

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Robert J. Davis,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1673 C.D. 2009
	:	Submitted: January 15, 2010
Pennsylvania Public	:	
Utility Commission,	:	
	:	
Respondent	:	

BEFORE: HONORABLE BERNARD L. MCGINLEY, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY

FILED: April 22, 2010

Robert J. Davis (Davis) petitions for review from an order of the Pennsylvania Public Utility Commission (Commission) which approved the petition of the Sustainable Energy Fund of Central Eastern Pennsylvania (SEF) for the removal of Davis as a member of the Board of Directors of SEF. We affirm.

The SEF was established under the terms of the PPL Electric Utilities, Inc. restructuring settlement. The purpose of the SEF is to promote the development and use of renewable and clean energy technologies, energy conservation, energy efficiency and sustainable energy enterprises.

Under the restructuring settlement, the SEF must be managed by an administrator designated by a seven member board of directors. Any person appointed to the board of directors must be approved by the Commission.

On September 28, 2006, the Commission approved the appointment of Davis as a replacement board member, to fill an open term that was to expire in June of 2007. On October 25, 2007, the board of directors of the SEF appointed Davis to a full three year term beginning on July 1, 2007, and expiring on June 30, 2010.

On March 19, 2009, the SEF filed its petition with the Commission requesting that the Commission approve the board of directors' removal of board member Davis. Article III, Section 9 of the SEF by-laws provides that the Commission may remove a board member for cause on its own motion or upon motion from the SEF that is subsequently approved by the Commission. As required by 52 Pa. Code § 1.36, the SEF petition included a verification. The petition was served on Davis. Although 52 Pa. Code §5.61 provides for an answer to the petition, Davis did not file an answer to the petition.

In the petition, the SEF alleged that Davis improperly communicated confidential information to a loan applicant with the SEF. The petition also alleged that Davis had a business relationship or potential business relationship with a loan applicant that Davis failed to disclose to the board of directors.

The Commission issued an order on July 27, 2009, approving the SEF petition and removing Davis from the board of directors. The Commission found that the petition was unopposed, that the SEF established

a *prima facie* case and that the allegations against Davis were not challenged or rebutted. The Commission also determined that Davis violated the SEF's conflict of interest policy, the by-laws of the SEF and his fiduciary duty as a director of the SEF. The Commission concluded that there was sufficient cause to remove Davis as a director of the SEF. Davis filed his petition for review with this court on August 26, 2009.¹

In his petition, Davis claims that the Commission violated the Pennsylvania and United States Constitution by depriving him of property without due process of law and that the Commission failed to apply its own regulations, which include notice and an opportunity to be heard.

Davis maintains that Section 703(g) of the Public Utility Code (Code), 66 Pa.C.S. § 703(g) affords him a hearing before the Commission can amend or rescind a previously issued order. Because the Commission originally entered an order appointing him as a board member, Davis argues that he was entitled to a hearing pursuant to Section 703(g) of the Code, which provides, in pertinent part:

Rescission and amendment of orders. – [The commission may, at any time, after notice and after opportunity to be heard as provided in this chapter, rescind or amend any order made by it.²]

¹ The Commission correctly states that Davis' brief violates Pa. R.A.P. 2119(a), in that it is not divided into parts with distinctive headings. Additionally, the Commission claims that Davis includes in his brief information which was not a part of the evidentiary record below, in violation of Pa. R.A.P. 2132(a). Although we disapprove of Davis' non-compliance with the rules, the brief does not substantially hamper this court's review.

² The Commission concedes that it entered an order approving the appointment of Davis as a board member to fill an open term expiring in 2007. The Commission claims that Davis' term as a board member was extended by the Board from July 1, 2007 to June 30, 2010. According to the Commission, the by-laws do not require the

In Tripps Park Civic Association v. Pennsylvania Public Utility Commission, 415 A.2d 967 (Pa. Cmwlth. 1980), a case also involving Section 703(g) of the Code, the Pennsylvania Gas and Water Company (PG&W) filed a petition with the Commission seeking a modification of a Commission order through settlement. Service of the petition was made on Tripps. Although Tripps had twenty days to file an answer, it failed to do so. The Commission thereafter adopted an order approving PG&W's settlement and modified its previous order to that effect.

