

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002571-MR

SEABOARD SURETY COMPANY

APPELLANT

v. APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE ROGER L. CRITTENDEN, JUDGE
ACTION NO. 00-CI-00319

NATURAL RESOURCES AND ENVIRONMENTAL
PROTECTION CABINET;
GREEN COAL COMPANY, INC.

APPELLEES

OPINION
REVERSING AND REMANDING
** **

BEFORE: JOHNSON, KNOPE, AND MILLER, JUDGES.

MILLER, JUDGE: Seaboard Surety Company (Seaboard) brings this appeal from an order of the Franklin Circuit Court entered November 16, 2001. We reverse and remand.

This matter emanates from an administrative proceeding by the Natural Resources and Environmental Protection Cabinet (Cabinet), commenced January 7, 1999, in an effort to forfeit a reclamation bond covering Increment Number 2 of the Green Coal

Company's Surface Mining Permit No. 830-8003 in Daviess County, Kentucky.¹ Seaboard was surety on the bond.

On December 29, 1999, the hearing officer issued a report in favor of the Cabinet's motion. The report, served by mail, contained the following:

VI. EXCEPTIONS AND RESPONSE RIGHTS

Pursuant to KRS 350.0301 any party may file exceptions to this Report and Recommended Order within fourteen (14) days of service of this Report. A party may file a Response to any Exceptions within (21) days of service of this Report. The Secretary will then consider this report, exceptions, response and recommended order and decide the case. (emphasis added).

On January 18, 2000, Seaboard filed exceptions to the report. The Cabinet objected, arguing that the exceptions were untimely. On February 2, 2000, the Secretary of the Cabinet issued his final order adopting the hearing officer's report. Seaboard was adjudicated liable on the bond. The Secretary noted that the exceptions filed by Seaboard were untimely and therefore not considered.

On March 3, 2000, Seaboard filed the instant action in Franklin Circuit Court entitled "PETITION ON APPEAL AND COMPLAINT FOR DECLARATORY RELIEF." On November 16, 2001, the Franklin Circuit Court entered an order dismissing the petition, which precipitated this appeal.

The circuit court considered Seaboard's petition an attempt to appeal the order of the Cabinet, without first having exhausted its administrative remedy. The court was of the

¹Green Coal Company failed to appear.

opinion that it was without jurisdiction inasmuch as the exceptions to the hearing officer's report were made outside the fourteen day provision in Kentucky Revised Statutes (KRS) 350.0301(2). Cf. Swatzell v. Commonwealth, Ky., 962 S.W.2d 866 (1998) (holding that failure to file exceptions to a hearing officer's report constitutes failure to exhaust administrative remedies, thus precluding appeal).

KRS 350.0301(2) reads in pertinent part as follows:

. . . The hearing officer shall serve a copy of his report and recommended order upon all parties or record and their attorney of record to the proceeding, and they shall be granted the right to file exceptions thereto within fourteen (14) days of service.
(emphases added).

Thereunder, Seaboard was required to file exceptions within fourteen days of the report's date of service (December 29, 1999). The circuit court concluded that Seaboard's exceptions were due January 12, 2000. Seaboard argued that the weekend/holiday extension and that the mail extension of 400 Ky. Admin. Regs. (KAR) 1:030 §3(1) and (3) applied, thus extending the filing deadline to January 18, 2000. 400 KAR 1:030 provides in relevant part as follows:

Section 3. Time. (1) Computation. **In computing any period of time prescribed or allowed by order of the hearing officer** or by any applicable administrative regulation, the day of the act, event or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. Unless otherwise directed by the hearing officer, when the period of time prescribed

or allowed is less than seven (7) days, intermediate Saturdays, Sundays and legal holidays shall be excluded from the computation. (emphasis added).

. . . .

(3) Additional time after service by mail. Whenever a party has the right or is required to do some act or take some proceeding within a period prescribed by order of the hearing officer or by administrative regulation after the service of a notice or other paper upon the party and the notice or paper is served by mail, three (3) days shall be added to the prescribed period. This provision shall not apply to the service of administrative summons and initiating documents by mail.

The circuit court viewed 400 KAR 1:030 §3 as inapplicable and reasoned thusly:

400 KAR 1:030[Section](3)(3) also requires that the original filing deadline must have been prescribed either by regulation or a hearing officer's order. Seaboard asserts the original deadline was prescribed by order because it was laid out in the hearing officer's report. However, the time for filing exceptions in this case was prescribed by statute, KRS 350.0301, not by order. This fact does not change simply because the hearing officer cited this statute in his report. It is by statute that the fourteen days to file existed. The hearing officer merely referenced that statute, he did not prescribe it. Because a statute prescribed the fourteen days and not a hearing officer's order, the three day extension in 400 KAR 1:030[Section](3)(3) does not apply in this case. Because the three day extension does not apply, neither does the weekend extension in 400 KAR 1:030[Section](3)(1). (emphasis added).

We must disagree with the circuit court's interpretation of 400 KAR 1:030 §3. We think the circuit court too narrowly interpreted the phrase "prescribed or allowed by order of the hearing officer." The circuit court focused on the word

"prescribed" and failed to consider the word "allowed." It is a well established rule of interpretation that a word will be given its ordinary and common meaning. See Kentucky Unemployment Insurance Commission v. Jones, Ky. App., 809 S.W.2d 715 (1991). A common definition of "allow" is "to acknowledge or admit." The American Heritage Dictionary 96 (2d ed. 1985). Here, we believe the hearing officer's report could be said to have "acknowledged or admitted" the fourteen day time period prescribed for filing under KRS 350.0301(2). Hence, we are of the opinion that the time for filing exceptions to the hearing officer's report is properly computed under 400 KAR 1:030 §3.

In sum, we think Seaboard should have been accorded a three day extension for notice by mail and a three day exclusion comprising the weekend and Monday, which was a legal holiday. We thus conclude that Seaboard's exceptions to the hearing officer's report were timely filed on January 18, 2000.

Finally, although we are aware that the civil rules are not applicable to the filing of exceptions as the latter is a proceeding within the confines of the administrative agency (see Board of Adjustments of City of Richmond v. Flood, Ky., 581 S.W.2d 1 (1978)), we must note that the wording of 400 KAR 1:030 substantially parrots Ky. R. Civ. P. 6.01 and 6.05. It seems reasonable that in adopting the regulation, the Cabinet sought to, in some measure, adhere to those rules.

We view Seaboard's remaining contentions as moot.

For the foregoing reasons, the order of the Franklin Circuit Court is reversed and remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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