

**AOPA COMMITTEE
OF THE
NATURAL RESOURCES COMMISSION
October 28, 2016 Meeting Minutes**

AOPA COMMITTEE MEMBERS PRESENT

Jane Ann Stautz, Chair
Jennifer Jansen
R. T. Green

NRC, DIVISION OF HEARINGS STAFF PRESENT

Sandra Jensen
Dawn Wilson
Scott Allen

GUESTS PRESENT

Carnie Allen	Bill Groth
Sean Wooding	Jason Kuchmay
Ihor Boyko	Sandra Harston
Will Gooden	Matthew Harston
David Vlink	Jason Lee
David Moss	Danny East

Call to order and introductions

Jane Ann Stautz, Chair, called the meeting to order at 8:20 a.m., EDT, at the Fort Harrison State Park, Garrison, 6001 North Post Road, Lawrence Room, Indianapolis, Indiana. With the presence of three members, the Chair observed a quorum. The Chair, Jennifer Jansen, and R. T. Green introduced themselves.

Consideration and approval of minutes for meeting held on April 15, 2016

R.T. Green made a motion to approve, as presented, the minutes of the meeting held on April 15, 2016. Jennifer Jansen seconded the motion. Upon a voice vote, the motion carried.

Consideration of Findings of Fact and Conclusions of Law with Nonfinal Order in the matter of *Harston v. Bortner and DNR (Intervenor)*, Administrative Cause No. 14-114W

Administrative Law Judge (“ALJ”) Jensen noted that both parties in the case filed Objections and Clarification to the Finding of Fact and Conclusions of Law with Nonfinal Order.

The Chair recognized counsel for the Petitioners to proceed with oral argument.

Jason Kuchmay, Counsel for Petitioners, Matthew and Sandra Harston, (Harstons) noted that this action was filed in an effort to remove, what was believed to be, an offending pier belonging to

backlot owners, Chad and Erica Bortner (Bortners), who are the Respondents in this matter. Kuchmay explained that the Bortners' pier was located in front of the Harstons' property. Kuchmay stated that the Harstons own Lots 13 and 14. He explained that there is a five foot strip of land that used to be part of Lot 14. The five foot strip is burdened by the easement at issue in this case. Kuchmay stated that in 1954 the Fellers conveyed Lot 14 to the Garnet and Mabel Dunn and at the time of the conveyance the Fellers reserved the five foot right-of-way (easement) along the east side of Lot 14 for the purpose of ingress and egress to the Hackenburg Lake. Kuchmay said the easement use was for any subsequent owner of the real estate that the Fellers owned at the time and included the right to land and moor boats. Kuchmay noted that a year after the Fellers sold Lot 14 to the Dunns, the Dunns subsequently sold Lot 14, except the five foot strip burdened by the easement, to a third party. The Dunns, who were not located but were served with notice of this proceeding by publication, remain the owners of the five foot strip off the east side of Lot 14.

Kuchmay stated that there is no dispute that the Bortners have rights within the easement; however, the Harstons also have rights to the easement. Kuchmay stated that the Bortners are using more than five feet and angling their pier in such a way that the pier interferes with part of the Harstons' riparian rights associated with Lot 14. Kuchmay stated that after the Administrative Hearing ALJ Jensen ruled and confirmed that the riparian zone is determined by extending the onshore property boundary line lakeward consistent with Principle Two as set forth in Riparian Zones within Public Freshwater Lakes and Navigable Waters, Information Bulletin #56, Second Amendment (IB #56). Kuchmay stated, the ALJ also confirmed that both parties have rights within the five foot easement.

