

BEFORE THE ALLEGHENY COUNTY HEALTH DEPARTMENT

BUNTING GRAPHICS, INC.,	:	In Re: Appeal of Bunting Graphics,
	:	Inc. from July 12, 2019 Enforcement
Appellant,	:	Order
v.	:	
	:	Docket No. ACHD-19-032
ALLEGHENY COUNTY HEALTH	:	
DEPARTMENT,	:	
	:	
Appellee.	:	

APPELLANT’S RESPONSE IN OPPOSITION TO ALLEGHENY COUNTY HEALTH DEPARTMENT’S MOTION FOR RECONSIDERATION AND TO DISMISS APPEAL

On August 16, 2019, Bunting Graphics, Inc. (“Bunting” or “Appellant”) appealed an Enforcement Order of the Allegheny County Health Department (the “Department”) dated July 12, 2019. The Department moved to dismiss the appeal, arguing that it was untimely under Article XI, Section 1104(A) of the Department’s Rules and Regulations. After an administrative hearing on the Department’s motion to dismiss on September 19, 2019, the Administrative Hearing Officer entered an order denying the Department’s motion on that same day. Now, the Department has filed the instant motion styled as a “Motion for Reconsideration and to Dismiss.” The Department asks this tribunal to reconsider its decision on the timeliness issue and also asks it to dismiss Bunting’s appeal based on the completely new argument that the issues raised on appeal have been previously adjudicated or waived and, thus, are no longer justiciable under the doctrines of *res judicata* and collateral estoppel. As an initial matter, neither a motion for reconsideration nor a second motion to dismiss is provided for or contemplated by the Department’s Rules and Regulations. On this basis alone, the Department’s motion should be either stricken or denied. In addition to the obvious procedural improprieties, the Department’s motion provides no explanation as to why reconsideration is warranted, nor does it provide any legal or factual basis for dismissal of Bunting’s appeal.

THERE IS NO DEPARTMENT RULE PROVIDING FOR A MOTION FOR RECONSIDERATION OR SUCCESSIVE MOTIONS TO DISMISS

Most significantly, there is simply no Department Rule or Regulation allowing for the filing of a motion for reconsideration; nor is there any Rule or Regulation providing for the filing of a second motion to dismiss.¹ Allowing the Department to essentially make up its own procedural rules as it goes would result in a complete breakdown of the orderly handling of proceedings before this tribunal. As the Supreme Court of the United States has accurately recognized, “[p]roper exhaustion demands compliance with an agency’s deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings.” *Woodford v. Ngo*, 548 U.S. 81, 126 S.Ct. 2378, 2386 (2006); see also *Shenango Valley Osteopathic Hospital v. Dept. of Health*, 499 Pa. 39, 451 A.2d 434, 438 (1982) (“an unjustified failure to follow the administrative scheme undercuts the foundation upon which the administrative process was founded”). There is absolutely no mechanism in the Department’s Rules and Regulations providing for a motion for reconsideration or successive motions to dismiss. The Department’s motion represents a clear disregard for the rules as written and an attempt to effectively create new ones that would serve only the Department’s self-interest. This tribunal should not countenance such conduct. To do so would render the Department’s Rules and Regulations essentially meaningless.

¹ Not surprisingly, the motion at issue now is consistent with underhanded approach the Department has taken thus far in this matter. By way of its procedurally baseless motion for reconsideration, the Department continues to assert that email is an effective form of notice despite the fact that its own Rules and Regulations provide otherwise.

Moreover, the filing of a second motion to dismiss, raising an entirely new argument, is not only in blatant disregard for the Department’s own rules, but it is wholly inconsistent with Pennsylvania procedural law. The Pennsylvania Rules of Civil Procedure require that all preliminary objections be raised at one time. *See* Pa.R.C.P. 1028(b) (“All preliminary objections shall be raised at one time.”).² The reason the rule limits parties to one motion is rather obvious—that is the efficient method to dispose of all threshold motions at one time. “The basis for the rule that all preliminary objections must be raised at one time is that otherwise the court would have to rule on preliminary objections on a piecemeal basis.” *Martin v. Gerner*, 332 Pa.Super. 507, 481 A.2d 903, 906 (1984); *see also Lexington Ins. Co. v. Com., Ins. Dep’t*, 116 Pa. Cmwlth. 259, 262, 541 A.2d 834, 836 (1988) (“The Rules imply a strong prohibition against a serial raising of objections.”). Without limitation, a party could delay proceedings almost indefinitely by meting out multiple motions. Here, the Department should not be allowed to take a proverbial “second bite at the apple.” The Department was unsuccessful on its first motion to dismiss raising the issue of timeliness. Not only is the Department improperly asking this tribunal to reconsider its previous determination of that issue, but now it shamelessly raises the wholly unrelated principles of *res judicata* and collateral estoppel as grounds for dismissal. These issues could have and, should have, been raised in its prior motion to dismiss. Based on these procedural improprieties alone, the Department’s motion should be summarily denied.

