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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000699-MR

KENTEC COAL — APPELLANT

v.

APPEAL FROM PERRY CIRCUIT COURT
HONORABLE DOUGLAS C. COMBS, JR., JUDGE
ACTION NO. 98-CI-00025

COMMONWEALTH OF KENTUCKY,
NATURAL RESOURCES AND ENVIRONMENTAL
PROTECTION CABINET — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, KNOPF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Kentec Coal (Kentec) appeals from a judgment of the Perry Circuit Court that affirmed the final order of the Secretary of the Natural Resources and Environmental Protection Cabinet (Resources Cabinet) finding Kentec in violation of the Surface Coal Mining Act, Chapter 350, and several administrative rules involving land reclamation. After reviewing the record, the applicable law, and the arguments of counsel, we affirm.

Kentec obtained a permit to conduct strip mining operations on approximately 107 acres in Perry and Leslie

Counties. Under the mining permit, Kentec was required to return some of the realty to its prior use as forest land. The permit included a revegetation plan under which Kentec proposed planting grass seed during the first growing season after backfilling and grading the area, then planting 200 white pines per acre, 250 scotch pines per acre, and 200 black alders per acre between February 5 - April 15, and September 15 - November 15. The permit provided, "After the completion of one growing season, additional fertilizer will be applied if sufficient vegetative growth is not obtained. If a low germination rate is evident of a tree species, then seedlings will be planted at the next favorable planting time. The area will be considered successfully revegetated when sufficient ground cover is obtained which effectively controls erosion and has a tree species representative of the postmining land use plan."

The permit also was subject to the terms and conditions of the Kentucky Pollutant Discharge Elimination System (KPDES), which establish effluent limitations and monitoring requirements as issued by the Division of Water for surface mining operations. Under the terms of the KPDES permit, Kentec was required to monitor all of its sediment structures and submit water samples and discharge reports on a quarterly basis to the Department for Surface Mining Reclamation and Enforcement. Kentec's mining activities ceased in 1992. Kentec submitted a report indicating it had backfilled, limed, put down grass seed, and mulched in November 1994.

On February 27, 1997, two Environmental Control Supervisors with the Department for Surface Mining, Joe Duff and David Harvey, conducted a regular inspection of the Kentec site. Following the inspection, they issued several notices of noncompliance with the postmining land use requirements in the permit in violation of Chapter 405 of the Kentucky Administrative Regulations (KAR) including: (1) 405 KAR 16:200 (revegetation) - failure to plant trees as required by the permit plan; (2) 405 KAR 16:210 (postmining land use plan) - failure to plant trees to achieve the approved postmining land use; (3) 405 KAR 16:100 and 401 KAR 5:065 (impoundments) - failure to submit fourth quarter 1996 dam maintenance reports and annual certifications for all sediment ponds; (4) 405 KAR 5:065 (KPDES) - failure to comply with KPDES requirements to submit fourth quarter 1996 water monitoring reports; and (5) 405 KAR 16:110 (water monitoring) - failure to submit fourth quarter 1996 water monitoring reports. The inspectors ordered abatement of the violations by March 27, 1997, which was subsequently extended. The violations of 405 KAR 16:110, 401 KAR 5:065, and 405 KAR 16:100 were abated as of May 28, 1997.[1]

On March 24, 1997, Kentec filed a petition for review with the Resources Cabinet challenging the notices of noncompliance. During a prehearing conference, the parties agreed to merge the revegetation violations of 405 KAR 16:200 and 405 KAR 16:210 into a single violation and the water report

[1]Kentec also filed a request to revise the permit to change the approved postmining land use in September 1997.

violations of 405 KAR 16:110 and 401 KAR 5:065 into a single violation. On October 16, 1997, a hearing officer conducted an evidentiary hearing at which the Resources Cabinet called Joe Duff as a witness and offered several documents. Kentec called no witnesses. Duff testified that although there was some ground cover vegetation, he saw only a few stray tree seedlings during the inspection that appeared to be from natural growth and no organized plantings as proposed in the permit plan. He also testified that the required water monitoring and impoundment reports had not been filed as of the date of the inspection. Duff stated that Kentec had sought a Phase I bond release that had been granted in May 1995. He stated that under the permit revegetation plan, Kentec should have performed tree seeding in September 1995, February 1996, September 1996, and February 1997. The planting report for the Phase I bond release indicated that in November 1994, Kentec had applied lime, fertilizer, grass seed, legumes, and mulch, but no tree seeds or seedlings. Duff testified that the trees needed to be planted early enough to prevent their being crowded out by the ground cover.

