AOPA COMMITTEE
OF THE
NATURAL RESOURCES COMMISSION

April 23, 2014 Meeting Minutes

MEMBERS PRESENT

Jane Ann Stautz, Chair
Doug Grant
R.T. Green
Bob Wright

NATURAL RESOURCES COMMISSION STAFF PRESENT

Stephen Lucas
Sandra Jensen
Jennifer Kane

PARTICIPANTS AND GUESTS PRESENT

Charles Parkinson	Paul Panther	Cameron Clark
Mark O'Hara	Chris Smith	Dan East
Andrew Wells	Steve Hunter	Terry Hyndman
Ihor Boyko	Dave Moss	
Joe Hoage	John Davis	

Call to order and introductions

The Chair, Jane Ann Stautz, called the meeting to order at 1:19 p.m., EDT, on April 23, 2014 in the Gates Room of the Fort Harrison State Park, The Garrison, 6002 North Post Road, Indianapolis, Indiana. With the presence of four members, the Chair observed a quorum. She, R. T. Green, Doug Grant, and Bob Wright introduced themselves.

Consideration and approval of minutes for meeting held on March 18, 2014

Doug Grant moved to approve, as presented, the minutes of the meeting held on March 18, 2014. R. T. Green seconded the motion. Upon a voice vote, the motion carried.

Consideration of objections to "Findings of Fact and Conclusions of Law with Nonfinal Order" by the Administrative Law Judge in *Collins, et al. v. Town of Ogden Dunes and Department of Natural Resources,* Administrative Cause No. 13-195D

The Chair noted the Claimants who filed objections to the Nonfinal Order were not present at today's meeting, but Claimant Charlie Costanza filed on April 21, 2014 a document entitled "Plea in support of objections filed 4-6-14".

Administrative Law Judge, Stephen Lucas, indicated there were multiple Claimants. Two of the Claimants, Jon and Joan Machuca, recently withdrew from the administrative proceeding. "Because the Claimants were not always of one mind, [in] the proceeding before me—and I realize that at this stage it is before the AOPA Committee—I reflected that no Claimant could file a pleading and purport to speak for all Claimants." Lucas said the pleading filed on April 21 and before the AOPA Committee is from one of the Claimants, Charles Costanza. "I have no opinion as to whether he speaks for the other two remaining Claimants or not. Had the [pleading] been before me, I would have reflected to [Costanza] that the filing was not consistent with a prior order. But since it was presented to you, I just leave it where it is."

Lucas said Charles Parkinson, attorney for the Town of Ogden Dunes, and Andrew Wells, attorney for the Department of Natural Resources, were both present. He added the Claimants were not represented by an attorney throughout the proceedings, and none of the Claimants were present before the AOPA Committee for arguments on objections.

The Chair thanked Judge Lucas for the clarifications. "Seeing that we do not have any of the Claimants present today who have raised objections or expressed the desire to raise objections, we do have the written objections" from Costanza. She opened discussions among the AOPA Committee members. The Chair asked the members whether they wished to hear arguments from the two attorneys who were present.

R. T. Green stated, "I'm fine with what we have in the record right now, unless there needs to be something for any clarification that need be addressed."

Andrew Wells stated the administrative law judge's nonfinal order, findings of fact, and conclusions of law were appropriately entered. "The conclusions made on the evidence were reasonable, and no changes would need to be made." But he added there were two points the DNR wished to address.

First, Wells urged Costanza's April 21 pleading, which was "filed 48 hours ago…, is inappropriate, and it shouldn't be considered." In his objections and subsequent filing, Costanza "has completely misrepresented" the testimony of DNR employee, Bob Porch. "Mr. Porch never testified that he didn't follow certain procedures. He didn't testify that he went outside of the statute or didn't comply with what needed to be complied with to issue the permit. That is not true. I felt obligated to point that out."

Second, Wells noted Costanza made allegations as to the Department's unwillingness to produce documents, which "again, is a completely false position". Costanza intervened approximately

one month into the proceeding. "No discovery was ever produced to the Department…. Myself, [Parkinson], and Claimant Collins, we teleconferenced to stipulate evidence into the record. I offered to produce the entire DNR file regarding this permit and any other documentation that [Collins] could think of. But, I specifically said that I would take the whole DNR file. Let's stipulate it into evidence. Let's get it into the record. [Collins] refused to stipulate to that. The Town [of Ogden Dunes] agreed to stipulate to that, but [Collins] refused." Wells said he had to "piecemeal in the parts of the DNR's file during the administrative hearing that were pertinent to the Department's case. Again, that was based on all the witnesses that [the Claimants] called. I didn't have the opportunity to call witnesses because they had called all the witnesses that I was going to call anyway. What I'm getting at is that the presentation that the DNR was not forthcoming with documentations, or trying to hide the ball in any manner, is inappropriate and not a true representation of what occurred." Wells concluded that the Department hoped the AOPA Committee "finds Judge Lucas's order to be appropriate and upholds it."

