[Cite as *Harbor View v. Jones,* 2010-Ohio-6533.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Village of Harbor View,	:	
Appellant-Appellant,	:	
		No. 10AP-356
v.	:	(ERAC No. 485634)
Christopher Jones, Director of Environmental Protection et al.,	:	(REGULAR CALENDAR)
	:	
Appellees-Appellees,	:	
The Sierra Club,	:	
Appellant-Appellant,	:	
	:	No. 10AP-357
v.	:	(ERAC No. 255633)
Christopher Jones, Director of Environmental Protection et al.,	:	(REGULAR CALENDAR)
Appellees-Appellees.	:	

D E C I S I O N

Rendered on December 30, 2010

Peter A. Precario and *Megan De Lisi*, for appellant Village of Harbor View.

Tucker Ellis & West LLP, *Irene C. Keyse-Walker*, *Martin H. Lewis, Nicholas C. York* and *Eric D*. *Weldele,* for appellee FDS Coke Plant, LLC.

E. Dennis Muchnicki, for appellant The Sierra Club.

Richard Cordray, Attorney General, and *Gary L. Pasheilich*, for appellee Director of Environmental Protection.

APPEALS from the Environmental Review Appeals Commission

KLATT, J.

{¶1} Appellants, The Sierra Club and the Village of Harbor View, appeal from a final order of the Environmental Review Appeals Commission ("ERAC") granting summary judgment to appellee, FDS Coke Plant, LLC ("FDS"). For the following reasons, we affirm in part and reverse in part.

{¶2} FDS wants to build a coke plant in Oregon, Ohio, which is located just outside of Toledo. On June 14, 2004, the Director of the Ohio Environmental Protection Agency ("Director") issued FDS a permit to install ("PTI") the components of the coke plant that qualify as air contaminant sources. Both Sierra Club and Harbor View appealed the issuance of the PTI to ERAC. While those appeals were pending before ERAC, the Director modified the PTI. In accordance with R.C. 3745.04(B), the Director filed with ERAC and served on appellants a notice of the modification. Both Sierra Club and Harbor View objected to the modification of the PTI. Appellants asserted virtually identical bases for their objections. Appellants contended that the modification was unreasonable and unlawful because: (1) the Director lacked jurisdiction to modify the PTI as it was the subject of appellants' prior appeals, (2) the Director could not modify the PTI because it had expired under its own terms and under Ohio law, and (3) the Director could not modify the PTI because it expired under its own terms and federal law.

{¶3} Soon after appellants filed their objections, FDS moved for summary judgment. First, FDS argued that a recent amendment to R.C. 3745.04 empowered the Director to modify FDS' PTI even though an appeal from the issuance of that PTI was pending before ERAC. As amended by Am.Sub. H.B. No. 119, effective September 29, 2007, R.C. 3745.04(B) states:

> The environmental review appeals commission has exclusive original jurisdiction over any matter that may, under this section, be brought before it. However, the director has and retains jurisdiction to modify, amend, revise, renew, or revoke any permit, rule, order, or other action that has been appealed to the commission.

The Director issued FDS the modified PTI on January 31, 2008—approximately four months after the amendment to R.C. 3745.04(B) took effect. Thus, FDS asserted that the amendment applied and vested the Director with the authority necessary to modify the PTI.[1]

{¶4} Second, FDS argued that its PTI had not expired before the Director modified it. Section B(4) of the original PTI stated:

> This permit to install shall terminate within eighteen months of the effective date of the permit to install if the owner or operator has not undertaken a continuing program of installation or modification or has not entered into a binding contractual obligation to undertake and complete within a reasonable time a continuing program of installation or modification. This deadline may be extended by up to 12 months if application is made to the Director within a reasonable time before the termination date and the party shows good cause for any such extension.

Section B(4) reiterated the rule contained in former Ohio Adm.Code 3745-31-06.[2] Pursuant to Section B(4) of its PTI and former Ohio Adm.Code 3745-31-06, FDS requested that the Director extend the expiration date of its PTI for one year. The Director granted FDS' request, making the PTI valid until December 14, 2006. FDS

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[1] Pursuant to uncodified section 737.30 of Am.Sub. H.B. 119, "[t]he amendment to section 3745.04 of the Revised Code by this act applies to any action of the Director of Environmental Protection that is the subject of an appeal to the Environmental Review Appeals Commission that is already pending on the effective date of the amendment to that section by this act as well as to actions appealed after the effective date of that amendment."

[2] Since the issuance of the original PTI, this regulation has been amended and now appears in Ohio Adm.Code 3745-31-07(A)(1) and (2). Because former Ohio Adm.Code 3745-31-06 was in effect when the Director issued the original PTI, it applies to this matter.

alleged that it executed major construction contracts for the coke plant on November 1, 2006. Based upon this allegation, FDS argued that, prior to the December 14, 2006 expiration date, it had "entered into a binding contractual obligation to undertake and complete within a reasonable time a continuing program of installation," thus forestalling the termination of the PTI.

{¶5} Notably, FDS did not support its motion for summary judgment with any affidavits attesting to the facts alleged in the motion. Also, claiming that the alleged construction contracts contained confidentiality provisions and trade secrets, FDS did not attach the contracts to its motion. However, FDS offered to make the contracts available for review if ERAC designated them confidential.

