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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001239-MR

KENTEC COAL CO., INC. — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE WILLIAM L. GRAHAM, JUDGE
ACTION NOS. 98-CI-00580 AND 98-CI-02002

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

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, McANULTY, and PAISLEY, Judges.

COMBS, JUDGE. This is an appeal from a judgment entered by the Franklin Circuit Court which affirmed a penalty assessed against Kentec Coal Co., Inc. (Kentec), the appellant, by the Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet (the Cabinet) as a result of a postmining land use violation. We vacate and remand.

The Cabinet issued a surface coal mining permit to Kentec in 1987 for areas located in Perry and Leslie Counties. Although its permit expired in 1992, Kentec continued reclamation work in an effort to correct previous violations and to obtain its bond release. In May 1996, a Cabinet inspector observed the construction of a residential building on increment number 5 of Kentec's permitted area. Since the postmining land use of this area was designated for forestry land or hayland/pasture, the presence of the residence constituted a violation. The inspector issued a mine inspection report advising Kentec to submit a revision to the postmining land use –- a change that essentially would reflect on paper the reality of the different use to which the land was now being dedicated. When Kentec failed to do so, the inspector issued additional mine inspection reports in June, July, August, September, and October of 1996. The inspector also met with Kentec's representatives during her July inspection and advised them that the postmining land use had to be changed due to the construction of the house.

Kentec did not submit the paperwork to reflect the change in the postmining land use, and in November 1996, the inspector issued a notice of noncompliance requiring Kentec to "submit and obtain a revision to allow change in post mining land use" by December 22, 1996. Kentec did not obtain the

revision by the date of the next inspection on December 27, 1996. The inspector issued Kentec a cessation order that day. Both the noncompliance and cessation orders were upheld by order of the Secretary of the Cabinet. After the cessation order had remained unabated for thirty days, the Cabinet gave Kentec notice of a proposed penalty assessment in the amount of $29,700.

Kentec requested and received an assessment conference. Kentec failed to appear, and the conference officer recommended that the Secretary uphold the proposed assessment. Kentec subsequently requested a review of the conference officer's report and recommendation as well as a formal hearing regarding the penalty amount. Kentec failed to submit prepayment of the penalty as required by KRS[1] 350.0301 and 405 KAR[2] 7:092; as a result, the petition was dismissed, and the proposed penalty assessment was upheld by the Secretary. Kentec then appealed this decision to the Franklin Circuit Court, which affirmed the Secretary's order and assessment. Kentec's motion to alter, amend, or vacate the judgment was also denied, and this appeal followed.

Kentec first argues that KRS 350.0301 and 405 KAR 7:092 are invalid and unconstitutional because they deny Kentec

[1] Kentucky Revised Statutes.

[2] Kentucky Administrative Regulations.

due process and equal protection by requiring prepayment of a penalty assessment as a condition precedent to obtaining a formal hearing regarding that very assessment. Appellant relies heavily on Franklin v. Natural Resources and Environmental Protection Cabinet, Ky., 799 S.W.2d 1 (1990). In Franklin, our Supreme Court held that 405 KAR 7:090(4), the predecessor to the regulation at issue, was "null, void, and unenforceable." Franklin, 799 S.W.2d at 4. Its reasoning was threefold. First, the enabling statutes in force at the time did not condition entitlement to a formal hearing upon the prepayment of a penalty assessment. Thus, the Court found that the regulation improperly modified the underlying statute in violation of KRS 13A.120(1)(i). Second, the Court held that the regulation further violated KRS 13A.120(1) because it was more stringent than comparable federal regulations. Third, the Court found that the regulation violated the Due Process and Equal Protection Clauses of the Constitutions of the United States and of Kentucky because it "denie[d] the due process hearing to an aggrieved party based solely on his financial inability to pay the penalties which he seeks to appeal." Franklin, 799 S.W.2d at 3-4.

As a result of statutory and regulatory amendments enacted since Franklin, the circumstances now before us differ somewhat from those at issue in Franklin. In response to

Franklin, the General Assembly revised KRS Chapter 350 and enacted KRS 350.0301, which provides in pertinent part that:

> [t]he administrative regulations shall provide for the conduct of hearings and investigation of any matter relating to the regulation of surface coal mining and reclamation operations; provide for the assessment and payment of civil penalties, including the placement of proposed civil penalty assessments into an escrow account prior to a formal hearing on the amount of the assessment; and provide for a waiver of the placement of the proposed civil penalties into escrow for those individuals who demonstrate with substantial evidence an inability to pay the propose civil penalties into escrow. (Emphasis added.)

In order to achieve consistency and conformity with federal law, the more recent regulations were amended as well to provide for bifurcated hearings regarding the violation itself and the penalty assessment. Prepayment is still required to obtain a formal hearing regarding the penalty, but it is not a condition to obtaining such a hearing regarding the violation. While a hearing as to the alleged violation does not require prepayment of the penalty, prepayment of the contested penalty is a prerequisite for that portion of the hearing process concerning the penalty itself. The newer regulations also provide for a waiver of the prepayment requirement as to qualified individuals but not with respect to corporations.