Kuchmay stated that he filed, on behalf of the Harstons, three objections and a request for clarification on June 10, 2016. The "First Objection and/or Request for Clarification" addressed the part of ALJ Jensen's ruling that had to do with the forfeiting of rights by one party if they failed to meet their financial contribution for the pier. He stated the Harstons were concerned, because they do not currently have a home on the property and may not want to use the pier right away, but may want to in the future. Kuchmay posed the question: Should the Harstons pay for the years they are not using the pier or could the Harstons start paying when they begin to use the pier? Kuchmay stated that the Harstons agreed with the language in the "Entry Offering Clarification of Findings of Fact and Conclusions of Law with Nonfinal Order as Sought by the Parties" (the "Clarification Order") and requested the AOPA Committee adopt the amendment of Finding 133(f) as set forth in the Clarification Order, Paragraph 1.

Kuchmay stated that his "Second Objection and/or Request for Clarification" addresses the possible interpretation of the Findings of Fact Conclusions of Law with Nonfinal Order that if a party does not use the pier, the other party could exercise the rights of the nonparticipating party. Kuchmay posed the question: If a party is not using the pier can the other party then put boats on both sides of the pier, which would encroach into the riparian zone associated with the portion of Lot 14 owned by the Harstons? Kuchmay noted that ALJ Jensen, in Paragraph 2 of the Clarification Order, clarified that the Bortners would not be able to encroach into the riparian zone of the Harstons. Kuchmay stated that the Harstons agreed with the revision language in the Clarification Order, Paragraph 2, and he requested the AOPA Committee adopt ALJ Jensen's interpretation.

Kuchmay explained that his “Third Objection and/or Request for Clarification” addressed the contention that there were no parameters on the configuration or cost of the subject pier. Kuchmay stated that the Harstons sought to have the order provide specifications for the pier and confirm that costs were to be reasonable. Kuchmay stated that the Harstons would support the revised language of Finding 133(a) and (e) as set forth in the Clarification Order, Paragraph 3, and asked the AOPA Committee to adopt the revision.

Kuchmay stated that the Bortners filed their objections and sought clarification of the Nonfinal Order on June 13, 2016, three days after the Harstons had filed. Kuchmay observed that the Bortners now object to Finding 32 of the nonfinal order, which determined that the Harstons have rights to the easement although Kuchmay noted that during the Administrative Hearing the Bortners made a judicial admission of this fact. Kuchmay said the Bortners should be estopped from now arguing to the contrary of their admission.

Kuchmay requested that the Bortners’ objection to Finding 32 be rejected and the proposed revised language provided by the ALJ in the Clarification Order be incorporated as part of the Nonfinal Order and the Committee adopt the revised Nonfinal Order as the Commission’s Final Order.

William Gooden, representing the Bortners, agreed that ALJ Jensen’s Clarification Order should be adopted and incorporated into the Commission’s Final Order. He noted, however, that the Bortners object to Finding 32 wherein the ALJ determined that by virtue of the Harstons’ ownership of the western portion of Lot 14 they also possess rights to the Easement. Gooden acknowledged that during the Administrative Hearing the Bortners did not dispute the Harstons’ rights to use the five foot property; however, he noted that there were no stipulations with respect to the rights of the Harstons to use the easement.

Gooden stated that the Harstons own Lots 13 and 14, which are the lake front lots, as well as two non-lake front lots, Lots 1 and 2. He noted that in Finding 35 of the Nonfinal Order ALJ Jensen found there was no evidence presented to indicate the Fellers owned Lots 1 and 2 at the time of the Fellers conveyance of Lot 14 in May 1954 thereby concluding that the Harstons have no right to use the easement by virtue of their ownership of Lots 1 and 2. Gooden recognized ALJ Jensen’s conclusion that the Harstons have rights within the easement by. He explained that the easement was reserved by the Fellers for their use and for use by persons who later acquired title to real property still owned by them. Gooden noted that the reservation occurred contemporaneous with the sale of Lot 14 and, therefore, ownership of Lot 14 carried with it no right to the easement.

