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Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-002364-MR

FLAGET FUELS, INC. — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NO. 01-CI-0587

COMMONWEALTH OF KENTUCKY,
ENVIRONMENTAL AND PUBLIC
PROTECTION CABINET — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE, KNOPF, AND TACKETT, JUDGES.

KNOPF, JUDGE: Flaget Fuels, Inc. appeals from an order of the Franklin Circuit Court affirming an order by the Secretary of the Environmental and Public Protection Cabinet (the Cabinet) finding that Flaget Fuels violated KRS 151.250(2), KRS 151.310, and 401 KAR 4:060, and imposing a civil penalty of $43,200.00. Flaget Fuels argues that the Cabinet acted in excess of its

statutory authority, that the Cabinet's finding of a violation was not supported by substantial evidence, and that the civil penalty imposed by the Cabinet was arbitrary and excessive. We agree with the circuit court that the Cabinet used substantial evidence and a correct application of the law to ascertain Flaget Fuels's violations and penalty. Hence, we affirm.

Flaget Fuels holds a surface mining operations and reclamation permit for mining in the Brown's Fork Creek area of Perry County, Kentucky. Prior to the events at issue, in 1991 and 1995, respectively, Flaget Fuel's activities had caused spoil material from its permitted area to slide into Brown's Fork Creek adjacent to property owned by Joe and Nadine Roberts. These previous slides were the subject of a prior administrative action by the Cabinet's Department of Surface Mining Reclamation and Enforcement (DSMRE).[1] DSMRE directed Flaget Fuels to remove the material from the stream, to return the material to the permitted area and to spread the material out to dry. Instead, Flaget Fuels took the material from the creek and stacked it back against the toe of the slide.

On July 8, 1998, DSMRE was informed that material had slid from the face of the slide, obstructing the Brown's Fork

[1] The previous slides were addressed in a prior decision by this Court, Flaget Fuels, Inc. v. Commonwealth, Natural Resources & Environmental Protection Cabinet, No. 1998-CA-001106-MR (Not-to-be-published opinion rendered June 4, 1999).

Creek and causing water from the creek to flow into the Robertses' yard up to their residence, through the yard and back into the stream channel. DSMRE contacted the Division of Water (DOW), which sent an environmental response team to assess the situation. DOW did not immediately issue a notice of violation to Flaget Fuels because Flaget Fuels and DSMRE had reached an agreement that the slide material was to be removed from the creek and hauled back into the permitted area.

The Robertses' property was unflooded within twenty-four hours. However, the creek remained partially blocked throughout July and August, and was totally blocked several times during August. DOW became dissatisfied with the slow progress of Flaget Fuel's work to remove the material from the creek. In addition, DOW complained that Flaget Fuels was depositing the slide material on the banks of the creek, rather than returning it to the permitted area.

Consequently, DOW issued a notice of violation to Flaget Fuels on August 28, 1998. DOW cited Flaget Fuels for "unpermitted relocation of slide material in and along the Brown's Fork Creek channel." DOW directed Flaget Fuels to immediately cease placing the material along the stream channel, to remove the slide material from the floodplain and stream channel, to take the material to another, appropriate location, and to stabilize the slide to avoid further encroachment into

Brown's Fork Creek. By September 3, Flaget had removed all slide material from the creek channel, and by September 9, Flaget completed restoration of the creek channel. However, Flaget Fuels left the slide material in the floodplain, and did not complete all required reclamation work until February 8, 1999.

On September 28, 1998, Flaget Fuels filed a petition contesting the notice of violation. A date was set for an expedited hearing, and DOW reached an interim agreement with Flaget Fuels regarding the remedial measures which Flaget Fuels needed to take to prevent the probability of flooding due to the placement of material in the floodplain. Following the hearing, the hearing officer issued a report on March 13, 2001. The hearing officer found that Flaget Fuels had violated the provisions of KRS 151.250, KRS 151.310, and 401 KAR 4:060 due to its unpermitted depositing of slide material into the channel and floodway of Brown's Fork Creek. The hearing officer also recommended that Flaget Fuels be assessed a penalty of $43,200.00. The Cabinet Secretary adopted the hearing officer's report in an order entered on April 16, 2001.

