NO. 2014-CA-000415-MR
Commonwealth of Kentucky Court of Appeals

Energy & Env't Cabinet & Sanitation Dist. No. 1 v. Guilfoile

Decided Jun 12, 2015

NO. 2014-CA-000415-MR

06-12-2015

ENERGY AND ENVIRONMENT CABINET AND SANITATION DISTRICT NO. 1 OF NORTHERN KENTUCKY APPELLANT v. TIM GUILFOILE AND BETSY BENNETT APPELLEES

BRIEFS FOR APPELLANT ENERGY AND ENVIRONMENT CABINET: John C. Bender Lexington, Kentuck Lisa Hollander Ft. Wright, Kentucky BRIEFS FOR APPELLEE SANITATION DISTRICT NO. 1: Christopher Fitzpatrick Anna K. Girard Frankfort, Kentucky

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DIXON, JUDGE

NOT TO BE PUBLISHED APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 10-CI-01300
OPINION
AFFIRMING

BEFORE: DIXON, J. LAMBERT, AND STUMBO, JUDGES. DIXON, JUDGE: Appellants, the Energy and Environment Cabinet ("Cabinet"), and the Sanitation District No. 1 of Northern Kentucky ("SD1"), appeal from an opinion and order of the Franklin Circuit Court reversing a final order of the Cabinet's Secretary upholding the issuance of a Kentucky Pollutant
2 Discharge *2 Elimination System Permit to SD1, and remanding the matter to the Cabinet for further proceedings. Finding no error, we affirm.

SD1 is a publically owned multi-county wastewater treatment works engaged in the collection, treatment, and disposal of wastewater in Boone, Campbell, and Kenton counties. SD1 serves both residential and industrial users. In July 2009, the Cabinet issued a Kentucky Pollutant Discharge Elimination System ("KPDES") permit to SD1 for the discharge of treated wastewater from the publically owned Western Regional Water Reclamation Facility in Belleview, Kentucky, ("Belleview facility") into the Ohio River. The following month, Tim Guilfoile and Betsy Bennett[1] initiated the underlying administrative action pursuant to the Clean Water Act, 33 United States Code (U.S.C.) §1251 *et seq*. and Kentucky Revised Statutes (KRS) 224.10-420, challenging the Cabinet's issuance of the permit. The petition for hearing contained the following six claims:

[1] For simplicity's sake, we will refer to the Petitioners as "Guilfoile" singularly.

> Count I: The permit is contrary to the Clean Water Act antidegradation requirement because SD#1 and the Cabinet have not completed a Tier II analysis of the Ohio River.
>
> Count II: The permit is contrary to the Clean Water Act because it allows a new point source that will add pathogens to the Ohio River, an "impaired" water that has no TMDL for pathogens.
>
> Count III: The permit is contrary to the Clean Water Act because it is not consistent with the most current WQMP for the northern Kentucky area.
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> 3 *3
>
> Count IV: The permit is contrary to the Clean Water Act in light of compelling new scientific studies, pending litigation, and pending governmental action regarding an area of hypoxia in the Gulf of Mexico.
>
> Count V: The permit must contain numeric limits for nitrogen and phosphorous.
>
> Count VI: The permit provisions related to a mixing zone, dissolved oxygen, and toxicity are all contrary to the Clean Water Act and other law.

On November 6, 2009, SD1 and the Cabinet filed a joint motion for summary disposition. Thereafter, on December 9, 2010, Guilfoile filed a response as well as his own motion for summary disposition.

