IN THE COMMONWEALTH COURT OF PENNSYLVANIA

HET Enterprises, LLC, Petitioner	:	
	:	No. 693 M.D. 2010
v.	:	
	:	Argued: May 9, 2011
Commonwealth of Pennsylvania, Department of Labor & Industry's Industrial Board, Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: August 1, 2011

HET Enterprises, LLC (HET) petitions for review of the July 27, 2010, order of the Department of Labor and Industry's Industrial Board (Board) dismissing as moot HET's appeal from the March 12, 2010, orders of the Bureau of Occupational and Industrial Safety (BOIS) placing gasoline dispensing equipment at a service station operated by HET out of service for numerous violations of the Combustible and Flammable Liquids Act (Act).[1] For the reasons that follow, we now vacate and remand.

HET operates the BP Service Station at 3635 Simpson Ferry Road, Lower Allen Township. On March 10, 2010, BOIS conducted an inspection of this

[1] Act of February 11, 1998, P.L. 58, as amended, 35 P.S. §§1241-52.

service station and found twenty violations of the Act and its regulations.[2] Concluding that the violations constituted an imminent danger to the public, BOIS issued two orders, both dated March 12, 2010, directing that the gasoline dispensing equipment at the service station be placed out of service until the violations were corrected and HET received permission to resume its operations.[3] The orders advised HET of its right to file an appeal with the Board and request a hearing to determine the reasonableness of the rules or regulations, to request a variance, or to request an extension of time to comply with the orders.

HET corrected the violations and requested a new inspection. Following an inspection on March 29, 2010, HET was permitted to resume operations at the service station.[4] On April 1, 2010, HET filed a notice of appeal with the Board of the original March 12, 2010, orders and requested a hearing. The Board did not conduct a hearing, and, on April 9, 2010, HET filed a petition for review in the nature of a complaint in mandamus with this Court seeking an order directing the Board to hold a hearing and render a determination on the merits, or, alternatively, simply reverse the March 12, 2010, orders.[5] While this petition for review was pending, the

[2] This inspection followed an accident at the service station on March 5, 2010, at a time when there was no attendant on duty and which resulted in fatal injuries to a customer fueling his vehicle.

[3] One of the orders addressed violations of the Act, while the other order addressed violations of the regulations.

[4] However, on this same day, BOIS filed a private criminal complaint against HET citing the same violations noted in its March 12, 2010, orders. The parties later agreed to a stay of the criminal proceedings pending the Board's decision on the merits and any subsequent appeal to this Court.

[5] This petition for review was docketed at No. 363 M.D. 2010.

parties reached an agreement whereby the Board agreed to issue a determination and HET agreed to withdraw its petition for review.[6] By order dated July 6, 2010, this Court directed that the matter be closed and discontinued.

On July 27, 2010, the Board issued an order dismissing HET's appeal as moot. In an accompanying decision, the Board explained that no case or controversy remained because HET corrected any alleged violations and was permitted to resume operations as of March 29, 2010, prior to the filing of its appeal of the March 12, 2010, orders. Additionally, the Board noted that it lacked any power to impose sanctions or fines, or take other action, since the violations had already been corrected. Finally, the Board concluded that HET did not meet any of the exceptions to the mootness doctrine, specifically indicating that BOIS orders and Board adjudications do not constitute precedent for other actions.

On August 26, 2010, HET filed a petition for review in our Court setting forth two counts. The first count is addressed to our original jurisdiction, is in the nature of a complaint, and seeks equitable relief. Specifically, HET seeks an order vacating the Board's July 27, 2010, order and BOIS' March 12, 2010, orders, and continuing the stay of the criminal proceedings. The second count is addressed to our appellate jurisdiction and seeks reversal of the Board's order, a remand to the Board for a hearing on the merits, and a continued stay of the criminal proceedings. HET subsequently filed an amended petition for review essentially raising the same