{¶6} The Director filed a memorandum in support of FDS' motion for summary judgment. The Director attached to his memorandum the affidavit of Michael E. Hopkins, the Assistant Chief of Permitting for the Ohio Environmental Protection Agency ("OEPA"). Hopkins averred that the Director had extended the 18-month life of FDS' PTI by another 12 months. This extension meant that the PTI terminated on December 14, 2006 unless, by that date, FDS had begun a continuing program of installation or entered into a binding contractual obligation to undertake and complete within a reasonable time a continuing program of installation. According to Hopkins, FDS had submitted a letter to OEPA indicating that, "on December 13, 2006, [FDS had] entered into binding contractual agreements for site specific activities related to the FDS Coke Plant's engineering and construction." (Hopkins' affidavit, at ¶9.) Based on the evidence set forth in Hopkins' affidavit, the Director contended that FDS had executed binding contracts to undertake a

continuing program of installation prior to December 14, 2006, and thus, FDS' PTI did not expire.

{¶7} Harbor View responded to FDS' summary judgment motion with a demand for the production of "[c]opies of any and all contracts entered into between [FDS] and any construction company, contractor, builder, or any other person, firm, or company related to the design, planning, construction, building, or any other construction[-]related activities related to the FDS Coke Plant * * * ." FDS objected to the demand for the contracts, claiming that the contracts were not relevant to the issues raised in appellants' objections.

{¶8} When FDS refused to produce the contracts, Harbor View filed a motion to compel. Harbor View argued that FDS could not rely on the contracts as a basis for claiming that the PTI had not expired, yet withhold the contracts after receiving a valid request for their production. As Harbor View perceived the situation, FDS' recalcitrance in turning over the contracts deprived Harbor View of any opportunity to refute the arguments that FDS made in its motion for summary judgment.

{¶9} On November 26, 2008, ERAC granted Harbor View's motion to compel and ordered FDS to produce the contracts. ERAC directed appellants to file a response to FDS' pending motion for summary judgment ten days after receiving the contracts.

{¶10} Although FDS complied with ERAC's order, it heavily redacted the two contracts that it produced. After receipt of "essentially 52 blank pages of paper," Harbor View filed its second motion to compel the production of the contracts. (Harbor View's Dec. 30, 2008 motion to compel, at 2.) Harbor View argued that the extent of the

redaction rendered the contracts virtually meaningless, thus frustrating Harbor View's ability to respond to FDS' motion for summary judgment.

{¶11} On February 10, 2009, ERAC granted Harbor View's second motion to compel. ERAC found that the contracts, as produced, were inadequate to permit Harbor View to reasonably respond to FDS' motion for summary judgment. ERAC also found that, due to the extensive redactions, the contracts did not provide it with sufficient evidence to consider and rule on FDS' motion. Finally, ERAC again ordered appellants to respond to FDS' motion within ten days of receipt of the contracts.

{¶12} In accordance with ERAC's order, FDS submitted to Harbor View the contracts in a "substantially less redacted" form "than previously provided." (FDS' Feb. 25, 2009 letter from Eric D. Weldele, counsel for FDS, to ERAC.) According to FDS, in this second production of the contracts, it tried to redact only those portions of the contracts that were confidential and proprietary in nature.

{¶13} Again, instead of responding to FDS' summary judgment motion, Harbor View filed a motion to compel after receiving the contracts. Harbor View acknowledged that FDS' second submittal of the contracts provided more substance than the previous submittal. However, Harbor View claimed that FDS still omitted significant portions of the contracts, and the omissions precluded Harbor View from forming a meaningful response to FDS' motion for summary judgment.

{¶14} On the same day that Harbor View filed its third motion to compel, FDS moved for an immediate ruling on its motion for summary judgment.[3] FDS argued that it

[3] This was actually FDS' second motion for an immediate ruling on its motion for summary judgment. FDS filed its first motion for an immediate ruling prior to receiving a copy of ERAC's order granting Harbor View's second motion to compel. FDS complied with that order, and then it filed its second motion for an immediate ruling.

deserved judgment in its favor because appellants had not responded to the motion for summary judgment despite ERAC's order that they do so after receiving copies of the contracts.

{¶15} ERAC resolved the escalating dispute between the parties by denying FDS' motion for summary judgment. In its March 11, 2009 ruling, ERAC found that FDS failed to support its motion with any affidavits, and it concluded that the contracts turned over in the second production did not contain sufficient information to establish FDS' entitlement to summary judgment. In light of its denial of the summary judgment motion, ERAC found that FDS' motions for an immediate ruling were moot.

{¶16} FDS then requested that ERAC reconsider its denial of the motion for summary judgment. FDS attached to its motion the affidavit of Kathleen Jarema, general counsel for FDS. Jarema testified that she had signed the two contracts at issue on behalf of FDS, the contracts were construction contracts for the construction of the coke plant, and FDS had already paid millions of dollars pursuant to the terms of the contracts. FDS argued that Jarema's testimony proved that it had "entered into a binding contractual obligation to undertake and complete within a reasonable time a continuing program of installation." FDS thus asserted that the PTI had not expired, and it was entitled to summary judgment.

