

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001583-MR

LIBERTY ROAD CHRISTIAN SCHOOL

APPELLANT

v.

APPEAL FROM TODD CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
ACTION NO. 02-CI-00080

TODD COUNTY HEALTH DEPARTMENT
AND
CABINET FOR HEALTH SERVICES AND
FAMILIES

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, DYCHE, AND TAYLOR, JUDGES.

BUCKINGHAM, JUDGE: Liberty Road Christian School appeals from an order of the Todd Circuit Court denying its motion to dissolve an injunction closing the school. We affirm.

Liberty Road Christian School is a private parochial school located in Todd County, Kentucky. The building is composed of one room that also serves as the Meadow Valley Mennonite Church. The litigation conducted herein on behalf of

the school is through its school board members. Thus, we will hereinafter refer to the appellant as "the school board."

On June 20, 2002, the Todd County Health Department filed a civil complaint in the Todd Circuit Court alleging that the school board had refused to comply with applicable provisions of KRS¹ 212.210 and 902 KAR² 45:150, which govern school sanitation standards. The health department sought a temporary restraining order and permanent injunction to enforce compliance with the applicable regulations. The primary violations asserted against the school were that it had neither an appropriate water system available for drinking and hand washing nor an approved toilet or privy system including a septic system. The school board filed a *pro se* response to the complaint, in which no formal legal argument was presented.

The health department filed a motion for summary judgment, which was heard by the court on September 19, 2002. School board members and other individuals appeared without counsel in opposition to the motion. The court allowed those present to speak openly about their concerns, and it attempted to elicit any legal defense to enforcement of the school sanitation regulations. Those opposing the motion explained

¹ Kentucky Revised Statutes.

² Kentucky Administrative Regulations.

that the changes sought by the health department would be costly and in conflict with their religious beliefs and traditions.

Although the school board members did not recognize the authority of the health department to impose regulations on their school, they did not claim that the enforcement of the regulations violated their right to freely exercise their religion. Further, they did not assert that the regulations were void or illegal or that they were being enforced in an arbitrary or unfair manner. The court specifically inquired into these matters at the hearing.

At one point, the court also inquired about the school board hiring legal counsel, but the board members indicated their refusal to do so for religious reasons. Further, the board indicated its intent not to comply with the applicable regulations.

On October 9, 2002, the court granted the health department's motion for summary judgment. In doing so, it enjoined the operation of the Liberty Road Christian School until the school board substantially complied with the applicable law. The court scheduled a hearing for the following week to determine if the board had made any attempt to comply with the regulations. On October 16, 2002, the court entered an order finding that no such attempt had been made, and it ordered

the school to be closed. The school board did not appeal from that order, which the court had stated was final and appealable.

On February 23, 2004, the school board,³ with counsel and pursuant to CR⁴ 60.02, filed a motion to dissolve the injunction. The motion stated that there had been a substantial change in conditions that warranted the dissolution of the injunction entered by the court in October 2002. In support of its motion, the board asserted it had complied with applicable state regulations, and it attached various documents, including a letter from Dr. Rice C. Leach, Commissioner of the Kentucky Cabinet for Health Services. Therein, Dr. Leach set forth "[c]ertain provisions and variances" for the "guidance and recommendations of the Department for Public Health (DPH) to the Todd County Health Department and others regarding the opening of Liberty Road School."

Dr. Leach stated that these provisions and variances were "being offered to accommodate the unique circumstances surrounding the establishment of this Amish School, both recognizing the right of individuals to practice their religious beliefs and the Department for Public Health's statutory obligation to ensure public health and safety by the regulation

³ The membership of the school board had changed between the court's October 2002 order and the board's February 2004 motion to dissolve the injunction.

⁴ Kentucky Rules of Civil Procedure.

of sanitation of schools." The variances included unapproved sources of potable water, unapproved hand-washing methods, and a non-flush septic system. Dr. Leach concluded his letter by stating that the school board "must seek approval from other agencies, including the Division of Plumbing, Department of Housing, Buildings and Construction, to ensure the school meets other agency's criteria for operating a school."

The school board then sought an exemption under the state plumbing code as a Special Religious Use Group from the Office of Housing, Buildings and Construction. On December 11, 2003, a hearing was held before a hearing officer, Frank Dempsey, for the purpose of determining whether a Special Religious Use Group exemption should be allowed for the school. Dempsey concluded that based on the evidence, "the Board of Housing, Buildings and Construction may place the project into the Special Religious Use Group and waive the portions of the Kentucky Building Code and the Kentucky Plumbing Code which conflict with Petitioner's religious beliefs."