Thereupon, Flaget Fuels filed a timely appeal from this order to the Franklin Circuit Court.[2] After considering

[2] *See* KRS 224.10-470 and KRS 151.186. The former statute requires an appeal from a final order of the Cabinet to be taken

briefs and arguments of counsel, the circuit court affirmed the Cabinet's order and penalty. The circuit court concluded that the Cabinet's findings were supported by substantial evidence, that the Cabinet's order was not clearly erroneous or in excess of its statutory authority, and that the Cabinet applied the appropriate factors to determine the amount of the penalty. Flaget Fuels now appeals to this Court.[3]

In Bowling v. Natural Resources and Environmental Protection Cabinet,[4] this Court set out our standard of review as follows:

> "Judicial review of an administrative agency's action is concerned with the question of arbitrariness." Commonwealth Transportation Cabinet v. Cornell, Ky.App., 796 S.W.2d 591, 594 (1990), *citing* American Beauty Homes Corporation v. Louisville and Jefferson County Planning and Zoning Commission, Ky., 379 S.W.2d 450, 456 (1964).

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to the circuit court of the county where the structure or activity which is the subject of the complaint is located, while the latter statute requires an appeal from a final order of the Cabinet to be taken to the Franklin Circuit Court. In Shewmaker v. Commonwealth, 30 S.W.3d 807 (Ky.App. 2000), this Court held that the context of these statutes implies that KRS 224.10-470 applies to violations under Chapter 224, while KRS 151.186 applies to violations under Chapter 151. Although the Cabinet charged Flaget Fuels with violations under Chapter 151, its administrative process against Flaget Fuels was initiated pursuant to KRS 224.10-420(2). Consequently, the Franklin Circuit Court determined that it had jurisdiction over the appeal. Neither party appeals from this conclusion.

[3] KRS 224.10-470(2).

[4] 891 S.W.2d 406 (Ky.App. 1994).

Section 2 of the Kentucky Constitution prohibits the exercise of arbitrary power by an administrative agency. *Id.*

> 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. (citation omitted). 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. (citation omitted). If any of these three tests are failed, the reviewing court may find that the agency's action was arbitrary.

Com. Transp. Cabinet v. Cornell, 796 S.W.2d at 594. *See also* KRS 18A.100(5). Because no arguments were addressed to the first two factors and because we nevertheless find them satisfied by the evidence in the record, we focus only upon whether the Board's final decision is supported by substantial evidence.

"On factual issues[ ], a circuit court in reviewing the agency's decision is confined to the record of proceedings held before the administrative body and is bound by the administrative decision if it is supported by substantial evidence." Id. at 594. "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." Taylor v. Coblin, Ky., 461 S.W.2d 78, 80 (1970). Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken

alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972), *citing* Blankenship v. Lloyd Blankenship Coal Company, Inc., Ky., 463 S.W.2d 62 (1970).

In weighing the substantiality of the evidence supporting an agency's decision, a reviewing court must hold fast to the guiding principle that the trier of facts is afforded great latitude in its evaluation of the evidence heard and the credibility of witnesses appearing before it. Kentucky State Racing Commission v. Fuller, *supra*, at 308. The former Court of Appeals in its discussion of the substantial evidence standard in Kentucky State Racing Commission v. Fuller addressed at length the notion that although a reviewing court may arrive at a different conclusion than the trier of fact in its consideration of the evidence in the record, this does not necessarily deprive the agency's decision of support by substantial evidence. *Citing* Chesapeake and Ohio Railway Company v. United States, 298 F.Supp. 734 (D.C.1969), the Court observed:

> Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; it is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

Kentucky State Racing Commission v. Fuller, *supra*, at 307. The Court underscored this point by further stating:

> Regardless of the fact that this Court might have reached a contrary result if it were hearing this case de novo, it is required on the basis of its posture as a reviewing body to affirm the

> administrative determination. For it must be borne in mind that it is the exclusive province of the administrative trier of fact to pass upon the credibility of witnesses, and the weight of the evidence.
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> *Id.* at 308, *citing* Wheatley v. Shields, 292 F.Supp. 608 (D.C.1968). To put it simply, "the trier of facts in an administrative agency may consider all of the evidence and choose the evidence that he believes." Com. Transp. Cabinet v. Cornell, *supra*, at 594.[5]

On the other hand, this Court is authorized to review issues of law on a *de novo* basis.[6] While we will give some deference to an agency interpretation of the regulations and the law underlying them, the courts have the ultimate responsibility in matters of statutory construction.[7]

With this standard of review in mind, we will first address Flaget Fuel's argument that DOW lacks jurisdiction over the subject matter of the violations. Flaget Fuels points to KRS 350.425, which provides in pertinent part:

> The Kentucky Department of Surface Mining through this chapter shall have exclusive jurisdiction over Chapter 151 concerning the regulation of dams, levees, embankments, dikes, bridges, fills, or other obstructions across or along any stream or in the

[5] *Id.* at 409-410.