Charles Parkinson said he is the attorney for the Town of Ogden Dunes. The Town of Ogden Dunes is located in the very north part of Indiana, a Lake Michigan coastal town. The Town is bordered by the Indiana Dunes National Lakeshore, which is operated by the National Park Service. The Town determined about three years ago it would initiate a deer cull. Parkinson said the Town of Ogden Dunes was following the lead set previously by other coastal towns. "Dune Acres is the town that basically set the benchmark for what needs to be demonstrated in cases similar to this case. A town must demonstrate it owned property, and, secondly, that the property was subject to damage from a wild animal, in this case, deer. The common theme here is that we have the National Park. [The Park Service] has recently determined to start [its] own cull, but what the towns have experienced up there is a real problem with deer overpopulation. Unfortunately, this reasoned, studied approach by the [Ogden Dunes] Town Council, as the policy-maker, has met with challenges each of the three years that we have been issued a permit. Each year, the challenges get less and less based on the law at issue, and more and more based on emotion and more and more based on a simple disagreement with policy. I would like to commend Judge Lucas for his handling of each of the three of these cases, and in particular, this last instance, where the Claimants have not been represented by counsel. The litigation has clearly been groundless, frivolous, vexatious, harassing. We've got a term for it in state and federal courts. It's Rule 11. This is bordering on meaningless litigation. Unfortunately, the Town has stood behind its policy and been met at each turn with another groundless procedural challenge. And, really, there is no legal challenge to be made."

Parkinson said he concurred with the characterization by Andrew Wells of the testimony and what it demonstrated. One of the points Costanza raised in his objections is that "perhaps there should have been an initial automatic stay. Now, understand that when the Claimants have been filing these [requests for administrative review] year after year, they have waited until the very last moment to file their objection to the permit. What they have been hoping for is that the Town would sort of voluntarily withdraw or somehow not take action on its permit. This year, once again, they filed at the very last moment, and they expected Judge Lucas to issue an automatic stay." Parkinson said Judge Lucas properly held that when an objection is filed to a permit that is issued pursuant to IC 4-21.5-3-4(a)(2), permits granted for noncommercial fishing or hunting under subsection (e) of that statute, the administrative law judge shall as soon as practicable conduct a preliminary hearing to determine whether the permit should be stayed in

whole or in part. He said the Claimants filed the request for administrative review of the Town of Ogden Dunes's permit on November 14, 2013. A stay hearing was held on November 22, 2013. At the conclusion of the stay hearing, the Town of Ogden Dunes moved to consolidate the hearing on the merits with the stay hearing. Judge Lucas denied the motion but indicated he would take "it up at a later point in time. That did occur, and what the Judge asked for was whether there was any newly discovered evidence. The Claimants basically said they had nothing except for a document that they had received, which was a document that laid out the policy, the way the DNR would handle a review of the permit."

Parkinson urged that after reviewing the evidence presented at the stay hearing, there "can be no question but the policy, in terms of the way it is expressed, was followed. The DNR went out, observed the conditions. These conditions were documented. They were reported up the chain, and the permit was issued in accordance with what the DNR actually saw. The DNR saw damage to property within the [Town of Ogden Dunes]. There is no question but the deer are overpopulated. The neighboring communities have recognized this. The National Park Service finally has implemented its own cull." Parkinson asked the AOPA Committee to affirm the administrative law judge's nonfinal order in all respects. "We see this objection was merely another one of a guerilla tactic that has been used throughout the last three years. We expect no less that an appeal to be filed with the Porter Superior or Circuit Court. At that point in time we intend to ask that the Court impose some form of sanction, because I realize that you, like Judge Lucas, are not able to do that."

Bob Wright moved to approve Judge Lucas's Findings of Fact, Conclusions of Law, and Nonfinal Order, as presented, as the final order of the Natural Resources Commission. R. T. Green seconded the motion.

The Chair then called for a vote to approve the Findings of Fact and Conclusions of Law with Nonfinal Order, as presented by the administrative law judge, as the Findings of Fact and Conclusions of Law with Final Order of the Natural Resources Commission. On a voice vote, the motion passed unanimously.

***Information Item*: Overview of P.L. 72-2014 (HEA 1121) and its application to the AOPA Committee and the Commission as a whole**

Sandra Jensen, Assistant Director of the Division of Hearings, presented this information item. She said House Enrolled Act 1121 (P.L.72-2014), effective upon passage, has provisions that are relevant to the Commission's AOPA Committee and to the full Commission. SECTIONS 1 and 2, amending IC 4-2-7-3 and IC 4-2-7-9 respectively, require the Inspector General to adopt a rule establishing a code of judicial conduct for all state administrative law judges. The Commission at 312 IAC 3-1-2.5, parallel with the Office of Environmental Adjudication, previously adopted a code of judicial conduct for its administrative law judges. The new statutory amendments require the Inspector General to consider the Commission and OEA rules when developing the statewide code of judicial conduct. P.L. 72-2014 does not prohibit an agency from having its own code of judicial conduct, but the agency's code of judicial conduct must be at least as

restrictive as the code that is developed by the Inspector General. Jensen observed 312 IAC 3-1-2.5 may need to be amended when new standards are approved by the Inspector General.