Gooden stated that the Bortners object to Finding 32, because there is no evidence that the Harstons, by virtue of their ownership of Lot 14, have any rights to use the easement. He said the Fellers conveyed away Lot 14 while reserving for themselves the five foot strip off the east side of Lot 14 so the Fellers did not leave any interest in the five foot strip to the owner of Lot 14. Gooden stated that ALJ Jensen concluded in Finding 48 that the Fellers’ easement constituted a reservation of the riparian rights, which did not include the Dunns who purchased Lot 14 at that time in 1954. Gooden said the Harstons took title of Lot 14 through the Dunns, and if the Dunns

did not have rights to the easement, then there would not be a way for the Harstons to have a right to the easement. In finding 29, Gooden said that ALJ Jensen recognized that the Fellers owned Lot 4, now owned by the Bortners, after their conveyance of Lot 14 to the Dunns in May 1954, and therefore use of the easement was reserved for the benefit of future owners of that Lot.

Gooden stated that in 1954 the Dunns did not need the use of the easement, because the Dunns were conveyed the lakefront property of Lot 14. He stated the Harstons now own Lot 14 and Lot 13, next to the five foot strip. He also noted that the lake frontage of Lots 14 and 13 is approximately 96 feet in length. Gooden stated that the Bortners' objection is that by virtue of the conclusion of the Finding 48 that would be inconsistent with the language of the easement. Gooden stated that the Bortners would request that their objections be sustained and that the Committee direct that the Order be corrected consistent with the Bortners' request.

Kuchmay provided rebuttal. He stated that the easement language was drafted in a way that the easement was for property owned by the Fellers. He noted that it is not in dispute that Lot 14 was owned by the Fellers and is now owned by the Harstons. Kuchmay stated "Counsel, in objecting to Finding 32, is really just trying to split hairs here to try to show a different intent, but at the [Administrative Hearing] there was no evidence of a different intent." Kuchmay stated that the Bortners do not dispute and that the testimony given from the Bortners is that the Harstons have rights in the easement. Kuchmay requested that the Committee uphold ALJ Jensen's decision as modified by the Clarification Order.

The Chair then opened the floor for Committee member questions and discussion. The Chair asked Gooden whether he believed the Harstons would have rights to the easement because of their ownership of Lots 1 and 2 if it is not conveyed or part of their ownership of Lot 14.

Gooden responded, "No. Confining our objection to the order and to the record, we agree that there was no evidence that they have a right to use the property in question by virtue of their ownership of Lots 1 and 2."

Green asked about the five foot strip reservation being referenced to as an "easement". He commented, "I thought someone reserved the land in 1954?"

Kuchmay agreed, and said that initially the five foot strip of land was part of Lot 14, but when Lot 14 was conveyed by the Dunns, the Dunns retained ownership of the five foot strip.

ALJ Jensen stated that at the five foot strip of land, at one point, was up for tax sale.

Jansen noted that the five foot strip of land was not sold.

Green asked if the five foot strip of land would need to be purchased separately or if it would be sold with a lot.

The Chair stated that the issue is whether the five foot easement is sold would it be sold with Lot 14. The Chair confirmed that the parties were in agreement with the Clarification Order with the

exception of Finding 32. She noted that the questions are: Who has rights to the use of the five foot strip of land; and if the strip of land is part of Lot 14?

Green asked if the Committee's decision on this issue would have an effect on the property owner's rights and if the properties would then need to be recorded differently in the LaGrange County Recorder's Office?

ALJ Jensen stated that the Indiana Court of Appeals has affirmed that when a landward property decision has to be made to determine riparian rights the Commission has that authority.

Green asked if the Committee did not overturn the ruling of the ALJ, would the Bortners only be negatively impacted if and when the property sold.

Gooden stated that the Bortners' objection was based on the ALJ's Findings of Fact and Conclusions of Law with Nonfinal Order. He stated, "There's no evidence that the Harstons have a right to use the easement from Lots 1 and 2, so their ability to [use the easement] is through [Lot] 14, but the Dunns, the predecessors in title, had no right to use the easement, so how could the Harstons, through Lot 14?" He stated that based on the Findings the Bortners do not feel they should be required to share use of the easement or a pier located on the easement with the Harstons. He noted that the issue is not with the future conveyance of the property.

