

**BEFORE THE
OHIO ENVIRONMENTAL PROTECTION AGENCY**

In the Matter of:

DAVID GUARNERA,

Respondent.

**Case No. 08-OC-02
Hearing Officer Wilson**

REPORT AND RECOMMENDATION

Attached hereto is a copy of the Hearing Officer's Report and Recommendation in this matter. Pursuant to Ohio Revised Code Section 119.09 and Ohio Administrative Code Rule 3745-47-24, any party to this matter may file written objections to the Report and Recommendation. Such objections must be filed with the Director of Environmental Protection within ten (10) days of the receipt of the Report and Recommendation. Written objections should be filed with:

Hearing Clerk, Legal Section
Ohio Environmental Protection Agency
Lazarus Government Center
50 West Town Street, Suite 700
Columbus, Ohio 43215

If objections are filed, an original plus two (2) copies are required.

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**BEFORE THE
OHIO ENVIRONMENTAL PROTECTION AGENCY**

In the Matter of:

**Case No. 08-OC-02
Hearing Officer Wilson**

DAVID GUARNERA,

**REPORT AND
RECOMMENDATION**

Respondent.

STATEMENT OF CASE

This case arises out of a request for an adjudication hearing filed by David Guarnera. The hearing request was filed in response to an October 1, 2007 Proposed Order for Invalidation of Mr. Guarnera's November 7, 2006 Wastewater II Operator Examination Score. Within the Proposed Order, in addition to proposing to invalidate Mr. Guarnera's examination score, the Director also proposed to disqualify Mr. Guarnera from taking future water and wastewater examinations for a period of five (5) years.

On November 17, 2008, an adjudication hearing was held in this matter. On November 26, 2008, the hearing transcript was filed with the Hearing Clerk of the Ohio EPA. On December 11, 2008, Mr. Guarnera filed his Post-Hearing Brief. On December 12, the Staff of Ohio EPA filed its Post-Hearing Brief. On December 19, 2008, the Ohio EPA Staff filed Staff's Motion to Strike Portions of Applicant's "Post-Hearing Brief". On December 22, 2008, the undersigned Hearing Officer issued a Ruling Granting in Part and Denying in Part OEPA's Motion to Strike.

FACTS

After entering the Lausche Building, Mr. Guarnera proceeded to a check-in table. (Hearing Transcript (Tr.) - David Bornino (DB), page (pg.) 40, lines 1-14; Tr. - Andrew Barienbrock (AB), pg. 107, lines 1-19; and Tr.- David Guarnera (DG), pg. 117, lines 3-17.) At the check-in table, Ohio EPA examination proctor, Jessica Dingman, confirmed Mr. Guarnera's identification; checked to ensure that he had an examination entrance letter sent to him by the Ohio EPA; examined Mr. Guarnera's possessions, including Mr. Guarnera's calculator; confiscated Mr. Guarnera's calculator cover; and allowed Mr. Guarnera to take a seat and to take the certification examination. (Tr. - Jessica Dingman (JD), pg. 20, line 14 - pg. 21, line 3.) Mr. Guarnera did not actually possess the calculator cover at the time he received the examination or during the time that he

took the examination. (Tr.- JD, pg. 21, lines 9 - 14.) Mr. Guarnera did not possess, use, or share any unauthorized written materials (including any formulas written on the cover of his calculator) at the time he received the examination or during the time he took the examination. (Tr. - JD, pg. 27, lines 12 - 19.) Furthermore, there was no evidence presented at the hearing that Mr. Guarnera communicated with any other examinee during the administration of the examination. Likewise, there was no evidence that Mr. Guarnera copied answers from another examinee or allowed another examinee to copy answers from him during the administration of the examination.

DISCUSSION

The Ohio Environmental Protection Agency (Ohio EPA) Staff argues that Mr. Guarnera engaged in conduct that violated Ohio Administrative Code (O.A.C.) 3745-7-18. The Ohio EPA Staff argues that Mr. Guarnera violated O.A.C. 3745-7-18 because on November 7, 2006, he entered the Lausche Building to take the certification examination while carrying a calculator with a cover that had writing on it.