{¶17} On March 24, 2009, ERAC agreed to reconsider its denial of FDS' motion for summary judgment. In the same order, ERAC denied Harbor View's third motion to compel, and it set a deadline for appellants to file any memoranda contra to FDS' motion for summary judgment.

{¶18} Instead of filing memoranda contra, appellants filed joint objections to ERAC's ruling on FDS' motion for reconsideration and Harbor View's third motion to compel. Appellants attached to their motion the affidavit of Paul V. Pavlic, an Ohio attorney who has "reviewed, examined, drafted, and revised numerous business-related contracts." (Mar. 27, 2009 Pavlic affidavit, at ¶2.) Pavlic testified that, in its redacted form, FDS' contract with Uhde Corporation of America ("Uhde") did not contain sufficient terms to determine what type of agreement it was. Pavlic acknowledged that the second contract—between FDS and Talon Consulting, LLC ("Talon")—was a construction management agreement. However, according to Pavlic, the Talon contract was not a construction contract under Ohio law. In summary, Pavlic opined that "it cannot be determined to any reasonable degree whether these documents call for or require construction or [contain] any of the terms or conditions or contingencies relating to that construction." (Mar. 27, 2009 Pavlic affidavit, at ¶20.)

{¶19} Based on Pavlic's affidavit, appellants asserted that, while they could not determine exactly what services FDS had contracted for, the disclosed contractual terms revealed that the two contracts were not construction contracts. Because FDS had not executed a construction contract, appellants argued that FDS had not established that it "entered into a binding contractual obligation to undertake and complete within a reasonable time a continuing program of installation."

{¶20} At this point, ERAC heard oral argument from both parties regarding the merits of the various filings before it. On April 1, 2009, ERAC issued an order again denying FDS' motion for summary judgment. ERAC found Jarema's affidavit insufficient support for an award of summary judgment for two reasons: (1) it failed to properly

authenticate the two contracts, and (2) based on FDS' admissions during oral argument, it was unclear whether Jarema had personal knowledge of all the statements contained in her affidavit. Also in the order, ERAC reconsidered its earlier denial of Harbor View's third motion to compel, and it granted that motion. At the oral argument, all the parties had expressed willingness to enter into a protective order to restrict disclosure of the proprietary and trade secret information contained in the contracts. Consequently, ERAC ordered the parties to enter into a joint protective order. ERAC also ordered FDS to produce the contracts within seven days of the filing of the joint protective order.

{¶21} After a lengthy negotiation, the parties agreed upon the terms of a joint protective order. Pursuant to the joint protective order, FDS produced versions of the two contracts that contained significantly more contractual language than contained in the second production. In accordance with the terms of the protective order, FDS still redacted proprietary and trade secret information from the contracts.

{¶22} Displeased by the continued redaction of what it considered substantive contractual terms, Harbor View filed a fourth motion to compel. Harbor View contended that the redacted material "could reasonably be determinative of the nature of the contract[s] at issue." (Harbor View's Dec. 9, 2009 motion to compel, at 3.) Harbor View thus requested that ERAC conduct an in camera review of the complete contracts and order FDS to disclose the relevant and material portions.

{¶23} FDS strenuously disputed Harbor View's contention that the redacted material was relevant to determining whether it had "entered into a binding contractual obligation to undertake and complete within a reasonable time a continuing program of installation." According to FDS, it had redacted only technical, pricing, payment, and

scheduling information. FDS argued that the nature of the contracts could be determined without disclosure of this highly sensitive, proprietary information.

{¶24} To resolve this dispute, ERAC ordered FDS to produce the complete contracts so that it could perform an in camera review. FDS complied with this order.

{¶25} In the meantime, FDS also moved again for summary judgment. FDS reiterated all the same arguments that it had previously asserted, but this time, it relied upon the third production of the contracts to support its arguments. FDS failed to attach any evidentiary materials to its motion.

{¶26} Harbor View responded with a memorandum contra, attaching a second affidavit from Pavlic. After reviewing the third production of the contracts, Pavlic again opined that the Uhde contract did not contain sufficient detail to determine the true nature of the contract. He also again found that, based on the contractual terms disclosed, neither contract constituted a construction contract.

{¶27} Seeking further explication of the parties' positions, ERAC convened oral argument on FDS' second motion for summary judgment. Two days later, on February 4, 2010, ERAC issued decisions on the fourth motion to compel and the second motion for summary judgment. First, ERAC denied Harbor View's fourth motion to compel. ERAC concluded that, based on its in camera inspection of the complete, unredacted contracts, FDS did not need to disclose any further provisions of the contracts to appellants.

{¶28} Second, ERAC also "ruled" on FDS' motion for summary judgment. Although ERAC denominated its entry a "ruling," ERAC neither granted nor denied the motion for summary judgment. Instead, ERAC found that FDS had failed to support its motion with any sworn evidence or authenticated documents. ERAC then stated, "[i]n the

event the parties wish to properly support or oppose FDS' Motion for Summary Judgment, in accordance with Civ.R. 56, they shall do so on or before February 9, 2010." (Feb. 4, 2010 ruling on FDS' motion for summary judgment, at 2.)