The Chair asked, "Do you foresee anything significant at this time…, or any indication what it might be?" Jensen responded she had not heard the intentions of the Inspector General pertaining to a rule proposal.

Jensen noted that SECTION 3 of P.L. 72 adds IC 4-21.5-3-8.5, which expressly authorizes what the Commission's and other state administrative law judges have been doing "on a periodic basis, for a long time…, sharing services amongst other agencies. We do this primarily with the Office of Environmental Adjudication," but we have also partnered with other state agencies. For examples, she has served as an administrative law judge for the Civil Rights Commission, and Steve Lucas has served as an administrative law judge for the State Employees' Appeals Commission.

Jensen said the statutory amendments also require an administrative law judge to have some expertise in the subject matter that is under consideration. IC 4-21.5-3-8.5(c) requires that the agency post on its website the administrative law judge's information such as name, salary, and professional experience. This requirement may have been enacted in order to facilitate governmental agencies that are looking for an administrative law judge with the appropriate professional background in considering a particular subject matter.

The Chair said she understood the reason behind posting professional experience and qualifications of the administrative law judge. "If there was going to be some type of cost sharing or rebilling…, at least you would understand whether it would be an hourly rate or project or case rate. That would make sense, but individual salary…, you would think there is some discretion or confidentiality there." Jensen responded all state employee salaries are presently available for public view and are searchable on the website of the State Department of Personnel.

Jensen then observed the standards in IC 4-21.5-3-8.5 correlate with the Commission's nonrule policy document, Information Bulletin #73, published at 20140402-IR-312140099NRA in the Indiana *Register*. The bulletin was approved at the Commission's March 18, 2014 meeting. Information Bulletin #73 authorized an employee of the Commission's Division of Hearings to serve as mediator, administrative law judge, hearing officer, or in a similar capacity to assist with dispute resolution on behalf of another state agency or a local governmental agency. IC 4-21.5-3-8.5 only applies to administrative law judge services and not to other dispute resolution services. There is an exemption within the "ghost employment" statute, or IC 35-44.1-1-3, which allows for beneficial services, but the beneficial services can only be provided under a written policy. The written policy can be the mechanism to implement the new authority under IC 4-21.5-3-8.5.

Jensen said amendments to IC 4-21.5-3-9(a)(3), SECTION 4 of P.L. 72, also require a person acting as an administrative law judge under AOPA to be an attorney licensed in Indiana. A state employee already serving as an administrative law judge before January 1, 2014, without being a licensed attorney, was grandfathered and may continue to serve.

Jensen said amendments to IC 4-21.5-3-9(g) pertain to the prohibition on *ex parte* communications. The amendments specifically apply the prohibition on *ex parte* communications to anyone who might serve as a member of the ultimate authority. "The prohibition would apply to the members of this Committee. The way the AOPA Committee was developed as a delegated function of the Commission, there are provisions within that delegation that allow for the AOPA Committee to lean on someone from the Commission for particular expertise in an area. If there are members [of the AOPA Committee] with conflicts with a particular topic, other members of the Commission could serve in the ultimate authority function…. This probably applies to everyone on the Commission, with the exception of the Director of the Department, who was disqualified from serving on the AOPA Committee" because of the Director's need to consult with his attorneys and agency professionals. Jensen said all *ex parte* communication prohibitions in IC 4-21.5 are now expressly applicable to the ultimate authority. A violation of the prohibition on *ex parte* communications can subject a person to prosecution for a Class A misdemeanor. "It's something to take very, very seriously."

Jensen reported SECTION 5 of P.L. 72 amended IC 4-21.5-3-24 to authorize the dismissal of an action by a person who does not demonstrate the statutory requirements of IC 4-21.5-3-7(a). Section 7(a) sets forth the minimum requirements of a petition for administrative review. The administrative law judges in the Division of Hearings have considered the ability to dismiss a deficient petition was implicit to AOPA, and this amendment makes the ability explicit.

Jensen added that SECTION 6 of P.L. 72 clarified an ambiguity in AOPA that had existed since its 1986 enactment. Although the clarification is not unique to the relationship between the Commission and the DNR, it has particular application to us. *Peabody Coal Co. v. Ind. DNR*, 664 N.E.2d 1171 (1996) decided the DNR could take judicial review of an adverse decision when an administrative law judge was the "ultimate authority" under AOPA but could not otherwise seek judicial review. Among several persons identified in IC 4-21.5-5-3 as having standing was a person to whom an "agency action" was specifically directed. "Agency action" is a defined term in AOPA and refers to the order issued by the agency which precipitates administrative review—in our structure generally a permit, status determination, sanction, or similar order by the DNR. SECTION 6 clarifies that any person who is a party to the "final agency action", either the ALJ or AOPA Committee depending on the particular statute or rule, has standing. The amendment underlines the DNR's ability to seek judicial review of a final agency decision, made either by the ALJ or the AOPA Committee, by stating that the agency "whose order was under review" in the administrative proceeding has standing. SECTION 6 "makes it very clear now that the Department can, in fact, seek judicial review."