As stated in the pertinent facts listed above, after entering the Lausche Building, Mr. Guarnera proceeded to a check-in table. At the check-in table, Ohio EPA examination proctor, Jessica Dingman, confirmed Mr. Guarnera's identification; checked to ensure that he had an examination entrance letter sent to him by the Ohio EPA; examined Mr. Guarnera's possessions, including Mr. Guarnera's calculator; confiscated Mr. Guarnera's calculator cover; and allowed Mr. Guarnera to take a seat and to take the certification examination. Mr. Guarnera did not actually possess the calculator cover at the time he received the examination or during the time that he took the examination. Mr. Guarnera did not possess, use, or share any unauthorized written materials (including any formulas written on the cover of his calculator) at the time he received the examination or during the time he took the examination. Furthermore, there was no evidence presented at the hearing that Mr. Guarnera communicated with any other examinee during the administration of the examination. Likewise, there was no evidence that Mr. Guarnera copied answers from another examinee or allowed another examinee to copy answers from him during the administration of the examination. Based upon the foregoing, I cannot find that Mr. Guarnera's conduct actually subverted the examination process as described by O.A.C. 3745-7-18(B)(3).

Because Mr. Guarnera's conduct did not actually subvert the examination process, the question that becomes pertinent to this case is whether the Ohio EPA Staff

has met its burden of proving that Mr. Guarnera engaged in conduct that attempted to subvert the examination process.¹

The word “attempt” is defined in Webster’s New World Dictionary, College Edition, as: “to make an effort to do ... [to] try...” The question is did Mr. Guarnera make an effort to or try to subvert the examination process. Mr. Guarnera testified that he never intended to subvert the examination process. Mr. Guarnera testified that he did not remember that the writing was on the calculator cover. Mr. Guarnera testified that the writing was probably from a class that he had taken at Lorain Community College five years ago. (Tr.- DG, pg 116, line 19 - pg. 117, line 23.) Mr. Guarnera testified in reference to the writing on the calculator cover (which was written in pencil) that “You can’t even hardly read it.” (See Staff’s Exhibit 1, which is the calculator cover.) Mr. Guarnera testified that after he was handed the test, “I sat down and took the test. Never left my seat until I was done and handed my test in and went home. It was never anything in my mind – any intent or otherwise, that that – I didn’t realize it was even there – to do that. The best I can do is offer to take a lie detector test.” Tr. - DG, pg. 117, lines 16 - 23.

The Ohio EPA Staff has the burden of proving that Mr. Guarnera’s conduct was an “attempt to subvert the examination process.” (See O.A.C. 3745-47-23(A)(2)). The Staff did not present any evidence to demonstrate that Mr. Guarnera intended to use the formulas on the calculator cover to subvert the examination process. The Staff’s explanation for why it did not present any evidence that Mr. Guarnera intended to subvert the examination process appears at page 5 of its Post-Hearing Brief. At page 5 of Staff’s Post-Hearing Brief, the Ohio EPA Staff argued that “In order for the Staff to prove that Mr. Guarnera engaged in conduct that attempted to subvert the certification examination process, it is sufficient for the Staff to demonstrate that Mr. Guarnera’s conduct is similar to the conduct described in O.A.C. 3745-7-18(B).” At page 5, the Staff’s Post-Hearing Brief continues by stating: “O.A.C. 3745-7-18(B) provides in relevant part that: Conduct that subverts or attempts to subvert the ... examination ... process includes, but is not limited to: (3) Conduct that violates the standard of test administration, such as communicating with any other examinee during the administration of the examination; copying answers from another examinee or allowing answers to be copied by another examinee during the administration of the examination; possessing during the administration of the certification examination any books, notes, written or printed materials or data of any kind, other than the examination materials distributed or specifically listed as approved materials ...”. (Underline emphasis was added in the Staff’s Post-Hearing Brief.)

¹ The Ohio EPA Staff did not argue that Mr. Guarnera’s conduct actually subverted the examination process. The Staff argues that Mr. Guarnera engaged in conduct that attempted to subvert the examination process. (See the Staff’s Post-Hearing Brief at Page 5, Heading B., and Page 13, Headings C. and D.)

The Staff is apparently arguing that as long as it can prove that carrying a calculator with formulas written in pencil on the cover up to the check-in desk is similar to the conduct described in O.A.C. 3745-7-18(B)(3), then the Staff will have proven that Mr. Guarnera engaged in conduct that attempted to subvert the examination process. The Staff is apparently arguing that it does not matter that Mr. Guarnera carried the calculator without remembering that he had written formulas and other information, including some information unrelated to water and wastewater issues, on the calculator cover during a class he had taken at Lorain Community College five years before. (See the Staff's Post-Hearing Brief, Section B., Pages 5- 6.)