[6] Aubrey v. Office of Attorney General, 994 S.W.2d 516, 519 (Ky.App. 1998).

[7] Delta Air Lines, Inc. v. Com., Revenue Cabinet, 689 S.W.2d 14, 20 (Ky. 1985).

> floodway of any stream, which structures or obstructions are permitted under this chapter.

However, the preceding text in the statute relates to regulation of coal waste piles used as dams or embankments. KRS 350.425 specifically gives the DSMRE exclusive jurisdiction over such structures only if the material or obstruction to the waterway is within a permitted area. Neither the creek channel nor the banks of Brown's Fork Creek are within Flaget Fuel's permitted area. Furthermore, the Cabinet has the authority to assign its duties and responsibilities to its departments except where designated by statute.[8] Consequently we conclude that KRS 350.425 does not prohibit DOW from exercising jurisdiction over the violation.

Flaget Fuels next argues that the Cabinet failed to prove the charged violations. In addition to challenging the sufficiency of the evidence, Flaget Fuels contends that the Cabinet failed to adequately identify the floodway of Brown's Fork Creek. Since no floodway had ever been properly determined, Flaget Fuel asserts that the hearing officer's finding that it improperly redeposited slide material in the floodway was arbitrary and clearly erroneous as a matter of law.

KRS 151.250(2) provides that

[8] KRS 224.10-050.

> No person, . . . shall commence the filling of any area with earth, debris or any other material, or raise the level of any area in any manner, or place a building, barrier, or obstruction of any sort on any area located adjacent to a river or stream or in the floodway of the stream so that such filling, raising or obstruction will in any way affect the flow of water in the channel or in the floodway of the stream unless plans and specifications for such work have been submitted to and approved by the cabinet and a permit issued.

Likewise, KRS 151.310 prohibits any person from "deposit[ing] or caus[ing] to deposit any matter that will in any way restrict or disturb the flow of water in the channel or in the floodway of any stream" except where permitted by the Cabinet.[9] Flaget Fuels correctly notes that DOW did not charge it for the initial deposit of the slide material in Brown's Fork Creek, but for the actions it took (or failed to take) while remediating the slide. DOW's notice of violation involved two aspects of Flaget Fuel's remediation efforts: (1) the slow progress of those efforts (resulting in the obstruction of the creek channel after August 28); and (2) Flaget Fuel's actions in depositing the material removed from the channel onto the banks of the creek. Flaget Fuels focuses on the second aspect of the charged violation. Although KRS 151.250(2) and 151.310 prohibit

[9] 401 KAR 4:060, also cited as a basis for the violation, sets out stream construction criteria, including definition of the regulatory floodway, and regulations relating to construction and placement of materials within the floodway and floodplain.

the unauthorized placement of material in a “floodway”, DOW’s notice of violation charges Flaget Fuels with the authorized placement of slide material in the creek’s “floodplain”. KRS 151.100(6) & (7) define the terms “floodway” and “floodplain” as follows:

> (6) The word “floodway” shall mean that area of a stream or watercourse necessary to carry off flood water as determined by the secretary;
> (7) The word “floodplain” shall mean the area in a watershed that is subject to inundation.

Flaget Fuels contends that DOW used the terms “floodway” and floodplain” interchangeably, even though they have separate and distinct statutory definitions. Flaget Fuels also asserts that KRS 151.100(6) reserves the designation of a “floodway” to the Cabinet Secretary. Flaget Fuels argues that it could not be charged with improperly placing slide material within a floodway because the Secretary never designated a floodway for Brown’s Fork Creek.

We find none of these arguments convincing. First, Flaget Fuel’s argument does not address the finding that it failed to take timely action to remove the slide material from the creek channel. (We shall address the sufficiency of this finding later in the opinion). Second, the statutory definitions of the terms “floodway” and “floodplain” support the Cabinet’s position that the floodway is part of the floodplain,

rather than an entirely different area as claimed by Flaget Fuels.