Pursuant to a scheduling order filed on January 8, 2010, the hearing officer was assigned a deadline of May 10, 2010, in accordance with the provisions of KRS 224.10-440(3).[2] The hearing officer thereafter set the matter for a final hearing on April 6-8, 2010, as well as set a discovery cutoff date of March 26, 2010. However, on March 8, 2010, the hearing officer filed an interim report ruling on the parties' various motions. Specifically, the hearing officer granted summary disposition in favor of the Cabinet and SD1 on several of the Guilfoile's counts. However, the hearing officer further found that Guilfoile "made general allegations, which, if supported by specific 4 facts, raise genuine issues appropriate *4 for hearing. . . . Petitioners must be given a chance to clarify those counts before this case can proceed." Noting that the Gulf of Mexico impairments were "too far away," and that the claims of downstream nutrient pollution needed to relate to the Ohio River itself, the hearing officer granted Guilfoile leave to amend the petition as to Counts IV, V, and VI to allege specific facts. Guilfoile was initially given five days to file the amended petition but, on March 12, 2010, filed a motion to enlarge the time for filing which was subsequently granted. At that same time, the hearing officer rescheduled the final hearing from April 6th to April 13th.

[2] KRS 224.10-440(3) provides, in relevant part:

> Unless all parties to the case agree in writing otherwise, the hearing officer shall conduct the hearing, complete the report and recommended order, and transmit the report and recommended order to the secretary no later than one hundred eighty (180) days after service of the written notice described in KRS 224.10-420(1) upon all named parties or service of the petition and demand for hearing pursuant to KRS 224.10-420(2) upon all named parties, whichever is applicable.

On March 18, 2010, Guilfoile filed a motion with the Cabinet Secretary pursuant to KRS 224.10-422(3)[3] requesting a 90-day extension for the hearing officer to hold a final hearing and complete his report and recommendation. Therein, Guilfoile argued that the hearing officer's directive to amend the petition to allege facts specific to the Ohio River would require his expert to redirect his focus and preparation for the hearing. Guilfoile contended that procedural due process within the administrative context required that he be given more time to adequately research and prepare the amended claims for the hearing. Guilfoile also pointed out that Bennett would be out of the country on the scheduled hearing day and thus would be unable to testify. By order entered on *5 April 6, 2010, the Secretary denied the motion for a 90-day extension. Thereafter, Guilfoile filed his witness list and exhibits under protest, stating he was being denied the opportunity to present expert testimony at the hearing.

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[3] KRS 224.10-422(3) provides that

> [u]pon written request of the hearing officer or any party to the hearing, the secretary or secretary's designee, for good cause shown, may extend this deadline for a period not to exceed ninety (90) days. The secretary shall grant no more than two (2) ninety (90) day extensions under this subsection, unless the secretary and all parties to the case agree to the contrary in writing.

Ultimately, a final hearing was held on April 23, 2010.[4] Only Guilfoile testified in support of his position. On May 10, 2010, the hearing officer issued his final report and recommendation that the KPDES permit be remanded to set nutrient limits and dissolved oxygen limits as required by the Kentucky Administrative Regulations. All parties then filed exceptions to the recommendation.

[4] The matter was rescheduled a second time due to a medical emergency that prevented Guilfoile from attending the April 13, 2010 hearing date.

On June 25, 2010, the Deputy Secretary entered a final order adopting the hearing officer's report and recommendations. However, on July 14, 2010, the Secretary filed an Errata Order, reversing the June 25, 2010 final order and dismissing Guilfoile's petition. Therein, the Secretary ruled, in part, that Guilfoile failed to put forth "affirmative, admissible, scientific evidence during [his] case in chief . . . . Lay witness assumptions are not sufficient to carry this burden." The Secretary further ruled that the amended claims were untimely as they "were not raised in the original Petition for Hearing . . . and, in fact, were never truly raised by Petitioners."

On August 13, 2010, Guilfoile filed an appeal and petition for review pursuant to KRS 224.10-470 in the Franklin Circuit Court, asserting that his due

process rights were violated when the Secretary arbitrarily denied the motion for a *6 90-day extension. Guilfoile also sought a declaration of rights that the July 14th order was null and void because the Cabinet was without jurisdiction to enter said order nineteen days after entry of the final June 25th order.