Assuming that the Staff is correct that if it can prove that Mr. Guarnera engaged in conduct that is similar to the conduct described in O.A.C. 3745-7-18(B)(3), then it will have proven that Mr. Guarnera attempted to subvert the examination process, I will now examine whether the act of carrying a calculator with formulas written in pencil on the cover to the check-in desk (and not to his seat) is similar to the conduct described in O.A.C. 3745-7-18(B)(3). I must conclude that it is not. All of the prohibited conduct described in O.A.C. 3745-7-18(B)(3) is the type of conduct that occurs after examinees take their seats and during the period following the distribution of the examination through the time the examination is completed and turned in. The Ohio EPA Staff argues that the "administration of the examination" begins prior the time when examinees take their seats and the examination is distributed. The Ohio EPA Staff argues that the "administration of the examination ... is, at a minimum, the period of time beginning when the first examinee enters the outside doors of the Lausche Building and ending when the last examinee has left the Lausche Building." (See the first full paragraph of Page 8 of the Staff's Post-Hearing Brief.) Such an interpretation is inconsistent with the meaning of the phrase as it is used in O.A.C. 3745-7-18(B)(3) to describe the type of conduct prohibited during the administration of the examination. All of the examples of prohibited conduct contained in O.A.C. 3745-7-18(B)(3), which is the only paragraph where the phrase "during the administration of the examination" is used, are examples of cheating that would only be prohibited during the course of taking an examination. The only time that examinees could possibly be "copying answers from another examinee" or "allowing answers to be copied by another examinee" is after examinees are seated and the examination has been distributed and the testing has begun. Communicating during the administration of the examination is prohibited. To give the phrase "during the administration of the examination" the meaning that the Ohio EPA Staff suggests (that it includes, at a minimum, the period of time beginning when the first examinee enters the Lausche Building and ending when the last examinee has left the Lausche Building) would prohibit examinees from saying hello to each other on the way to the check-in table or from small-talking to each other while waiting in line to check in.

The phrase “during the administration of the examination” is not defined anywhere in O.A.C. Chapter 3745-7. At page 8 of Staff’s Post-Hearing Brief, the Staff correctly states that “Pursuant to the rules of statutory construction, we must assign terms their ordinary and plain meanings.” See *ODOT v. Orange Barrel Media, LLC et al.* (2007, 10th Appellate District), 2007 Ohio 3218. Apparently, the Staff would like to convince this tribunal that its broad interpretation of the phrase “during the administration of the examination” is correct because “[a]ny other reading of this clause narrows the ordinary meaning given to the phrase as intended by the rule writers.” (Bracket and underline emphasis added.) The Staff’s argument misses the point that when words are not defined and when words have an ordinary meaning, arriving at the meaning of the words does not involve the examination of the minds of the writers of the rule. “[T]he Legislature [rule writer] must be assumed or presumed to know the meaning of words, to have used the words of a statute [rule] advisedly and to have expressed legislative intent by the use of words found in the statute [rule] ...” *Wachendorf v. Shaver* (1948), 149 Ohio St. 231, 236-237. (Bracketed material added.) The word “administer” is defined in Webster’s New World Dictionary, College Edition, as: “to direct the taking of (an oath, pledge, test, etc.)”. Read in the context of the examples contained in O.A.C. 3745-7-18(B)(3), and by giving the words their ordinary meaning, it is clear that the phrase “during the administration of the examination” includes, at most, only the period from the time the examinee is seated to take the examination until the time the examinee turns in his or her examination, i.e, during the taking of the test.

Given the fact that all of the examples of conduct contained in O.A.C. 3745-7-18(B)(3) involve conduct that would be prohibited only during the course of taking an examination, given the fact that the plain meaning of the phrase “during the administration of the examination” contained in O.A.C. 3745-7-18(B)(3) includes, at most, only the period from the time the examinee is seated to take the examination until the time the examinee turns in his or her examination, and given the fact that Mr. Guarnera’s conduct occurred prior to and not “during the administration of the examination”, the Ohio EPA Staff has failed to establish that Mr. Guarnera’s conduct was similar to the conduct described in O.A.C. 3745-7-18(B)(3). Therefore, even if we assume for the sake of argument that in order to prove that Mr. Guarnera attempted to subvert the examination process all the Ohio EPA Staff had to do was prove that Mr. Guarnera’s conduct was similar to the conduct described in O.A.C. 3745-7-18(B)(3), the Staff has failed to prove that, and, therefore, the Staff has failed to prove that Mr. Guarnera attempted to subvert the examination process.²