Following the hearing, the hearing officer issued a report that contained findings of fact, conclusions of law, and recommendations. The hearing officer found that Kentec had committed three violations by failing to comply with 405 KAR 16:100, 405 KAR 16:110/401 KAR 5:065, and 405 KAR 16:200/405 KAR 16:210. He noted that under 405 KAR 7:092 Section 7(9), the Resources Cabinet had the initial burden of establishing a prima facie case supporting the notice of noncompliance, but the

ultimate burden of persuasion rested with Kentec. He stated that Kentec had offered no evidence to rebut the evidence of the Resources Cabinet showing the violations, and that the inspector acted within his discretion in concluding that Kentec had not properly completed its permit vegetation plan or complied with the postmining land use. Kentec filed exceptions to the hearing officer's report.

On December 18, 1997, the Secretary of the Resources Cabinet entered a final order adopting the hearing officer's report and finding that Kentec had committed the three violations of noncompliance. Kentec appealed to the circuit court. On February 21, 2000, the circuit court found that the Resources Cabinet's order was supported by substantial evidence and affirmed the Secretary's final order. This appeal followed.

Kentec challenges the action of the Resources Cabinet on procedural and substantive grounds. It contends that the administrative hearing violated its constitutional rights and that the hearing officer misconstrued the applicable regulations. First, Kentec asserts that the administrative proceeding was invalid because the hearing officer utilized an impermissible burden of proof. 405 KAR 7:092 Section 7(9) provides:

> Burden of Proof. In review of notices of noncompliance and orders for remedial measures or orders for cessation and immediate compliance or the modification, vacation, or termination thereof under this section, the cabinet shall have the burden of going forward to establish a prima facie case as to the propriety of the notice, order, or modification, vacation, or termination thereof. The ultimate burden of persuasion shall rest with the petitioner.

Kentec argues that placing a slight burden on the Resources Cabinet and the ultimate burden of persuasion on the party challenging the noncompliance imposes an inappropriate burden of proof standard in violation of due process and equal protection. It notes that KRS 350.130(5) provides that each provision of KRS 350.130, which deals with issuance and enforcement of notices of noncompliance, "shall be interpreted and applied consistently with due process of law." Kentec maintains that the Resources Cabinet exceeded its authority in promulgating 405 KAR 7:092 Section 7(9) by placing the ultimate burden of persuasion for establishing noncompliance with the regulations on the permit holder rather than the Resources Cabinet. Kentec asserts that an enforcement agency should not be allowed to use unfair, advantageous regulations, which lessen the Resources Cabinet's burden when trying to punish by way of a civil penalty, any more than the criminal justice system should have laws that require the accused to disprove his guilt.

First, we believe Kentec's analogy of this noncompliance proceeding with a criminal prosecution is inapt. This situation involves an administrative proceeding creating civil sanctions, not a criminal prosecution with potential jail sanctions. Constitutional protections required for criminal prosecutions do not necessarily apply to proceedings involving civil sanctions. See, e.g., Hudson v. United States, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997) (Fifth Amendment double jeopardy); Commonwealth v. Lawson Mardon Flexible Packaging Inc., Ky. App., 10 S.W.3d 488 (2000) (same). While

administrative hearings must be conducted in a fair and impartial manner, they need not possess the formality of judicial proceedings. See Perkins v. Stewart, Ky. App., 799 S.W.2d 48, 51 (1990) (administrative agencies not bound by technical rules of evidence governing jury trials); KRE 1101(a) (Evidence rules apply to all courts of the Commonwealth). Administrative regulations and procedures are based on and limited by statutory authority. See Flying J. Travel Plaza v. Commonwealth, Transportation Cabinet, Department of Highways, Ky., 928 S.W.2d 344 (1996). As the United States Supreme Court noted in Lavine v. Milne, 424 U.S. 581, 96 S. Ct. 1010, 47 L. Ed. 2d 249 (1976), burdens of proof established under criminal jurisprudence generally do not apply in the context of administrative proceedings.

> Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application. . . . Outside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not an issue of federal constitutional moment.

424 U.S. at 585, 96 S. Ct. at 1016. See also Concrete Pipe and Products of California Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 626, 113 S. Ct. 2264, 2281, 124 L. Ed. 2d 539 (1993).

In the case sub judice, Chapter 350 clearly places the burden for reclamation of surface mined areas on the coal mine operator as part of the mining permit. See, e.g., KRS 350.064, KRS 350.085, KRS 350.090, KRS 350.093, KRS 350.095, KRS 350.100.

The General Assembly also gave the Resources Cabinet broad authority to enforce the act. KRS 350.020 states the legislative policy and intent.

> The General Assembly finds that the Commonwealth is the leading producer of coal and that the production of coal in Kentucky contributes significantly to the nation's energy needs. The General Assembly further finds that unregulated surface coal mining operations cause soil erosion, damage from rolling stones and overburden, landslides, stream pollution, the accumulation of stagnant water and the seepage of contaminated water, increase the likelihood of floods, destroy the value of land for agricultural purposes, destroy aesthetic values, counteract efforts for the conservation of soil, water and other natural resources, destroy or impair the property rights of citizens, create fire hazards, and in general create hazards dangerous to life and property, so as to constitute an imminent and inordinate peril to the welfare of the Commonwealth. The General Assembly further finds that lands that have been subjected to surface coal mining operations and have not been reclaimed and rehabilitated in accordance with modern standards constitute the aforementioned perils to the welfare of the Commonwealth. The General Assembly further finds that there are wide variations in the circumstances and conditions surrounding and arising out of surface coal mining operations due primarily to difference in topographical and geological conditions, and by reason thereof it is necessary, in order to provide the most effective, beneficial and equitable solution to the problem, that a broad discretion be vested in the authority designated to administer and enforce the regulatory provisions enacted by the General Assembly. The General Assembly further finds that governmental responsibility for regulating surface coal mining operations rests with state government and hereby directs the Natural Resources and Environmental Protection Cabinet to take all actions necessary to preserve and exercise the Commonwealth's authority[.] . . . Therefore, it is the purpose of this chapter to provide such regulation and control of

> surface coal mining operations as to minimize or prevent injurious effects on the people and resources of the Commonwealth. To that end, the cabinet is directed to rigidly enforce this chapter and to adopt whatever administrative regulations are found necessary to accomplish the purpose of this chapter.

See also KRS 350.028; KRS 350.465. The Resources Cabinet also has broad authority to promulgate rules and regulations, to conduct investigations or inspections necessary to ensure compliance with Chapter 350, to adopt procedures with respect to filing reports, and to order the suspension of any permit for failure to comply with the statutory or regulatory provisions. KRS 350.050. See also KRS 13A.100.

KRS 350.0301 provides for certain procedures in connection with administrative hearings challenging agency action, including noncompliance citations. It requires a hearing before a duly qualified hearing officer, a written report and recommended order, representation by counsel, and the opportunity to offer testimony evidence and cross-examine witnesses. KRS 350.0301(5) states in part: "The cabinet shall promulgate administrative regulations, pursuant to the provisions set forth in this chapter, establishing formal and informal hearing procedures . . . before an impartial hearing officer who is independent of any prosecutorial functions of the cabinet." The Resources Cabinet's regulations accordingly provide for notice of noncompliance or cessation order, 405 KAR 12:020, Section 5; the right to discovery, 400 KAR 1:040; representation by counsel with the opportunity to make oral or written argument, offer testimony, and cross-examine witnesses, 405 KAR 7:091, Section 3;

and a written report by a hearing officer, 405 KAR 7:091, Section 5. These procedures provide sufficient due process protections.

Kentec also claims that placing the burden of persuasion on it rather than the Resources Cabinet violated equal protection. This argument is predicated on the fact that in administrative hearings under Chapter 350 where the Resources Cabinet initiates an administrative complaint, and under Chapter 13B, the regulations place the ultimate burden of persuasion on the Resources Cabinet. Kentec contends this different treatment has no rational basis.