Kuchmay stated there were no other third parties or property owners who could claim rights to the strip of land other than the Harstons and the Bortners.

Jansen asked if the Harstons ownership of Lots 1 and 2 gives the Harstons rights to the five foot strip of land.

Kuchmay stated that the Harstons do not waive the argument that they have rights through Lots 1 and 2, but that the Nonfinal Order does not address that issue.

ALJ Jensen stated that her Nonfinal Order does rule on the issue of the right of easement through Lots 1 and 2, and there was no evidence presented on the issue. "If the Harstons had a right to the five foot easement, it was only through Lot 14." She stated that after reviewing Finding 32 and Finding 48, as pointed out by Gooden, the two findings appear to be inconsistent with each other.

Green suggested that if the parties agreed to amend the Nonfinal Order, then the Nonfinal Order could be modified to reflect that the parties have rights to the easement.

Gooden stated that Finding 35 states that there was no evidence to support a conclusion that Lots 13, 1, or 2 benefit from the Feller easement over the Dunn property. He stated that the Findings following Finding 35 deal with another easement and conveyances to the lake through a channel that was located between Lots 13 and 14. He said that Finding 39 indicates that overall the easement language associated with Lots 1 and 2 in the Fellers Addition is more consistent with a channel easement.

R. T. Green made a motion to remand the Nonfinal Order for inclusion of the amendments set forth in ALJ Jensen's Clarification Order. Green also moved to further revise the Nonfinal Order to address the Bortners' objection to Finding 32 by adding findings to reflect that the evidence and testimony provided no dispute that both parties have the right to use the five foot easement. Jennifer Jansen seconded the motions.

The Chair noted that motions were made and seconded. The Chair called for a vote. Upon a voice vote, the motions carried.

Consideration of Findings of Fact and Conclusions of Law with Nonfinal Order Revising the Commission's Findings of Fact and Conclusions of Law with Final Order Issued on April 18, 2014 on Remand Following Judicial Review in the matter of *Moss v. DNR*, Administrative Cause No. 13-134L

The Chair noted that the Department filed Objections to the Findings of Fact, Conclusions of Law, and Nonfinal Order Revising the Commission's Findings of Fact and Conclusions of Law with Final Order Issued on April 28, 2014 on Remand Following Judicial Review entered July 8, 2016.

Sean Wooding, Counsel for Respondent, Department of Natural Resources (Department), noted that the Director of the Department terminated Petitioner, Officer David Moss (Moss), for committing violations of the law and Department policy. He observed that as a result of the administrative review, the Administrative Law Judge (ALJ) commuted Moss's termination to a suspension. Wooding stated that the standard of review for this Committee is to determine if the ALJ's decision was arbitrary and capricious; abuse of discretion; and not in accordance with the law. Wooding noted that the Committee was split in its decision in affirming the ALJ's initial decision. The Department took judicial review in the Marion Circuit Court (49D04-1405-PL-017919), which resulted in vacation of the Commission's original Final Order. Moss appealed the Marion Circuit Court's decision and on July 9, 2015, the Indiana Court of Appeals affirmed in part and reversed in part the Marion Circuit Court's order, remanding the matter back to the Marion Circuit Court. On March 18, 2016, the Marion Circuit Court once again remanded the matter to the Commission with instructions to reconsider the sanctions after finding that Moss contributed to the possession of a handgun by a violent felon under 18 U.S.C. § 922(g).

Wooding stated that the Department established the disciplinary history of Moss. He noted that on January 21, 2012 Moss received a letter of consultation; on June 25, 2012 he received a letter of reprimand; January 2013 he had an internal investigation; on May of 2013 there was a second internal investigation; and in July of 2013 Moss was terminated from employment with the Department. Wooding listed the reasons for the termination of Moss: improper radio notification of duty status; failure to file a timely report for duty; failure to report to a superior that Moss was being investigated for child molestation as required by the Department's rules; providing confidential information of an investigation to an unauthorized party; lying to an investigator about providing confidential information to a third party; public intoxication; and misleading the Department investigator with regard to his father's cultivation of marijuana. Wooding stated that

the Marion County Circuit court found that Moss provided a gun to his father, as such committing a felony by causing possession of a handgun by a violent felon.