Jensen concluded by saying SECTION 7 of P.L. 72 clarified certain terms and other requirements governing statutorily-required agency online rule-making dockets. Jennifer Kane manages the Commission's online rule-making dockets. "The changes are generally consistent with our current practices and may allow modest simplification to entries."

The Chair thanked Sandra Jensen for the presentation. She recommended that a brief presentation of the significance of P.L. 72-2014 also be offered at the next Commission meeting. In particular, the presentation should discuss changes pertaining to *ex parte* communications,

including the possibility a violation could be enforced as a Class A misdemeanor. "It may require a little explanation what constitutes *ex parte* communications and how that might occur, just as some background for some who are not attorneys or do not have legal background." She noted that there have been instances where the AOPA Committee has asked for expertise from a Commission member to sit in on and hear matters before the AOPA Committee. "Generally, that has been the Chairman."

Jensen said she would tender an information item for the May 13 Commission meeting, including copies of the *ex parte* communication statutory section and the relevant section of the criminal code.

The Chair reflected, "I think that will be helpful for folks to have that and for their reference."

Jane Ann Stautz commended the Division of Hearings "for their posting and management of the website and the availability of the materials, because as I reviewed [P.L. 72], I really felt we are already complying with this. There is some clarification here, but I do appreciate the effort in keeping things posted and maintained."

Consideration of objections to "Findings of Fact and Conclusions of Law with Nonfinal Order" by the Administrative Law Judge in *Moss v. Department of Natural Resources*, Administrative Cause No. 13-134L

The Chair explained that before the AOPA Committee are the ALJ's "Findings of Fact and Conclusions of Law with a Nonfinal Order", DNR's Objections to them, and a submission by the Judge Jensen of a possible revision of Finding 80 and related Footnote #3, in the matter of *Moss v. Department of Natural Resources*.

Ihor Boyko, Counsel for the Department of Natural Resources, urged that Judge Jensen should not have changed the original termination from employment to a suspension. There are three reasons to support the Department's contention. "More from a practical standpoint, once a suspension goes beyond a certain period of time, it kind of, *de facto*, becomes a termination. In this case, we are at the nine month level as far as the suspension, if it is a suspension." In most instances, the upper range of suspensions is approximately 20 to 30 days. Boyko cited a recent judicial disciplinary case involving a Marion County Judge, Kimberly Brown, where Justice Rucker, in a concurring opinion, quoted from another disciplinary case, which stated that suspension without pay for more than a few weeks, at least in the case of a judge, is tantamount to a forced resignation. Boyko urged the Department's original termination of Conservation Officer David Moss should be reinstated.

Boyko urged the totality of the evidence established an overall pattern of conduct that "calls into serious question Moss's integrity and honesty." There were some minor disciplinary issues in 2012, but in January of 2013 there was the first internal investigation, which resulted in four formal charges ("Ops#1"). All four charges were upheld by Judge Jensen as reflected in Finding 142. The four formal charges included: (1) failure to timely report to a superior that Moss was being investigated for an allegation unrelated to Moss's state employment; (2) providing details of the DNR investigation to an unauthorized party after signing a confidentiality agreement; (3)

being untruthful to Captain Matthews about revealing information of the ongoing investigation to another party; and, (4) conduct unbecoming of an officer. Boyko noted that in Finding 48 Judge Jensen found the charges enumerated in (2) and (3) were not excusable.

Boyko explained there was a second internal investigation involving Claimant Moss ("OPS#2"), which occurred several months after OPS#1. Judge Jensen affirmed the charge regarding the Claimant's deception about his father's cultivation of marijuana, which "standing by itself, is extremely serious because there is an applicable rule found at 312 IAC 4-6-4 that requires an Indiana conservation officer to truthfully answer questions from a superior regarding his employment."

Boyko said the third reason the Department's termination of Moss should be reinstated is that "five upper level DNR professional Law Enforcement personnel who comprised the Disciplinary Action Board unanimously recommended" Moss's termination "after a very careful review of the facts in evidence". Major Terry Hyndman facilitated the Board and "asked each officer who was on the Board, independently and without them being together, what their thoughts were as far as the discipline". Attached to the DNR's Objections was Administrative Hearing Respondent DNR Exhibit 17, which lists the thoughts of each Board member. "The Board members had very legitimate concerns that [Moss's] lack of honesty would undermine [Moss's] effectiveness as a law enforcement officer since [Moss's] credibility would be at issue based on U.S. Supreme Court decisions such as *Brady* and *Giglio*. Boyko noted that he attached to the Department's Objections a short article that "succinctly discusses those issues and problems from the standpoint of a law enforcement officer who has credibility problems". If Moss is returned to duty "his effectiveness as an Indiana Conservation Officer is going to be severely limited and undermined, and his credibility issues will have to be disclosed. This will make it extremely difficult for him to work with county prosecutors and other law enforcement officials."