By opinion and ordered entered February 10, 2014, the trial court, citing *Union Light, Heat & Power Company v. Public Service Commission*, 271 S.W.2d 361 (Ky. 1954), first found that the Cabinet retained jurisdiction over the petition until the expiration of the appeals period or the filing of an appeal from the June 25th order. Because no appeal had been filed and it was still within the 30-day appeals period, the Secretary had the authority to reconsider and change its final decision. As such, the trial court concluded that the July 14th order was valid.

However, the trial court further ruled that the Secretary's denial of Guilfoile's request for a 90-day extension violated his due process rights. The trial court relied upon a decision of this Court, *Pizza Pub of Burnside v. Commonwealth Dept. of ABC*, 416 S.W.3d 780 (Ky. App. 2013), in concluding that Guilfoile was denied the opportunity to be heard in a meaningful manner because he was unable to present expert reports or testimony to support his amended claims at the hearing. Accordingly, the trial court remanded the matter for further proceedings and declined to address the substantive arguments made by the parties regarding the Cabinet's final order. The Cabinet and SD1 thereafter appealed to this Court.

Our standard of review in administrative appeals is well-settled. "In its role as the finder of fact, an administrative agency is afforded great latitude in *7 its evaluation of the evidence heard and the credibility of witnesses, including its findings and conclusions of fact." *McManus v. Kentucky Retirement Systems*, 124 S.W.3d 454, 458 (Ky. App. 2003) (citations omitted). "A court's function in administrative matters is one of review, not reinterpretation." *Thompson v. Kentucky Unemployment Ins. Com'n*, 85 S.W.3d 621, 624 (Ky. App. 2002). Thus, "[a] reviewing court is not free to substitute its judgment for that of an agency on a factual issue unless the agency's decision is arbitrary and capricious." *McManus*, 124 S.W.3d at 458.

> In determining whether an agency's action was arbitrary, the reviewing court should look at three primary factors. The court should first determine whether the agency acted within the constraints of its statutory powers or whether it exceeded them.... Second, the court should examine the agency's procedures to see if a party to be affected by an administrative order was afforded his procedural due process. The individual must have been given an opportunity to be heard. Finally, the reviewing court must determine whether the agency's action is supported by substantial evidence.... If any of these three tests are failed, the reviewing court may find that the agency's action was arbitrary.

Bowling v. Natural Resources and Environmental Protection Cabinet, 891 S.W.2d 406, 409 (Ky. App. 1994) (Quoting *Com. Transp. Cabinet v. Cornell*, 796 S.W.2d 591, 594 (Ky. App. 1990). " '[S]ubstantial evidence' means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998) (Citing *Kentucky State Racing Comm'n v. Fuller*, 481 *8 S.W.2d 298, 308 (Ky.1972)). We review an agency's conclusions of law *de novo*. *See Aubrey v. Office of Attorney General*, 994 S.W.2d 516, 519 (Ky. App. 1998); *Kentucky Retirement Systems v. Bowens*, 281 S.W.3d 776, 780 (Ky. 2009).

The Cabinet and SD1 first argue that the trial court erred in concluding that the Secretary's denial of Guilfoile's motion for an extension violated his

due process rights. Specifically, SD1 and the Cabinet contend that KRS 224.10-440 codifies the discretion of the Secretary to grant an extension "for good cause shown," and that the record herein supports the conclusion that the Secretary's denial of an extension was a reasonable exercise of that discretion. Furthermore, SD1 and the Cabinet argue that the trial court's reliance on the *Pizza Pub of Burnside* decision was erroneous because therein the petitioner was denied *any* opportunity to participate in the hearing.

