

ALLEGHENY COUNTY HEALTH DEPARTMENT
ADMINISTRATIVE DECISION

BUNTING GRAPHICS, INC.,	:	In Re: Bunting Graphics, Inc.
	:	Docket no. ACHD-19-032
Appellant,	:	
	:	<u>Copies Sent To:</u>
v.	:	<i>Counsel for Appellant:</i>
	:	Avrum Levicoff, Esq.
ALLEGHENY COUNTY HEALTH	:	THE LEVICOFF LAW FIRM, P.C.
DEPARTMENT,	:	4 PPG Place, Suite 200
	:	Pittsburgh, PA 15222
Appellee.	:	
	:	<i>Counsel for Appellee:</i>
	:	Jason K. Willis, Esq.
	:	301 39 th Street, Building 7
	:	Pittsburgh, PA 15201

**DECISION AND ORDER OF THE ALLEGHENY COUNTY HEALTH
DEPARTMENT HEARING OFFICER**

I. INTRODUCTION

When Yogi Berra quipped, “It’s déjà vu all over again,” he inadvertently summed up two legal concepts: a motion for reconsideration and the doctrine of *res judicata*. A motion for reconsideration asks a judicial body to re-evaluate a decision it already made, usually based on newly-discovered evidence or new law that has taken effect since the previous decision. Conversely, the doctrine of *res judicata* asks a judicial body to dismiss a party’s case because that party either already litigated the same matter in an earlier case, or had the opportunity to litigate the same matter in an earlier case, but failed to do so. In other words, a motion for reconsideration seeks to take a second bite at the proverbial apple. A motion for *res judicata* seeks to prevent another party from taking a second bite at the apple.

At issue here are two motions filed by the Allegheny County Health Department (“ACHD” or the “Department”) against the architectural signage firm Bunting Graphics, Inc. (“Bunting” or “Appellant”): one for reconsideration, and the other for *res judicata*. The motion for reconsideration asks this tribunal to re-assess its September 19, 2019 decision to dismiss Bunting’s appeal of the Department’s July 12, 2019 enforcement order. The motion for *res judicata* asks this tribunal to dismiss Bunting’s appeal because Bunting already litigated, or had the opportunity to litigate, the same issues in its appeal of the Department’s 2017 enforcement order.

After reviewing the relevant facts and law, as well as the parties’ briefs and other filings, this tribunal holds that the ACHD’s Motion for Reconsideration is **DENIED**, and the ACHD’s Motion to Dismiss based on the doctrine of *res judicata* is **GRANTED**. Bunting’s appeal is therefore **DISMISSED**.

II. PROCEDURAL HISTORY

This case has a labyrinthine procedural history. It can be summarized thusly:

1. Bunting Graphics, Inc. (“Bunting”) is a corporation that provides products and services in the architectural signage and ornamental metals markets. Specifically, Bunting fabricates and coats specialty metals with paints and other surface coatings. (Hearing Transcript (“H.T.”) of December 11, 2018 Hearing¹, Ex. B-3).
2. The Allegheny County Health Department (“ACHD” or the “Department”) is a local health agency whose powers and duties include the enforcement of laws relating to public health within Allegheny County, including the

¹ For the purposes of Section II of this Decision and Order, the terms “Hearing Transcript” and “H.T.” refer to the Hearing Transcript of the December 11, 2018 administrative hearing involving Bunting and the ACHD.

Allegheny County Health Department's Rules and Regulations, Article XXI, Air Pollution Control ("Article XXI"). (*Id.*).

