

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001186-MR

HOLLY CREEK PRODUCTION
CORPORATION

APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER CRITTENDEN, JUDGE
ACTION NO. 99-CI-01085

PUBLIC SERVICE COMMISSION
OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUDGEL, CHIEF JUDGE; KNOPF, JUDGE
AND MARY COREY, SPECIAL JUDGE.¹

KNOPF, JUDGE: Holly Creek Production Corporation, a supplier of natural gas, appeals from an April 10, 2000, order of the Franklin Circuit Court dismissing its petition for review of a decision by the Public Service Commission (PSC). The PSC determined that Holly Creek had overcharged one of its natural gas customers \$23,674.00 and ordered it to refund that amount. Arguing that the PSC had miscalculated the amount of the

¹ Senior Status Judge Mary Corey sitting as special judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

overcharge, Holly Creek sought review in Franklin Circuit Court. The court dismissed the action on the ground that Holly Creek's tardy designation of the record rendered its petition fatally defective. Holly Creek contends that the court applied the designation requirement too strictly. We affirm.

KRS 278.410 provides that parties to proceedings before the PSC may seek review of commission orders by filing an action in the Franklin Circuit Court. KRS 278.420 then provides, in pertinent part, as follows:

(2) Unless an agreed statement of the record is filed with the court, the filing party shall designate, within ten (10) days after an action is filed, the portions of the record necessary to determine the issues raised in the action. . . . The court may enlarge the ten (10) day period where cause is shown. Additionally, the court may require or permit subsequent corrections or additions to the record.

Holly Creek filed its action for review of the PSC's order on September 17, 1999. Attached to its complaint was a copy of the PSC's original order finding Holly Creek liable for the refund and a copy of a subsequent order denying Holly Creek's motion for reconsideration. Holly Creek did not file a designation of the administrative record, nor did it anywhere indicate that the orders attached to its complaint were intended to serve in lieu of a designation. On September 29, 1999, the PSC moved for dismissal of Holly Creek's action on the grounds both that Holly Creek had failed to name an indispensable party (the over-billed customer) and that it had failed to designate the record. Holly Creek responded on September 30, 1999, by filing a designation of the entire administrative record. It

also moved, on October 8, 1999, for an enlargement of the time in which to file the designation. It is from the court's order denying this latter motion and dismissing the action that Holly Creek appeals.

Holly Creek argues that it substantially complied with the designation requirement by attaching the PSC's orders to its complaint. Those orders, it maintains, provided the circuit court with a meaningful basis to review the PSC's method of calculating the alleged overcharge. At the very least, Holly Creek insists, the attached orders established a preliminary designation of the record, which might then have been supplemented or amended as the statute seems plainly to contemplate. The circuit court not only had the authority to so rule, Holly Creek contends, but its failure to do so was erroneous.

We tend to agree with Holly Creek that the circuit court's authority, its jurisdiction, is not the issue here. Procedural rules, even those governing the invocation of a court's jurisdiction, do not themselves fix or alter that jurisdiction.² In this case in particular, the statute provides that enforcement of the designation requirement is to some extent within the discretion of the circuit court. This would not be

²Johnson v. Smith, Ky., 885 S.W.2d 944 (1994); Stewart v. Kentucky Lottery Corporation, Ky. App., 986 S.W.2d 918 (1998). *But see* Forest Hills Developers, Inc. v. Public Service Commission, Ky. App., 936 S.W.2d 94 (1996) (“[T]he failure to abide by the statutory scheme for seeking review of a commission's order deprives the reviewing court of jurisdiction.” citing Frisby v. Board of Education of Boyle County, Ky. App., 707 S.W.2d 359 (1986)); Kentucky Unemployment Insurance Commission v. Providian Agency Group, Inc., Ky. App., 981 S.W.2d 138 (1998).

the case if the requirement were jurisdictional. Be that as it may, the point is largely academic, for it is well established even apart from any question of jurisdiction that courts will apply statutes and regulations governing appeals from administrative tribunals strictly according to their terms.³ Substantial compliance, a policy guiding judicial construction of the civil and criminal rules, generally does not apply to such questions of statutory or regulatory construction.⁴