{¶29} Seizing the opportunity ERAC offered, FDS submitted three affidavits in support of its motion for summary judgment on the February 9 deadline. In the first affidavit, William Mitchell, President and CEO of Talon, identified the contract attached to his affidavit as the contract between Talon and FDS. In the second affidavit, Rajagopala Venkataramani, Chief Engineer for Uhde, identified the various documents that "taken together [constituted] the primary binding terms of the agreement between UHDE and FDS for the purpose to provide engineering, design, and procurement service to FDS." (Venkataramani affidavit, at ¶6.) In the final affidavit, Jarema identified the documents attached to her affidavit as the contract between FDS and Talon and the contract between FDS and Uhde.

{¶30} Two days later, on February 11, 2010, Mary Oxley, Executive Secretary for ERAC, sent an email to counsel for the Director, FDS, Harbor View, and Sierra Club. The email stated:

> The Commission has asked that I notify everyone that the Commission is GRANTING the pending FDS Motion for Summary Judgment and that the Commission will be issuing its Decision shortly. As a result, the Prehearing Conference and De Novo Hearing currently scheduled this month will not go forward.

(Emphasis sic.)

{¶31} Over a month later, on March 17, 2010, ERAC issued its decision granting FDS' motion for summary judgment. ERAC concluded that the Uhde and Talon contracts qualified as "binding contractual obligation[s] to undertake and complete within a

reasonable time a continuing program of installation." Because FDS had executed both of the contracts prior to the December 14, 2006 expiration date of the PTI, ERAC held that FDS' PTI had not expired. ERAC then stated that, at oral argument, appellants' counsel had admitted that the expiration of FDS' PTI was the sole remaining issue for resolution. Because it had resolved that issue in FDS' favor, ERAC affirmed the Director's issuance of the PTI and dismissed appellants' appeals.

{¶32} Appellants now appeal from the March 17, 2010 final order. On appeal, Harbor View assigns the following errors:

> [1.] The Environmental Review Appeals Commission erred in granting Appellee FDS's Motion for Summary Judgment in that the Commission's unprecedented and novel administration of this case violated Appellant Village of Harbor View's procedural due process rights.
>
> [2.] The Environmental Review Appeals Commission erred in granting Appellee FDS's Motion for Summary Judgment because Appellee was not entitled to Summary Judgment under Civ.R. 56.

{¶33} In its appeal, Sierra Club assigns the following errors:

> [1.] The Environmental Review Appeals Commission erred in granting Appellee FDS's Motion for Summary Judgment in that the Commission's unprecedented and arbitrary administration of this case violated Appellant Sierra Club's procedural due process rights.
>
> [2.] The Environmental Review Appeals Commission erred in granting Appellee FDS's Motion for Summary Judgment because Appellee was not entitled to Summary Judgment under Civ. R. 56.

{¶34} Before considering the merits of appellants' assignments of errors, we must determine the appropriate standard of review. Pursuant to R.C. 3745.05(F), ERAC must affirm actions appealed to it if those actions are "lawful and reasonable," and it must

vacate or modify actions that are "unreasonable or unlawful." This court reviews ERAC's orders to determine whether they are "supported by reliable, probative, and substantial evidence and [are] in accordance with law." R.C. 3745.06.

{¶35} Because appellants' assignments of error are virtually identical, we will address them together. By their first assignments of error, appellants argue that ERAC deprived them of procedural due process by: (1) failing to force FDS to disclose the complete, unredacted contracts, thus preventing appellants from formulating a meaningful response to FDS' second motion for summary judgment, (2) denying appellants the opportunity to respond to the three affidavits that FDS filed in support of its second summary judgment motion, and (3) denying appellants an opportunity to be heard on their objection that FDS' PTI expired under the mandate of federal law. We disagree with all three arguments.

{¶36} Both the Fourteenth Amendment of the United States Constitution and Section 16, Article I, of the Ohio Constitution require that administrative proceedings comport with due process. *Mathews v. Eldridge* (1976), 424 U.S. 319, 96 S.Ct. 893 (considering whether a federal agency accorded an individual due process before depriving him of a private interest); *Doyle v. Ohio Bur. of Motor Vehicles* (1990), 51 Ohio St.3d 46 (considering whether a state agency complied with due process requirements).[4] To comply with the requirements of procedural due process, governmental agencies must, at a minimum, provide notice and an opportunity for a hearing before depriving individuals of their protected liberty or property interests. *Cleveland Bd. of Ed. v.*

[4] The "due course of law" aspect of Section 16, Article I, Ohio Constitution is the equivalent of the Due Process Clause of the United States Constitution. *Groch v. Gen. Motors Corp.*, 117 Ohio St.3d 192, 2008-Ohio-546, ¶53.

Loudermill (1985), 470 U.S. 532, 542, 105 S.Ct. 1487, 1493; *Boddie v. Conn.* (1971), 401 U.S. 371, 377-78, 91 S.Ct. 780, 786; *Ohio Assn. of Pub. School Employees, AFSCME, AFL-CIO v. Lakewood City School Dist. Bd. of Edn.*, 68 Ohio St.3d 175, 176, 1994-Ohio-354. A "fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews*, 424 U.S. at 333, 96 S.Ct. at 902 (quoting *Armstrong v. Manzo* (1965), 380 U.S. 545, 552, 85 S.Ct. 1187, 1191). See also *State ex rel. Plain Dealer Publishing Co. v. Floyd*, 111 Ohio St.3d 56, 2006-Ohio-4437, ¶45.