² It is this Hearing Officer’s opinion that there may be some confusion between the phrase “during the administration of the examination”, as used only in O.A.C. 3745-7-18(B)(3), and the broader phrase “examination process” as used throughout the rest of O.A.C. 3745-7-18. It is this Hearing Officer’s conclusion that the period

As stated above, the Ohio EPA Staff has the burden of proof in this case. While the Ohio EPA Staff has not proven that Mr. Guarnera's conduct was similar to the conduct specifically prohibited by O.A.C. 3745-7-18(B)(3), and while the Staff has not proven that Mr. Guarnera's conduct was specifically prohibited by O.A.C. 3745-7-18(B)(3), the Staff could have tried to prove that Mr. Guarnera's conduct was otherwise an "attempt to subvert the examination process" in violation of O.A.C. 3745-7-18(A) and/or 3745-7-18(B)(1), (B)(2), (B)(4), or (B)(5). The Ohio EPA Staff could have tried to prove that Mr. Guarnera's conduct, even though it did not occur during the administration of the examination, was an effort to/an attempt to subvert the examination process. However, the Ohio EPA Staff did not offer any proof whatsoever (beyond its attempt to demonstrate that Mr. Guarnera's conduct was similar to the conduct described in O.A.C. 3745-7-18(B)(3)) that Mr. Guarnera was trying to subvert the examination process. By failing to refute or even question Mr. Guarnera's explanation that he unknowingly and unwittingly carried a calculator with a cover with writing on it to the check-in desk, and by failing to present any proof whatsoever that Mr. Guarnera tried to/made an effort to subvert the examination process (other than its unpersuasive argument that Mr. Guarnera's conduct was similar to the conduct prohibited by O.A.C. 3745-7-18(B)(3)), the Ohio EPA Staff has failed to meet its burden of proof. Without some kind of proof, I simply cannot conclude that carrying a calculator with hard to read writing on the cover, containing formulas similar to the formulas that

"during the administration of the examination", as used in O.A.C. 3745-7-18(B)(3), is, at most, the period from the time the examinee is seated to take the examination until the time the examinee turns in his or her examination. While it is this Hearing Officer's understanding that the phrase "during the administration of the examination" means during the course of the taking of the examination, it is my conclusion that the phrase "examination process" has a broader meaning. The best way I can try to explain the distinction is by using an analogy. I believe the distinction between "during the administration of the examination" and the "examination process" is analogous to the difference between an Ohio EPA "adjudication hearing" and the Ohio EPA "adjudication process." The "adjudication hearing" only involves the period of time from the initial convening of the hearing until the final adjournment of the hearing. The "adjudication process" involves much more. The "adjudication process" involves the period of time from the filing of a request for an adjudication hearing, through the prehearing conferences, discovery, filing of prehearing statements, the hearing, the filing of post-hearing briefs, the filing of the Report and Recommendation, all the way through the issuance of the Director's Final Findings and Orders. Just as the Ohio EPA "adjudication process" is a broader term than "adjudication hearing", the phrase "examination process" is broader than the phrase "during the administration of the examination." Just as the "adjudication hearing" involves only the period following the convening of the hearing through the adjournment of the hearing, the "administration of the examination" involves only the period following the distribution of the examination until the examination is finished and turned in. To illustrate the distinction between the phrases "during the administration of the examination" and the "examination process", let us look at O.A.C. 3745-7-18 (B)(2). O.A.C. 3745-7-18(b)(2) gives examples of conduct that would "subvert the examination process", even if the conduct does not occur during the "administration of the examination." For example, "selling, distributing, buying, receiving, or having unauthorized possession of any, portion of, or information from, a future or current certification examination" would subvert the examination process. The phrase "examination process" is broader and appears to include a wider range of activities. Clearly, one could subvert the examination process by engaging in conduct not prohibited by O.A.C. 3745-7-18(B)(3), which addresses only conduct prohibited "during the administration of the examination."

would be supplied with the test anyway, was an attempt by Mr. Guarnera to subvert the examination process.

