STATE OF INDIANA COUNTY OF HUNTINGTON PHIL PASKO FARMS, INC.; JOHN FREDS; PINKERTON FARMS, INC., DANIEL PINKERTON, DK FARMS, INC.; KRATZER FARMS, INC.; GARY KRATZER; CALEY FARMS, INC.; CALEY BROS FARMS, INC.; SELDOM REST FARMS OF HUNTINGTON, INC.; AND KRATZER FAMILY FARMS, INC., Appellants and Petitioners Below, vs. INDIANA GRAIN BUYERS AND WAREHOUSE LICSENING AGENCY, Respondent.	HUNTINGTON SUPERIOR COURT CAUSE NO. 35D01-2210-PL-000629

ORDER REVERSING ADMINISTRATIVE LAW JUDGE'S DECISION

The consolidated Petitioners and Indiana Grain Buyers and Warehouse Licensing Agency ("Agency") submitted briefs regarding this request for judicial review and presented argument on January 8, 2024. The Court, being duly advised, now sets aside the agency action and remands the case to the agency for further proceedings using December 31, 2018 as the "failure date" for Petitioners' claims related to Salamonie Mills, Inc. ("SMI").

FINDINGS OF FACT

1. This case comes to the Court by farmers (the Petitioners) who assert they were wrongly excluded from reimbursement from the Indiana Grain Indemnity Program.[1] The Program is a statutory creation involving two entities: (1) the Indiana Grain Buyers and Warehouse Licensing Agency (the "Agency"), which licenses grain buyers and

[1] The Indiana Grain Indemnity Program website is: https://www.in.gov/isda/divisions/indiana-grain-buyers/grain-indemnity-corporation/

warehouses that meet certain financial requirements; and (2) the Indiana Grain Indemnity Corporation ("IGIC"), which reimburses farmers for grain out of the Indiana Grain Indemnity Fund ("Fund") when a licensed grain buyer "fails" and the farmer is unpaid. I.C. 26-4-1-1 *et seq.* Farmers like the Petitioners pay a small percentage on grain marketed in Indiana, and these payments create the Fund for use when a licensed grain elevator fails.

2. The Agency licensed SMI as a grain buyer for years, from at least 2012 through 2020. Petitioners delivered grain to SMI's multiple locations in northeast Indiana.

3. At all relative times, Indiana law required Agency-licensed grain buyers and warehouses to maintain a current asset to liability ratio of 1:1 and a minimum positive net worth of at least $100,000. I.C. § 26-3-7-16(a)(2017).

4. By December 31, 2018, SMI's net worth was negative $6,607,120 and SMI showed a net loss of $1,053,563. (OALP_841.) SMI's accountants indicated to the Agency that SMI had a going concern uncertainty. (OALP_837-38, 1268.) The financial statement also showed SMI was not in compliance with its bank loan covenants. (OALP_837-38, 1266.) The Agency audited SMI but did not consider all debts, making the audit incomplete. (OALP_3651.) On September 24, 2018, the Agency concluded SMI did not have the required amount of grain on hand but allowed it to continue operating. (OALP_842.)

5. In 2019, SMI were found to have insufficient funds for several checks to farmers. (OALP_841, 3462-74, 3528.) SMI's net worth decreased further to *negative* $10,217,253. (OALP_841.) SMI showed a net loss in 2019 of $3,489,083. (OALP_3508.) That year, on several instances, Agency employees internally flagged SMI as a "problem license" that was in "trouble." (OALP_131, 380-81, 442-444, 639-40, 646-49, 837, 844, 3458, 3461.)

6. In December 2019, the Agency recognized SMI had financial problem and began reviewing its financial information on SMI. (OALP_719.)

7. On January 15, 2020, SMI defaulted on two loans with First Farmers Bank & Trust ("FFBT"). (OALP_841, 845.) On January 20, 2020, FFBT informed the Agency that the bank might not renew SMI's operating loan. (OALP_722, 842.)

8. On February 18, 2020, the Agency started an audit of SMI. (OALP_727, 842.) The Agency completed the audit on February 24, 2020, and notified SMI of multiple statutory violations, including the fact that SMI's net worth was negative $11,768,264. (*Id.* at 727, 842, 2740, 2987.) The Agency concluded SMI was likely unable to financially satisfy fully all of the obligations it owed to claimants. (OALP_842.)

9. On March 3, 2020, the Agency suspended SMI's license for 20 days pursuant to I.C. § 26-3-7-17.1(e). (OALP_728, 843.)

10. The Agency held a hearing on March 19, 2020 with SMI. (OALP 729, 843.) The hearing was a "Notice of Suspension of License Hearing" pursuant to I.C. § 26-3-7-17.1. (OALP_769.) The Agency did not notify any farmers or bond companies of the hearing. (OALP_506-07, 518-19, 844.) Only SMI, the Agency, and FFBT's counsel attended this meeting. (OALP_3352, 3355.)