This court determined that PG&W followed prescribed procedure and that Tripps did not. Although Tripps had notice of PG&W's petition, it failed to follow prescribed procedure by filing an answer. Tripps had been given notice of the petition and an opportunity to be heard but failed to avail himself of that opportunity and, as such, there was no violation of Section 703(g) of the Code or of Tripps' due process rights.

Similarly, in this case, the SEF filed its petition, which included a verification, to remove Davis as a Board member on March 19, 2009. In accordance with 52 Pa. Code §5.61(a), Davis had twenty days in which to file an answer to the petition. Further, the provisions of 52 Pa. Code §5.61(e) provide what shall be included in an answer to a petition. That section provides:

(e) *Form of answers to petitions.* The answer must be in writing and:

Commission to re-approve existing board members at the onset of the new term. We disagree, inasmuch as Article III, Section 2 of the by-laws state that: "The Board of Directors shall elect all new directors. The term of a new director shall begin upon approval of the director by the Commission."

(1) Advise the parties and the Commission of the parties' position on the issues raised in the petition.

(2) State the parties' standing to participate in any Commission proceeding resulting from the petition.

(3) State concisely the facts and matters of law relied upon.

(4) Include a copy of a document, or the material part of a document when relied upon in the answer. If the writing or a copy is not available, the answer must set forth that the document is not available and the reason, and set forth the substance of the document.

By not responding to the petition via an answer, Davis did not avail himself to prescribed procedure.

Moreover, Section 703 of the Code, 66 Pa.C.S. §703, does not mandate that a hearing be afforded. Specifically, 66 Pa.C.S. §703(b) states that the Commission shall fix the time and place of a hearing, "if any is required."

The Supreme Court in Chester Water Authority v. Pennsylvania Public Utility Commission, 581 Pa. 640, 868 A.2d 384 (2005), addressed the issue of whether a hearing is required in all cases involving an application for a certificate of public convenience under Section 1103 of the Code, 66 Pa.C.S. §1103. Like 66 Pa.C.S. §703(b), 66 Pa.C.S. §1103(b) does not mandate a hearing in all cases. Rather, 66 Pa.C.S. §1103(b) provides that the Commission shall hold hearings, "as it may deem necessary."

In Chester Water Authority, Philadelphia Suburban Water Company (Philadelphia Suburban) filed an application with the Commission for a certificate of public convenience. Chester Water Authority (Authority) lodged a protest in opposition to Philadelphia Suburban's application. Thereafter, Philadelphia Suburban sought judgment on the pleadings. Without conducting a hearing, the Commission granted Philadelphia Suburban's motion.

The Supreme Court stated that due process of law does not require a hearing on every application for a certificate of public convenience. “[A]s a matter of constitutional due process, an evidentiary hearing is most often implicated where there are material facts in dispute.” Id. at 653-654, 868 A.2d at 392. “[S]ince the Commission was able to accept the material factual allegations of the authority's protest as true, a due process hearing was not essential, and the use of the procedure for judgment on the pleadings relative to the protest was not inappropriate. Id. at 654, 868 A.2d at 392.

In this case, no material facts were in dispute. The SEF filed a petition with the Commission. Although 52 Pa. Code §5.61(a) provided Davis an opportunity to file an answer to advise the Commission of his position and state facts and matters relied upon, Davis failed to avail himself to this opportunity. Because 66 Pa.C.S. §703(b) states that the Commission shall fix the time and place of a hearing “if any is required” and because there were no material facts in dispute, we conclude that the Commission did not err in not scheduling a hearing.

Moreover, we do not agree with Davis that 2 Pa.C.S. §504 mandates a hearing in this case. That law provides that no adjudication of a Commonwealth agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard. As stated in Turner v. Pennsylvania Public Utility Commission, 683 A.2d 942, 946 (Pa. Cmwlth. 1996):

Where there are no specific provisions regarding adjudicatory actions of an agency, the Administrative Agency Law (AAL) provides a default mechanism for the provision of hearings and for appeals from administrative adjudications, which comport with due process requirements.

Here, as acknowledged by Davis, Section 703(g) of the Code provides specific provisions for rescission and amendment of any order made by it.

In accordance with the above, the order of the Commission is affirmed.

JIM FLAHERTY, Senior Judge

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ORDER

Now, April 22, 2010, the order of the Pennsylvania Public Utility Commission, in the above-captioned matter, is affirmed.

JIM FLAHERTY, Senior Judge