Boyko said that Lieutenant Steve Hunter reviewed Moss's record at a pre-deprivation hearing held on July 2013. DNR Director Cameron Clark also reviewed the recommendations and approved Moss's termination from employment, which was effective July 18, 2013. "I would emphasize…that termination of a conservation officer by the Director, including Claimant Moss's termination here, is not a decision that Director Clark or any other director undertakes lightly or makes without a very careful review of the facts given that there is a great outlay of resources that are required to properly train an Indiana conservation officer in the first place."

Boyko summarized. Moss's record and the investigation were reviewed on at least three separate levels and occasions in the DNR by a total of seven individuals, including the DNR Director, with a conclusion each time that termination from employment was the appropriate sanction. "The DNR believes the termination from employment continues the appropriate sanction based on the totality of circumstances and the extremely serious misconduct, even when the charges [Judge Jensen] did not uphold are excluded from consideration." Boyko cited *DNR v. Cobb* which found an "administrative law judge should not sit as a super personnel department and re-examine an entity's business decisions. Therefore, we feel that the termination that was originally imposed should be reinstated."

Boyko said the Department accepted Judge Jensen's proposed modifications to Finding 80, which addresses the issue of the shotgun registration. The Department objected, though, to her determinations regarding Moss's knowledge about his father's right to possess firearms. Moss's father was convicted of a drug offense, dealing in cocaine, which categorizes him as a serious and violent felon under Indiana law and prohibited Moss's father from possessing a firearm. "I should stress that [Moss] was not a novice when it came to firearms…. He served in the military before becoming an Indiana Conservation Officer, and [Moss] also purchased a firearm as a gift for his father when [Moss] was 21." Moss should have been familiar with the laws regarding possession of firearms. "We feel that there was an error made by [Judge Jensen] in Finding 96 and Finding 147, that there was no proof that [Moss] knew his father's felony conviction placed him in the category of 'serious, violent felon' that prohibited the possession of firearms". Findings 96 and 147 conflicted with Finding 148 where Judge Jensen found Moss's ignorance with respect to the lawfulness of his father's possession of firearms was unacceptable. He urged the findings do not address the Federal aspect of firearms possession. 18 U.S.C § 922(b)(1) prohibits a person, convicted of a crime punishable by imprisonment exceeding a year, from possessing a firearm or ammunition. "The evidence is…incomplete and the findings are incomplete from a standpoint [Judge Jensen] did not address" the relevance of the Federal law.

Boyko said the DNR objected to Findings 134 through 142 where Judge Jensen "basically characterizes the second investigation as being biased, not objective, and untrustworthy…and designed for the specific purpose of persecution and not seeking the truth". Judge Jensen's use of the word "persecution" implies that the DNR "singled out [Moss] and was pursing some sort of vendetta" against him. Judge Jensen's Findings 11 and 64 confirmed that OPS#2 was a result of a complaint received outside of the Department from the Bartholomew County Sheriff's Department. Captain Zach Matthews conducted OPS#1 and OPS#2 and is "a very experienced and highly regarded investigator". Matthews used the Reid Technique when questioning Moss during the investigation. The technique is recognized as the standard interrogation method, and Indiana courts are familiar with it. "There was nothing unprofessional or improper about the investigation, at least the second investigation, since it was routine police work. [Judge Jensen's] negative characterization of its investigations was prejudicial."

Boyko summarized that there has been no showing the decision-makers in this matter did anything improper. Moss was represented by counsel at various stages of the Department proceedings. The DNR did not object to Finding 155, which requires Moss to undergo a drug and alcohol evaluation, but his client requested clarification, if Moss is returned to duty status, as to the time-frame in which Moss must complete the evaluation.

The Chair then opened discussion between Committee members.

Bob Wright observed the DNR seemed to consider the shotgun registration a significant issue.

Boyko responded the DNR objected to the findings and conclusions of law regarding the shotgun registration. But with Judge Jensen's proposed revision to Finding 80 and associated Footnote 3, the DNR no longer had an objection regarding interpretation of the gun possession regulations.

Mark O'Hara, attorney for David Moss, then presented a response to the DNR objections. He urged the Department was asking the AOPA Committee to "throw out" Judge Jensen's interpretation, review and oversight of the evidence. "She is the one who listened to hours upon hours of tapes, probably four or five hours at a minimum of interviews. She could hear the nature of the questioning…. It's interesting to see the demeanor which is coming across. [Judge Jensen] is correct in saying she questions the unbiased nature of the way the investigations occurred." If you listen to the evidence regarding OPS#2, "they were out to get him…. In the audio, if you listen to it carefully, the questioning between Officer Matthews and another officer down in Columbus is 'Are you going to get him this time?' And the answer is, 'yes'".

Boyko said, "I object to that because that was never in the record."

The Chair noted Department's objection.