11. On March 20, 2020, the Agency suspended SMI's license again. (OALP_732.)

12. SMI surrendered its license on April 24, 2020. (OALP_734-35, 840.)

13. The Agency conducted claims hearings in August 2020.

14. The Director first considered using April 24, 2020 as a "failure date" for SMI, but admitted he could have used September 2019 or December 31, 2019 based on SMI's finances. (OALP_513, 539-43, 735, 739-40, 840.)

15. On October 26, 2020, the Director issued the Agency's final findings and identified a "failure date" of March 20, 2020. (OALP_843.) Petitioners timely appealed to the Office of Administrative Law Proceedings ("OALP"), arguing the Agency's use of March 20, 2020 as the failure date was arbitrary, as SMI had failed earlier.

16. Both sides cross-moved for summary judgment before the OALP. Petitioners argued SMI had failed as early as December 31, 2018, so that should have been used as the failure date. The Agency argued March 20, 2020 was the correct failure date because the Director had great discretion to decide the failure date, and that is what he picked.

17. OALP denied the cross-motions for summary judgment, adopted neither side's position, and instead held the "failure date" was tied to when the Agency held a "shortage hearing" as part of the claims process and/or the date the Director entered a preliminary determination that a licensee failed to meet its legal obligations. (OALP_910-11.) OALP's approach was new and was not used or suggested by the Agency or Petitioners.

18. OALP held a final hearing and ruled in favor of the Agency, noting that while the Agency did not actually hold a shortage hearing or enter a preliminary determination, the Agency's actions came close enough.[2]

19. OALP affirmed the Agency's decision to use March 20 as the failure.

CONCLUSIONS OF LAW

Standard of Review

[2] The OALP erred by refusing to hear evidence from Petitioners or allow them to make a full offer of proof regarding how the Agency treated other licensees in similar financial condition and the arbitrariness of the Agency's decision. Due process and the Administrative Orders and Procedures Act require more. *See* I.C. § 4-21.5-3-25.

1. The Court shall grant relief to Petitioners if they were prejudiced by an Agency action that is:

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; or (5) unsupported by substantial evidence.

I.C. § 4-21.5-5-14(d).

2. The interpretation of a statute presents a question of law. *Ind. BMV v. Douglass*, 135 N.E.3d 598, 602 (Ind. Ct. App. 2019). If the language of a statute is clear and unambiguous, it is not subject to judicial interpretation. *Id.* If the language is susceptible to more than one reasonable construction, the Court must construe the statute in accordance with legislative intent. *Id.* We presume the legislature intended for statutory language to be applied in a logical manner consistent with the statute's underlying policy and goals. *Sears v. Ind. Grain Buyers & Warehouse Lic. Agency*, 117 N.E.3d 588, 595 (Ind. Ct. App. 2018).

3. "Although an appellate court grants deference to an administrative agency's findings of fact, no such deference is accorded to its conclusions of law." *Walker v. State Bd. of Dentistry*, 5 N.E.3d 445, 448 (Ind. Ct. App. 2014). An interpretation of a statute by an administrative agency charged with the duty of enforcing the statute is entitled to great weight unless this interpretation would be inconsistent with the statute itself. *M.A. v. Rev. Bd. of Indiana Dept. of Workforce Dev.*, 157 N.E.3d 536, 541 (Ind. Ct. App. 2020).

4. An agency's incorrect interpretation of a statute is entitled to no weight. If an agency misconstrues a statute, there is no reasonable basis for the agency's action and the Court must reverse the agency's action as being arbitrary and capricious. *Am. Senior Comm. v. Ind. Fam. & Soc. Servs. Admin.*, 206 N.E.3d 495, 499–500 (Ind. Ct. App. 2023).

5. Administrative decisions must be based on ascertainable standards in order to be *fair* and *consistent* rather than arbitrary and capricious. *Moriarity v. Indiana DNR.*, 113 N.E.3d 614, 621 (Ind. 2019).

6. While inconsistent prior actions alone are not conclusive evidence of arbitrariness or capriciousness, a consistently applied policy weighs against the notion that it is arbitrary. *S. Gibson Sch. Bd. v. Sollman*, 768 N.E.2d 437, 442 (Ind. 2002).

7. The Agency's applicable standards should be readily available to those having potential contact with the administrative body. *Cmty. Care Centers, Inc. v. Ind. Dept. of Pub. Welfare*, 523 N.E.2d 448, 450 (Ind. Ct. App. 1988).