{¶37} As applied to summary judgment, procedural due process requires that a non-moving party have an opportunity to respond before the adjudication of a motion for summary judgment. *Deutsche Bank Natl. Trust Co. v. Knox*, 7th Dist. No. 09-BE-4, 2010-Ohio-3277, ¶41; *Raben Tire Co., Inc. v. K & G Contracting Servs., Inc.*, 6th Dist. No. S-09-017, 2009-Ohio-6256, ¶14; *State Farm Fire & Cas. Co. v. Holland*, 12th Dist. No. CA2007-08-025, 2008-Ohio-4436, ¶33. "However, mere failure to respond does not constitute a lack of opportunity, since '[a]n opportunity squandered does not make out a due process claim.' " *Divane v. Krull Elec. Co., Inc.* (C.A.7, 1999), 194 F.3d 845, 848 (quoting *EEOC v. Bay Shipbuilding Corp.* (C.A.7, 1981), 668 F.2d 304, 310).

{¶38} Here, appellants first argue that ERAC denied them the opportunity to respond to FDS' motion for summary judgment when it refused to compel FDS to produce unexpurgated copies of the two contracts at issue. The outcome of FDS' summary judgment motion turned upon whether FDS had prevented its PTI from expiring by contractually committing itself to a continuing program of installation prior to the December 14, 2006 expiration date. Appellants contend that, without the full contracts,

they were unable to determine the nature of the contracts, and thus, they could not discern whether the contracts obligated FDS to undertake and complete a continuing program of installation.

{¶39} Contract interpretation is a matter of law. *St. Marys v. Auglaize Cty. Bd. of Commrs.*, 115 Ohio St.3d 387, 2007-Ohio-5026, ¶38. Therefore, we must examine whether, as a matter of law, the disclosed terms of FDS' contracts with Uhde and Talon contain enough specificity to interpret the scope of the contracted-for work.[5] If they do, then appellants had sufficient information from which to determine the nature of the contracts and develop a response to FDS' second motion for summary judgment.

{¶40} With regard to the Uhde contract, the third production disclosed significant portions of the text of Section 3 of the contract, entitled "Scope of Work by Uhde." Section 3.1 states, "[a]s the technology provider for the Toledo Heat-Recovery Cokemaking Facility, Uhde will provide basic engineering and detailed engineering of [the] technology-related facility, supply major materials, assign specialists for technical supervision during construction and for start-up and commissioning." Under Section 3.2.1, entitled "Engineering," Uhde agreed to perform "[b]asic engineering, detailed engineering, preparation of specifications for procurement, preparation of operating and maintenance manuals and preparation of procedures for commissioning and start-up * * *." Section 3.2.2, entitled "Procurement," states that, "Uhde will be responsible for scheduling, directing, coordinating and supervising the procurement" of the materials needed to construct the coke oven battery. Also in Section 3.2, Uhde agreed to provide

[5] Because contract interpretation is a matter of law, Pavlic's opinion that "there is not sufficient information in the [Uhde contract] to determine the nature of the agreement" is irrelevant to our analysis. (Jan. 22, 2010 Pavlic affidavit, at ¶13.)

advisory services during all phases of field activities and the commissioning of the coke oven battery, as well as training of FDS' operating and maintenance personnel.

{¶41} While FDS excised all details explaining the exact parameters of the work and materials Uhde agreed to supply, the contract includes enough specificity to determine its nature. In short, FDS contracted with Uhde for the engineering of the operating components of the coke plant, the procurement of the materials needed to construct the operating components, and oversight of the installation and commissioning of the operating components.

{¶42} In Talon's contract with FDS, Talon agreed to serve as FDS' construction manager during construction of the coke plant. The contract states that the "major items of [Talon's] work are generally to review, authenticate and advise [FDS] to accept and pay for the Project Work * * *." Thus, FDS contracted with Talon for it to serve as FDS' agent during the construction of the coke plant and the installation of the components engineered by Uhde.

{¶43} Because FDS disclosed enough of the contracts in the third production to determine the nature of the contracts, appellants' first due process argument fails. Appellants had adequate information to respond to FDS' second summary judgment motion.

{¶44} In arguing to the contrary, appellants point out that ERAC twice ruled that FDS' redaction of the contracts precluded appellants from rebutting FDS' summary judgment arguments. According to appellants, nothing explains ERAC's subsequent contrary decision that the contracts included enough information for appellants to respond to and ERAC to rule on FDS' motion for summary judgment. Appellants ignore that

ERAC's earlier rulings were based on FDS' first and second productions of the contracts at issue. With FDS' third production, ERAC simply determined that FDS had finally provided sufficient contractual language for appellants to address and ERAC to resolve the operative issue—whether the contracts constituted "binding contractual obligation[s] to undertake and complete within a reasonable time a continuing program of installation."

{¶45} By appellants' second due process argument, they assert that ERAC unconstitutionally denied them an opportunity to respond to the three affidavits that FDS filed in support of its second motion for summary judgment. According to appellants, on the same day that they received the affidavits, they also received the email from ERAC's executive secretary informing them that ERAC would be granting FDS' motion. Appellants contend that this sequence of events precluded them from responding to the affidavits. Had they been able to respond, appellants claim that they would have argued that two of the three affidavits were invalid because they were improperly notarized.