3. On June 11, 2015, the Pennsylvania Department of Environmental Protection ("DEP") received a complaint that Bunting was installing a paint line for the application of high VOC coatings without applying for or obtaining the required permits. (H.T. at 150).
4. On October 30, 2015, the ACHD issued a Notice of Violation to Bunting for failure to apply for the requisite permit. The Notice of Violation required Bunting to submit an installation and operating permit for its facility, and imposed a civil penalty of \$11,450. (H.T., Ex. B3).
5. On December 15, 2015, Bunting submitted an application for an operating permit to the ACHD. (*Id.*).
6. On March 31, 2016, the ACHD deemed Bunting's December 15, 2015 application "administratively incomplete, and issued an enforcement order directing Bunting to pay the \$11,450 and to file complete applications for the installation and operating permit. (*Id.*).
7. After Bunting appealed the March 31, 2016 enforcement order, the parties held a settlement conference in May 2016 at which Bunting claimed that it had misrepresented the volatile organic compound ("VOC") content of its coatings, and that based on the correct data, it would not be required to obtain a permit. (*Id.*).
8. On June 15, 2016, the ACHD and Bunting entered into a Consent Order and Agreement ("June 2016 Consent Order"), which required, among other things, that Bunting would be required to pay a \$2,500 penalty for past Article XXI violations, and would be required to submit an installation permit application to the ACHD for review. (*Id.*).
9. On December 9, 2016, Bunting submitted an installation permit application, which the ACHD rejected on the grounds that Bunting's Best Available Control Technology ("BACT") analysis was faulty. (H.T. at 20, 27).
10. On March 17, 2017, Bunting submitted its revised permit application. This application indicated that Bunting's facility had the potential to emit 343,260 pounds, or 171.36 tons of VOCs per year. (H.T., Ex. ACHD-2)

11. In August 2017, ACHD personnel inspected Bunting's facility and found that there were no pollution controls for capturing VOCs emanating from paint lines or curing ovens. (H.T. at 22-23).
12. Based on its inspections of Bunting's facilities, the ACHD issued an enforcement order against Bunting on December 5, 2017. The enforcement order levied a \$25,000 civil penalty against Bunting for failing to implement proper pollution controls, and instructed Bunting to install a regenerative thermal oxidizer ("RTO") if economic feasibility was out of line with similarly situated sources of VOCs. (H.T., Ex. B-00).
13. On January 18, 2018, Bunting filed its notice of appeal of the December 5, 2017 enforcement order.
14. On August 27, 2018, following attempts to settle this matter, this tribunal issued an order, with Bunting's and the ACHD's consent, narrowing the scope of the hearing regarding the December 2017 enforcement order to two issues: (1) the installation of a thermal oxidizer by Bunting, and (2) the civil penalty that the ACHD levied against Bunting. (H.T. at 12).
15. On December 11, 2018, an administrative hearing in this matter was held.
16. On June 5, 2019, this tribunal issued an administrative decision, ruling that Bunting needed to install a thermal oxidizer. The administrative decision also upheld the civil penalty that the ACHD levied against Bunting.
17. On July 12, 2019, the ACHD filed a new enforcement order against Bunting.
18. On August 16, 2019, Bunting appealed the ACHD's July 12, 2019 enforcement order, contending that Bunting possessed all the permits necessary for lawful operation at its Verona facility, that installing an RTO is unnecessary under the applicable regulatory law and facts, and that the ACHD's determination that an RTO is necessary is "arbitrary, capricious and not properly based upon a correct interpretation of the regulatory law and the evidence." (*Bunting August 16, 2019 Appeal* at ¶¶ 1-3).
19. On August 19, 2019, the ACHD filed a motion to dismiss Bunting's appeal for alleged untimeliness.
20. On September 19, 2019, this tribunal denied the ACHD's Motion to Dismiss.

21. On September 27, 2019, the ACHD filed a motion for reconsideration of this tribunal's September 19, 2019 order, and also filed a motion to dismiss Bunting's appeal on the grounds of *res judicata*.

22. On October 30, 2019, Bunting filed a response to the ACHD's September 27, 2019 motions for reconsideration and *res judicata*.

III. DISCUSSION

A. The ACHD's Motion for Reconsideration is DENIED.

ACHD Rules & Regulations, Article XI ("Hearings and Appeals"), § 1104, provides in relevant part:

A. "The 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 notice of appeal must be filed no later than 4:00 p.m. Eastern Time on the thirtieth (30th) day after written notice or issuance of the action. [...]

D. All actions of the Department shall become final thirty (30) days after receipt of written notice or issuance if no appeal has been perfected under the provisions of this Section."