Ironically, had the Ohio EPA Staff not confiscated Mr. Guarnera's calculator cover and allowed Mr. Guarnera to take the calculator cover with him to his seat and allowed Mr. Guarnera to possess the calculator cover during the administration of the examination, then Mr. Guarnera would have violated the standard of test administration specifically described in O.A.C. 3745-7-18(B)(3) and Mr. Guarnera would be subject to the sanction in O.A.C. 3745-7-18(A)(2). However, Mr. Guarnera did not possess the calculator cover during the administration of the examination. Therefore, the Ohio EPA Staff was obligated to prove that Mr. Guarnera was attempting to subvert the examination process. Other than its unsuccessful argument that Mr. Guarnera's conduct was similar to the conduct prohibited by O.A.C. 3745-7-18(B)(3), the Ohio EPA Staff offered absolutely no proof that Mr. Guarnera attempted to subvert the examination process. Absent any proof, I must find that the Ohio EPA Staff has failed to meet its burden of proving that Mr. Guarnera attempted to subvert the examination process.

SUMMARY

Because Mr. Guarnera's conduct was not specifically prohibited by O.A.C. 3745-7-18(B)(3), because Mr. Guarnera's conduct was not similar to O.A.C. 3745-7-18(B)(3), and because the Ohio EPA Staff has failed to offer any evidence (other than to argue that Mr. Guarnera's conduct was similar to the conduct listed in O.A.C. 3745-7-18(B)(3)) that Mr. Guarnera's conduct was otherwise an "attempt to subvert the examination process" in violation of O.A.C. 3745-7-18(A) and/or 3745-7-18(B)(1), (B)(2), (B)(4), or (B)(5), and because the Ohio EPA Staff has therefore failed to meet its burden of proving that Mr. Guarnera attempted to subvert the examination process, I cannot find that Mr. Guarnera engaged in conduct that attempted to subvert the examination process.³ Therefore, given the fact that Mr. Guarnera did take and did pass the certification examination (without possessing or using any unauthorized written material), I cannot find any reason, based upon O.A.C. 3745-7-18, that the Director should further withhold Mr. Guarnera's score on the certification examination. Furthermore, I cannot find any reason, based upon O.A.C. 3745-7-18, that the Director should further delay the issuance of Mr. Guarnera's Wastewater II Operator Certificate.

³ Having heard Mr. Guarnera's testimony and having had the opportunity to judge his demeanor, I believe that Mr. Guarnera did not attempt to subvert the examination process. I believe that Mr. Guarnera did not plan to use the writing on the calculator cover during the examination. I believe that Mr. Guarnera forgot that he had written the formulas and other information (including information unrelated to the certification examination) years before at the time he was taking a course at Lorain Community College. However, what I believe is not legally significant because Mr. Guarnera did not have to prove that he did not attempt to subvert the examination process. The Ohio EPA Staff had the burden of proving that Mr. Guarnera did attempt to subvert the examination process.

CONCLUSION

Based upon the foregoing, the Director should withdraw the October 1, 2007 Proposed Action for Invalidation of Wastewater II Operator Examination Score. Furthermore, the Director should issue to Mr. Guarnera a Wastewater II Operator's Certificate.

The attached Findings of Fact, Conclusions of Law, and Recommendations are hereby submitted to the Director for his consideration.

W. Sam Wilson
W. SAMUEL WILSON, ESQ.
Hearing Officer

12-24-08
Date

BEFORE THE
OHIO ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:

Case No. 08-OC-02
Hearing Officer Wilson

DAVID GUARNERA,

REPORT AND RECOMMENDATION

Respondent.

FINDINGS OF FACT

1. On October 1, 2007, the Director of the Ohio Environmental Protection Agency ("Director") issued to Respondent a Proposed Order for Invalidation of David Guarnera's November 7, 2006 Wastewater II Operator Examination Score. Within the proposed order, the Director also proposed to disqualify Mr. Guarnera from taking future water and wastewater examinations for a period of five (5) years.
2. The Director based his October 1, 2007 Proposed Order upon Ohio Administrative Code (O.A.C.) 3745-7-18.
3. In response to the Director's October 1, 2007 Proposed Order, David Guarnera filed a request for an adjudication hearing.
4. On November 17, 2008, an adjudication hearing was held in this matter.
5. On November 26, 2008, the hearing transcript was filed with the Hearing Clerk of the Ohio EPA.
6. On December 11, 2008, David Guarnera filed his Post-Hearing Brief.
7. On December 12, 2008, the Ohio EPA Staff filed its Post-Hearing Brief.
8. On December 19, 2008, the Ohio EPA Staff filed Staff's Motion to Strike Portions of Respondent's Post-Hearing Brief.
9. On December 22, 2008, the undersigned Hearing Officer issued a Ruling Granting in Part and Denying in Part Ohio EPA Staff's Motion to Strike.
10. During the course of the November 17, 2008 hearing, evidence in the form of testimony and exhibits was introduced and admitted. Numerous facts were established, including the following facts.
11. After entering the Lausche Building (where the November 7, 2006 Wastewater II Operator Examination was given), Mr. Guarnera proceeded to a check-in table.