Generally, the Equal Protection Clause of the Fourteenth Amendment requires equal treatment by the state of persons similarly situated. See Cleburne v. Cleburne Living Center, 473 U.S. 432, 439, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313 (1985); Weiand v. Board of Trustees of Kentucky Retirement Systems, Ky., 25 S.W.3d 88, 92 (2000). Where an equal protection challenge does not involve a suspect class or a fundamental right, a statute or government action is valid if it is rationally related to a legitimate state interest. Id.; Commonwealth v. Howard, Ky., 969 S.W.2d 700, 702 (1998); Yeoman v. Commonwealth, Health Policy Board, Ky., 983 S.W.2d 459, 469 (1998). Under the rational basis test, a classification resulting in differential treatment is valid if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. Howard, 969 S.W.2d at 703 (citing Heller v. Doe, 509 U.S. 312, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993)). The Equal Protection Clause does not require a

state to provide the exact same procedure in all administrative proceedings. See Dohany v. Rogers, 281 U.S. 362, 369, 50 S. Ct. 299, 302, 74 L. Ed. 904 (1930); Kelly v. Warminster Township Board of Supervisors, 512 F. Supp. 658, 669 (E.D. Pa. 1981), overruled on other grounds by Gregory v. Chehi, 843 F.2d 111 (3d Cir. 1988).

In the present case, 405 KAR 7:092, Section 7(9) requires the Resources Cabinet to establish a prima facie case of noncompliance, then shifts the burden of persuasion on the permittee. As indicated earlier, reclamation is an obligation imposed on coal operators for the health and welfare of society. The reclamation plan is developed by the permittee and submitted for approval by the Resources Cabinet. Information concerning the permittee's actions in carrying out the reclamation/revegetation plan and any problems excusing compliance is more particularly within the knowledge of the permittee. These factors provide sufficient rational basis for putting the burden of persuasion on the coal miner. Therefore, we opine that 405 KAR 7:092, Section 7(9), which assigns the initial burden of establishing the existence of a violation on the Cabinet but places the ultimate burden of persuasion on the permittee, passes the rational basis test. Kentec's citation to and reliance on KRS 13B.090(7) is misplaced because administrative hearings under Chapter 350 are specifically exempted from Chapter 13B. KRS 13B.020(3)(f)(l).

Kentec also contends that the hearing officer improperly construed sections 405 KAR 16:200 and 405 KAR 16:210

in finding that it had not satisfied its obligation to restore the land use to forest. 405 KAR 16:200 requires each permittee to establish an effective, permanent vegetative cover meeting the requirements of the regulation and the approved postmining land use. 405 KAR 16:200 Section 1. See also KRS 350.435. 405 KAR 16:210 generally requires that strip mined areas be returned to conditions capable of supporting the uses which existed prior to any mining. Kentec argues that the noncompliance citation was improper because 405 KAR 16:210 does not specify a firm deadline for achieving the postmining land use, but rather merely states that "prior to the final release of performance bond, affected areas shall be restored in a timely manner." Kentec also asserts that the revegetation planting plan in the permit sets forth the seasonal times for planting trees in a given year and provided that "forest land shall be achieved, after mining and reclamation are completed. . . ." Because it had not applied for final release of its performance bond, Kentec argues the revegetation noncompliance citation was premature. It also notes that an adequate ground cover had been established.

The hearing officer rejected Kentec's arguments based on the fact that Kentec completed backfilling and grading in November 1994 but had conducted no organized tree planting prior to issuance of the noncompliance citation in February 1997. He indicated that the inspector properly exercised his discretion in finding that Kentec had failed to comply with its planting plan and properly revegetate the area in a timely manner to achieve the postmining forest land use.

First, we note that the violations of 405 KAR 16:200 and 405 KAR 16:210 were merged and treated as a single entity, so a violation of either would support a finding of noncompliance. Nevertheless, we believe the hearing officer correctly found a violation of both regulations.