{¶46} Appellants are attempting to convert their failure to respond into a lack of opportunity to respond. An email from an executive secretary indicating how ERAC intends to rule on a motion does not equate with a final order from ERAC. A final order would have decided the motion and ended litigation before ERAC, thus barring appellants from raising their objections to the affidavits. Because the email had neither the authority nor consequence of a final order, it did not preclude appellants from asserting their arguments against the affidavits and the impending grant of summary judgment. However, in the month between the email communication and the issuance of the final order, appellants filed nothing before ERAC.

{¶47} Appellants repeatedly stress the length of FDS' supplemental filing, and suggest that they did not have enough time to review the "over one hundred pages long" filing and submit a response. (Harbor View's brief, at 17; Sierra Club's brief, at 19.) In major part, FDS supplied the three affidavits to authenticate the Uhde and Talon contracts. Thus, the vast bulk of FDS' supplemental filing consisted of copies of the Uhde and Talon contracts. Appellants received the third production of those contracts in early December 2009. FDS did not file its second motion for summary judgment until January 12, 2010. Given this timeline, appellants had ample opportunity to assert any argument refuting the merits of FDS' argument that the contracts qualified as "binding contractual obligation[s] to undertake and complete within a reasonable time a continuing program of installation." To contest the validity of the affidavits, appellants only had to review one one-page affidavit and two two-page affidavits. We thus find that the one month between receipt of the executive secretary's email and the issuance of the final order provided appellants with sufficient opportunity to form and file a response. Appellants' failure to seize that opportunity does not give rise to a due process violation.

{¶48} Finally, appellants argue that ERAC denied them a hearing on their objection that FDS' PTI expired because FDS failed to "commence" construction in accordance with the definition of "commence" contained in 40 C.F.R. 52.21(b)(9)(ii). Because appellants chose to forego multiple opportunities to assert this argument, we find no due process violation.

{¶49} The Director issued FDS' PTI under the authority vested in him by R.C. 3704.03(F) to grant installation permits for air contaminant sources.[6] Former R.C. 3704.03(F) also provided that, "[i]nstallation permits shall be issued for a period specified by the director." Exercising this latter grant of authority, the Director adopted former Ohio Adm.Code 3745-31-06, which read:

> (A) A permit to install shall terminate within eighteen months of the effective date of the permit to install if the owner or operator has not undertaken a continuing program of installation or modification or has not entered into a binding contractual obligation to undertake and complete within a reasonable time a continuing program of installation or modification.
>
> (B) The director may modify a permit to install to extend these dates of expiration by up to twelve months if the applicant submits, within a reasonable time before the termination date, an application for modification * * *.

Section B(4) of FDS' PTI, quoted above, duplicates the operative language of this regulation.

{¶50} Because Section B(4) of the PTI and former Ohio Adm.Code 3745-31-06(A) governed whether FDS' PTI expired, FDS focused on these two sections when arguing that its PTI did not expire. Although appellants had ample opportunity, neither responded to FDS' argument by contending that 40 C.F.R. 52.21(b)(9)(ii) instead controlled whether the PTI expired.[7] Therefore, appellants cannot complain now that ERAC deprived them of their due process right to be heard on this contention.

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[6] We cite and quote from the version of R.C. 3704.03 in effect when the Director issued FDS' original PTI on June 14, 2004. The General Assembly has amended the statute since then.

[7] 40 C.F.R. 52.21(b)(9) defines the word "commence" for purposes of 40 C.F.R. 52.21, which sets forth requirements of the federal prevention of significant deterioration program. Appellants do not explain how this definition relates to the expiration of an OEPA-issued PTI.

{¶51} In sum, we conclude that ERAC did not violate appellants' due process rights. Accordingly, we overrule appellants' first assignments of error.

{¶52} By appellants' second assignments of error, they argue that ERAC erred in granting FDS summary judgment. While we reject the majority of the arguments asserted under these assignments of error, we agree with appellants that a genuine issue of material fact remains as to whether FDS contracted to "undertake and complete within a reasonable time" the required program of installation.

{¶53} Appellants first argue that ERAC erred in considering the three affidavits that FDS offered in support of its second motion for summary judgment. Appellants point to Civ.R. 56(C), which states that "[s]ummary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, *timely filed in the action*, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Emphasis added.) FDS did not file the three affidavits with its second summary judgment motion, as required by Civ.R. 6(D). Appellants thus contend that the three affidavits were not "timely filed in the action," and Civ.R. 56(C) precluded ERAC from considering the affidavits. With no other Civ.R. 56(C) evidence offered in support of the motion, appellants argue that ERAC should have denied FDS summary judgment.

{¶54} The Ohio Rules of Civil Procedure apply (with some exceptions) to "all courts of this state," not to administrative bodies. Civ.R. 1(A); *In re Blue Flame Energy Corp.*, 171 Ohio App.3d 514, 2006-Ohio-6892, ¶15. Thus, while Civ.R. 56 may guide ERAC when it decides motions for summary judgment, that rule does not bind ERAC's

review. *Waste Mgt. of Ohio, Inc. v. Bd. of Health of Cincinnati*, 159 Ohio App.3d 806, 2005-Ohio-1153, ¶93 Here, ERAC chose to diverge from a strict application of Civ.R. 56(C) and consider evidence filed after the submittal of a motion for summary judgment. As Civ.R. 56(C) does not constrain ERAC, we find no error in ERAC's consideration of the late-filed affidavits.