(Hearing Transcript (Tr.) - David Bornino (DB), page (pg.) 40, lines 1-14; Tr. - Andrew Barienbrock (AB), pg. 107, lines 1-19; and Tr. - David Guarnera (DG), pg. 117, lines 3-17.)

12. At the check-in table, Ohio EPA examination proctor, Jessica Dingman, confirmed Mr. Guarnera's identification; checked to ensure that he had an examination entrance letter sent to him by the Ohio EPA; examined Mr. Guarnera's possessions, including Mr. Guarnera's calculator; confiscated Mr. Guarnera's calculator cover; and allowed Mr. Guarnera to take a seat and to take the certification examination. (Tr. - Jessica Dingman (JD), pg. 20, line 14 - pg. 21, line 3.)
13. Mr. Guarnera did not actually possess the calculator cover at the time he received the examination or during the time that he took the examination. (Tr.- JD, pg. 21, lines 9 - 14.)
14. Mr. Guarnera did not possess, use, or share any unauthorized written materials (including any formulas written on the cover of his calculator) at the time he received the examination or during the time he took the examination. (Tr. - JD, pg. 27, lines 12 - 19.)
15. Furthermore, there was no evidence presented at the hearing that Mr. Guarnera communicated with any other examinee during the administration of the examination. Likewise, there was no evidence that Mr. Guarnera copied answers from another examinee or allowed another examinee to copy answers from him during the administration of the examination.
16. While the Ohio EPA Staff could have tried to prove that Mr. Guarnera attempted to subvert the examination process by engaging in conduct prohibited by or similar to the conduct described in O.A.C. 3745-7-18(A) and/or 3745-7-18(B)(1), (B)(2), (B)(4), or (B)(5), the Ohio EPA Staff failed to introduce any evidence in this regard.
17. David Guarnera passed the November 7, 2006 Wastewater II Operator Examination. (Tr. - JD, pg. 27, line 24 - pg. 28, line 8.)

CONCLUSIONS OF LAW

1. Because the Ohio EPA issued a proposed order proposing to invalidate David Guarnera's November 7, 2006 Wastewater II Operator examination score and proposing to disqualify Mr. Guarnera from taking future water and wastewater examinations for a period of five (5) years, the Ohio EPA has the burden of proof in this case. (See O.A.C. 3745-47-23(A)(2)).

2. O.A.C. 3745-7-18 prohibits persons from engaging in conduct that subverts or attempts to subvert the operator certification examination process.
3. O.A.C. 3745-7-18(B)(3) addresses conduct that violates the standard of test administration and prohibits certain conduct “during the administration of the examination.”
4. Read in the context of the examples contained in O.A.C. 3745-7-18(B)(3), and by giving the words their ordinary meaning, it is clear that the phrase “during the administration of the examination” includes, at most, only the period from the time the examinee is seated to take the examination until the time the examinee completes taking the test and turns in his or her examination, i.e., during the taking of the test. (See O.A.C. 3745-7-18(B)(3) and the Discussion section of this Report and Recommendation at Pages 4-5.)
5. Because Mr. Guarnera’s calculator cover was confiscated at the check-in prior to his being seated to take the examination and because Mr. Guarnera did not possess, use, or share any unauthorized written materials (including any formulas written on the cover of his calculator) at the time he received the examination or during the time he took the examination, and because there is absolutely no evidence to indicate that Mr. Guarnera engaged in any of the other conduct prohibited by O.A.C. 3745-7-18(B)(3), Mr. Guarnera’s conduct did not specifically violate O.A.C. 3745-7-13(B)(3)’s prohibitions against engaging in certain conduct “during the administration of the examination.”
6. Because Mr. Guarnera’s calculator cover was confiscated at the check-in prior to his being seated to take the examination and because Mr. Guarnera did not possess, use, or share any unauthorized written materials (including any formulas written on the cover of his calculator) at the time he received the examination or during the time he took the examination, and because the conduct prohibited by O.A.C. 3745-7-18(B)(3) only involves the type of conduct that occurs after examinees take their seats and during the period following the distribution of the examination through the time the examination is completed and turned in, and because Mr. Guarnera’s conduct occurred prior to and not during the administration of the examination, Mr. Guarnera’s conduct was not similar to the conduct prohibited by O.A.C. 3745-7-13(B)(3).
7. Because the Ohio EPA Staff relied on the argument that in order to prove that Mr. Guarnera attempted to subvert the examination process all it had to do was prove that Mr. Guarnera’s conduct was similar to the conduct specifically prohibited by O.A.C. 3745-7-18(B)(3), and because Mr. Guarnera’s conduct