Wooding stated, “The Claimant has proven himself to be an insubordinate, lying individual, that committed the act of a felony while he was supposed to be upholding the laws of the State of Indiana as a law enforcement officer.” Wooding stated that the ALJ’s current Nonfinal Order falls short of the Marion Circuit Order to reconsider the sanctions assessed by the ALJ, because the complete disciplinary history of Moss was not considered in the analysis including the felony. Wooding stated that the Findings mandated a progressive system of discipline. He stated that 312 IAC 4-4-5 does not mandate progressive discipline. Wooding said Moss committed several serious acts of misconducts making termination of the Claimant appropriate with the circumstances.

Wooding cited *Scearcy v. DNR*, 9 CADDNAR 62 (2002) and stated that an ALJ panel initially determined that the Department had not met its burden of proof to establish that Scearcy had conveyed false information to another law enforcement officer and engaged in conduct that could compromise a conservation officer, and reinstated Scearcy. Wooding noted that the Department filed objections to the Committee, which resulted in reinstatement of the Department’s termination of Scearcy setting a precedent. According to Wooding, the *Scearcy* case also showed that progressive discipline is not needed before termination. He said *Scearcy* demonstrates that there is no requirement for progressive discipline in cases where the conduct alleged is so egregious or overwhelming that termination is the only appropriate remedy.

Wooding cited the disciplinary action in *Gerber v DNR*, 8 CADDNAR 147 (1999) where Gerber was suspended for 20 days for providing a knife to an informant. He noted that the act of providing a knife to an informant was not a felony. In *Gerber v. DNR*, 10 CADDNAR 62 (2005) (referred to as *Gerber II*) Gerber was terminated for insubordination and varying his assigned work hours without approval. The *Gerber II* decision was upheld by the Indiana Court of Appeals. He noted that based on those offenses it was determined that there was enough for termination of Gerber.

Wooding stated that Gerber, a conservation officer for 18 years, was not shown to be untruthful and he did not commit a felony. He said Moss had only been an officer for a couple of years before this disciplinary action. Wooding added that *Scearcy* should have been acknowledged as precedent in this instant proceeding. Wooding stated that Moss’s lack of honesty was documented and this undermines his ability as a law enforcement officer to be used as a witness for the prosecution. Wooding stated that the credibility of Moss will always be an issue citing *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972), which requires a prosecutor to provide impeachment information to the defense counsel.

Wooding stated that Moss as a law enforcement officer should be held to a higher standard. He said Moss would not be able to uphold the Indiana Conservation Officers Oath. He also stated that Moss’s serious misconduct leads to the termination of his employment as the only appropriate sanction under 312 IAC 4-4-5. Wooding said that the Nonfinal Order is arbitrary and capricious and not in accordance with the law.

Wooding requested on behalf of the Department that the Committee reverse the Nonfinal Order on Remand Following Judicial Review and uphold the termination of David Moss as an Indiana Conservation Officer or remand this matter to the ALJ with instructions to fully consider the impact of all the Moss's disciplinary history prior to the first investigation; the misconduct found in the first investigation; the misconduct found in the second investigation; the upheld charge of committing the act of a felony by providing a handgun to a serious violent felon; and to consider the holding in *Scearcy*.

Bill Groth, representing David Moss, stated that the standard which should apply is 312 IAC 4-4-5, which makes the case one of "just cause" because Moss is not an "employee at will". Groth stated that one of the inherent elements of "just cause" is progressive discipline and that the punishment should be proportionate to the offense. Groth stated that Moss's July 2013 termination resulted from two investigations conducted by the Department's Office of Professional Standards. He explained that the first investigation was completed in January of 2013 resulting in finding of minor violations for which discipline was not immediately imposed.

