

**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
OF THE STATE OF DELAWARE**

<b>MICHAEL J. SCHEPENS</b>	)	
<b>D/B/A SCHEPENS SEPTIC SERVICE,</b>	)	
	)	
<b>Appellant,</b>	)	
	)	
<b>v.</b>	)	<b>EAB Appeal No. 2017-02</b>
	)	
<b>DELAWARE DEPARTMENT</b>	)	
<b>OF NATURAL RESOURCES AND</b>	)	
<b>ENVIRONMENTAL CONTROL,</b>	)	
	)	
<b>Appellee.</b>	)	

**DECISION AND FINAL ORDER**

Pursuant to due and proper notice of time and place of hearing served on all parties in interest and to the public, the above-stated cause of action came before the Environmental Appeals Board (“Board”) on November 14, 2017, in the Auditorium of the Richardson & Robbins Building, located at 89 Kings Highway, Dover, Kent County, Delaware.

Members of the Board present and constituting a quorum were: Dean Holden (Chair), Michael Horsey, Robert Mulrooney, Sebastian LaRocca, Frances Riddle, Guy Marcozzi and Gordon Wood. No Board Members disqualified themselves or were otherwise disqualified. Deputy Attorney General Kevin P. Maloney represented the Board.

Michael Schepens (“Appellant”) represented himself by filing a Notice of Appeal that initiated this matter but he failed to appear at the hearing. Deputy Attorney General Devera Scott represented Appellee Delaware Department of Natural Resources and Environmental Control (“DNREC”).

## STATEMENT OF THE CASE AND PROCEEDINGS

On January 24, 2017, the Secretary of DNREC issued a Secretary's Order suspending Appellant's Class B, E and H Wastewater Treatment and Disposal System license due to 1) repeated failure to comply with applicable regulations, 2) failure to exercise reasonable care and judgment and effectively apply his knowledge and ability while completing septic system installations, and 3) failure to timely submit complete reports to the Department as required.

Appellant, who was not represented by counsel, submitted a timely Notice of Appeal dated February 14, 2017 and a hearing was scheduled for May 9, 2017. In the weeks leading up to the May 9<sup>th</sup> hearing date, the EAB's Administrative Assistant attempted unsuccessfully to contact Appellant numerous times by telephone and email in an effort to schedule a pre-hearing conference in accordance with the EAB's regulations. In addition, the EAB's Administrative Assistant sent Appellant a certified letter asking about his availability for the pre-hearing conference.

Appellant was completely unresponsive to the EAB until May 2, 2017 when he advised the Board's Administrative Assistant that he would not be able to attend the hearing. Appellant requested a continuance of the May 9<sup>th</sup> hearing date, which the Board granted on May 5, 2017. The Board's Order of Continuance provided that "Schepens and DNREC have agreed to continue the date for hearing on the Appeal for a time prior to the 180 day statutory limit of 11 August 2017."<sup>1</sup>

Between May 5 and July 26, 2017, the Board, through its Administrative Assistant, attempted to contact Appellant multiple times by telephone and email to reschedule the hearing in accordance with the Order of Continuance. The Board sent Appellant at least four separate letters

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<sup>1</sup> This timeframe was to ensure compliance with 7 *Del.C.* § 6007(c), which provides, in part, that "the Board shall conduct, but not necessarily complete, the hearing within 180 days following the receipt of the appeal unless the parties agree otherwise."

by both U.S. Mail and email. Finally, on July 26, 2017, the Board sent Appellant *another* letter requesting that he contact the Board's Administrative Assistant to reschedule the hearing and alerting him that the earliest a hearing on his appeal could be scheduled would be February 2018, due to other Board appeals having been scheduled for hearing in the interim, and that he should respond to the Board no later than August 4, 2017. Despite these numerous communications from the Board, there has been no response or contact from Appellant to date.

### **DNREC'S MOTION TO DISMISS**

On September 14, 2017, DNREC filed a Motion to Dismiss the Appeal for failure to prosecute the Appeal. DNREC argued that all of the delay in scheduling and hearing this matter was due, initially, to Appellant's request for a continuance and then Appellant's continuing, ongoing non-responsiveness. DNREC further argued that the 180-day deadline imposed by 7 *Del.C.* § 6007(c) expired on August 11, 2017.

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The decision to dismiss an action for failure to prosecute is discretionary. *Draper v. Med. Ctr. Of Delaware*, 767 A.2d 796, 798 (Del. 2001). Repeated missed deadlines and lack of communication is sufficient grounds for dismissing an action for failure to prosecute, and dismissal on those grounds is not an abuse discretion. *Playtex Apparel, Inc. v. Melvin*, 867 A.2d 902 (Del. 2005).

“The burden of proof is upon the Appellant to show that the Secretary's decision is not supported by the evidence on the record before the Board.” 7 *Del.C.* § 6008(b). Thus, the Board's decision rests on Appellant's legal obligation to carry his burden of proof, as well as the amount of credible evidence supporting Appellant's claims. Simply put, based on the absence of any evidence presented by Appellant (due to his failure to appear for the hearing), the Board is unable

to determine that the Secretary's decision was not supported by the evidence on the record before the Board.

It follows, then, that Appellant's failure to prosecute his appeal is fatal to his cause because he did not appear to present, argue and prove his case. Despite numerous, documented communications to Appellant regarding the need to schedule a hearing on his Appeal, and in light of his total lack of responsiveness to those communications, the Board has the right, in its discretion to, to dismiss the appeal. This right stems from its "inherent power to manage its own affairs and to achieve the orderly and expeditiously disposition of its business." *Id.* (internal citations and quotations omitted).

Based on the foregoing, DRNEC's Motion to Dismiss is granted and the decision of the Secretary is hereby affirmed.

**IT IS SO ORDERED**, this \_\_\_\_\_ day of \_\_\_\_\_, 2018.

\_\_\_\_\_  
Dean Holden, Chairperson

The following Board members concur in this decision.

Date: \_\_\_\_\_

1/18/18

\_\_\_\_\_  
Guy Marcozzi, Board Member

Date: \_\_\_\_\_

\_\_\_\_\_  
Frances Riddle, Board Member

Date: \_\_\_\_\_

\_\_\_\_\_  
Robert Mulrooney, Board Member

Date:

1/17/18

Frances Riddle

Frances Riddle, Board Member

Date: 1/19/2018



Robert Mulrooney, Board Member


Date: 1/18/18

  
Sebastian LaRocca, Board Member

Date: 1/17/2018 Gordon Wood Sr.  
Gordon Wood, Board Member



Date: 1/19/18

  
Michael Horsey, Board Member

Date: 2-1-2018

  
Dean Holden, Chairperson