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DOUGLAS J. ...
COMMON PLEAS COURT
HOLMES COUNTY, OHIO

**IN THE COURT OF COMMON PLEAS
HOLMES COUNTY, OHIO**

**STATE OF OHIO, *ex rel.*,
NANCY H. ROGERS,
ATTORNEY GENERAL,
Plaintiff,**

V.

**BOARD OF COMMISSIONERS OF
HOLMES COUNTY, OHIO,
Defendant.**

CASE NO. 97-CV-049

DECISION

Journalized: Journal 199, Page(s) 516-526

I. INTRODUCTION

On March 25, 1997, the Attorney General on behalf of the Ohio Environmental Protection Agency (hereafter "EPA"), filed a complaint in this Court for civil penalties and injunctive relief against the Board of Commissioners of Holmes County, Ohio, (hereafter "Commissioners") for violation of R.C. Chapter 6111 at seven of the Commissioner's wastewater treatment plants (hereafter "WWTPs").

R.C. Chapter 6111 regulates water pollution control for sewage effluent discharged into the waters of the State of Ohio. EPA is authorized to regulate pollution discharge by WWTPs through the issuance of permits requiring compliance with national effluent limitations pursuant to the Federal Water Pollution Control Act. Hereafter the WWTP permits are referred to as NPDES permits.

On December 15, 1998, the parties entered into a Consent Order to resolve the violations in the State's Complaint. Part IV, Paragraph 4 of the Consent Order imposed a permanent injunction against Holmes County for any future violation of R.C. Chapter 6111, the Administrative Rules adopted by the EPA, the terms and conditions of its NPDES permits and the terms and conditions of its NPDES permits. Part X, Paragraphs

10-11 imposed stipulated penalties for any failure to comply with NPDES permit terms at the Berlin Village, Mount Hope and Walnut Creek WWTPs. Part IX, Paragraph 9 of the Consent Order required the Commissioners to complete a supplemental environmental project (hereafter "SEP") within four years in the amount of \$300,000. The SEP was in lieu of paying an additional \$100,000 civil penalty. The SEP required the construction of sewer lines to eliminate actual or threatened water quality standard exceedences in residential areas of Holmes County.

The Commissioners now own or operate at least five wastewater treatment plants located in Holmes County, Ohio which are the subject of this litigation. The Holmes County Administrative Building Wastewater Treatment Plant (aka the Jail WWTP) is located on State Route 83 north of Township Road 574 in Prairie Township and it discharges effluent into Martin's Creek. The Berlin Village WWTP is located at Township Road 359 in Berlin Township and discharges effluent into the Doughty Creek. The Mt. Hope WWTP is located at 4561 County Road 160 in Mt. Hope and discharges effluent into an unnamed tributary of the Middle Fork of the Sugar Creek. The October Hills WWTP is located 16310 County Road 23 in Knox Township and discharges effluent into the Mohican River. The Walnut Creek WWTP is located at Township Road 421, one-half mile east of State Route 39 in Walnut Creek Township and discharges effluent into the Walnut Creek.

The Commissioners have been issued NPDES permits for each of these plants which have been renewed since the time of the consent decree.

On July 20, 2007, the State of Ohio filed charges in contempt against the Commissioners alleging violation of their NPDES permits and the Consent Order for the Jail, Berlin Village, Mt. Hope, October Hills and Walnut Creek WWTPs, alleging that the Commissioners failed to complete the SEP or pay the associated civil penalty, and alleging that the Commissioners failed to pay stipulated penalties for the alleged NPDES permit violations.

The issues presented to the Court are as follows:

1. Whether the Commissioners are in contempt of court for violation of Part IV, Paragraph 4 of the Consent Order, which permanently enjoins the Commissioners from violating their NPDES permits issued for the Jail, Berlin Village, Mt. Hope, October Hills, and Walnut Creek WWTPs.

2. Whether the Commissioners are in contempt of court for violation of Part X, Paragraphs 10-11 of the Consent Order, which require the Commissioners to pay stipulated penalties for the number of violations determined to have occurred according to a schedule for failure to comply with NPDES permits for Berlin Village, Mt. Hope and Walnut Creek WWTPs.
3. Whether the Commissioners are in contempt of court for violation of Part IX, Paragraph 9 of the Consent Order, which requires the Commissioners to spend \$300,000 on a SEP to eliminate actual or threatened water control standard excedences in residential areas within four years of the execution of the Consent Order.