Groth said the second investigation, reportedly unrelated to the first, began on April 24, 2013, and was conducted by the same investigator who investigated the first allegations made against Moss. Only after the second investigation was completed did the Department take action on the minor violations identified during the first investigation.

Groth said a Disciplinary Action Board meeting was conducted on June 13, 2013 and Moss was terminated on July 18, 2013.

Groth noted that integrity should be expected from both sides, and stated that the investigations were conducted in a biased manner. He stated that Finding 36 of the April 28, 2014 Order noted a concern with the objectivity with which the investigations were conducted recognizing an investigation report "misrepresented the facts" and was "marred by falsities and embellishments." Groth noted the ALJ's recognition that the biased nature of the investigations had predetermined the guilt of Moss and were "untrustworthy at face value". Groth stated, "This Commission ultimately affirmed Judge Jensen's findings and conclusions that the charges associated with OPS#2 were false or unsubstantiated."

Groth stated that the standard is just cause and progressive discipline is inherent in just cause. He stated that the Indiana Court of Appeals recently made it clear by holding that the purpose of progressive discipline is to give an employee the adequate notice and opportunity to correct any performance deficiencies. Groth cited *Madison County Board of Commissioners v. American Federation of State, County, and Municipal Employees* 45 N.E.3rd 868 (2015), pp. 875, 876.

Groth stated that the ALJ considered all of the evidence and equities, commuted Mosses discharge to nine month suspension without pay, and ordered Moss returned to duty status. The Department requested judicial review on May 30, 2014. The Marion Circuit Court granted review and held that the Commission's decision did not provide adequate conclusions of law to show how the just cause standard was applied. Groth stated that Moss appealed the Marion Circuit Court decision on September 30, 2015, and the Appeals Court reversed and remanded the matter to the Marion Circuit Court. On remand, the Marion Circuit Court affirmed the

Commission's decision with the exception of the issue of Moss handing his father a firearm for a very brief period of time. Groth said the "Circuit Court also specifically held that the Commission was correct in considering these equities including Mr. Moss's relatively unblemished past record and was correct in commuting the sanction of discharge as a result of mitigating circumstance." Groth stated that the case was remanded back to the Commission to reconsider the decision as to sanctions in light of the Court's decision to reverse one of its previous decisions.

Groth stated that the matter was referred back to the ALJ who followed the Remand Order and determined that the Final Order previously issued was consistent with progressive discipline and proportionate to the offense that Moss was found to have committed. Groth noted that Moss allowed his father to briefly possess a handgun, which was considered in the context of mitigating circumstances. He noted that the Marion Circuit Court did not find that Moss had violated the law with regard to the handgun and Moss has not been charged or convicted of violating a firearm regulation. Groth stated that the Marion Circuit Court found that Moss had committed an act, which could form the basis for a violation of federal law.

Groth explained that Moss handed his father a handgun in his father's home, and the father held the handgun for a few seconds of time. Groth noted that, at the time, Moss did not know that his father was legally prohibited from possessing firearms. Groth stated that Moss believed his father could possess firearms since his father had had weapons in the home for Moss's whole life. He stated that based on the facts no reasonable prosecutor would bring charges and no reasonable jury would convict Moss.

Groth stated that the role of the Commission should not be to retry the facts of the case as long as the ruling of the ALJ is within the law. Groth stated that the finality of the case will be expedited if the Committee sustains the ruling by the ALJ and not doing so would subject the matter for additional judicial reviews.