O'Hara said the DNR was asking this Committee to reweigh the evidence. The Department depicted the case against Officer Moss "in the worst scenario. The evidence doesn't depict it as bad as the [DNR] points it out." OPS#1 involved two "write-ups" from 2012 and was concluded "with no further carry over, and there were no formal disciplinary actions." The OPS#1 investigation concluded four months before OPS#2. "If the investigation is done for four months, and you don't do anything about it…, do you just carry it over until way down the road and with no statute of limitations? Do you wait until something else comes along later?" OPS#1 by itself probably would not have resulted in any discipline. OPS#2 was initiated as a result of a burglary at Moss's father's residence in Bartholomew County. "At which point in time, the issue of guns comes up in dad's home, and dad, to this day, a year plus later, still has not been charged" by the Bartholomew County prosecutor as a violent offender possessing firearms.

The Chair stated, "That matter is not before us today."

O'Hara responded the DNR was "saying that Officer Moss should have made that determination when in reality other law enforcement officials since then have still not made that same determination. So, it's not clear on its face…. Prosecutors and judges still question as to the violent offender laws, which did not come into place until the mid '90s…." Moss's "dad was convicted in the early '80s when Officer Moss was six years old. The question is what a six-year-old should remember from his dad's convictions that would carry forward to when he's a Conservation Officer in his late 20s and early 30s. Our answer is that you are placing a burden on [Moss] to go back and retroactively apply a law that nobody really knows. In fact, I think [Judge Jensen] stated that the [DNR] failed to show that [Moss] knew or should have known how that law would have prevented his dad from having a gun or even touching a gun basically."

O'Hara said that in OPS#1, Moss was charged with conduct unbecoming of an officer. As Judge Jensen found, "There was no indication that any of his intoxication got to the level of public or that he became an embarrassment. He wasn't in officer clothes or driving an officer's vehicle. No one in public knew he was a Conservation Officer." The allegation regarding an incident unrelated to state employment was not substantiated. "Yes, [Moss] took a phone call…when he was being questioned by Officer Matthews" regarding the unrelated allegation. "Was that a clear violation of the confidentiality? Potentially, yes." The rules governing these types of

investigations or interdisciplinary proceedings do not provide for assistance of counsel "until the time before an administrative law judge. Even at the post-termination review hearing, I was allowed to sit in the room, but I could not participate in that hearing. The statement that [Moss] was represented by counsel throughout the process is incorrect."

O'Hara urged Judge Jensen's Findings of Fact and Conclusions of Law are "very well thought out, very well presented, and based on the evidence that was presented, and should be upheld." The DNR argues a nine month suspension is "very terrible. Well, the result is that's just going backwards in time to procedurally get to where we were in order for that order to take place. It took nine months. That is not Officer Moss's fault. That's the nature of the proceedings."

O'Hara said the DNR had not shown that as a result of the passing of nine months, there are no openings in the DNR for Officer Moss. The DNR had not shown it was prejudiced by the passing of nine months. The Department is "just saying nine months is a long time for anyone to be suspended." The hardship has been on Officer Moss. "There is no hardship on the [DNR] to reinstate Officer Moss at this point in time." He concluded and asked that the AOPA Committee approve the Findings of Fact, Conclusions of Law and Nonfinal Order as the final order of the Natural Resources Commission.

The Chair then opened up the floor for questions from the Committee members.

Wright asked regarding what is the AOPA Committee's standard of review of Judge Jensen's decision.

O'Hara responded the review by this AOPA Committee is similar to a trial court in relation to an appellate court. Judge Jensen reviewed and weighed the evidence. Unless the AOPA Committee finds an abuse of discretion or something clearly erroneous, the "trial court or in this case [Judge Jensen's] order should stand. The [DNR] is trying to make extra-judicial arguments. If you do this, this will occur. Fact is, it is based on what was presented, and [Judge Jensen's] weighing of that evidence and determination of the credibility of witnesses in front of her should not be second guessed by this panel."

Boyko responded the AOPA Committee's standard of review is that the Committee has to find that there were no errors made by Judge Jensen, and there is substantial evidence to support the nonfinal order. O'Hara's characterization was fair that the administrative law judge acts as a trial court, and the AOPA Committee sits as the appellate court.

The Chair said, "Just for clarification, as members of the Committee, that upon our review and reading, as well as hearing testimony before us, if we do believe that there is a discrepancy for a need for modification of a finding based on testimony or information presented, then we do have that opportunity to correct that or modify it, for example, with regard to the proposed modification as it relates to Finding 80."

R. T. Green asked the attorneys if Finding 132 was acceptable to use "more like a combination finding of fact and conclusion of law."

O'Hara responded, "That is the law. That is the standard of the [the administrative law judges]. That is their duty in reviewing and having a case come in front of them…. That statement is clearly what the law is, and there is no question about it. That's her job."

Boyko responded Finding 132 indicates the administrative law judge has to make findings based on evidence presented. "So, if you present evidence and the [administrative law judge] ignores that evidence, it is my opinion that the [administrative law judge] has not considered the evidence and hasn't independently weighed that evidence."

Green continued, "Neither of you take exception" to Finding 132. "So that is something from which we springboard forth on this review, right?"

The Chair agreed. "That is consistent with other matters before us and has been referenced in other proceedings as well as case law for us."