Clearly, the plain language of KRS 224.10-440(3) affords the Secretary the discretion to determine whether good cause warrants an extension of the administrative process. However, that discretion is not unfettered. Unless an action taken by an administrative agency is supported by substantial evidence it is arbitrary. *American Beauty Homes Corp. v. Louisville*, 379 S.W.2d 450, 456 (Ky. 1964) (Arbitrariness in an administrative action can be shown through "(1) action in excess of granted powers; (2) lack of procedural due process, and (3) lack of substantial evidentiary support.") Furthermore, while SD1 and the Cabinet are correct that the 180-day deadline contained in KRS 224.10-440 is indication of the Legislature's concern with timely adjudication of
9 administrative hearings, we *9 cannot agree that the Legislature intended the efficient disposition of hearings to deny a party due process. Indeed, the Legislature provided in the same statute the mechanism for requesting two 90-day extensions.

In denying Guilfoile's motion for an extension, the Secretary ruled,

> Petitioners have a long history of opposing the construction and operation of the Sanitation District's Western Regional Water Reclamation Facility and have had an ample opportunity, and indeed an obligation, to prepare evidence and supporting expert testimony if they wished to advance their claims in their Petition for Hearing. Petitioners have failed to provide good cause for an extension of the schedule. Their decision to instruct their experts not to prepare expert reports or analyses was inconsistent with the General Assembly's intentions in amending KRS 224.10-440(3) to provide for prompt resolution of such proceedings. Moreover, the presence of Petitioner Bennett is not required at the Administrative Hearing, and she admits she has brought this Petition in a representational capacity on behalf of the Cumberland Chapter of Sierra Club of which her counsel and co-Petitioners are also members.

We are of the opinion that the Secretary's rationale with respect to Bennett was reasonable, given her representative capacity. However, Guilfoile's history of opposition to SD1's activities, as well as what previously occurred during the pendency of the 2009 summary disposition motions, has no relevance to whether he demonstrated good cause for an extension *after* he was directed by the hearing officer to refocus the petition's claims. Certainly, Guilfoile had an obligation to prepare and present evidence in support of the petition, but the Secretary failed to consider the circumstances in light of the hearing officer's interim report and, as such, we must conclude that the denial of the
10 extension was arbitrary. *10

We must also agree with the trial court that the Secretary's denial of the extension violated Guilfoile's due process rights. As previously noted, the trial court concluded that the facts herein were analogous to those set forth in *Pizza Pub of Burnside*, 416 S.W.3d at 780. Therein,

counsel for the corporate petitioner had notified the ABC Board prior to the scheduled hearing date that he was withdrawing from representation of the petitioner and requested a continuance of the administrative hearing so that the petitioner could retain new counsel. The Board refused to grant a continuance and, during the subsequent hearing, did not allow the petitioner to proceed *pro se*. As a result, the petitioner was prohibited from participating in the hearing or admitting any evidence. The ABC Board thereafter revoked the petitioner's alcohol license. The trial court subsequently upheld the Board's revocation decision. On appeal, however, a panel of this Court reversed the trial court, noting,

> The fundamental requirement of procedural due process is simply that all affected parties be given "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976) (internal citation and quotation omitted). Procedural due process in the administrative or legislative setting has widely been understood to encompass "a hearing, the taking and weighing of evidence if such is offered, a finding of fact based upon a consideration of the evidence, the making of an order supported by substantial evidence, and, where the party's constitutional rights are involved, a judicial review of the administrative action." *Morris v. City of Catlettsburg*, 437 S.W.2d 753, 755 (Ky. 1969), *see also Kaelin v. City of Louisville*, 643 S.W.2d 590, 591 (Ky. 1982); *Wyatt v. Transportation Cabinet*, 796 S.W.2d 872, 873-74 (Ky. App. 1990).

Hilltop Basic Resources, Inc. v. County of Boone, 180 S.W.3d 464, 469 (Ky. 2005).

. . . .

