

2017 MISSOURI WATER SEMINAR



Ethical Issues in Practice Before the AHC and DNR Commissions

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Rules to be discussed:

Rule 4-1.1 - Competence

Rule 4-1.7 - Conflict of Interest

Rule 4-4.2 - Communication with Persons
Represented by Counsel

621.250.1, RSMo - AHC hears certain DNR appeals:

All authority to hear contested case administrative appeals granted in chapters 236, 256, 260, 444, 640, 643, and 644, and to the hazardous waste management commission in chapter 260, the Missouri mining commission in chapter 444, the safe drinking water commission in chapter 640, the air conservation commission in chapter 643, and the clean water commission in chapter 644 shall be transferred to the

Who makes the final decision in these appeals?

The authority to render final decisions after hearing on appeals heard by the administrative hearing commission shall remain with the commissions listed in this subsection.

621.250.1, RSMo

Hypothetical Facts:

A large international corporation acquires an existing manufacturing facility located in rural Missouri. The plant was built in the 1970s. The plant manufactures auto parts and has an electroplating line. The plant discharges its domestic wastewater to a lagoon onsite. Process wastewater is pumped to a holding tank and transported offsite for disposal.

Facts:

When built, the plant was in an isolated rural location. However, five years ago, an upscale residential subdivision was built 1 mile downgradient from the plant.

Facts:

Also, DNR just issued a permit to a large swine CAFO owned by out-of-State interests on the adjacent property in between the plant and the subdivision.

Facts:

Recently, DNR conducted a surprise inspection at the plant and sampled the lagoon. The samples show the lagoon sediments contain hexavalent chromium.

Facts:

Because it uses groundwater for animal watering and wash-down purposes, the CAFO operator demands that DNR conduct groundwater sampling to determine if the groundwater contains hexavalent chromium.

Facts:

After months of “conference, conciliation, and persuasion,” DNR issues an Administrative Order to close the lagoon, connect to the nearest POTW, and to supply bottled water to the area residents.

DNR declines the CAFO’s request for groundwater sampling.

Facts:

The plant wants to appeal the Administrative Order.

The subdivision residents want to intervene in any appeal by the plant, as well as to appeal the CAFO permit.

The CAFO wants to appeal DNR's denial of its request.

Facts:

There is one lawyer in the area. He represents the real estate developer who built the subdivision, and he lives in the subdivision.

Also, he represents several local landowners who have contracts with the CAFO to accept wastes for use as fertilizer.

Who may the local attorney represent?

Rule 4-1.7: Conflict of Interest: Current Clients

(a) Except as provided in Rule 4-1.7(b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

Rule 4-1.7: Conflict of Interest: Current Clients

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by a personal interest of the lawyer.

Rule 4-1.7: Conflict of Interest: Current Clients

(b) Notwithstanding the existence of a concurrent conflict of interest under Rule 4-1.7(a), a lawyer may represent a client if:

Rule 4-1.7: Conflict of Interest: Current Clients

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;

Rule 4-1.7: Conflict of Interest: Current Clients

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Analysis:

Are the plant's interests adverse to subdivision residents' interests and the CAFO's interests?

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Yes

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Analysis:

Are the CAFO's interests adverse to the plant's interests and to the subdivision residents' interests?

Analysis:

Are the CAFO's interests adverse to the plant's interests and to the subdivision residents' interests? - **Yes**

Analysis:

Under Rule 4-1.7, because “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client ... or ... by a personal interest of the lawyer,” the lawyer should probably **not** represent either the plant, the subdivision residents, or the CAFO.

Rule 4-1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 4-1.1 - Competence

Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably required for the representation. *In Re Kleppin*, No. SC09-784, slip op. at 14 (Fla. June 24, 2010)

Rule 4-1.1 - Competence

To comply with Rule 4-1.1, it is strongly advised that an attorney be familiar with the AHC procedural requirements and rules.

Who may file an appeal?

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“. . . As provided by sections 621.250 and 640.013, the applicant may appeal”

644.051.6, RSMo

Who may file an appeal?

“Section 644.051.6 grants those denied a permit the right to appeal to the commission, and **any person with an interest that is or may be adversely affected by a permit decision** is permitted to appeal to the commission by 10 CSR 20-6.020(5)(C).”

Missouri Coalition for the Environment v Herrmann,
142 S.W.3d 700, 702 (Mo. 2004)

When and where is the appeal filed?

When and where is the permit appeal filed?