[6] The exact nature of the Board's determination is disputed by the parties. HET contends that the Board agreed to issue a determination on the merits of its appeal of the March 12, 2010, orders. The Board contends that it only agreed to issue a determination regarding whether or not HET's appeal was moot and to hold a hearing if it was not moot. The record is devoid of any written agreement. Rather, the only evidence memorializing this agreement consists of a July 2, 2010, letter from HET's counsel to counsel for the Board indicating his understanding that the Board agreed to rule on HET's petition for appeal. The extent of this ruling is not discussed further.

allegations. BOIS filed preliminary objections to HET's amended petition for review and the Board filed preliminary objections to the first count of this petition. By order dated November 1, 2010, this Court dismissed the preliminary objections filed by BOIS. HET thereafter agreed to withdraw the first count. By order dated November 24, 2010, this Court directed that the first count be discontinued and issued a briefing schedule regarding HET's appeal. Additionally, the parties agreed to stay the criminal proceedings pending this appeal.[7]

On appeal,[8] HET argues that the Board erred in concluding that its appeal from the BOIS orders was moot and that the Board's failure to hear and decide its appeal resulted in a deprivation of its right to due process and equal protection under the United States and Pennsylvania Constitutions.[9] We agree.

An appeal will be dismissed as moot unless an actual case or controversy exists at all stages of the judicial or administrative process. In re Gross, 476 Pa. 203, 382 A.2d 116 (1978). An issue can become moot during the pendency of an appeal due to an intervening change in the facts of the case or due to a change in the applicable law. Id. However, exceptions to this mootness doctrine have been made

[7] By order dated October 27, 2010, the district judge formally stayed the criminal proceedings.

[8] Our scope of review is limited to determining whether constitutional rights were violated, whether the decision was rendered in accordance with the law, and whether necessary findings of fact were supported by substantial evidence. Bologna v. Department of Labor and Industry, 816 A.2d 407 (Pa. Cmwlth.), appeal denied, 574 Pa. 755, 830 A.2d 976 (2003).

[9] While HET raised an equal protection issue in its statement of questions involved, HET did not further develop this issue in the argument portion of its brief. Hence, this issue is waived. City of Philadelphia v. Workers' Compensation Appeal Board (Calderazzo), 968 A.2d 841 (Pa. Cmwlth.), appeal denied, 602 Pa. 669, 980 A.2d 609 (2009) (issues raised in statement of questions presented and not properly developed in argument portion of brief are waived).

where the conduct complained of is capable of repetition yet likely to evade judicial review, where the case involves issues of great public importance, or where one party will suffer a detriment without the court's decision. Cytemp Specialty Steel Division v. Pennsylvania Public Utility Commission, 563 A.2d 593 (Pa. Cmwlth. 1989).

In Al Hamilton Contracting Company v. Department of Environmental Resources, 494 A.2d 516 (Pa. Cmwlth. 1985), this Court explained that the appropriate inquiry in determining mootness is whether the litigant has been deprived of the necessary stake in the outcome or whether the agency will be able to grant effective relief. In that case, an inspector from the Department of Environmental Resources (DER) conducted an inspection of the contracting company's operation. During this inspection, the inspector noted that an underdrain was blocked by silt and other debris and that a catch basin and a diversion ditch also needed cleaning. DER issued an order directing the contracting company to unplug the underdrain and clean the catch basin and diversion ditch. The contracting company immediately complied with the order and never sought a stay. Subsequently, the contracting company appealed the order to the Environmental Hearing Board (EHB). The EHB concluded that there was no relief which it could grant and dismissed the appeal. The contracting company then appealed to this Court.

Before this Court, the contracting company argued that it was deprived of the opportunity to challenge whether it was in fact guilty of the named violations and that denial of a hearing constituted a deprivation of its right to due process. The contracting company also argued that these prior violations could subject it to a penalty escalation provision in DER's regulations, which permits DER to consider prior violations when assessing future civil penalties. Ultimately, we vacated EHB's order and remanded the case to the EHB to hold a hearing on the merits. We noted

that had the contracting company seriously questioned the propriety of DER's order, it could have requested a stay under DER's regulations. We further noted that the fact that the contracting company was deprived of property without a hearing did not justify ignorance of the fact that the appeal was moot and that courts should be most reluctant to consider constitutional claims in moot cases. However, because the DER regulation provided for enhanced penalties if there were a record of violations, we concluded that the company retained a sufficient stake in the outcome such that the EHB erred in dismissing the matter as moot.