The trial of the State's motion was had to the Bench on May 12, 13 and 14, 2008. The Court bifurcated the issues in the State's motion and heard only the issue of whether or not the Commissioners are in contempt of court for violations of the Consent Order. In the event the Court finds the Commissioners in contempt, a sanctions hearing will be scheduled at a later date.

II. APPLICABLE LAW

"The power of contempt is inherent in a court, such power being necessary to the exercise of judicial functions." *Denobchek v. Trumbull County Bd. of Commissioners* (1988), 36 Ohio St. 3d 14, 15. Such power derives from the Ohio Constitution and exists independently of the express statutory law on contempt. Neither the legislative nor the executive branches of state government may limit a court's ability to enforce its orders through the contempt process. *Cincinnati v. Cincinnati Dist. Council 51* (1973) 35 Ohio St. 197, 202.

Not only does a court have the inherent power to punish contempt, it also has the power to determine the kind and character of conduct which will constitute contempt. *Turner v. Albin* (1928), 118 Ohio St. 527, 535; *In re: Ayre* (1997), 119 Ohio App. 3d 571, 576.

Contempt of court is defined as disobedience of a court order. It is conduct which brings the administration of justice into disrespect, or which tends to embarrass, impede

or obstruct a court in the performance of its functions. *Windham v. Tomaszczyk* (1971), 27 Ohio St. 2d 51, Paragraph 1 of the syllabus.

Contempt is first, either direct or indirect. Direct contempt occurs in the presence of the judge, while indirect contempt occurs outside the immediate presence of the judge. *Rudduck v. Rudduck* (5th Dist., June 16, 1999), Licking App. No. 98 CA 85, *unreported*, p. 3, citing *In re: Purola* (1991), 73 Ohio App. 3d 306, 310. R.C. 2705.01 addresses direct contempt by stating, "A court, or judge at chambers, may summarily punish a person guilty of misbehavior in the presence of or so near the court or judge as to obstruct the administration of justice." R.C. 2705.02 states that an individual may be punished for contempt if he is disobedient of or displays resistance to, a lawful writ, process, order, rule, judgment, or command of a court or officer of the court.

Contempt is secondly distinguished by the penalties imposed: criminal or civil. Whether the contempt is civil or criminal, the sanction imposed contains an element of punishment. *Brown v Executive 200, Inc.* (1980), 64 Ohio St. 2d 250, 253. These classifications are dependent upon the character and purpose of the contempt sanctions. *Rudduck, supra*.

Criminal contempt is characterized by unconditional fines or prison sentences. *Id.* Because the purpose of criminal contempt is punitive, there is no requirement that the offending individual be permitted to purge himself of the contempt. *Brown, supra*, at 253. "The purpose of criminal contempt sanctions is to vindicate the authority of the court, and to punish past acts of disobedience." *Brown, supra*, at 254; *Latrobe Steel Co. v. United Steelworkers of America* (1976), 545 F.2d 1336, 1343.

Civil contempt is designed to benefit a wronged party and is remedial in nature. *Rudduck, supra*, at page 4. An individual charged with civil contempt must be permitted to appear before the court and to purge himself of the contempt by demonstrating compliance with the court's order he is charged with violating. *Id.* "The purpose of sanctions imposed for civil contempt is to coerce the compliance with the underlying order or to compensate the complainant for loss sustained by the contemnor's disobedience. Punishment for civil contempt may, therefore, be either: (1) remedial or compensatory in the form of a fine to compensate the complainant for the contemnor's past disobedience; or (2) coercive and prospective, *i.e.*, designed to aid the complainant by bringing the defendant into compliance with the order, and conditional, wherein

confinement may be terminated by the contemnor's adherence to the court's order." *Brown, supra; State v. Miller*, 2003-Ohio 948, 2003 WL 722836.

Applying the above law the Court finds that this is a motion sounding in indirect civil contempt. The primary purpose of EPA is to bring the Commissioners into compliance with the Consent Order.