{¶55} Although Civ.R. 56(C) does not bind ERAC, all of ERAC's decisions " 'must be predicated upon testimony of witnesses who are sworn and papers or documents properly authenticated in some fashion.' " *Citizens Against Am. Landfill Expansion v. Korleski*, 180 Ohio App.3d 170, 2008-Ohio-6678, ¶21 (quoting *Jackson Cty. Environmental Commt. v. Shank* (Dec. 10, 1991), 10th Dist. No. 91AP-57). Thus, while neither the rules of civil procedure nor evidence apply to ERAC's proceedings, ERAC must ensure that the evidence it relies upon meets this minimum standard. Appellants assert that ERAC ignored this standard and rested its summary judgment decision on unsworn testimony; namely, the improperly authenticated affidavit of Jarema.

{¶56} "It is * * * essential to the validity of [an] affidavit that it be sworn to by the affiant before some person who has authority to administer oaths, and if such affidavit shows upon its face that it is not sworn to before a person authorized by law to administer the oath it has no legal force whatever." *State v. Lanser* (1924), 111 Ohio St. 23, 27. See also *Clodgo v. Kroger Pharmacy* (Mar. 18, 1999), 10th Dist. No. 98AP-569 (holding that the trial court properly disregarded an improperly notarized affidavit when deciding a motion for summary judgment). Here, an Indiana notary public took and certified Jarema's affidavit. According to the affidavit, Jarema was located in Cook County, Illinois at the time she swore to the statements in the affidavit. The jurisdiction of notary publics

qualified in Indiana extends only to that state's borders. Ind.Code Section 33-42-1-1. Consequently, the notary public who signed Jarema's affidavit was not authorized by law to administer the oath in Illinois, rendering Jarema's affidavit invalid.

{¶57} Because Jarema did not provide ERAC with sworn testimony, ERAC could not rely on her authentication of the contracts when deciding the motion for summary judgment. ERAC itself discounted Mitchell's affidavit because it, too, was signed by a notary public acting outside of her jurisdiction.[8] The invalidity of Jarema's and Mitchell's affidavits makes Venkataramani's affidavit the only sworn testimony supporting FDS' motion for summary judgment. While Venkataramani authenticated the Uhde contract, he did not also authenticate the Talon contract. ERAC, however, found that each of the two contracts qualified as "binding contractual obligation[s] to undertake and complete within a reasonable time a continuing program of installation." Therefore, contrary to appellants' contention, we need not reverse ERAC's decision merely because ERAC erroneously considered Jarema's affidavit as sworn testimony. The Uhde contract, alone, could provide sufficient evidence to support ERAC's grant of summary judgment. Consequently, we now must determine whether FDS proved that the Uhde contract constituted a "binding contractual obligation to undertake and complete within a reasonable time a continuing program of installation."

{¶58} Pursuant to Section B(4) of the PTI and former Ohio Adm.Code 3745-31-06(A), FDS' PTI expired on December 14, 2006, unless FDS established that it had: (1) "undertaken a continuing program of installation," or (2) "entered into a binding

[8] Mitchell signed his affidavit in La Plata County, Colorado, but an Ohio notary public took and certified the affidavit. Ohio notary publics can only perform notarial acts inside of Ohio. R.C. 147.07. Thus, ERAC correctly determined that Mitchell's affidavit was invalid.

contractual obligation to undertake and complete within a reasonable time a continuing program of installation." FDS asserts that it avoided the expiration of its permit by satisfying the latter option.

{¶59} In attacking FDS' assertion, appellants first argue that the Uhde contract does not qualify as a "binding contractual obligation" because it does not contain all the basic elements of a contract. " 'Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration.' " *Minster Farmers Cooperative Exchange Co., Inc. v. Meyer*, 117 Ohio St.3d 459, 2008-Ohio-1259, ¶28 (quoting *Perlmuter Printing Co. v. Strome, Inc.* (N.D.Ohio 1976), 436 F.Supp. 409, 414). According to appellants, the Uhde contract does not incorporate any terms that require FDS to remit consideration for Uhde's services. We find this argument unavailing. While FDS redacted the exact amount of money it agreed to pay Uhde, the contract includes payment terms.

{¶60} Appellants next argue that the Uhde contract does not contemplate the undertaking of a "continuing program of installation." Former Ohio Adm.Code 3745-31-01(PP) defined "installation" to mean "to begin actual construction, erect, locate or affix any air contaminant source."[9] Pursuant to former Ohio Adm.Code 3745-31-01(N), the phrase "begin actual construction" meant, "in general, initiation of physical on-site construction activities on an emissions unit that are of a permanent nature." Such activities included "installation of building supports and foundations, laying of underground

[9] We rely on the version of Ohio Adm.Code 3745-31-01 that was in effect on June 14, 2004, the date the Director issued the original PTI. The regulation has since been amended.

pipework, and construction of permanent storage structures." Id. Based on these definitions, appellants argue that FDS' PTI expired because FDS failed to prove any actual, physical construction occurred at the coke plant site. ERAC, however, rejected appellants' argument.