KRS 350.090(1) requires a mining permittee to submit a reclamation plan for approval by the Resources Cabinet. KRS 350.093(1) provides that time and distance limits requiring backfilling, grading, and planting "be kept current, so that all reclamation efforts proceed in an environmentally sound manner and as contemporaneously as practical under regulations promulgated by the cabinet." (emphasis added). Similarly, KRS 350.100(1) imposes a duty on the permittee to commence reclamation of the area "as contemporaneously as practicable after the beginning of operations on that area in accordance with plans previously approved by the cabinet." KRS 350.100(2) permits the Resources Cabinet to delay planting if it appears necessary due to environmental conditions. 405 KAR 16:200, Section 3 states:

> Timing. Seeding and planting of disturbed areas with permanent species shall be conducted no later than during the first normal period for favorable planting conditions after final preparation. The normal period for favorable planting shall be that planting time generally accepted locally, or as approved by the cabinet in the permit, for the type of plant materials selected. (emphasis added).

As stated earlier, Kentec's revegetation plan called for planting three species of trees from February 15 to April 15 and/or September 15 to November 15, with grass seeding during the

first growing season after backfilling and grading. The plan suggests that tree planting would occur promptly when it states "after the completion of one growing season additional fertilizer will be applied if sufficient vegetative growth is not obtained. If a low germination rate is evident of a tree species, then seedlings will be planted at the next favorable planting time. The area will be considered successfully revegetated when sufficient ground cover is obtained which effectively controls erosion and has a tree species count representative of the postmining land use plan." Kentec completed backfilling, regrading, and grass seeding in November 1994, but had conducted no tree planting as of February 1997. Its reliance on the existence of groundcover alone is misplaced because the revegetation plan and regulations clearly contemplated the establishment of forest land. Thus, Kentec was properly cited for a violation of 405 KAR 16:200.

Similarly, while 405 KAR 16:210 speaks in terms of release of the performance bond, it likewise requires reasonably prompt action by stating the affected areas shall be restored in a timely manner prior to release of the bond. Bond release generally occurs in three stages or phases. See KRS 350.093(4); 405 KAR 10:040. A permit is eligible for Phase I bond release when the permittee has completed backfilling, regrading, topsoil replacement, and drainage control, including soil preparation, initial seeding, and mulching in accordance with the approved reclamation plan. 405 KAR 10:040 Section 2(4)(a). Phase II bond release is available when revegetation has been established in

accordance with the approved reclamation plan and the standards for success of revegetation as stated in 405 KAR Chapter 16. 405 KAR 10:040 Section 2(4)(b). "At Phase II bond release, each tree or shrub counted shall be alive and healthy and shall have been in place for not less than one (1) growing season. At Phase III bond release, each tree or shrub counted shall be alive and healthy and shall have been in place for not less than two (2) growing seasons." 405 KAR 16:200 Section 6(3)(a). "At Phase III bond release, at least eighty (80) percent of the trees and shrubs used to determine success shall have been in place for three (3) years or more." 405 KAR 16:200, Section 6(3)(e). A permit is not eligible for Phase III bond release until "the permittee has successfully completed all surface coal mining and reclamation operations in accordance with the approved reclamation plan, such that the land is capable of supporting the [approved] postmining land use. . . ." 405 KAR 10:040 Section 2(c).

The regulations require planting and successful establishment of trees prior to the various stages of bond release, along with ultimate restoration to postmining land use in a timely manner. Kentec's argument that it may delay even initial planting of trees necessary to restore forest land use based solely on a milestone of final release of the performance bond ignores the purpose and intent of the statute to reclaim strip-mined land in a timely manner. The citation of Kentec for violation of 405 KAR 16:200 and 405 KAR 16:210 was neither arbitrary, nor improper.

Finally, Kentec admits it failed to file the water monitoring reports and pond certifications on time in violation of 405 KAR 16:110 and 401 KAR 5:065. It contends, however, that these violations were "administrative" in nature, involving mere "paper work" rather than threats to the environment. It asserts that there was no evidence that the water quality was substandard or the ponds defective. "Thus, Kentec's 'sin' was slight tardiness in reporting."

First, we note that reporting is a very important component of the regulatory scheme. Kentec's argument goes to mitigation rather than the existence of a violation. The proceeding in this case did not involve assessment of penalties and therefore the hearing officer properly discounted this argument. Neither the inspector nor the Resources Cabinet is required to totally ignore so-called "correctable" violations.

For the foregoing reasons, we affirm the judgment of the Perry Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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