Kentec contends that the constitutional flaws outlined in Franklin have not been cured. We agree that both the statutory and regulatory changes enacted since Franklin remain defective constitutionally as impermissibly erecting a monetary bar to access to the fundamental due process right to a hearing.

Permittees are placed in the anomalous posture of enjoying access to a hearing as to an underlying violation but facing perhaps an insurmountable financial hurdle when seeking to challenge at the subsequent penalty hearing the propriety or amount of penalty imposed. It is noteworthy that the propriety of the penalty cannot be addressed at the hearing on the violation. Once a violation is determined at the first hearing, the opportunity to address the fine or penalty flowing from that violation comes only at the price of prepayment of the subject matter of the challenge –- a price that has the very real potential of foreclosing actual access to stage two of the bifurcated hearing process. As a practical matter, the amount or propriety of the penalty imposed could be as critical as or perhaps even more weighty than the fact of the violation itself.

We hold that this bifurcated hearing process cannot satisfy fundamental due process by operating under a double standard of access to an administrative forum. Insofar as they exact such a monetary prerequisite prior to the penalty phase hearing, both KRS 350.0301 and KAR 7:092 are unconstitutional

violations of due process, equal protection, and the ban against arbitrary state action contained at Section 2 of the Kentucky Constitution.

Kentec contends that the statutory exception as to a waiver for individuals but not for corporate permittees identically situated is a clear violation of its right to equal protection as provided by the United States and Kentucky Constitutions. Kentec claims that corporations that are unable to prepay the assessment are wrongfully deprived of a formal hearing regarding their penalty assessment; unlike individuals, corporations are not allowed to seek a waiver of this requirement.

There is no attempt to classify corporate permittees differently from individuals anywhere in the statute or regulation for any other purposes than for the grace of this waiver exception. We have been unable to discern any rational basis or legitimate state interest to explain -– much less to justify -– the arbitrary singling out of a corporation for such disparate treatment. Particularly disturbing is the fact that the classification results in erecting a barrier to the due process right to a hearing. This is error compounding error. Therefore, we hold that this classification is repugnant to settled principles of equal protection of the law pursuant to Amendment Fourteen of the United States Constitution.

Kentec next asserts that the issuances of the noncompliance and cessation order were arbitrary and erroneous in light of the Cabinet's own third-party disturbance policy. That policy has been compiled over the course of three separate memoranda by the Office of Surface Mining (OSM) of the Department of the Interior, both pre-empting and subsuming Kentucky's laws and regulations on the matter. The policy essentially addresses the duties of a permittee undertaking remedial measures to achieve the postmining land use as set forth in the permit. When a third party intervenes and uses the surface area in a manner differing from the restoration described in the original permit to the permittee, the policy comes into play to ascertain the reality of the situation –- including the good faith efforts of the permittee to carry out its postmining land use efforts in light of the interference by a third party.

The federal policy notes that the third-party disturbance may not be "an isolated event, but, rather, an ongoing process which might be discovered, through normal inspection, before, during, or after the fact." Memorandum of David Nance to all Field Personnel, May 2, 1992, Joint Exhibit 3. The Nance memorandum directs that a "wait and see approach" be implemented before issuance of a cessation order unless

imminent danger be threatened. The memorandum concludes as follows:

> In summary, one should try to approach third party situations with common sense. A violation should not be written prior to the permittee being able to do anything . . . . Nance Memorandum, supra.

In this case, Kentec was a lessee. Prior to being able to complete restoration of the land in question to use for hayland/pasture or forestry land according to the terms of its original permit plan, a third party built a house on the permit site. There was literally nothing that Kentec as a lessee could do to prevent the construction. Furthermore, the house constituted no danger -– imminent or otherwise. The third-party disturbance effectively terminated Kentec's ability to restore the land fully to hayland/pasture or forestry land use according to the original terms of its permit plan.

The Cabinet nevertheless issued its Noncompliance and Cessation Order, arguing that Kentec failed to file the necessary paperwork for a revision of its postmining land use plan reflecting the reality of what had transpired. As noted in the briefs and during oral arguments on this case, the revision process is rather lengthy and complicated, requiring advertising in the newspaper for four consecutive weeks before the revision can be reviewed. As a practical matter, it is not a process

that can be achieved within the thirty days allotted. In this case, common sense (the approach prescribed by the Nance Memorandum) clearly indicated that even if the process had been begun and completed within thirty days, the third-party disturbance (here, the house) would render moot any meaningful action by the Cabinet. Under the unique circumstances of this case, the Cabinet's assessment of a penalty without a hearing was unreasonable and arbitrary in violation of Section Two of the Kentucky Constitution.

The judgment of the Franklin Circuit Court is vacated and remanded for entry of an order consistent with this opinion.

McANULTY, JUDGE, CONCURS.

PAISLEY, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR AND ORAL ARGUMENT FOR APPELLANT:	BRIEF AND ORAL ARGUMENT FOR APPELLEE:
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