The Department issued its enforcement order on July 12, 2019, which Bunting received by U.S. mail on July 18, 2019. Bunting filed its appeal on August 16, 2019. On September 19, 2019, this tribunal denied the ACHD's motion to dismiss Bunting's appeal for alleged untimeliness, primarily because Bunting filed its appeal fewer than 30 days after "receipt of written notice" of the enforcement order, which occurred on July 18, 2019.

In its motion for reconsideration, the ACHD contends that this tribunal misconstrued Article XI, § 1104: "The occurrence of either scenario (notice or issuance) triggers that finality of that Order on the 30th day[.]" (*ACHD Motion for*

Reconsideration and to Dismiss at ¶ 10) (emphasis in original). The ACHD further argues, “If this tribunal insists that the appeal is not time-barred by the requirements of Article XI, it must articulate how it is timely given the fact that: 1) the Order at bar was issued on July 12, 2019, 2) 30 days after issuance would require a notice of appeal by August 12, 2019; and 3) yet the appeal was filed on August 16, 2019, 35 days after issuance.” (*Id.* at ¶ 15).

Article XI, § 1104 does not say that the occurrence of *either* receipt of written notice or issuance triggers the 30-day appeal window. It says, cryptically, that a notice of appeal shall be filed no later than 30 days “after receipt of written notice or issuance of the action by which the Appellant is aggrieved.” It does not say which one starts the 30-day clock. It is, admittedly, a poorly-drafted regulation.

Fortunately, ACHD Rules & Regulations ACHD Rules and Regulations, Article XXI (Air Pollution)² § 2109.03(c) specifies that enforcement orders shall be served on parties in one of three ways:

1. “Personally handing them a copy;
2. Serving them 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 them at their last known address by registered or certified mail, return receipt requested.”

Further, Article XI, § 1112 provides, “Where notice is given by United States mail,, the time of service of such notice shall be the date of receipt.” Based on these legal precepts, this tribunal found that Bunting’s appeal was timely.

² Article XXI is the controlling body of law for this matter, as the ACHD’s Air Quality Program issued the enforcement order in this matter.

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 Howard Hess Dental Laboratories Inc. v. Dentsply Intern., Inc.*, 602 F.3d 237, 251 (3d Cir. 2010) (“The purpose of a motion for reconsideration... is to correct manifest errors of fact or law or to present newly discovered evidence.”); *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).

Here, the Department does not present any new facts or law that were not previously brought to the attention of this tribunal. The Department essentially just restates its argument from its earlier motion to dismiss on the grounds of untimeliness, an argument that this tribunal found lacking. Therefore, the ACHD’s motion for reconsideration is denied.

B. The ACHD’s Motion to Dismiss on the Grounds of *Res judicata* is GRANTED.

The doctrine of *res judicata* “prevents a party from instituting litigation that has been the subject of a lawsuit.” *Robinson Coal Co. v. Goodall*, 72 A.3d 685, 689 (Pa. Super. Ct. 2013). Application of the doctrine of *res judicata* as a bar to later litigation requires that the two actions possess the following common elements: “(1) identity of the thing sued upon; (2) identity of the cause of action; (3) identity of the parties; (4) identity of the capacity of the parties.” *Stoeckinger v. Presidential*

Financial Corp. of Delaware Valley, 948 A.2d 828, 832 (Pa. Super. Ct. 2008)
(internal citations omitted).

Additionally, “*res judicata* will bar subsequent claims that could have been litigated in the prior action, but which actually were not[.]” *Chada v. Chada*, 756 A.2d 39, 43 (Pa. Super. Ct. 2000). The doctrine of *res judicata* can be applied in administrative proceedings. See *Montour School Dist. v. S.T.*, 805 A.2d 29, 41 (Pa. Commw. Ct. 2002); see also *United States v. Utah Const. & Min. Co.*, 384 U.S. 394, 422 (1966) (“When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.”).

The term adjudication is statutorily defined as, “Any 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.A. § 101.