The Indiana Grain Indemnity Program

8. There are two pieces of the Indiana Grain Indemnity Program. **First, the Agency licenses grain buyers and warehouses to ensure they are financially sound under I.C. § 26-3-7.** An entity may not operate as a grain buyer without a license from the Agency. I.C. § 26-3-7-4(a), (b). The statute requires the Agency director to ensure a grain buyer is in a suitable financial position to conduct business. I.C. § 26-3-7-3(b)(1).

9. The Agency analyzes review-level financial information for a licensee each year and decides whether to renew the license. I.C. § 26-3-7-6.1; 824 IAC 2-4-14. A licensee always must have and maintain a positive net worth to hold any license or do business. I.C. § 26-3-7-4(f). A licensee always must have and maintain a current asset to current liability ratio of 1:1. I.C. § 26-3-7-16(a). A licensee also always must maintain at least 80% of its unpaid balance of grain payables in unencumbered assets. I.C. § 26-3-7-4(e). A licensee must maintain a bond or letter of credit for an amount set by statute. I.C. §§ 26-3-7-9, -10.

10. **Second, the Indiana Grain Indemnity Program reimburses losses incurred by farmers who delivered grain to a licensee who fails (and have not yet been paid). I.C. § 26-4-1-15.** The Legislature established the Fund to pay farmers for losses incurred when a licensed grain buyer or warehouse fails. I.C. § 26-4-4-1. The Fund is administered by IGIC. I.C. § 26-4-3-7. Upon request of the Agency director and approval of the IGIC board, IGIC compensates claimants from the Fund. I.C. § 26-4-3-9(a)(11). The Fund is financed by premiums paid by Indiana producers. I.C. §§ 26-4-4-4; 26-4-4-6.

"Failure" of a Licensee is Determined by Statute

11. The Legislature provided clear instructions for determining when a licensee has "failed":

> "Failed" or "failure" means any of the following:
> (a) The inability of a licensee to financially satisfy fully all obligations due to claimants.
> (b) Public declaration of a licensee's insolvency.
> (c) Revocation or suspension of a licensee's license, if the licensee has outstanding indebtedness owed to claimants.
> (d) Nonpayment of a licensee's debts in the ordinary course of business, if there is not a good faith dispute.
> (e) Voluntary surrender of a licensee's license, if the licensee has outstanding indebtedness to claimants.
> (f) Involuntary or voluntary bankruptcy of a licensee.

I.C. § 26-3-7-2(14). An identical definition appears in Article 4, which provides the structure for the Indiana Grain Indemnity Program. I.C. § 26-4-1-10. A failure of a licensee therefore happens when "any" of the events in (A)-(F) occur. I.C. § 26-7-3-2(14).

9. The statute explains the "purpose" of the Program: "to pay producers for losses incurred due to the failure of a grain buyer or warehouse licensed under I.C. 26-3-7." I.C. 26-4-4-1(a). I.C. § 26-3-7-1.5 further explains: "This chapter shall be liberally construed

to effect its purpose." Thus, the definition of failure should be construed to maximize payment to producers who suffer a loss due to the failure of a licensee.

10. Failure is not a matter of the Director's discretion. Nothing in the statutory definition of failure gives the Director the power to ignore when a "failure" occurs and substitute his own discretion. *See* I.C. § 26-3-7-3. If the Legislature had wanted the director have such broad discretion, it could have easily stated as much in the definition of "failure."

Failure is Not Based on When a Shortage Hearing Occurs

11. Rather than follow the statutory definition of failure, OALP's decision wrongly based a failure on either when a shortage hearing occurred or when the director entered a preliminary determination that a licensee failed to meet its legal obligations. *See* OALP Summary Judgment Order (OALP_910-11), citing I.C. § 26-3-7-16.5 and -17.1.

12. A "shortage hearing" and "preliminary determinations" are Agency functions that might occur after the Agency learns of a potential grain shortage:

> "Upon learning of the possibility that a shortage exists, either as a result of an inspection or a report or complaint from a depositor, the agency, based on an on-premises inspection, shall make a preliminary determination as to whether a shortage exists.

I.C. § 26-3-7-16.5(a).

> "If it is determined that a shortage may exist, the director...shall hold a hearing as soon as possible to confirm the existence of a shortage as indicated by the licensee's books and records and the grain on hand. Only the licensee, the surety company named on the licensee's bond, the issuer of the irrevocable letter of credit, and any grain depositor who has made a claim or complaint to the agency in conjunction with the shortage shall be considered as interested parties for the purposes of that hearing, and each shall be given notice of the hearing."

I.C. § 26-3-7-16.5(b).