The burden of proof is upon the movant to establish the contempt violation. Neither a citation nor a show cause order serves to shift the burden of proof to the alleged contemnor. The standard of proof for indirect civil contempt is a preponderance of the evidence, as opposed to proof beyond a reasonable doubt. *Brown v. Executive, 200, Inc., supra*. Thus, The Ohio Supreme Court has ruled. However, the Court is aware of several courts of appeals which have adopted the federal court's standard of clear and convincing evidence. See *In re: Ayre, supra; Con Tex, Inc. v. Consolidated Technologies, Inc.* (1988), 48 Ohio App. 3d 94; and *Carroll v. Detty* (1996), 113 Ohio App. 3d 708. This line of cases interprets an Ohio Supreme Court decision in *Pugh v. Pugh* (1984), 15 Ohio St. 3d 136 as requiring clear and convincing evidence. The *Pugh* decision does not stand for that proposition, however, out of an abundance of caution, the Court shall apply the higher standard of clear and convincing evidence in this case.

Proof of purposeful, willing, or intentional violation of a court order is not a prerequisite of a finding of indirect civil contempt.

"The absence of willfulness does not relieve from civil contempt. Civil is distinguished from criminal contempt as a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance . . . The decree was not fashioned so as to grant or withhold its benefits dependant upon the state of mind of respondents... An act does not cease to be a violation of law and a decree because it may have been done innocently."

McComb v. Jacksonville Paper Co. (1949), 336 U.S. 187, 69 S. Ct. 497; *Arthur Young and Co. v. Kelly* (1990), 68 Ohio App. 3d 287; *Pugh v. Pugh, supra*.

Substantial compliance with an order of the court excuses contempt charges. *State, ex. rel. Curry v Bd. Of Education* (1980), 61 Ohio St. 2d 314.

During final argument, the Prosecuting Attorney on behalf of the Commissioners made an impassioned plea that contempt of court charges should not be leveled by EPA or the Attorney General against a Board of County Commissioners. After the eloquence of the argument wore off, the Court was left with the question: "How else does a party seek remedy for violation of a court order?" Upon this issue the Prosecuting Attorney was silent. The traditional, often used remedy for violation of a court order, especially a permanent injunction, is to seek to have the Court to enforce its order through contempt proceedings. A Board of County Commissioners is not exempt from sanctions for failure to comply with a court order. Like any other WWTP operator in this County who has been sued in this Court, and there have been a few, the Court must have the ability to enforce its orders against the Commissioners. The Commissioners are not above the law.

The Court has applied the law of Ohio regarding contempt actions as set forth above in deciding the contempt motion pending in this case.

III. VIOLATION OF PERMANENT INJUNCTION

The first issue before the Court is whether the Commissioners are in contempt for a violation of Part IV, Paragraph 4 of the Consent Order which permanently enjoins the Commissioners from violating their NPDES permits issued for the Jail, Berlin Village, Mt. Hope, October Hills and Walnut Creek WWTPs.

The October Hills WWTP was designated as a zero discharge facility in the Consent Order. The parties evidently modified that requirement without Court approval. EPA is reprimanded for bringing a contempt action in which EPA has not sought modification of the Consent Order to represent reality. The Court is unable to treat as contempt any act or failure to act which is not provided for in the Consent Order. Accordingly, by their actions, the parties have removed the October Hills WWTP from the scope of the Consent Order. The Commissioners are therefore found not guilty of violation of the Consent Order regarding the October Hills WWTP.

The evidence is clear that the Commissioners have brought the Jail and Berlin Village WWTPs into compliance with their NPDES permits. Substantial compliance is a

defense to a contempt action. Accordingly, the Commissioners are found not guilty of contempt of the Consent Order regarding the Jail and Berlin Village WWTPs.

The parties hotly contest whether the Commissioners are in substantial compliance with their NPDES permits for the Mt. Hope and Walnut Creek WWTPs. The State argues literally hundreds of days of violations which are ongoing for both of these plants. The Commissioners statistical analysis, performed by a former employee of the Commissioners' counsel's law firm, argue for finding of a 95% compliance rate. Neither party was able to submit to the Court any legal authority for determining substantial compliance with a NPDES permit that has been incorporated into a consent order. The Court must thus exercise its inherent power to determine what acts are in compliance with the Consent Order and which acts are not.