{¶61} As ERAC pointed out, former Ohio Adm.Code 3745-31-06(A) required a permit holder to enter a contract to undertake "a continuing *program* of installation," not just a contract to begin "continuing installation." (Emphasis added.) The rules of statutory construction require courts to give each word in a statute or regulation effect. *McFee v. Nursing Care Mgt. of Am., Inc.*, 126 Ohio St.3d 183, 2010-Ohio-2744, ¶27 (holding that courts "apply the rules of statutory construction to administrative rules as well" as statutes); *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, ¶21 (holding that courts must " 'give effect to every word and clause' " in a statute and that " '[n]o part should be treated as superfluous unless that is manifestly required' "). Courts cannot delete or ignore the words used in a regulation. *Bergman v. Monarch Constr. Co.*, 124 Ohio St.3d 534, 2010-Ohio-622, ¶9 (holding that " 'it is the duty of [ ] court[s] to give effect to the words used, not to delete words used * * *' "); *State ex rel. Keyes v. Ohio Pub. Employees Retirement Sys.*, 123 Ohio St.3d 29, 2009-Ohio-4052, ¶26 (holding that a court cannot "delete words in construing the pertinent language of [an] administrative rule"). Consequently, we must examine how the word "program" impacts the meaning of former Ohio Adm.Code 3745-31-06(A).

{¶62} "Program" is not defined in the regulations. When a statute or regulation fails to ascribe a definition to a word used, courts resort to the common, everyday

meaning of the word. *Am. Fiber. Systems, Inc. v. Levin*, 125 Ohio St.3d 374, 2010-Ohio-1468, ¶24. As defined by Webster's Third New Internatl. Dictionary (1966), a "program" is "a plan of procedure: a schedule or system under which action may be taken toward a desired goal: a proposed project or scheme." Here, the "desired goal" is the construction of the coke plant. As ERAC recognized, achievement of the "desired goal" requires more than physical acts of construction; it requires design and engineering work, planning, obtaining necessary permits, and procurement of materials. Therefore, a "continuing program of installation" encompasses both physical construction *and* all the preliminary activities that must be completed before beginning construction. Based on this reasoning, ERAC concluded that, "all contractual obligations relating to the ultimate construction of the facility, not just contracts relating to physical construction of the facility, are relevant when evaluating whether the permittee has entered into 'a binding contractual obligation to undertake and complete within a reasonable time a continuing program of installation.' " (Mar. 17, 2010 ERAC decision, at 21-22.)

{¶63} As a general matter, this court affords due deference to ERAC's interpretation of rules and regulations. *Parents Protecting Children v. Korleski*, 10th Dist. No. 09AP-48, 2009-Ohio-4549, ¶10; *Spencer v. Korleski*, 10th Dist. No. 08AP-1060, 2009-Ohio-4308, ¶9. Here, where ERAC's interpretation of former Ohio Adm.Code 3745-31-06(A) is both logical and consistent with the rules of statutory construction, we defer to ERAC's special expertise and adopt its interpretation. See *Parents Protecting Children* at ¶28 (finding that ERAC's interpretation of "continuing program of installation" was not unreasonable). Applying that interpretation to the instant matter, we concur with ERAC that the Uhde contract is a binding contractual obligation to undertake a "continuing

program of installation." As we stated above, FDS contracted with Uhde for the engineering of the operating components of the coke plant, the procurement of the materials needed to construct the operating components, and oversight of the installation and commissioning of the operating components. As each of these activities is necessary for the construction of the coke plant, we conclude that they are all part of a "continuing program of installation."

{¶64} Appellants claim that we cannot reach this conclusion because the nature of the contracts is a disputed issue of material fact. We find this argument unpersuasive. Contract interpretation is a matter of law, not a question of fact. *St. Marys* at ¶38. Because FDS supplied enough of the contractual language for this court to discern the nature of the Uhde contract, we can determine whether the contract called for a "continuing program of installation."

{¶65} Finally, appellants assert that FDS did not prove that it contracted to "undertake and complete within a reasonable time" the "continuing program of installation." As the party moving for summary judgment, FDS bore the burden of establishing that no genuine issue of material fact remained for adjudication. *Byrd v. Smith*, 110 Ohio St.3d 24, 2006-Ohio-3455, ¶10; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115. FDS failed to meet this burden with regard to the "reasonable time" element of Section B(4) and former Ohio Adm.Code 3745-31-06(A). Although the Uhde contract contains schedules for Uhde's work, FDS redacted all scheduling information. Venkataramani's affidavit also lacks any information about the timing of Uhde's work on the coke plant project. Given the absence of any evidence as to the "reasonable time" element, we conclude that ERAC's grant of summary judgment was not supported by

reliable, probative, and substantial evidence. Accordingly, we sustain appellants' second assignments of error.

{¶66} For the foregoing reasons, we overrule appellants' first assignments of error, and we sustain appellants' second assignments of error. We affirm in part and reverse in part the final order of the Environmental Review Appeals Commission, and we remand this matter for further proceedings consistent with law and this decision.

Final order affirmed in part and reversed in part; matter remanded.

TYACK, P.J., and BROWN, J., concur.