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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000603-MR

BETHEL FELLOWSHIP, INC., D/B/A BETHEL FELLOWSHIP CHRISTIAN ACADEMY — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE PHILLIP J. SHEPHERD, JUDGE
ACTION NO. 06-CI-01175

ENVIRONMENTAL AND PUBLIC PROTECTION CABINET — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND STUMBO, JUDGES; WHITE,[1] SENIOR JUDGE.

STUMBO, JUDGE: Bethel Fellowship, Inc., d/b/a Bethel Fellowship Christian Academy, appeals from an Opinion and Order of the Franklin Circuit Court

[1] Senior Judge Edwin M. White sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

affirming an administrative decision of the Environmental and Public Protection Cabinet (now Energy and Environmental Cabinet). The instant action arose from an administrative penalty imposed by the Cabinet resulting from Bethel's alleged failure to obtain an asbestos inspection of its school premises. Bethel maintains that the circuit court erred in failing to determine that the Cabinet failed to prove that Bethel is a corporation or owns real property. It also argues that the Cabinet improperly reopened the case for submission of additional evidence, and that the hearing officer admitted hearsay evidence and improperly shifted the burden of persuasion. We find no basis for disturbing the Opinion and Order on appeal, and accordingly affirm.

On July 3, 2003, the Cabinet filed an Administrative Complaint against "Bethel Fellowship, Inc., d/b/a/ Bethel Fellowship Christian Academy" alleging that Bethel failed to comply with various provisions of the Asbestos Hazard Emergency Response Act ("AHERA"). AHERA requires all school facilities to survey their premises for asbestos and to comply with various reporting and corrective requirements. The action was based on the Cabinet's claim that Bethel improperly failed to inspect its premises for asbestos and to take corrective action after receiving Notices of Violation from the Cabinet.

On March 11, 2005, the matter went before Hearing Officer Alan Wagers who conducted a formal administrative hearing. After hearing proof, Hearing Officer Wagers rendered a Hearing Officer's Report and Recommended Secretary's Order. The report recommended in relevant part that the Secretary find

Bethel to have violated 401 KAR 58:010 and 40 CFR 763, and impose a $10,000 penalty and order compliance with the asbestos testing requirement.

The matter went before the Secretary, who remanded it to the Hearing Officer on February 23, 2006, for the limited purpose of determining whether Bethel owned the "old school building" and the "radio station building." On remand, Hearing Officer Janet Thompson conducted the hearing, which resulted in her conclusion that the buildings at issue were owned by Bethel. This determination was made based on direct testimony, property record cards and information from deed books.

On July 27, 2006, the Secretary rendered an Amended Final Secretary's Order, which incorporated Hearing Officer Wagers' Report and Recommended Secretary's Order and Hearing Officer Thompson's recommendation. The Secretary found that Bethel violated the relevant regulations and he assessed a monetary penalty in accordance with the Hearing Officer's recommendation. Bethel then appealed to the Franklin Circuit Court, which affirmed. This appeal followed.

Bethel now argues that the circuit court erred in affirming the Cabinet's ruling. It first maintains that the Cabinet improperly determined that Bethel is a corporation for purposes of applying 401 KAR 58:010 et al. Bethel contends that the burden rests with the Cabinet to demonstrate that Bethel is a corporate entity, and that Bethel's corporate status can only be shown by the introduction of a certified corporate charter. It contends that the Hearing Officer

improperly determined that Bethel is a corporation, and that the Cabinet and circuit court erred in adopting that determination.

We find no error on this issue. In examining this claim of error, the circuit court noted that in response to the Cabinet's Amended Administrative Complaint, Bethel answered and admitted that it was a corporate entity. In its Complaint, the Cabinet alleged in paragraph 6 that "Bethel Fellowship Christian Academy . . . is a nonprofit LEA that is owned and operated by Bethel Fellowship, Inc., a Kentucky Corporation."[2] In answering, Bethel denied that Bethel Fellowship Christian Academy was listed as a nonprofit LEA, but admitted the balance of the Cabinet's allegation as set out in paragraph 6. This admission, taken alone, forms a proper basis for the circuit court's determination that Bethel is a corporate entity for purposes of 401 KAR 58.010. The Cabinet does not bear the burden of demonstrating something which Bethel acknowledged in its Answer. Other evidence of Bethel's corporate status was introduced, including deeds indicating that Bethel is a corporation, and the circuit court found that "certified copies of the articles of incorporation are indeed in the administrative record." Irrespective of this, Bethel's acknowledgement of its corporate status in its Answer was a sufficient basis for the Cabinet's conclusion that Bethel was a corporate entity, and the circuit court properly so found.