The State's argument citing hundreds of violations is overbroad. The EPA's own witness indicated that not every NPDES permit violation is treated by EPA as a violation subject to sanctions as it is not uncommon for WWTPs to have some violations. The Court is thus being asked to adopt unbridled and unregulated EPA discretion as the standard for compliance with the Consent Order. This argument violates the constitutional doctrine of separation of powers (the judicial branch being bound by executive discretion) and equal protection (without definite standards as to what violations are subject to sanctions and what violations aren't, there is real danger that different WWTP operators may be treated differently for the same conduct.) Thus the Court rejects EPA's argument as to what constitutes substantial compliance with the Consent Order.

The Commissioner's gross statistical analysis is also overbroad in a self-serving manner. First, it is not credible because of the Commissioners' expert witness was until recently an employee of defense counsel. The Court finds that such a biased witness does not pass the standards of credibility required for the testimony to be believable. Second, the analysis fails to give any weight to the potential seriousness of violations. As pointed out at final argument during discussion between the Bench and counsel, the Soviet Union's Chernobyl nuclear plant may well have had a 99% compliance rating, but the 1% of non-compliance was a major environmental catastrophe. Thus the Court rejects the Commissioners' argument as to what constitutes substantial compliance with the Consent Order.

The Court finds that it is most fair to compare the Commissioners' own actions in the operation of their various WWTPs to decide this issue. Both the Jail and Berlin

Village WWTPs have been operated for some time now without any NPDES permit violations. Thus the Commissioners have proved that they are able to operate WWTPs in compliance with NPDES permits. Comparing the Commissioners' relatively flawless current operation of the Jail and Berlin Village WWTPs to their repeated and ongoing violations in the operation of the Walnut Creek and Mt. Hope WWTPs reveals that the Walnut Creek and Mt. Hope WWTPs are not in substantial compliance with their NPDES permits and thus not in substantial compliance with the Consent Order.

It was uncontested that the Commissioners, through the expansion of effluent treated by the Walnut Creek WWTP, have hydraulically overloaded the Walnut Creek WWTP for the past several years. This is not a slight overloading; the Commissioners own reports reflect a dramatic hydraulic overload which has lead directly to ongoing NPDES permit violations. The Commissioners have hydraulically overloaded a plant that is not designed to handle the amount of effluent that is currently being processed. In addition, the Commissioners have failed to pass a sewer use ordinance which would limit the introduction of cleaning waste from large nursing home that also leads directly to ongoing NPDES violations. Accordingly, the Court finds the Commissioners guilty consistently violating their NPEDS permit to operate the Walnut Creek WWTP in violation of the Consent Order.

The Mt. Hope WWTP is experiencing ongoing and consistent NPDES permit violations due to the Commissioners failure to enact a sewer use ordinance which would restrict the dumping of large amounts of glue into the Mt. Hope WWTP. This failure to enact a sewer use ordinance has led directly to the repeated and continuing NPDES violations of the Mt. Hope WWTP. Accordingly, the Court finds the Commissioners guilty of contempt of court regarding their operation of the Mt. Hope WWTP in violation of their NPDES permit and the Consent Order.

IV. STIPULATED PENALTIES

The next issue for the Court to determine is whether the Commissioners are in contempt for violation of Part X, Paragraphs 10-11 of the Consent Order which requires the Commissioners to pay stipulated penalties for the number of violations determined to have occurred for failure to comply with the Commissioners NPEDS permits for the Berlin Village, Mt. Hope and Walnut Creek WWTPs.

As previously held, the State failed to provide the Court with a measure for determining what is an insignificant, non-sanctionable NPDES permit violation and what is a significant, sanctionable NPEDS permit violation. Thus, the State has failed to carry its burden of proof in this regard and the Commissioners are found not guilty of contempt of court for failure to pay stipulated penalties pursuant to the Consent Order.

V. SUPPLEMENTAL ENVIRONMENTAL PROJECT

The last issue for the Court to determine is whether the Commissioners are in contempt of Part IX, Paragraph 9 of the Consent Order, which requires the Commissioners to spend \$300,000 on an SEP to eliminate actual or threatened water quality standard exceedences in residential areas.

On this issue there is a conflict in evidence. The Court heard the testimony of EPA employee Dean Stoll who indicated that the Commissioners failed to obtain EPA approval for \$300,000 value of SEP within the four years required by the Consent Order. Commissioners' employee Jerry Galbraith testified that he and the Commissioners were under the impression that sewer lines installed in the Winesburg area and a flow equalization tank to the Winesburg plant would qualify for \$300,000 of SEP credit.