The Chair asked the attorneys whether they were comfortable with Finding 155 under the Nonfinal Order regarding Moss undergoing drug and alcohol evaluation.

O'Hara responded Moss has already completed the evaluation through the Veterans Affairs, and the paperwork could be provided to the DNR.

The Chair asked whether there was rebuttal from either Counsel.

Boyko stated that O'Hara in his arguments focused on Moss's father's criminal conviction. But the focus of the DNR's investigation was of Moss. "In fact, [Moss] was given the *Garrity* warning, which means [Moss] is required to truthfully answer all of the questions. If [Moss] provides information about his own criminal activity, [Moss] can't be prosecuted based on *Garrity.*" Even though Moss was six years old when his father was convicted as a serious felon, Moss "is not six years old anymore. It is his job to know what a serious, convicted violent felon is…. If he encounters someone in the field, and they tell them they have a conviction for so and so, [Moss] has to make a decision whether or not they have a right to possess a firearm and be hunting…. It is [Moss's] job as a conservation officer to know those laws, both the state and federal aspect of the laws." There is prejudice against the DNR if Moss is reinstated. "Based on the statements that [Moss] made that were shown to be false, [Moss] can't be an effective police officer at this point. I don't know if there is a position we can put [Moss] in at this point."

Wright said he understood Boyko's statement regarding Moss's ability to be an effective Conservation Officer. "But do you believe that [Moss] should suffer the consequences of that, if, in fact, your charges were not of the magnitude that they originally thought to be, and [Moss] should not have been suspended. But during the process of [Moss's] suspension his truthfulness became an issue, and now he has this problem and you have this problem if he continues in the Department?"

Boyko noted that OPS#1, which involved untruthfulness on Moss's part, was upheld by Judge Jensen. Moss "was untruthful to Captain Matthews about talking to somebody about the investigation so that was established."

Wright said, "I see that there are a lot of problems with Mr. Moss, but I just think that your procedure was not good. You start out with" an allegation unrelated to Moss's state employment, "which, wow, I see that and think this is horrible. The next thing you are arguing about whether or not he is being truthful as to some event that occurred when he was six years old or truthful with the polygraph office examiner. I don't even know—I don't think any of us knows—how the polygraph ever came into this situation. Is this something that [Moss] agreed to, or is it something [Moss] automatically has to do because he is an employee of the state?"

Boyko responded DNR did not investigate the allegation unrelated to Moss's state employment.

Wright said an unproven allegation of the type that impugns a person's moral conduct and character is "still on [Moss's] record." Wright offered an analogy. "It's like saying that you were accused of rape, but they found there was nothing to it. Well, I think that is going to follow you for awhile." The unproven allegation "is going to follow Moss for awhile."

Boyko responded Moss was investigated and never charged.

The Chair said, "Right. So, let's draw back to the charges that were brought. If I am reading and hearing correctly, the OPS#1 investigation and those charges, [Judge Jensen] found to be upheld, correct? It's really the OPS#2 charges and counts there that are in question as well, right?"

Boyko answered in the affirmative.

Wright said he understood, but the practicality of that is Moss was still accused. "If [Moss] was on trial, could that be asked of [Moss] to impeach" him?

O'Hara noted Moss was not formally charged but only investigated. Whether Moss could be reinstated as a Conservation Officer, *Garrity* and *Giglio* do not require the fact that what happened in a disciplinary in a polygraph where there is difference in opinion. "It has never been legally concluded that [Moss] lied." The use of polygraph results "would be a quantum leap on the relevancy on what happened in an interdisciplinary proceeding." O'Hara asked the AOPA Committee to review the seriousness of what was alleged in OPS#1. Moss took a telephone call during the investigation of the unrelated allegation. "When [Moss] came back and was questioned—exactly who you were talking to and about what—[Moss] basically did not at first fully disclose to Captain Matthews. It's only because [Moss] was truthful with Captain Matthews that Captain Matthews knew who he talked to and about what…. If [Moss] continued to be deceptive all the way through Captain Matthews would never have known who he was talking to and about what." The OPS#2 issue comes down to what Moss should have known and when Moss should have known it, and what Moss should have done about it once Moss knew it. "I think the ruling is fair based on what [Moss] knew, when [Moss] should have known it, and how [Moss] should have applied that knowledge." Moss has been punished. "Nine months without pay, without that job, is not a slap on the wrist. It's a significant punishment. [Moss] has learned, and the Department will not be prejudiced" by Moss's reinstatement.

The Chair stated, "We take our responsibilities here very seriously, particularly in a disciplinary action that has resulted in suspension and could lead to a possible termination of employment.

As I review the information before us, it is troubling with regard to a Conservation Officer in a position of authority. I agree with the fact that [a Conservation Officer] should know the law, particularly around firearms and possession of guns, as well as the cultivation of marijuana." Looking from the standpoint as a member of the AOPA Committee and the Natural Resources Commission, and the integrity and reputation of the DNR's conservation officer, "I do want to protect that and have that trust in our authorities."