13. There is a formal procedure for a shortage hearing. To conduct a shortage hearing, the Agency *shall* give notice to the surety companies who hold the licensee's bond

and *shall* give notice to any farmers who have made complaints to the Agency about the licensee. I.C. § 26-3-7-16.5(b). The usage of "shall" in this statute is mandatory, not discretionary. Matters of statutory interpretation present pure questions of law and are thus reviewed *de novo*. *Matter of Ar.B.*, 199 N.E.3d 1232, 1239 (Ind. Ct. App. 2022).[3]

14. The hearing on March 19, 2020 did not follow the procedure in § 16.5 and was instead a hearing on the suspension of a license conducted under I.C. § 26-3-7-17.1.

15. The law does not tie a failure to a shortage hearing or preliminary determination, and as the OALP even noted, the Agency never held a shortage hearing or entered a preliminary determination in accordance with the statutory requirements.

16. The law does not give the Director unfettered discretion to decide whether and when a failure occurs. The statute unambiguously defines failure. This Court will simply apply that definition rather than adopt the OALP's shortage hearing analysis.

The Agency's Inconsistent Reasons for Using March 20 Demonstrate Arbitrariness and Failure to Observe Procedure

17. The fluctuating reasons set forth by the Agency for identifying March 20 as a failure date ignore the statutory language and demonstrate the arbitrariness of the Agency decision. *See* I.C. § 4-21.5-5-14(d).

18. The Agency first suspended SMI's license on March 3, 2020, but nevertheless used March 20, 2020 as the "failure" date. This was arbitrary. I.C. § 4-21.5-5-14(d).

---

[3] The Agency has asserted that "shall" here means "may." Case law does not agree. "Shall" is an imperative unless it appears clearly that the Legislature intended a different construction. *State v. C.K.*, 70 N.E.3d 900, 904 (Ind. Ct. App. 2017); *Wilson v. Wilkening*, 175 N.E.3d 1169, 1174 (Ind. Ct. App. 2021). In § 16.5, the word "shall" requires the Agency to give notice to farmers and bond holders before it takes action against a licensee. This goes to the essence of the statutory purpose.

19. The Agency's suggestion that the Director has unlimited discretion to identify when a failure occurs is not in accordance with the statutory language and exceeds the Agency's statutory authority. I.C. § 4-21.5-5-14(d). The OALP's holding that a failure is based on a shortage hearing or preliminary determination—when neither of those events happened—is arbitrary, not in accordance with the statute, and without observance of procedure required by law. *Id.*

As a Matter of Law, SMI was a "Failure" by December 31, 2018

20. There was ample evidence in the financials submitted to the Agency that SMI had failed under I.C. § 26-3-7-14(A) by December 31, 2018, because SMI did not have enough assets to satisfy all its obligations. SMI's inability to meet the statutory financial metrics, the noncompliance with debt covenants, and the substantial doubt about the ability of SMI to continue as a going concern show SMI was not able to financially satisfy fully all obligations due to claimants and thus, had "failed" by that date.

21. There is also evidence SMI had failed under I.C. § 26-3-7-14(C) by December 31, 2018. SMI's current asset to liability ratio had plummeted to 0.78 (statute requires 1:1 at minimum), its net worth was a negative $6,607,120 (statute requires *positive* net worth), and it did not possess a sufficient bond. SMI failed to meet the licensee requirements, which should have resulted in revocation or suspension of its license. This is another reason the Director should have identified December 31, 2018 as the failure date.

22. A failure also exists when licensee does not pay its debts in the ordinary course of business. I.C. § 26-3-7-2(14)(D). SMI had insufficient funds to cover at least $884,792 in checks in September 2019. (OALP_3528.) The Agency knew of this when it erroneously identified March 20, 2020 as the failure date.

23. Using December 31, 2018 as the failure date advances the legislative intent to protect farmers when a licensed grain buyer fails. Selecting the last possible date (SMI's *second* suspension on March 20, 2020), as the Agency did here, thwarts the purpose of the Indiana Grain Indemnity Program.

24. Only grain that has been delivered not more than 15 months before the failure date may be considered in determining the loss sustained by each depositor. I.C. § 26-3-7-16.5(e). This sets a *lookback* period for grain delivered too long *before* a failure—it does not limit recovery for grain delivered *after* a failure date.

THEREFORE, the Court now sets aside the Agency action and remands the case to for further proceedings using December 31, 2018 as the "failure date" for Petitioners' claims related to SMI. The lookback period in I.C. § 26-3-7-16.5(e) shall accordingly begin 15 months prior to the failure date, and continue until March 3, 2020, as that is final date the Agency allowed grain to be delivered to SMI.

So Ordered: 4/29/2024

Chad E. Kukelhan, Special Judge
Huntington Superior Court

Distribution List:
All counsel of record