Moreover, we agree with the hearing officer's finding that the floodway of Brown's Fork Creek was adequately defined. Although the notice of violation and the hearing officer's report refer to material left in the "floodplain" and the "floodway", Flaget Fuels repeatedly pointed out this discrepancy to the hearing officer. The hearing officer's report focuses on the relocation of slide material to the floodway. Furthermore, we agree with the following portion of the hearing officer's analysis:

> While KRS 151.100(6) makes reference to a determination being made by the Secretary, I would construe this to be a determination by representatives of the Secretary, who are qualified by their training and expertise to make such a determination, such as [floodplain inspector Orville] Darvin Messer and [DOW engineer] Art Clay. In addition, floodway is not defined solely in KRS 151.100(6). It is defined in 401 KAR 4:060 Section 1, Subsection (20), as the stream channel and that portion of adjacent land area that is required to pass flood flows without raising the base flood crest elevation by more than one (1) foot.

The testimony from the expert witnesses established that the floodway and floodplain of a stream cannot be defined by a blanket rule, but can only be determined by applying the statutory and regulatory definitions to the particular stream. 401 KAR 4:060 § 5 sets forth the criteria for determining the

regulatory floodway boundaries. The engineering analysis, performed by Cabinet engineer Art Clay with information supplied by Flaget Fuel's engineer Myron McCoy, concluded that at least a portion of the material relocated to the bank of Brown's Fork Creek was within the floodway. In addition, Darvin Messer testified that the slide material which Flaget Fuels placed on the bank significantly raised the elevation on the slide side of Brown's Fork Creek by several feet. Consequently, there was substantial evidence to support the hearing officer's conclusion that Flaget Fuels redeposited slide material within the floodway of Brown's Fork Creek.

Likewise, there was substantial evidence to support the hearing officer's finding that Flaget Fuels blocked or obstructed the channel of Brown's Fork Creek. As previously noted, DOW did not charge Flaget Fuels with the initial slide on July 8, 1998.[10] But following that slide, DOW and Flaget Fuels entered into a specific reclamation plan. Flaget Fuels points out that its efforts to remove the slide material were hampered because the Robertses refused to allow it access to the creek through their property. Nevertheless, the Cabinet inspectors repeatedly complained throughout July and August that the equipment which Flaget Fuels was using was too small and

[10] Apparently, that slide was the subject of a separate action before the DMSRE.

inefficient for the work. When DOW issued its notice of violation on August 28, the creek channel had been obstructed or blocked for over eight weeks, and Flaget Fuels did not completely clear the channel until six days later. Furthermore, as noted above, Flaget Fuels failed to comply with DOW's instructions to return the slide material to its permitted area, but instead deposited most of the material within the floodway. In short, there was substantial evidence to support the hearing officer's finding that Flaget Fuels had violated KRS 151.250(2), KRS 151.310, and 401 KAR 4:060.

Finally, Flaget Fuels argues that the DOW's imposition of a civil penalty in this case was arbitrary and unsupported by the record. Flaget Fuels contends that it cooperated with DOW's remediation instructions and that it acted promptly to restore the creek channel. Flaget Fuels also states that it spent $27,000.00 for removal of slide material between August 25, 1998, and February 8, 1999. The hearing officer found otherwise, and we are bound by that finding as it is supported by substantial evidence.[11]

KRS 151.990(1) provides that any person who violates KRS 151.100 to 151.460 shall be liable for a civil penalty of

[11] The hearing officer noted Flaget Fuel's claimed expenditures to remediate the slide, but also found that Flaget Fuels had failed to present competent evidence to support those claimed expenses.

not more than $1,000.00 and in addition may be enjoined from continuing said violation. Each day upon which such violation occurs or continues shall constitute a separate offense. The Cabinet has not adopted regulations setting standards for determining the amount of such penalties. However, in the case of Natural Resources and Environmental Protection Cabinet v. Wendall Maggard,[12] the Secretary of the Cabinet adjudged that penalties must be determined by considering the following factors:

1. the seriousness of the violation, taking into account such factors as:
   a) the susceptibility of the site to environmental harm of the type concerned in the case,
   b) the physical, geographic and chronological extent of the violation,
   c) the inherent danger to the environment or human health and safety posed by a violation of the type concerned in the case,
   d) the substantive nature of the violation, e.g.; whether it is a reporting violation or a violation of a substantive standard of the law or regulations, and
   e) whether the violation is correctable and if so, the type and extent of remedial efforts required to correct the violation, taking into account any secondary harm to the environment which may be caused thereby;
2. the economic benefit (if any) resulting from the violation;
3. the economic impact of the penalty on the violator, including the cost of remediation;
4. the history of other violations on the site by this violator;
5. the culpability of the violator;
6. the good faith actions of the violator to remedy the violation, comply with the law or obey an order of the Cabinet;

[12] File No. DWM-19198-038 (June 2, 1994).