This conflict is resolved by referring to State's Exhibit T. State's Exhibit T consists of the progress reports the Commissioners were required to submit to EPA pursuant to the Consent Order. It is very clear that the Commissioners were under the impression that sewerage on the north side of Winesburg and installation of the flow equalization tank would qualify for \$300,000 worth of SEP credit. Neither EPA nor the Attorney General gave any written notice that this work would not qualify for SEP credit until it was virtually impossible for the Commissioners to submit and gain approval of a qualifying alternative within the time limits set by the Consent Order.

As noted at hearing, the Court reprimanded both parties for failing to request the Court's interpretation of the Consent Order on this issue and whether the Commissioners' Winesburg work would qualify for SEP credit.

However, as the documentary evidence is more consistent with Mr. Galbraith's testimony than Mr. Stoll's, the Court finds that the State has failed to prove contempt of court by the requisite burden of proof and thus the Court finds the defendants not guilty of contempt of court for failure to complete the SEP required by the Consent Order.

VI. COMMISSIONERS' MOTION FOR RELIEF FROM JUDGMENT

The Commissioners have filed a motion for relief from the Consent Order. The State has replied with a Memorandum in Opposition.

Because the Court has found the Commissioners to be in contempt for violation of the Consent Order, it is not appropriate for the Court to grant relief from the Consent Order.

WHEREFORE, the Commissioners' Motion for Relief from Judgment is considered and denied.

VII. ORDER

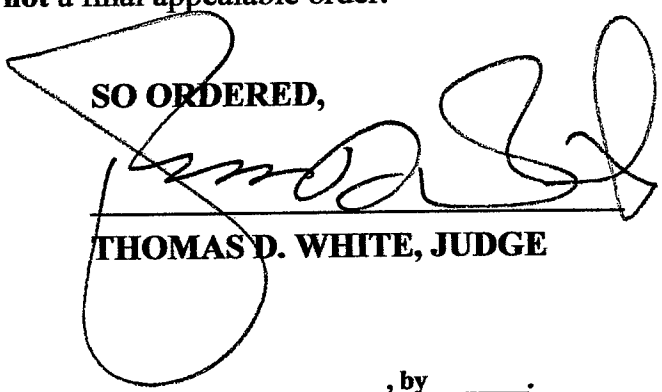
WHEREFORE, it is hereby ORDERED, ADJUDGED and DECREED that the Commissioners shall appear before a Judge of this Court and show cause as to how they shall purge themselves of contempt of this Court by bringing the Walnut Creek and Mt. Hope WWTPs into compliance with their NPDES permits and the Consent Order at **9:00 a.m. on October 21, 2008.**

It is further ORDERED that the Commissioners shall file a Memorandum outlining the means by which they intend to purge themselves of contempt of court by **September 22, 2008.** This Memorandum shall include:

1. A resolution engaging the services of a Professional Engineer to manage the Commissioners' WWTPs and interface with EPA; such engineer shall be subject to the approval of the Court. The Court favors and would approve the engagement of the County Engineer to perform these services as the wisest use of County resources. The Commissioners have proven that their Office is overburdened by the responsibilities of managing their WWTPs and they require the services of a Professional Engineer in this regard.
2. A resolution adopting a Sewer Use Ordinance to address the issues of industrial waste being placed in the effluent stream of the WWTPs. (See findings re: industrial waste causing violations at the Mt. Hope and Walnut Creek WWTPs.) Such resolution shall also be submitted to EPA for review in order that EPA may advise the Court at the purge hearing.
3. A definite plan for expansion of the Walnut Creek WWTP to relieve the hydraulic overloading of this plant. The plan shall contain a definite timetable for completion of the expansion.

It is further ORDERED that this Court finds that, as a sanction for contempt of court has not been imposed, this is **not** a final appealable order.

SO ORDERED,

A large, stylized handwritten signature in black ink, appearing to read 'T. White', is written over a horizontal line. The signature is highly cursive and loops around the line.

THOMAS D. WHITE, JUDGE

Dated: July 25, 2008

cc: All counsel

Copies distributed on _____, by _____.