

Agenda Item Summary

BACKGROUND

On May 18, 2009, the Oregon Department of Fish and Wildlife (department) notified Mr. Dennis Sturgell that the department proposed to suspend his commercial fishing licenses, because he had been convicted of certain fishing-related crimes. The notice (Attachment 2) gave Mr. Sturgell 60 days (until July 17, 2009) to request a contested case hearing to challenge the proposed suspensions. The notice also warned Mr. Sturgell that if he did not submit a written request for hearing within that time period, the department would issue a Final Order (see section IV of Attachment 2). Sturgell did not submit a written request for a contested case hearing before July 17, 2009.

On July 30, 2009, the department received from Mr. Sturgell's attorney a Request for Hearing (Attachment 3). Note that this request for a hearing is dated June 29, 2009 however the certificate of service is dated July 29, 2009. Department staff asked Oregon Fish and Wildlife Commission (Commission) Chair Rae to sign a Final Order as Mr. Sturgell had not requested a hearing by the July 17, 2009 deadline. Chair Rae signed the Final Order on August 4, 2009 (Attachment 4).

On August 13, 2009, the department received from Mr. Sturgell's attorney a petition raising several issues (Attachment 5) and asking the Commission to set aside the Final Order and give Mr. Sturgell a hearing. On August 24, 2009, the department received from Mr. Sturgell's attorney an amended petition (Attachment 6) and sworn declarations by Mr. Sturgell and others addressing his request (Attachments 7, 8 and 9).

PUBLIC INVOLVEMENT

Not Applicable

ISSUE 1

SHOULD THE COMMISSION RECONSIDER ITS FINAL ORDER AND GIVE MR. STURGELL A HEARING, DESPITE HIS FAILURE TO TIMELY REQUEST A HEARING?

ANALYSIS

Mr. Sturgell's petitions raise a number of technical legal issues concerning process, which your counsel can address at the Commission meeting. Essentially, the issue now before the Commission is whether to reconsider its Final Order and grant Mr. Sturgell a hearing, despite his failure to timely request a hearing. The Department of Justice advises that the Commission is under no legal obligation to grant Mr. Sturgell's request. OAR 137-003-0528(1)(1) governs late hearing requests. It provides that an agency "*may* accept a late hearing request only if the cause for failure to timely request the hearing was beyond the reasonable control of the party...." (emphasis added). In other words, the Commission is never legally *required* to accept a late hearing request. However, if the Commission wishes to accept a late hearing request, it may do so only if it concludes that something "beyond the reasonable control of the party" caused the late filing.

Although Mr. Sturgell's petition argues that he was legally entitled to 90 days (rather than 60) in which to file his request for hearing, that argument is not well founded. ORS 183.435 says that when an agency refuses to issue a license required to pursue any commercial activity, trade, occupation or profession (and the refusal is not based on the results of a test or inspection), a 60-day period is used. "Refuse to issue" encompasses a decision to suspend a license.

Mr. Sturgell's petition urges reliance instead on ORS 183.430, which requires a 90 day period. However, that statute is not germane here, because it governs only those situations where an agency finds "a serious danger to the public health or safety" and immediately suspends a license before holding a hearing. Such was not the case with Mr. Sturgell's licenses.

OPTIONS

1. Decline to reconsider the Final Order.
2. Reconsider and withdraw the Final Order, and allow Mr. Sturgell a contested case hearing.

**STAFF
RECOMMENDATION**

Option 2

DRAFT MOTION

I move to reconsider and withdraw the Final Order and accept Mr. Sturgell's late hearing request, because his failure to file on time was caused by a circumstance beyond his reasonable control.

EFFECTIVE DATE

September 4, 2009.