Bunting contends that *res judicata* does not apply here because that doctrine requires a determination on the merits in a prior case or proceeding, and “[t]here has only been one action litigated here.” (*Appellant’s Response in Opposition to Allegheny County Health Department’s Motion for Reconsideration and to Dismiss Appeal* (“*Appellant’s Response*”) at 7). Bunting argues that this tribunal’s June 5, 2019 Decision and Order is not an adjudication because it did not “have any effect on Bunting’s liabilities or obligations,” it “dismissed the appeal but afforded no

other relief,” and it “did not address the multitude of other issues raised in Bunting’s January 18, 2018 appeal.” (*Appellant’s Response* at 8, 12).

Bunting further claims that the December 11, 2018 hearing, on which the June 5, 2019 Decision and Order was based, was merely limited to the issues of the civil penalty levied against Bunting and whether Bunting was required to install a thermal oxidizer, without affecting the other issues Bunting raised in its appeal. (*Appellant’s Response* at 11).

This is incorrect. The doctrine of *res judicata* bars subsequent claims that could have been litigated in a prior action, but actually were not. *See Chada, supra*, 756 A.2d at 43. The purpose of this tribunal’s order in August of 2018 that narrowed the issues for a hearing to the civil penalty and the thermal oxidizer was to focus the hearing on the issues that the parties actually contested, so as to avoid drawn-out litigation. This procedure is expressly contemplated in the ACHD’s Rules and Regulations, Article XI § 1107.A, which allows the Hearing Officer to hold a conference “for the purpose of narrowing the matters in controversy.”

Here, both Bunting and the ACHD agreed to narrow the scope of the litigation to the thermal oxidizer and the civil penalty. (*See ACHD Motion for Reconsideration and to Dismiss*, Ex. F (Hearing Transcript of September 6, 2018 proceeding at 3 (ACHD Counsel Jason Willis: “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 also ACHD Motion for Reconsideration and to Dismiss*, Ex. H (Hearing

Transcript of December 11, 2018 Hearing at 5 (Bunting President Joshua Bunting: “Throughout the course of the Permit Application—as we know, the hearing has been limited to the need to provide a [thermal oxidizer] and a civil penalty.”). Nowhere in the transcripts of these proceedings does Bunting mention anything indicating that it is saving other issues for future litigation, or the ACHD or this tribunal agreeing to such.

Bunting could have litigated the other issues raised in its appeal of the December 5, 2017 enforcement order,³ but elected not to, when it agreed to limit the scope of the hearing to the thermal oxidizer and the civil penalty. Furthermore, Bunting’s claim that the June 5, 2019 Decision and Order “dismissed the appeal but afforded no other relief”⁴ rings hollow. The June 5, 2019 Decision and Order, which upheld the civil penalty and found that installing a thermal oxidizer would not be economically infeasible, declared, “This administrative decision may be appealed to the Court of Common Pleas of Allegheny County, Pennsylvania.” (June 5, 2019 Decision and Order at 14).

If Bunting was unsatisfied with this tribunal’s June 5, 2019 Decision and Order, their relief would be to appeal to the Court of Common Pleas. They did not do so. Therefore, this tribunal finds that Bunting’s current claims are barred by *res judicata*.

³ Some of these other issues that Bunting raised in its appeal of the December 5, 2017 enforcement order include, but are not limited to: Bunting’s arguments that it was exempt from permit requirements, that no permit was required for its dip tanks, and that Bunting’s paint booths met the requirements of 40 C.F.R. 63.3880. (*See ACHD Motion for Reconsideration and Motion to Dismiss*, Ex. E, Bunting’s Notice of Appeal and Petition for Stay at ¶¶ 3, 13, 15-16).

⁴ *Appellant’s Response* at 12.

IV. CONCLUSION

The ACHD's Motion for Reconsideration is **DENIED**, and the ACHD's Motion to Dismiss based on the doctrine of *res judicata* is **GRANTED**. Bunting's appeal is therefore **DISMISSED**. This decision may be appealed to the Court of Common Pleas of Allegheny County, Pennsylvania.



Max Slater
Administrative Hearing Officer
Allegheny County Health Department

Dated: December 13, 2019