Bethel next argues that the Cabinet failed to demonstrate that Bethel owns the subject parcel. It notes that Hearing Officer Thompson, who heard the

[2] "LEA" is an abbreviation for "Local Education Agency" as set out in 401 KAR 58.010.

matter on remand, relied on an Order issued by Hearing Officer Wagers on June 1, 2005, as proof that Bethel owned the property in question. Hearing Officer Wagers concluded that the Cabinet proved by a preponderance of the evidence that Bethel was a LEA, and in so doing cited a letter by a Pastor Lyons that referred to "[a]ll of our buildings . . . ." Hearing Officer Wagers cited also Lyons' testimony at the hearing, and concluded that the letter and testimony of Lyons constituted an admission by Bethel that it owns the buildings on its campus. Bethel now maintains that statements of legal conclusions are not admissible as admissions, or in the alternative would constitute an extrajudicial admission. Bethel also contends that the statute of frauds precludes the oral testimony of Lyons from being admissible to prove ownership of the property. In sum, Bethel maintains that the Cabinet failed to prove that Bethel owns the premises at issue, and that as such is without jurisdiction to hear and adjudicate the instant action.

We are persuaded by the Cabinet's contention that the preponderance of the evidence appearing in the administrative record as a whole supports the Secretary's Final Order and demonstrates that Bethel owns the property at issue. As the circuit court properly noted, in order for the Cabinet to sustain its burden of proof, it has to demonstrate by a preponderance of the evidence that Bethel was a LEA. One way to meet this burden was to establish that Bethel was the "owner of any nonpublic, nonprofit elementary or secondary school building." 401 KAR 58.010.

The Cabinet offered proof of Bethel's ownership of the subject parcel in several ways. It offered the testimony of Pastor Lyons, who stated that Bethel built the buildings and a letter from Lyons referring to the buildings' construction and to "our buildings." Additionally, property record cards and information gleaned from deed books was offered into evidence in support of the Cabinet's claim that Bethel owned both the real property and improvements of the subject parcel. The totality of the evidence supports the Cabinet's conclusion on this issue, and we find no error.

Bethel's third argument is that the circuit court improperly failed to conclude that the Cabinet was unauthorized to remand the matter to the Hearing Officer for a determination of whether Bethel owned the buildings at issue. Bethel argues that such a remand is not supported by the law, that it gives the Cabinet "a second bite at the apple," and constitutes a gross violation of the Due Process of Law to which Bethel is entitled. In support of this argument, Bethel cites case law standing for the proposition that a judgment may not be reopened for the taking of additional proof.

We find no error on this issue. 401 KAR 100:010, Section 3(6)(a) gives the Secretary the authority to "remand the matter to the hearing officer." This is precisely what occurred below. Additionally, the matter was remanded prior to the entry of the Cabinet's Final Order, and no final judgment was reopened for the taking of additional proof. We find no basis for disturbing the circuit court's Opinion and Order on this issue.

Bethel next argues that the Hearing Officer improperly shifted the burden of persuasion by placing the burden to prove or disprove an element of the violation on Bethel instead of the Cabinet. Bethel bases this argument on paragraph 7(a) of the Hearing Officer's Recommended Order, which states,

> Although Environmental Enforcement Specialist Hamm was not able to identify which deed pertained to the old school building and/or the radio station, he requested of PVA Bland that he be provided documents showing ownership of *all* properties owned by the church. Defendant offered no evidence to show that Hamm was not provided with ownership on all properties owned by the church, or that the deeds introduced did not pertain to the old school building and/or radio station.

Bethel maintains that this statement impermissibly places the burden on Bethel to disprove its ownership of the subject parcel, rather than properly placing the burden to prove ownership on the Cabinet. We are not persuaded by this argument. Bethel correctly notes that the Cabinet bears the burden of proof in administrative hearings. 401 KAR 100:010, Section 12(4). The Hearing Officer, via the Recommended Order cited by Bethel, properly placed the burden on the Cabinet. Once the Cabinet met that burden by a preponderance of the evidence, the Hearing Officer merely noted that Bethel did not rebut the Cabinet's proof or otherwise demonstrate that it did not own the buildings at issue. The Hearing Officer did not place the burden of proof on Bethel and the circuit court properly so found.

Lastly, Bethel contends that the Hearing Officer improperly admitted double hearsay testimony into evidence. It argues that Don Hamm, an

Environmental Enforcement Specialist employed by the Cabinet's Office of Legal Services, was improperly allowed to testify as to what PVA Bland told him the records reflected. Bethel maintains that not only was Hamm's testimony hearsay, but he was also placing into the record the hearsay evidence of PVA Bland. Bethel also argues that no foundation was laid for the introduction of property record cards and aerial photographs of the subject parcel.

We are not persuaded by Bethel's argument on this issue. The circuit court concluded that the deeds and public records admitted into evidence fall within KRE 803(14), as they are records of "a document purporting to establish or affect an interest in property." The court additionally found that the deeds and public records are certified copies which were signed and attested to by their respective custodians. As such, the court concluded that they fall within the KRE 803(8), (14) and (15) exceptions to hearsay, and are self-authenticating under KRE 902. We find no error in this conclusion. Additionally, evidence may be considered in an administrative proceeding which would not be admissible under the Rules of Evidence. 401 KAR 100:010, Section 3(1)(b). We find no basis for concluding that the Cabinet considered improper evidence in reaching its conclusion.

For the foregoing reasons, we affirm the Opinion and Order of the Franklin Circuit Court.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

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