Did the circuit court misconstrue KRS 278.420? Should it, as Holly Creek contends, have deemed the administrative orders attached to Holly Creek's brief a designation of the record? Our review of this question, a matter of statutory construction, is without deference to the circuit court's answer. As did the circuit court, we strive to give effect to the legislative intent as expressed in the statute's terms and as it appears within the statutory context.⁵

We are not persuaded that the circuit court read the designation requirement too strictly. It is true, as Holly Creek points out, that KRS 278.420, unlike CR 75.01, does not expressly define what shall constitute a designation of the record. We do not agree, however, that this silence renders the concept vague

³Johnson v. Smith, supra; Fisher v. Kentucky Unemployment Insurance Commission, Ky. App., 880 S.W.2d 891 (1994).

⁴Bowen v. Commonwealth, 887 S.W.2d 350 (1994); Jenny Wiley Health Care Center v. Commonwealth of Kentucky Cabinet for Human Resources, Ky., 828 S.W.2d 657 (1992). Unless of course the general assembly or the regulatory body have indicated otherwise. Whittaker v. Wright, Ky., 969 S.W.2d 209 (1998).

⁵Commonwealth v. Montague, Ky., 23 S.W.3d 629 (2000) (citing Floyd County Board of Education v. Ratliff, Ky., 955 S.W.2d 921 (1997)).

or mysterious. An important aspect of an appeal, at least in our system, is the direct communication between the reviewing and the reviewed tribunals. This communication helps to protect both tribunals against collusive appeals, and it helps to ensure the pertinence of the reviewing tribunal's mandate. Along with the notice of appeal, the formal designation of the record in the reviewed tribunal and that tribunal's preparation and certification of the record serves not only to bring the appellant's allegations of error before the reviewing body, but also to establish that inter-tribunal communication. We believe that the designation requirement of KRS 278.420 was intended, in part and as a general rule, to serve this communicative function.

Holly Creek's purported designation by way of its complaint bypassed the PSC and interfered with that function. Even if the orders Holly Creek included with its complaint provided an adequate record for review,⁶ therefore, we would agree with the circuit court that they did not constitute a designation of the record as required by the statute.

As noted above, KRS 278.420 permits the circuit court to enlarge the ten-day designation period where cause is shown. The court abused its discretion under this provision, Holly Creek next contends, by denying Holly Creek's belated motion for an enlargement.

The test for abuse of discretion is:

⁶ They do not. Although they indicate the method the PSC used to arrive at its estimate of the overcharge, they do not include the underlying data. Doubtless that data bore upon the PSC's choice of a method.

whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.⁷

We are not persuaded that the circuit court's decision failed this test. Although we sympathize with Holly Creek's counsel, whose parents it seems were both critically ill at the time of Holly Creek's appeal, the circuit court was within its discretion when it insisted upon a strict compliance with KRS 278.420's designation requirement.

As noted above, strict compliance with the statutory prerequisites for administrative appeals is the general rule. Another general rule is that, to avail oneself of an enlargement of a time period, one should request the enlargement before the original deadline.⁸ Here, however, the ten-day designation period had expired before Holly Creek sought relief. Only extraordinary cause will mandate the granting of a tardy motion for enlargement. No such cause was shown. As the trial court noted, designating the record was no more onerous than filing the notice of appeal, a task counsel performed despite his parents' illnesses. Although Holly Creek's neglect of the designation requirement is understandable, we are not persuaded that the circuit court was compelled to excuse it.

For these reasons, we affirm the April 10, 2000, order of the Franklin Circuit Court.

COREY, SPECIAL JUDGE, CONCURS.

GUDGEL, CHIEF JUDGE, DISSENTS.

⁷Commonwealth v. English, Ky., 993 S.W.2d 941, 945 (1999) (citations omitted).

⁸*Cf.* CR 6.02.

BRIEF FOR APPELLANT:

Sam P. Burchett
Lexington, Kentucky

BRIEF FOR APPELLEE:

Deborah Eversole
James R. Goff
Frankfort, Kentucky