² Similarly, the Federal Rules of Civil Procedure preclude the filing of successive motions to dismiss. *See* Fed.R.Civ.P. 12(g)(2) (“Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.”).

**THE DEPARTMENT HAS FAILED TO SET FORTH ANY REASON
THAT WOULD JUSTIFY DISTURBING THIS TRIBUNAL'S PRIOR DECISION**

Assuming there is some basis in the Department's Rules for a motion for reconsideration, it is well-settled that "[m]otions for reconsideration are discouraged unless the facts or law not previously brought to the attention of the court are raised." *Desai v. Hertz Corp.*, 2013 WL 6832225 (Pa. Com. Pl. 2013) (reconsideration properly denied where the plaintiff merely repeated his argument and raised no new facts or law). *See also Fanuiel v. Roxborough Mem. Hosp.*, 2013 WL 6143650 (Pa. Com. Pl. 2013) (denying motion for reconsideration of order granting summary judgment for defendant where Plaintiff did not offer any new facts or law); *Pa. Chiropractic Ass'n. v. Independence Blue Cross*, 2001 WL 1807984, *4 (Pa. Com. Pl. 2001) (denying reconsideration, finding plaintiffs "presented no new facts nor any controlling case law which compels this court to reconsider its original Order and Opinion"). Here, the Department does not point to any new facts or law to support its request for reconsideration. Instead, the Department merely repeats its prior argument—based on its continued disingenuous reading of its own Rules—that Bunting's appeal is untimely.

Article XI, Section 1104(A) of the Department's Rules and Regulations provides in relevant part that "[t]he Notice of Appeal shall be filed no later than thirty (30) days after receipt of written notice or issuance of the action by which the Appellant is aggrieved." The form and manner in which such notice must be given is dictated by Article XXI, Section 2109.03, which specifically provides that enforcement orders "shall be served upon the person responsible" in one of three ways:

- 1) Personally handing him a copy;

- 2) Serving him in the manner provided [by the Pennsylvania Rules of Civil Procedure] for the service of a complaint in a civil action; or
- 3) Mailing a copy to him at his last known address by registered or certified mail, return receipt requested.

§2109.03(c). Here, the Department used the third method of service by sending the Enforcement Order to Bunting via USPS certified mail. Article XI, Section 1112 provides that “[w]here notice is given by United States mail, the time of service of such notice shall be the date of receipt.”

Basing his determination on these rather straightforward provisions, the Administrative Hearing Officer correctly concluded that Bunting’s appeal was timely—Bunting received the Enforcement Order by United States mail on July 18, 2019 and filed its Notice of Appeal less than thirty days later, on August 16, 2019.³ In doing so, the Officer impliedly rejected the Department’s contention that the solicitor’s email constituted “written notice” sufficient to trigger the running of the appeal clock. Indeed, “[w]hen a statute prescribes a method of notice, that method is exclusive.” *Higgins v. Pub. Sch. Employees’ Ret. Sys.*, 736 A.2d 745, 751 (Pa. Commw. Ct. 1999). There is simply no authority in Pennsylvania to suggest that emails are an effective form of “written notice” under these circumstances and the Department has not cited to any.

Moreover, it is uniquely within the authority of the Officer to determine the meaning of the Rules and Regulations. “[A]n administrative agency’s interpretation of its own regulations is controlling unless the interpretation is plainly erroneous or inconsistent with either the regulation or the statute under which it is promulgated.” *Marshall v. State Employees’ Ret. Sys.*, 887 A.2d 351, 359 (Pa. Commw. Ct. 2005) (citations and quotation omitted). *See also Daneker v. State*

³ In the interest of brevity and to avoid redundancy, Bunting incorporates its response in opposition to the Department’s first motion to dismiss as if fully set forth herein.