Appeal must be filed at the Administrative Hearing Commission within 30 days of the issuance of the permit.

644.051.6, RSMo.

When and where is the Administrative Order appeal filed?

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“notice of appeal [must be filed] with the administrative hearing commission within thirty days after any such finding, order, decision, or assessment is placed in the United States mail or within thirty days of any such finding, order, decision, or assessment being delivered, whichever is earlier.

621.250.3, RSMo.

Is there a specific time limit to file the appeal?

If any such petition is sent by registered mail or certified mail, it will be deemed filed on the date it is mailed; if it is sent by any method other than registered mail or certified mail, it will be deemed filed on the date it is received by the administrative hearing commission.

621.250.3, RSMo.

Is there a specific time limit to file the appeal?

In computing any period of time prescribed or allowed by these rules or by order of the commission, the day of the act, event or default after which the designated period of time begins to run is not to be included.

1 CSR 15-3.230(1)

What must the Plant allege in the Complaint?

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As far as practical, facts in numbered paragraphs stating the relief sought and the reason for granting it; however, the failure to include facts in numbered paragraphs shall not be a reason for involuntary dismissal of a complaint.

1 CSR 15-3.350(1)

What if the Plaintiff's Complaint fails to state a claim?

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Involuntary Dismissal

The commission may order involuntary dismissal on its own motion. Grounds for involuntary dismissal include: (A) Lack of jurisdiction; (B) Mootness; and (C) Grounds for a sanction as set forth in rule 1 CSR 15-3.425.

1 CSR 15-3.346(1)

What if the Plaintiff's Complaint fails to state a claim?

Decision on the Pleadings

The commission may grant a motion for decision on the pleadings if a party's pleading, taken as true, entitles another party to a favorable decision.

1 CSR 15-3.446(4)

Can the Subdivision intervene in the Plant's Appeal?

Can the Subdivision intervene in the Plant's Appeal?

The commission may permit any person to intervene if the person —

- (A) Files a motion for intervention within such time as not to delay unduly the hearing on the complaint; and
- (B) Has an interest in the action which is different from the general public interest and which cannot be represented adequately by the parties.

1 CSR 15-3.390(1)

What are the available Discovery procedures?

Any party may obtain discovery in the same manner, upon or under the same conditions and upon the same notice and other requirements as is or may be provided for with respect to discovery in civil actions by rule of the Supreme Court of Missouri for use in the circuit court, except as provided in this rule or by statute.

1 CSR 15-3.420(1)

Facts:

During the appeal, the assistant attorney general representing DNR learns that as a result of a labor dispute, several employees at the plant were fired.

Can the assistant attorney general contact these former plant employees regarding wastewater disposal procedures at the plant?

Can the assistant attorney general send a DNR investigator to interview current plant employees?

Can the plant manager directly call DNR staff to discuss the allegations in the Administrative Order?

Rule 4-4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Rule 4-4.2, comment 7:

In the case of a represented organization, Rule 4-4.2 prohibits communications with a constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

Rule 4-4.2, comment 7:

Consent of the organization's lawyer is not required for communication with a former constituent.

We agree with the overwhelming majority of other states that Rule 4-4.2 and its respective counterparts simply does not apply to former employees who are not expressly represented by their own counsel or counsel for the organization.

Smith v. Kansas City Southern Ry. Co., 87 S.W.3d 266, 274 (Mo. App. W.D. 2002).

Rule 4-4.2, comment 4:

. . . A lawyer may not make a communication prohibited by this Rule 4-4.2 through the acts of another. . . .

Rule 4-4.2, comment 4:

. . . Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. . . .

Analysis:

Can the assistant attorney general contact these former plant employees regarding wastewater disposal procedures at the plant?

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Can the assistant attorney general contact these former plant employees regarding wastewater disposal procedures at the plant? – **Yes, as long as the former employees are not represented by counsel.**

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Can the assistant attorney general send a DNR investigator to interview current plant employees? –

No. Because the assistant attorney general cannot contact current employees, she cannot send someone else to do what she cannot.

Analysis:

Can the plant manager directly call DNR staff to discuss the allegations in the Administrative Order?

Analysis:

Can the plant manager directly call DNR staff to discuss the allegations in the Administrative Order?

– **Yes. Clients can always communicate among themselves.**

Facts:

During the course of the AHC appeal, the subdivision residents continually fail to return calls, do not provide certain documents requested by their lawyer, provide information that was false, and fail to make any payments to their lawyer.

