

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-002534-MR

FLAGET FUELS, INC.

APPELLANT

v. APPEAL FROM PERRY CIRCUIT COURT  
HONORABLE DOUGLAS COMBS, JR., JUDGE  
ACTION NO. 97-CI-00575

COMMONWEALTH OF KENTUCKY,  
NATURAL RESOURCES AND  
ENVIRONMENTAL PROTECTION CABINET

APPELLEE

OPINION  
AFFIRMING

\* \* \* \* \*

BEFORE: GUDGEL, CHIEF JUDGE; BUCKINGHAM and KNOX, Judges.

BUCKINGHAM, JUDGE. Flaget Fuels, Inc., appeals from a Perry Circuit Court order which upheld the final order of the Natural Resources and Environmental Protection Cabinet ("the Cabinet") that revoked Flaget's surface mining permit and ordered Flaget to forfeit the bond associated with the permit, abate their violation, and complete the reclamation. After reviewing the record, we affirm.

On September 6, 1995, the Cabinet issued a notice of noncompliance to Flaget for a violation of special performance standards applicable to "steep slope" operations. Kentucky

Revised Statute (KRS) 350.130(1); KRS 350.445; 405 KAR 20:060. To abate the violation, the Cabinet ordered Flaget to (1) remove trees from the mud slide area; (2) stabilize, seed, and mulch; (3) provide temporary sediment control; and (4) revise their permit to incorporate the off-permit area. Subsequently, Flaget was granted nine separate extensions of time in order to complete the abatement measures.

On May 10, 1996, the Cabinet finally issued an imminent danger cessation order to Flaget. KRS 350.130(4); 405 KAR 12:020. In response to the cessation order, Flaget submitted a remediation plan to the Cabinet. After the Cabinet again granted Flaget an extension of time, it issued a second cessation order. On May 29, 1996, the Cabinet notified Flaget that it had until July 15, 1996, to abate the violation. On July 15, 1996, the Cabinet refused Flaget's request for another extension of time and issued its third cessation order.

Ultimately, Flaget filed an administrative petition challenging the validity of the noncompliance and cessation orders. KRS 350.0301. After an administrative hearing, the Cabinet adopted the hearing officer's findings of fact and conclusions of law that upheld the noncompliance and cessation orders. Pursuant to KRS 350.032(2), Flaget appealed the Cabinet's final order to the Perry Circuit Court, which affirmed the order. Flaget then appealed to this court, where the Cabinet's order was again affirmed in Case No. 1998-CA-001106.

Meanwhile, the Cabinet initiated a bond forfeiture proceeding against Flaget and its surety, Lincoln General

Insurance Company. KRS 350.130(1); 405 KAR 10:050. At a prehearing conference, Lincoln indicated it would pay the remaining amount of bond and waive its right to a hearing. In light of Lincoln's withdrawal, Flaget moved the hearing officer for a continuance. The hearing officer denied the motion, and the hearing was held on April 14, 1997.

In her findings of fact and conclusions of law, the hearing officer recommended that Flaget's permit be revoked, the bond be forfeited, and Flaget be ordered to complete reclamation. On September 25, 1997, the Cabinet adopted the hearing officer's recommendations in a final order. Flaget then appealed the Cabinet's order to the Perry Circuit Court, which affirmed the Cabinet's order on September 8, 1998. This appeal followed.

On appeal, Flaget argues that the hearing officer applied the incorrect rule of law regarding extensions, that she erroneously denied the motion for continuance, and that the Cabinet's final order is not supported by substantial evidence. In reviewing an action of an administrative agency, we must determine (1) whether the action was within the agency's statutory power, (2) whether the party affected by the order was given his procedural due process or given the opportunity to be heard, and (3) whether the action of the agency was supported by substantial evidence. Bowling v. Natural Resources & Environmental Protection Cabinet, Ky. App., 891 S.W.2d 406-409 (1994).

Substantial evidence is defined as evidence which has "sufficient probative value to induce conviction in the minds of reasonable men." Kentucky State Racing Comm'n v. Fuller, Ky.,

481 S.W.2d 298, 308 (1972). "If there is any substantial evidence to support the action of the administrative agency, it cannot be found to be arbitrary and will be sustained." Bowling, supra at 409 (citing Taylor v. Coblin, Ky., 461 S.W.2d 78, 80 (1970)). A court reviewing the action of an agency may not substitute its judgment for that of the fact finder. Kentucky Bd. of Nursing v. Ward, Ky. App., 890 S.W.2d 641, 642 (1994).

Flaget's first argument focuses on the hearing officer's conclusion that Flaget had not met the criteria for the granting of another extension of time. According to its regulations, the Cabinet may extend the time set for the completion of remedial measures, but the total time, including all extensions, shall not exceed ninety days from the date of the issuance of the notice of noncompliance unless one of the circumstances set forth in paragraph (b) are met. 405 KAR 12:020 § 2(4)(a). The pertinent notice of noncompliance was issued by the Cabinet on September 6, 1995. Flaget was granted numerous time extensions until the Cabinet finally denied the request for an extension past the deadline date of July 15, 1996. The hearing officer specifically found that Flaget was not entitled to another extension of time because it had not submitted a permit application as required by 405 KAR 12:020 § 2(4)(b)(1) and that Flaget failed to establish extraordinary weather conditions under 405 KAR 12:020 § 2(4)(b)(4). Flaget contends that it could not submit the required permit application until it secured a legal right of entry onto the property owned by the Robertses and that it had met the necessary requirements for an extension of

time based on weather conditions. Flaget's contentions are without merit.

Even if we assume as true the disputed fact that the Robertses had not granted Flaget a right of entry onto their land to perform the abatement measures, Flaget is not relieved of the responsibility of performing such measures when reasonable alternatives exist. The hearing officer correctly relied on the testimony of Clyde DeRossett, a mining engineer who testified that the remedial measures could have been performed without entering the Robertses' property. There is also substantial evidence from DeRossett and Lisa Baker, an environmental inspector, to support the hearing officer's determination that Flaget was not entitled to another extension of time due to weather conditions. Fuller, 481 S.W.2d at 308 (the trier of facts is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it.)

Flaget next contends that the officer's refusal to grant a continuance denied it due process. After reviewing the record, it is apparent to this court that the hearing officer did not abuse her discretion in denying the motion. Contrary to Flaget's contention, Lincoln's withdrawal did not materially change the issues at the hearing. Flaget had ample opportunity to discover any relevant evidence possessed by Lincoln--its own surety--and to subpoena the appropriate witnesses to appear at the hearing. Furthermore, the hearing officer invited Flaget to move to allow the record to remain open to receive additional proof if Flaget made any representation at the hearing that there

were either witnesses or exhibits to prove facts which were unavailable due to the surety's withdrawal from the hearing.

Finally, Flaget contends that the Cabinet's final order is not supported by substantial evidence. We disagree. Despite the fact that it was granted numerous time extensions in which to abate the violation, Flaget did not complete one of the remedial measures set forth in the original notice of noncompliance. Testimony from Lisa Baker and Clyde DeRossett supports the Cabinet's conclusion that Flaget's failure to abate the violation stems from its total lack of diligence. Because there is substantial evidence in the record to support the Cabinet's final order, this court must sustain it. Bowling, supra.

For the reasons stated above, the order of the Perry Circuit Court is hereby affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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