Wooding provided rebuttal. Wooding stated the Department belief that the decision made is not in accordance with the law. He stated that progressive discipline is not mandated by the Department's regulations. He noted that if there is conduct serious enough there can be an appropriate sanction of termination by the Director of the Department. Wooding said the Department believes that the ALJ disregarded the regulation. He stated that for the act of Moss committing a felony he was given a Garrity warning, which precludes evidence from the investigation being used to support criminal charges against him. Wooding stated that the Marion Circuit Court did determine that Moss had committed a felony by providing a serious violent felon a handgun even though Moss was not charged. Wooding noted the other instances of deception, dishonesty, and insubordination are accumulated acts of misconduct by Moss. Wooding stated that based on those acts committed by Moss it would be inconceivable that the Department would continue to employ Moss as a law enforcement officer. Wooding reiterated the Department's request that the decision of the ALJ be reversed and the Commission uphold Moss's termination.

Groth provided brief rebuttal. Groth stated that the opposing Counsel referenced a Brady Handgun Violence Prevention Act issue suggesting that Moss is tainted and cannot perform law

enforcement duties. Groth noted that this argument was made on judicial review previously and was rejected by the Marion Circuit Court.

The Chair then opened the floor for Committee member questions and discussion.

Green asked, “The argument that progressive discipline is not a law, was that argued at the Circuit Court and then in front of the Court of Appeals?”

Wooding and Groth answered in the affirmative.

Green then asked, “The Court upheld that, did it not? They didn’t find that [conclusion] to be a violation?”

Wooding stated, “It was remanded because [the ALJ] didn’t take in everything that had been done up to this point.”

Green asked, “I’m assuming [Counsel] argued that the fact that you couldn’t say progressive discipline was inappropriate?”

Wooding answered in the affirmative.

Green asked, “The Court either ignored it or rejected it, did it not?”

Groth stated that the Court implicitly rejected the argument.

Green stated, “Isn’t that kind of the law of the case now? We’re kind of stuck with it. Your bite of the apple should have been down in front of the [Marion Circuit Court] or the [Indiana Court of Appeals] on that issue. We’re stuck; we can’t change that.” Green noted that the issue cannot be rehashed and the Committee is limited on what it can do. He stated, “If this was talked about early on, even though the conclusion, perhaps, was erroneous, or may not have been considered, I think all the facts were considered with respect to that conclusion. I don’t think... from my standpoint, we don’t have a choice. We can’t go outside of what’s already been done.” Green stated that any changes that might need to be made need to be consistent with the Finding and Order of the Marion Circuit Court. Green said that this Committee would need to show that the Marion Circuit Court Remand Order was considered and uphold what the ALJ’s Nonfinal Order.

ALJ Jensen stated that there was a finding in the Marion Circuit Court’s Order relative to Moss’s “relatively unblemished record” and she pointed out that there is a reference to Moss’s record in that Order. ALJ Jensen stated, “I did consider the entire matter was to be the law of the case except for the requirement to reconsider the one issue the Circuit Court asked to be reconsidered and my conclusion was that the findings were there.”

Green asked for a point of clarification asking ALJ Jensen if she has considered what the Circuit Court ordered the Commission to consider.

Stautz added, “the new order has been issued based on the directions from the Court on remand, is my understanding”.

ALJ Jensen stated that it was her intent to address what the Court had ordered be taken into consideration. She added, “If I have failed in some regard to do that in your opinion then, obviously, I am subject to correction.”

The Chair called for a motion.

R. T. Green moved to adopt the Findings of Fact and Conclusions of Law with Nonfinal Order Revising the Commission’s Findings of Fact and Conclusions of Law with Final Order Issued on April 28, 2014 on Remand Following Judicial Review as the Final Order of the Commission. Jennifer Jansen seconded the motion.

The Chair noted that a motion was made and seconded. The Chair called for a vote. Upon a voice vote, the motion carried.

Discussion of proposed rule amendment adding 312 IAC 3-1-3.5 regarding participation and representation in proceeding governed by IC 4-21.5-3; Administrative Cause No. 16-116A

Sandra Jensen, Director of the Commission’s Division of Hearings presented this item. She noted that there had been discussion in the past on how agencies deal with representation of a party during proceedings under the AOPA. This is particularly an issue when a corporation or a trust has a non-attorney representative. Jensen reminded the Committee that the discussion led to a submission of a request for an Advisory Opinion from the Office of the Indiana Attorney General (the “AG”), which was received and provided to the Committee on April 15, 2016.