Employes' Ret. Bd., 156 Pa.Cmwlt. 511, 628 A.2d 491 (1993) (“An administrative agency has wide discretion in establishing rules, regulations and standards, and also in the performance of its administrative duties and functions.”); *Pawk v. Department of Environmental Resources*, 39 Pa.Cmwlt. 457, 395 A.2d 692 (1978) (“[T]he resolution of conflicts in testimony, the credibility of witnesses, and the weight given the evidence are within the province of the Board.”). The Hearing Officer reached a well-reasoned and logical conclusion on the Department’s first motion to dismiss and without a change in the law or underlying facts, there is no reason to disturb that.

In somewhat of a “hail mary” attempt to salvage a losing argument, the Department now focuses on the phrase “or issuance” in Section 1104(A) and implies that consideration of that phrase would somehow dictate a different outcome.⁴ “Issuance”, however, is not defined by the Department’s Rules and Regulations. The Department, without any explanation, erroneously assumes that the date of issuance of the Enforcement Order is July 12, 2019. Under Local Agency Law, “in computing a period of time involving the date of the issuance of an order by an agency, the day of issuance of an order shall be the day the office of the agency mails or delivers copies of the order to the parties.” 1 Pa. Code § 31.13. The language of the July 12, 2019 Enforcement Order itself suggests that the appeals clock is triggered by the day Bunting *received the Order*. See Dept’s. July 12, 2019 Enforcement Order at 10 (“[Y]ou have ten (10) days from the date of receipt of this Order in which to file an appeal.”).⁵ This is consistent with 1 Pa. Code

⁴ The Department has waived this argument. As noted, the Department’s Rules and Regulations have not changed since the filing of its first motion to dismiss. To allow the Department to invoke a new argument now, that was previously available to it, would be fundamentally unfair and contrary to the proscription against successive motions to dismiss. See p. 3, *supra*.

⁵ As noted in Bunting’s response in opposition to the Department’s first motion to dismiss, the Department misstated the length of the appeal period in the Enforcement Order as only ten days rather than thirty which only serves to compound the confusion.

§ 31.13. Thus, the date of issuance was July 18, 2019, the day Bunting received the Enforcement Order by certified mail. To ascribe any other date of issuance would be contrary to the Enforcement Order itself.

**THE DOCTRINES OF RES JUDICATA AND
COLLATERAL ESTOPPEL HAVE NO RELEVANCY TO THIS MATTER**

Aside from the fact that the Department’s second motion to dismiss should be denied as procedurally improper, the motion is legally and factually unsound. The Department’s assertion that the issues raised by Bunting on appeal have been previously adjudicated or waived and, thus, are no longer justiciable under the principles of *res judicata* and collateral estoppel is flawed for a multitude of reasons.

Res judicata, or claim preclusion, provides that a final judgment on the merits will bar **any future suit** on the same cause of action between the same parties and their privies. *Mariner Chestnut Partners, L.P. v. Lenfest*, 152 A.3d 265, 286 (Pa. Super. 2016). Similarly, the doctrine of collateral estoppel, also known as issue preclusion, acts to foreclose re-litigation in a **subsequent suit** of a question of law or issue of fact that was litigated and fully adjudicated in a prior action. *Id.* Collateral estoppel “prevents re-litigation of an issue in a later action, despite the fact that it is based on a cause of action different from the one previously litigated.” *Griffin v. Cent. Sprinkler Corp.*, 823 A.2d 191, 195 n. 3 (Pa. Super. 2003) (quoting *Balent v. City of Wilkes-Barre*, 542 Pa. 555, 669 A.2d 309, 313 (1995)) (internal citations omitted).

The Department’s reliance upon either theory is erroneous. Most fundamentally, both doctrines require a determination on the merits in a **prior case or proceeding** of a claim (*res judicata*) or of an issue (collateral estoppel). There has been only one action litigated here. By definition, the doctrines do not apply to prior determinations within the same case.

Moreover, for either doctrine to apply, the issue or claim must have been fully and finally adjudicated on the merits. The term “adjudication” is statutorily defined as “[a]ny final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made.” 2 Pa. C.S. § 101. The Department contends that its October 30, 2015 letter, September 9, 2016 letter and this tribunal’s June 5, 2019 Decision and Order constituted final agency adjudications from which Bunting had a right to appeal but did not. However, none of these determinations is even close to an “adjudication” as that term is defined; they were neither final nor did they have any effect on Bunting’s liabilities or obligations. The Department’s argument otherwise is disingenuous.