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Can the lawyer withdraw from the representation?

Rule 4-1.16: Declining or Terminating Representation

(b) Except as stated in Rule 4-1.16(c), a lawyer may withdraw from representing a client if:

Rule 4-1.16: Declining or Terminating Representation

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

Rule 4-1.16: Declining or Terminating Representation

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client;

Keys to Terminating Representation

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Keys to Terminating Representation

1. Clearly define all Client obligations in the Engagement Letter;
2. Timely notify Client of its deficiencies;
3. Timely warn Client of possible withdrawal if deficiencies are not cured;
4. In Withdrawal Letter, identify all reasons for withdrawal with factual justification; and
5. Advise Client it needs to obtain new counsel.

After the AHC hearing, what happens?

Within fifteen days after the administrative hearing commission renders a recommended decision, it shall transmit the record and a transcript of the proceedings, together with the administrative hearing commission's recommended decision to the commission having authority to issue a final decision.

621.250.3, RSMo

After the AHC hearing, what happens?

The final decision of the commission shall be issued within one hundred eighty days of the date the notice of appeal in subsection 2 of this section is filed and shall be based only on the facts and evidence in the hearing record;

621.250.3, RSMo

After the AHC hearing, what happens?

. . . provided, however, that the date by which the commission is required to issue a final decision may be extended at the sole discretion of the permittee as either petitioner or intervenor in the appeal.

621.250.3, RSMo

What happens with the appeal at the Commission?

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The appeal and Recommended Decision are placed on the Commission's agenda.

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At the scheduled Commission meeting, the Commission may allow the attorneys for the parties to address the Commission.

The Commission then votes on the AHC's Recommended Decision.

What action can the Commission take?

What action can the Commission take?

The commission may adopt the recommended decision as its final decision.

621.250.3, RSMo.

What action can the Commission take?

The commission may change a finding of fact or conclusion of law made by the administrative hearing commission, or may vacate or modify the recommended decision issued by the administrative hearing commission, only if the commission states in writing the specific reason for a change made under this subsection.

621.250.3, RSMo.

Can the Commission consider other information in making its decision?

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No

Can the Commission consider other information?

Section 621.250.3, RSMo states “the final decision . . . shall be based only on **the facts and evidence in the hearing record**”

Can the Commission consider other information?

“However, by driving by and observing the location and topography of the site of the Callaway Farrowing CAFO while the permit appeal was pending before them, [commissioners] obtained ‘facts and evidence’ directly regarding the Callaway Farrowing permit appeal outside the hearing record and without any notice to Relator.”

FORAG v Mo DNR, Cole County Circuit Court, Case 15AC-CC00259 (July 26, 2016).

Who has the burden of proof before the Commission?

Who has the burden of proof at the Commission?

In all contested case administrative appeals heard by the administrative hearing commission . . . , the burden of proof shall be upon the department of natural resources to demonstrate the lawfulness of the finding, order, decision or assessment being appealed, . . .

640.012, RSMo

Who has the burden of proof at the Commission?

. . . except that in matters involving the denial of a permit, license or registration, the burden of proof shall be on the applicant for such permit, license or registration.

640.012, RSMo.

Significance of the burden of proof

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From the business' perspective, the plant wants the burden of proof to be on DNR concerning the validity of the Administrative Order.

From the business' perspective, the CAFO wants the burden of proof to be on the non-DNR party that is appealing its permit. **But, under 640.012, the burden of proof is on DNR to justify the issuance of the permit.**

Can the Commission's final decision be appealed?

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Yes

Can the Commission's final decision be appealed?

Clean Water Commission – appeal goes directly to Court of Appeals. 644.051.6, RSMo (“The commission's decision shall be subject to judicial review pursuant to chapter 536, except that the court of appeals district with territorial jurisdiction coextensive with the county where the point source is to be located shall have original jurisdiction”).

Can the Commission's final decision be appealed?

Air Conservation Commission – appeal filed in circuit court, except all actions seeking judicial review of any final determination relating to Part 70 operating permits and construction permits or permit applications filed under or related to the prevention of significant deterioration, major nonattainment area source, or major new source review programs shall be filed in the court of appeals. Section 643.130, RSMo.

Can the Commission's final decision be appealed?

Other Commissions - Proceedings for review may be instituted by filing a petition in the circuit court of the county of proper venue within thirty days after the mailing or delivery of the notice of the agency's final decision. Section 536.110.1, RSMo.

Questions



Thanks for your time !