Jensen stated that she, Dawn Wilson, and the Environmental Law Judges of the Office of Environmental Adjudication (the “OEA”) have worked together to draft language consistent with the AG’s Advisory Opinion that seems to meet the agencies’ needs. Jensen stated that the proposed addition of 312 IAC 3-1-3.5, as presented to the Committee, is a starting point for discussion to ensure that there is representation for a party when needed while maintaining the ability for individuals to bring matters before the Commission without undue difficulty. Jensen stated the Commission does not want to thwart the ability of someone who wishes to seek administrative review by unnecessarily requiring that person to hire counsel. She noted, however, the intent of the proposed rule is to ensure that counsel is obtained when necessary to the integrity of a Commission order. Jensen recognized the problem that may arise if a corporation having shareholders is represented by a non-attorney without authorization of the shareholders.

The Chair commented that she thought it would be important to have a rule in place to address this issue and to best support the administrative review process. She thanked the ALJs and OEA staff for their efforts in drafting proposed 312 IAC 3-1-3.5. The Chair opened the floor for Committee member questions and discussion.

Green asked if a template was used in drafting the proposed rule language or if the proposal had been drafted from scratch.

ALJ Jensen answered that some of the proposed rule language was from scratch and some aspects of the rule is based on OEA's 315 IAC 1-3-15(b)(4). She noted that the proposed rule provides more detail than 315 IAC 1-3-15(b)(4) and considers the AG's Opinion and various Indiana Trial Rules.

The Chair commented on 312 IAC 3-1-3.5(e)(3)(D) which states, "The designated representative cannot make legal arguments, address legal issues or otherwise engage in the practice of law." The Chair said the challenge is when non-attorneys are before the Commission and working through procedural matters, and appreciated the acknowledgment in 312 IAC 3-1-3.5(e)(3)(D). She noted that there will be a fine line of a lay person stating their case, but not being able to practice law.

ALJ Jensen stated that currently lay people before the Commission are attempting to make legal arguments and noted that the drafting of a rule was needed to address this issue. She suggested that once the proposed rule language has been approved by the Committee, the proposed rule language be presented to the Indiana State Bar Association (the "ISBA") and perhaps seek the opinion of the Indiana Supreme Court. Jensen noted her intent to avoid overstepping boundaries since matters of the unauthorized practice of law is strictly within the jurisdiction of the Indiana Supreme Court.

The Committee members agreed that proposed 312 IAC 3-1-3.5 was well drafted.

The Chair asked about the next steps regarding the proposal.

ALJ Jensen stated that the initial step is to seek a "Moratorium Exception" letter from the State Budget Agency's Office of Management and Budget. She stated that fiscal analyses are required as part of the "moratorium exception". She acknowledged that the proposed rule language might be viewed as a cost to small business since, in some limited instances, it may require an individual to obtain counsel. Jensen stated that she is hopeful that the rule draft will add clarity for the Commission and the public and will be viewed as intended that "[The Commission is] attempting to reduce potential liability" for parties.

Green asked about the possibility of vetting the proposed rule language with the ISBA and the Indiana Supreme Court in order to gain support before seeking moratorium exception. Jensen agreed that this could be done.

Jansen stated that by having the ISBA and the Indiana Supreme Court review the rule proposal before going through the rule making process would help in answering any questions from the OMB.

The Committee members agreed that the proposed 312 IAC 3-1-3.5 be submitted to the ISBA and the Indiana Supreme Court before initiating rule adoption. The Chair then recommended the

Commission work with the ISBA with regard to review of proposed 312 IAC 3-1-3.5 before proceeding to the rulemaking process.

The Committee discussed the first week in December 2016 as a potential week to select a date for the next Committee meeting.

Adjournment

The meeting was adjourned at 9:40 a.m., EDT.