Even a cursory review of the October 30, 2015 letter demonstrates that, on its face, it is not, nor was it intended to be, a final adjudication by the Department. *See Exhibit B* attached to the Department’s Motion for Reconsideration and to Dismiss. The letter expressly provides that the Department has not made any “final determination of law or fact.” *Id.* The letter serves to inform Bunting that operation of its Verona, PA facility requires an air quality operating permit which was not first obtained, in violation of the Department’s Rules. The letter states that it “constitutes notice of the *alleged* violation and the Department offers to settle this *alleged* violation without the cost and burden of litigation...” *Id.* (emphasis added). The letter then proposes that Bunting submit a permit application and pay a penalty as settlement and provides that, “[i]f such penalty payment is made in accordance with the offer, the County, by this letter, hereby agrees to accept such penalties in full satisfaction of the violation alleged herein, *without any final determination of law or fact.*” *Id.* (emphasis added). The letter also advises that

“[n]otwithstanding the fact that there has not been a final determination of law or fact, in the event that [Bunting] shall commit further violations of the ACHD Rules and Regulation, the Department shall not be precluded from considering any past violations that were subject to consent agreements or settlement offers, in any future penalty determinations...” *Id.* (emphasis added). The Department’s contention that the October 30, 2015 letter was a “final agency action” subject to appeal is incorrect and belied by the clear and unambiguous text of the letter itself.

The Department’s September 9, 2016 letter fares no better. *See Exhibit C* attached to the Department’s Motion for Reconsideration and to Dismiss. Indeed, that letter merely serves to inform Bunting that it is required to apply for and obtain an installation permit and operating permit for its Verona, PA facility. The Department’s October 30, 2015 and September 9, 2016 letters are similar to those at issue in *Chesapeake Appalachia, L.L.C. v. Dep’t of Env’tl. Prot.*, 89 A.3d 724 (Pa. Commw. Ct. 2014). There, Chesapeake entered into a consent order and agreement with the Pennsylvania Department of Environmental Protection (“DEP”) which required Chesapeake to submit a corrective action plan to the DEP for review and approval. After submission of the plan, the DEP responded to Chesapeake with three letters which modified and the plan and approved of the plan as modified. Chesapeake appealed each of the letters to the Environmental Hearing Board, which dismissed the appeal for lack of jurisdiction based on notion that the letters were not “final actions” of the DEP. The Commonwealth Court affirmed pointing to the regulatory definition of “action” which is virtually identical, in relevant part, to the definition of “adjudication.” Title 25, Chapter 1021 of the Pennsylvania Code, relating to practice and procedures before the Environmental Hearing Board, defines “action” as “[a]n order, decree, decision, determination or ruling by the Department affecting personal or

property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification.” The Court held that, because the letters were merely informative and did not affect Chesapeake’s rights, obligations or liabilities, they were not “actions.” The Court stressed the fact that it was the corrective action plan, not the letters, which becomes enforceable against Chesapeake and even then, it does not affect Chesapeake’s obligations unless and until the DEP brings an enforcement action. *See also Standard Lime & Refractories Co. v. Dep’t of Env’tl. Res.*, 279 A.2d 383 (Pa. Commw. Ct. 1971) (holding that letter from agency advising party of its non-compliance with a previous order is not an “adjudication” until the agency seeks to enforce the original order); *Alternate Energy Store, Inc. v. Dep’t of Env’tl. Res.*, 527 A.2d 1077, 1079 (Pa. Commw. Ct. 1987) (holding letter advising permit applicant of status of application was not an “action”); *Sunbeam Coal Corp. v. Com., Dep’t of Env’tl. Res.*, 304 A.2d 169 (Pa. Commw. Ct. 1973) (holding “written notices” indicating violations of the Surface Mining Conservation and Reclamation Act were not “adjudications”); *Fiore v. Dep’t of Env’tl. Res.*, 510 A.2d 880, 883 (Pa. Commw. Ct. 1986) (holding that notice of violation is not appealable action even if such notice might affect future rights because “even if Fiore is correct in his assertion that the notice of violation would ineluctably lead to the denial of a renewed waste disposal permit, such denial would be the correct point at which to appeal, in the course of which the opportunity would be had to demonstrate that the violations were erroneously found”).

