility for a Renewal LTO for the Bar.**

The issuance of the denial of Ms. Massarelli's LTO renewal application for the Bar as final should be based not only on her failure to sample for bacterial and chemical contaminants, but also on her failure to comply with the Bilateral Compliance Agreement of September 29, 1999, and the Director's Final Findings and Orders of August 7, 2001. The Hearing Officer concluded that there was sufficient evidence of substantial noncompliance with R.C. Chapter 6109 based solely on Ms. Massarelli's failure to sample at the Bar, but there was no compelling reason not to consider the additional violations.

The Hearing Officer references Ms. Massarelli's argument that she was deprived of her due process rights based on the presentation of evidence of violations beyond those listed in the Director's September 18, 2009 proposed action, but this argument should not remove Ms. Massarelli's noncompliance with the Director's prior orders from consideration. *See* Report and Recommendation at 2 n. 1. The Director specifically mentioned Ms. Massarelli's noncompliance with the prior orders in the proposed action of September 18, 2009 as one of the grounds for the proposed denial of her renewal LTO application at the Bar. Pursuant to O.A.C. 3745-84-06, the Director may deny renewal of a license to operate if the PWS has violated an order of the Director, and thus Ms. Massarelli's failure to comply with the Bilateral Compliance Agreement, and the Director's Final Findings and Orders at the Bar was appropriate grounds for denying her renewal LTO application.

Because noncompliance with both orders was specifically mentioned in the proposed action, consideration of the violations did not present a threat to Ms. Massarelli's due process rights. As a result, the Director should adopt the Staff's

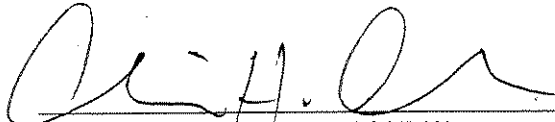
Proposed Findings of Fact numbers 23 through 33 and Conclusions of Law numbers 35 through 45 when issuing the September 18, 2009 proposed action as final.

III. CONCLUSION

Therefore, the Staff respectfully requests that the Director consider these Objections and issue a decision and final action denying Ms. Massarelli's applications for LTOs at both the Bar and Party Center for a period of five years, which also sets forth Findings of Fact and Conclusions of Law that reflect Ms. Massarelli's failure to comply with the Bilateral Compliance Agreement and the Director's Final Findings and Orders issued for the Bar.

Respectfully submitted,

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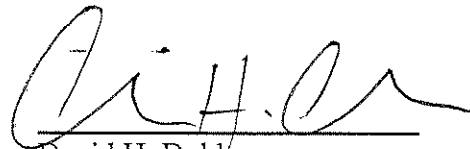
Attorneys for Staff

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Staff's Objections to Report and Recommendation was served on January 10, 2011 via regular U.S. Mail to:

Eugene H. Nemitz, Jr.
136 Second Street, NE
New Philadelphia, Ohio 44663
nemitzlaw@verizon.net

Counsel for Applicant

A handwritten signature in black ink, appearing to read "D.H. Dokko", written over a horizontal line.

David H. Dokko
Assistant Attorney General