Similarly, HET argues that the violations cited in BOIS' March 12, 2010, orders could result in future enhanced penalties such that the present matter was not moot. HET cites section 11 of the Act in support of this argument, which provides, in pertinent part, as follows:

> (a) INITIAL OFFENSE.-- Except as provided for in subsection (c), a person that violates this act or a regulation under this act commits a summary offense and shall, upon conviction, be sentenced to pay a fine of $500.
>
> (b) SUBSEQUENT OFFENSES.-- A person that, after being sentenced under subsection (a), violates this act or a regulation under this act commits a summary offense and shall, upon conviction, be sentenced to pay a fine of $ 1,000.

35 P.S. §1251(a), (b). The very language of section 11(a) of the Act transforms a notice of violation into a summary criminal offense, thereby subjecting a violator to fines which increase in the case of multiple violations.[10] Hence, this section provides for an enhanced penalty and, similar to Al Hamilton Contracting Company, HET retained a sufficient stake in the outcome such that the matter was not moot.

[10] As noted above, BOIS did in fact file a private criminal complaint on March 29, 2010.

Additionally, HET notes in its brief to this Court that while it took measures to correct certain violations such that business could resume at the service station, several other alleged violations were not corrected. At the very least, HET should have an opportunity to defend against these violations. Indeed, the Board's deprivation of HET's opportunity in this regard strikes at the basic foundation of due process, i.e., notice and an opportunity to be heard. Section 504 of the Administrative Agency Law, 2 Pa. C.S. §504 (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); Air-Serv Group, LLC v. Commonwealth, 18 A.3d 448 (Pa. Cmwlth. 2011) (notice and opportunity to be heard form the basis of due process). Because section 9(b) of the Act, 35 P.S. §1249(b), designates the Board as the appellate body for challenges to BOIS' orders, the matter must be remanded to the Board to consider HET's alleged violations.

Finally, we take this opportunity to address certain deficiencies in BOIS' March 12, 2010, orders. As HET notes in its brief to this Court, these orders failed to provide sufficient notice of the applicable appeal procedure. More specifically, these orders only stated that an aggrieved party may file a petition with the Board for a hearing on the reasonableness of the rules or regulations or an appeal requesting a variance or an extension of time to comply; they did not state that an aggrieved party can file an appeal challenging whether the violations alleged did in fact exist.

We have previously addressed a similar issue in Appeal of Hoge, 410 A.2d 106 (Pa. Cmwlth. 1980). In Appeal of Hoge, the Department of Labor and Industry (Department) issued an order requiring Ken Hoge, the owner of a commercial building in McCandless, Pennsylvania, to vacate and place the building

out of service because of alleged violations of what is commonly referred to as the Fire and Panic Act, Act of April 27, 1927, P.L. 465, as amended, 35 P.S. §§1221-1235.1. Similar to the BOIS orders in this case, the Department's order advised Hoge of his right to a hearing on the reasonableness of the rules, but did not mention his right to appeal the alleged violations. In remanding the matter to the Department to allow Hoge to file an answer to the Department's order to show cause, which constituted an appeal to the Board under the regulations of the Fire and Panic Act, we directed the Department to revise its order to clearly summarize the Board's appeal procedure. In the course of remanding the present matter to the Board, we direct BOIS to similarly revise its orders in the future.

Accordingly, the order of the Board is vacated. The matter is remanded to the Board for consideration of the merits of HET's appeal of BOIS' March 12, 2010, orders.

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PATRICIA A. McCULLOUGH, Judge

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ORDER

AND NOW, this 1st day of August, 2011, the order of the Department of Labor and Industry's Industrial Board (Board), dated July 27, 2010, is hereby vacated. The matter is remanded to the Board for further proceedings consistent with this opinion.

Jurisdiction relinquished.

PATRICIA A. McCULLOUGH, Judge