The Chair reflected the AOPA Committee has for consideration Judge Jensen's Findings of Fact, Conclusions of Law, and Nonfinal Order, including a modification proposed to Finding 80. She understood both parties agreed to and accepted the modification to Finding 80. She then opened the floor for further discussion.

Green suggested based on Finding 132, "It's not our place, I don't think, in these cases to rehash what's already been done at a lower level, if you will. If Judge Jensen's findings and conclusions are within the ballpark, and there is no error in law and concluding the way she did, then I think it is our job to approve, that is, to accept [Judge Jensen's] findings, to accept her conclusions and move forward. It may well be that at some point in time that is not the law, but I feel comfortable that is the law. That's the way we conduct business, and, in fact, about 30 days ago we did the same in a pier case. I think for me, and for this Commission to do otherwise, would be be inconsistent with other cases we have decided."

Green emphasized he also is "committed to the quality of law enforcement that we see every day in Indiana with respect to the difficult job that Conservation Officers do. I don't want you to take what I say and what I do, and would hope you don't take what Judge Jensen has done, in any way to show that that's tarnish on Conservation Officers. That's not it at all. I think it has as much to do with consistency of what we do as well as respecting the process itself."

Green then moved to adopt the Findings of Fact, Conclusions of Law as proposed and amended with respect to Finding 80 as the Final Order of the Natural Resources Commission. Doug Grant seconded the motion.

The Chair called for further discussion. She noted the DNR objected to the use of certain terminology used in the Nonfinal Order. "I believe it would be appropriate to strike reference to the use of the term 'persecution' in Finding 137."

Wright agreed with Jane Stautz's suggested modification.

The Chair continued, "I am one that I try to stick as close to the facts particularly in these types of proceedings versus personal opinion." She then recommended as an amendment to the motion to strike the reference to the use of "persecution" in Finding 137.

R. T. Green said he would consider striking the word "persecution" a friendly amendment and would concur. Doug Grant also concurred.

Green then moved to adopt the Findings of Fact, Conclusions of Law as proposed and amended with respect to Finding 80 and Finding 137 as the Final Order of the Natural Resources Commission. Doug Grant seconded the motion.

The Chair noted, "It is a challenging set of circumstances." She then called for a vote on the motion to approve the Findings of Facts, Conclusions of Law, and Nonfinal Order, as amended by modifications to Finding 80 and striking reference to the use of the term "persecution" in Finding 137. R.T. Green, Doug Grant, and Robert Wright voted in favor of the motion. Jane Stautz voted against the motion. The Chair found the motion carried.

Boyko reminded the AOPA Committee that the Nonfinal Order required reinstatement of Moss to duty status by April 18, 2014. The DNR included with its objections a request for stay of the reinstatement. "I think it would be the Department's intention to appeal this further, so the stay technically ends today from my understanding. We would move that the stay be extended pending appeal."

The Chair requested clarification regarding the procedure for considering a stay.

Judge Jensen indicated she was not aware if the AOPA Committee had addressed a request for stay. But "I would think the AOPA Committee is in a position to address the stay request."

The Chair said the AOPA Committee has before it a request by the Department to stay reinstatement pending appeal. The AOPA Committee now has a final order that would call for reinstatement of Moss to duty status.

O'Hara reflected, "I think it's sort of interesting that the [DNR] is saying that nine months suspension is really bad, but we want [Moss] to be suspended longer now. We would ask that obviously as a final order, there is no basis in it. It was easy to stay from April 18 to April 23, 2014…. [Moss] was supposed to report back to work last week. [Judge Jensen] stayed it for five days until today. We're talking about an appeal now. At this point in time, it could be six months or more in length." He urged that if there is a stay, the suspension should be with pay.

Boyko said the DNR's view is the stay would continue at most 30 more days until a petition for judicial review is filed. A court would then have jurisdiction to consider a stay request. The AOPA Committee would not have authority to grant a stay indefinitely.

The Chair reflected, "I agree."

Judge Jensen stated that IC 4-21.5 authorizes the AOPA Committee to modify a final order for up to 30 days. "After that 30-day window, there would be no recourse. There would have to be a definitive end, and it would need to be within that 30-day window."

The Chair then asked the Department whether it is requesting a stay without pay.

Boyko answered in the affirmative.

Green indicated he would move to approve a stay of reinstatement of Moss but with pay.

Grant also indicated he would support a stay of reinstatement of Moss to duty status with pay.

Wright said, "If we had the authority to do what we did, I think that is the legal repercussions of it."

The Chair then entertained a motion as it relates to the request for stay pending appeal.

R. T. Green moved to stay the reinstatement of David Moss to duty status, with pay, with the stay in effect not to exceed 30 days. Bob Wright seconded the motion.

The Chair then asked for further discussion. Hearing none, she called for a voice vote on Green's motion. All members voted in favor of the motion. The motion carried.

The Chair reflected, "The stay is granted with pay effective as of today for up to 30 days."

Adjournment

Doug Grant moved to adjourn the meeting. Robert Wright seconded the motion. The motion was approved and the meeting adjourned at approximately 4:15 pm., EDT.