Likewise, here, the Department’s letters served to inform Bunting that it was in violation of certain Department Rules and that it needed to obtain the proper permits. The letters did not affect Bunting’s obligations or liabilities; nor did they bear any attributes that would even

remotely suggest that they represented a “final” determination of the Department. As such, the letters were not “adjudications” as defined.

The Department also suggests that Bunting somehow waived the issues raised in its January 18, 2018 Notice of Appeal of the Department’s December 5, 2017 Enforcement Order. That contention, however, is a clear misrepresentation of what has transpired. This tribunal’s August 27, 2018 Order makes clear that only the administrative hearing scheduled for September 6, 2018—not the appeal—would be limited to adjudication of the proposed installation of a thermal oxidizer and the civil penalty. Likewise, during the September 6, 2018, hearing, the Department’s counsel stated as follows:

Mr. Willis: So originally we were – we had this hearing scheduled today for an evaluation on two issues from the Bunting Graphics Notice of Appeal. Specifically, the adjudication was for the civil penalty and the efficacy of that civil penalty, and secondarily the efficacy of the BACT analysis and inadequacy of the BACT analysis that’s been presented to date.

See Exhibit F attached to the Department’s Motion for Reconsideration and to Dismiss. The Department maintains that Bunting’s silence in light of that statement somehow constituted tacit waiver of every other issue raised in its appeal. That claim is preposterous. Clearly, the *hearing* itself was meant to be limited to the issues of the installation of a thermal oxidizer and the imposition of the civil penalty, not the entire appeal. Counsel’s statement cannot be interpreted any other way. Notably, the September 6, 2018 hearing did not even proceed as scheduled and was ultimately continued until December 11, 2018. Again, that *hearing* was limited to the issues of the civil penalty and whether Bunting was required to install a thermal oxidizer. There is no evidence whatsoever that Bunting waived or otherwise abandoned the other issues raised in its appeal.

Subsequently, on June 5, 2019, the Administrative Hearing Officer issued a Decision and Order simply dismissing the appeal. See **Exhibit J** attached to the Department's Motion for Reconsideration and to Dismiss. The Department seems to suggest that Bunting's failure to appeal that Decision and Order resulted in waiver of any claims of error. Under no circumstances, however, can the June 5, 2019 Decision and Order represent an "adjudication" from which an appeal may be taken. First, the June 5, 2019 Order was not "final." "A final order is one that disposes of the case and as a consequence puts the litigant out of court." *Lehigh Twp. v. Dep't of Env'tl. Res.*, 624 A.2d 693, 695 (Pa. Commw. Ct. 1993) (internal citation omitted). The June 5, 2019 Order dismissed the appeal but afforded no other relief; the Order did not finally dispose of the proceedings before this tribunal. In fact, the Order did not even purport to address the multitude of other issues raised in Bunting's January 18, 2018 appeal. Moreover, the appeal was taken from the December 5, 2017 Enforcement Order, which itself was not "final" as it clearly contemplated ongoing proceedings and further regulatory action. For example, the December 5, 2017 Enforcement Order dictated that "Bunting shall submit a full and complete application for the operation of its facility in conformity with all applicable provisions of Article XXI, Section 2103.01. In the event Bunting fails to submit a full and complete permit application[] by or before the above deadline, Bunting is herein ordered to cease all operations until such time as the Department certifies, in writing that its application is complete."

In short, the doctrines of *res judicata* and collateral estoppel have no applicability to this matter. Most obviously, both doctrines require that an issue or a claim be finally adjudicated on the merits in a **prior case or proceeding**; there has been only one proceeding here—a proceeding that remains ongoing. Moreover, there has been no final adjudication on the merits of any issue

or claim; any action or determination by this tribunal thus far has clearly contemplated further administrative proceedings.

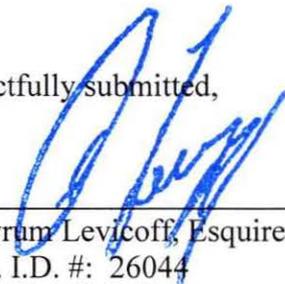
CONCLUSION

WHEREFORE, for all of the foregoing reasons, the Department's motion for reconsideration and to dismiss the appeal is without merit and should be summarily denied.

Respectfully submitted,

Date: October 30, 2019

By: _____



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