7. such other matters as imposition of a just penalty would require; and
8. the number of days the Cabinet shows the violator to have violated the law.

Flaget Fuels does not argue that any of these factors are arbitrary or inappropriate. The hearing officer made detailed findings applying each of these factors. Again, these findings are supported by substantial evidence and will not be disturbed on appeal.

Nonetheless, Flaget Fuels contends that DOW's calculation of the amount of its penalty was arbitrary and that the amount of the penalty is excessive. Much of Flaget Fuel's argument in this regard is devoted to irrelevant comparisons of its penalty to those imposed in entirely unrelated cases.

Flaget Fuels also suggests that KRS 13A.100(1) requires the Cabinet to promulgate regulations relating to the penalty calculations. That statute requires that administrative bodies empowered to promulgate regulations

> shall, by administrative regulation prescribe, consistent with applicable statutes: (1) Each statement of general applicability, policy, procedure, memorandum, or other form of action that implements; interprets; prescribes law or policy; describes the organization, procedure, or practice requirements of any administrative body; or affects private rights or procedures available to the public; . . .

Flaget Fuels points out that the DSMRE has promulgated regulations relating to its calculation of civil penalties,[13] but DOW has not. However, the DSMRE's adoption of a formula for calculating penalties does not suggest that all agencies are required to do so. Moreover, Flaget Fuels submits no authority for its assertion that DOW's failure to promulgate a regulation adopting the Maggard factors renders its use of those factors void.

To the contrary, 401 KAR 100.010 §3(5)(b) grants the hearing officer discretion to calculate the amount of the penalty, provided that the hearing officer states the reasons for the amount of the penalty with particularity. Indeed, the hearing officer's report sets out the basis for his calculation of the penalty in detail, as follows:

> In consideration of the above factors, it is my determination that a penalty of $43,200 is warranted. I concluded that the maximum penalty of $1,000 should be imposed from the date the NOV [notice of violation] was issued until the emergency was alleviated. Hence, the $1,000 penalty should run for six days from August 28 until September 3, for a total of $6,000. From September 4 until February 8, there were 158 additional days during which the NOV was not abated. While the emergency had been abated earlier, the entire reclamation could have been accomplished in much less than 158 additional days. Each month the violation continued unabated meant that the Cabinet expended additional man-hours monitoring the

[13] *See* 405 KAR 7:095.

> situation. Despite repeated admonitions from the Cabinet that the equipment on site was not adequate, Flaget [Fuels] refused to bring in an excavator, or demonstate that it had attempted to secure more appropriate equipment, until forced to by the Interim Agreed Order. Hence, I recommend that the per day penalty begin with a minimum penalty of $100 per day and increase by $100 for each month the violation remained unabated. For the remaining days in September, I recommend a penalty of $100 per day (27 days x 100 = $2,700); the days in October at $200 per day (31 days x $200 = $6,200); in November at $300 per day (30 days x $300 = $9,000); and in December at $400 per day (31 days x $400 = $12,400). For January 1-11, I recommend $500 a day (11 days x $500 = $5,500). From January 12 through February 8, when the Cabinet acknowledged that Flaget acted within the time deadlines given in the Interim Agreed Order, I propose a minimum of $50 per day ($50 x 28 = $1,400). The total penalty being recommended is $43,200.

Contrary to Flaget Fuels's argument, the hearing officer fully justified this calculation of the penalty. Furthermore, the amount of the penalty was well within the amounts allowed by KRS 151.990(1). We find nothing else in the record to indicate that the penalty was arbitrary or unreasonable under the circumstances.

In conclusion, therefore, we find that DOW was within its statutory authority to issue the notice of violation and to impose a penalty upon finding the violation. Furthermore, the hearing officer's finding that Flaget Fuels had violated KRS 151.250(2) and KRS 151.310 was based upon a proper application

of law and was supported by substantial evidence. Likewise, the penalty imposed by the Cabinet was supported by substantial evidence and was not clearly erroneous.

Accordingly, the order of the Franklin Circuit Court affirming the April 16, 2001, order by the Secretary imposing penalties upon Flaget Fuels is affirmed.

ALL CONCUR.

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