[W]e must agree with Pizza Pub that while it was afforded notice of the hearing, it was not afforded its due process rights during the administrative hearing because it was not able to participate at all due to its lack of counsel. In his notice of withdrawal, attorney McShurley sought to protect Pizza Pub's due process rights by requesting that the ABC Board grant Pizza Pub "additional time to retain counsel and prepare for the hearing in this matter." However, the ABC Board never specifically addressed whether a continuance should be considered, even in its final order, but rather proceeded with the hearing, after which Pizza Pub's license was revoked based upon the evidence presented at the hearing. Also, while counsel for the Department indicated that he had been contacted a few weeks prior to the hearing that Pizza Pub's counsel intended to withdraw, the actual notice was not filed until June 30, 2011, (a Thursday), which was six days before the hearing on the following Wednesday. That provided Pizza Pub with very little time to 1) retain new counsel and 2) for new counsel to adequately prepare for the hearing. Therefore, we must hold that Pizza Pub's due process rights were violated in that it was unable to meaningfully participate in the administrative hearing and that the

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> ABC Board's decision to hold the hearing while Pizza Pub was not represented by counsel was arbitrary and constituted an abuse of discretion.

Pizza Pub of Burnside, 416 S.W.3d at 787-88.

Guilfoile's expert had originally been asked to prepare a report and testimony about the water quality impacts of the nutrient pollution in the Ohio River on the Gulf of Mexico as a
12 contributing cause of the "Dead Zone." *12 However, the hearing officer, in his March 8, 2010 interim report, refused to allow Guilfoile to present evidence pertaining to the Gulf of Mexico but rather directed him to amend the petition to focus on the effects of nutrient pollution in the Ohio River itself. Guilfoile quickly realized that his expert would be unable to prepare his report, submit it as discovery, be available for a deposition, and be able to testify at an April 2010 final hearing, thus precipitating the motion for an extension. Ultimately, the expert did not testify at the hearing, leaving only Guilfoile's testimony in support of the claims.

The significance of Guilfoile's inability to present expert testimony at the hearing is apparent in the Secretary's final July 14th order wherein he specifically rules that the hearing officer should have granted SD1's and the Cabinet's motions for a directed direct because Guilfoile failed to present "affirmative, admissible, scientific evidence." In fact, the Secretary specifically ruled that lay witness assumptions were insufficient.

In the interest of fairness, a party to be affected by an administrative order is entitled to procedural due process. *American Beauty Homes Corp. v. Louisville*, 379 S.W.2d at 456; *Kentucky Alcoholic Beverage Control Board v. Jacobs*, 269 S.W.2d 189 (Ky. 1954). We conclude that the trial court properly found that the Secretary's denial of a 90-day extension denied Guilfoile the opportunity to be heard in a meaningful matter and thus violated
13 his due process rights. *13

SD1 and the Cabinet also argue that because the Secretary found Guilfoile's amended claims were time-barred, the trial court lacked jurisdiction over such claims. SD1 and the Cabinet rely on KRS 224.10-420, which provides:

> Any person not previously heard in connection with the issuance of . . . any final determination arising under the chapter by which he considers himself aggrieved may file with the cabinet a petition alleging that . . . the final determination is contrary to law or fact and is injurious to him, alleging the grounds and reasons therefore, and demand a hearing. . . . The right to demand a hearing pursuant to this section shall be limited to a period of thirty (30) days after the petitioner has had actual notice of the . . . final determination complained of, or could reasonably have had such notice.

We would first note that Guilfoile correctly points out that at no point in SD1's or the Cabinet's pleadings in the trial court do either raise the argument that the trial court lacked jurisdiction over the amended claims. Furthermore, the trial court did not reach the issue of whether the Secretary properly found the amended claims to be time-barred because the matter was remanded due to the Secretary's failure to grant an extension. While we do not read KRS 224.10-420 as narrowly as SD1 and the Cabinet suggest, we nevertheless decline to address the merits of this issue until the trial court has had the opportunity to do so.

For the reasons set forth herein, we affirm the opinion and order of the Franklin Circuit Court reversing the Secretary's final order and remanding this matter for further proceedings.

14 ALL CONCUR. *14 BRIEFS FOR APPELLANT ENERGY AND ENVIRONMENT CABINET:
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