occurred prior to and not during the administration of the examination, and, therefore, was not conduct similar to the conduct prohibited by O.A.C. 3745-7-18(B)(3), the Ohio EPA Staff failed to thereby prove that Mr. Guarnera attempted to subvert the examination process.

8. Because the Ohio EPA Staff failed to introduce any evidence that Mr. Guarnera's conduct was prohibited by or similar to the conduct prohibited by O.A.C. 3745-7-18(A) and/or 3745-7-18(B)(1), (B)(2), (B)(4), or (B)(5), the Ohio EPA Staff has thereby failed to prove that Mr. Guarnera attempted to subvert the examination process by engaging in any prohibited conduct before or after the administration of the examination.
9. Because David Guarnera's conduct was not specifically prohibited by O.A.C. 3745-7-18(B)(3), because Mr. Guarnera's conduct was not similar to O.A.C. 3745-7-18(B)(3), because the Ohio EPA Staff has failed to offer any evidence that Mr. Guarnera's conduct was otherwise an "attempt to subvert the examination process" in violation of O.A.C. 3745-7-18(A) and/or 3745-7-18(B)(1), (B)(2), (B)(4), or (B)(5), and because the Ohio EPA Staff has therefore failed to meet its burden of proving that Mr. Guarnera attempted to subvert the examination process, I cannot find that Mr. Guarnera engaged in conduct that attempted to subvert the examination process. (In other words, because the Ohio EPA Staff failed to refute or even question Mr. Guarnera's explanation that he unknowingly and unwittingly carried a calculator with a cover with writing on it to the check-in desk, and because the Ohio EPA Staff failed to present any proof whatsoever that Mr. Guarnera actually tried to/made an effort to subvert the examination process (other than its unpersuasive argument that Mr. Guarnera's conduct was similar to the conduct prohibited by O.A.C. 3745-7-18(B)(3)), the Ohio EPA Staff has failed to meet its burden of proof. Without some kind of proof, I simply cannot conclude that carrying a calculator with hard to read writing on the cover, containing formulas similar to the formulas that would be supplied with the test anyway, was an attempt by Mr. Guarnera to subvert the examination process.)
10. Because the Ohio EPA Staff has failed to meet its burden of proving that Mr. Guarnera attempted to subvert the examination process, I cannot find any reason, based upon O.A.C. 3745-7-18, that the Director should further withhold Mr. Guarnera's score on the November 7, 2006 Wastewater II Operator certification examination.
11. Because the Ohio EPA Staff has failed to meet its burden of proving that Mr. Guarnera attempted to subvert the examination process and because I cannot

find any reason, based upon O.A.C. 3745-7-18, that the Director should further withhold Mr. Guarnera's score on the November 7, 2006 Wastewater II Operator certification examination, I cannot find any reason, based upon O.A.C. 3745-7-18, that the Director should further delay the issuance of Mr. Guarnera's Wastewater II Operator Certificate.

RECOMMENDATIONS

1. Based upon the foregoing, the Director should withdraw the October 1, 2007 Proposed Action for Invalidation of David Guarnera's Wastewater II Examination Score.
2. Based upon the foregoing, the Director should issue to Mr. David Guranera a Wastewater II Operator's Certificate.

W. Sam Wilson

W. SAMUEL WILSON, Esq.
Presiding Hearing Officer

12-24-08

Date

DAVID GUARNERA
Case No. 08-OC-02

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