On February 12, 2004, the chairman of the Board of Housing, Buildings and Construction adopted the hearing officer's report and specifically stated that "any provisions of the Kentucky Building Code or Kentucky Plumbing Code or associated referenced standards which would require the project to include electric power, hot and cold running water, flushed

toilets or a pressurized water system are WAIVED." The hearing officer's report and the order were also attached to the school board's motion to dissolve the injunction.

On March 22, 2004, the court entered an order granting the school board's motion to add the Cabinet for Health Services as an indispensable third party to the case. On April 5, 2004, the Cabinet granted a permit allowing the operation of the school. The permit stated that the school was in compliance with school sanitation law. The Cabinet then filed a response in the case stating it felt the issuance of a certificate of operation was appropriate "in recognition of the efforts of the Board to comply with the recommendations of the agency." The Cabinet further responded that "[i]n the event of an outbreak of a disease traceable to sanitation practices, the state and local agencies will rely upon the statutory right to direct improvement of safety and sanitary practices including and not limited to the addition of equipment and practices to protect against the spread of disease."

The local health department responded by arguing that the actions of the various state officials did not preempt local enforcement of the state regulations. Further, it argued that the state agencies were not following their own regulations. Finally, the health department noted that the school was still not in compliance with applicable state sanitation regulations.

It also asserted that the Cabinet did not have the authority to grant the proposed variances.

The court entered an order on May 26, 2004, denying the school board's motion to dissolve the injunction. The court noted the Cabinet's position that the sanitary regulations had not yet been completely satisfied, but that the injunction should be lifted because school officials were now more cooperative and acting in good faith. The court further noted the health department's position that it had the legal duty to enforce school sanitation regulations and that neither the state health department nor the Cabinet had the authority to choose not to enforce the regulations as written. The court phrased the issue in the case as "whether the decision of the Cabinet not to enforce school sanitation regulations preempts the local Health Department from enforcing those same regulations."

Based on KRS 212.210(1) and (3), the court concluded that "a local health department has the duty to enforce state health and safety regulations independently of, and regardless of, whether the Cabinet chooses to do so." Further, the court concluded that the Cabinet had a "clear duty" to enforce its existing regulations and not to give "individualized special treatment by a Commissioner and Cabinet charged with enforcing a law, where there is no existing provision for a variance from that law." The court cited Hagan v. Farris, 807 S.W.2d 488 (Ky.

1991), to support its decision. The court also stated that the school board had the right to comply with existing sanitation laws and that the court "stands ready to review the matter and, upon a finding of substantial compliance, lift the injunction." Upon the court's entry of its order and the denial of the school board's motion to alter, amend, or vacate, this appeal by the school board followed.

The school board raises several arguments in an attempt to persuade us that the circuit court erred in denying its motion to dissolve the injunction. We will address each of these arguments separately. First, the school board argues that the Todd County Health Department did not have independent standing and legal authority to initiate a legal proceeding to unilaterally enforce the school sanitation laws. The school board asserts that such authority was vested in the Todd County Board of Health rather than the Todd County Health Department. In support of its argument, the school board cites KRS 212.210(1) and (3). These statutes address the powers of the Cabinet for Health Services and local health boards, and the statutes state that an action concerning an unsanitary or unsafe school building may be instituted in the circuit court by the local board of health or by the Cabinet. See KRS 212.210(3).

We disagree with the argument that the Todd County Health Department had no authority to bring an enforcement

action against the school board. KRS 212.240(1) gives county health departments the authority to administer and enforce all applicable public health laws and all rules and regulations of the Cabinet for Health Services. KRS 212.245(6) provides that "any health officer may institute and maintain mandatory or prohibitory injunction proceedings in the appropriate Circuit Courts of this state . . . to compel compliance with the public health laws of this state and the rules and regulations of the Cabinet for Health Services[.]" KRS 212.230(2) provides that, subject to exceptions not applicable herein, "all powers and authority of the local board of health under existing statutes are transferred to the county department of health." In short, we conclude that the Todd County Health Department had the authority to bring the injunction action in circuit court to enforce the state school sanitation laws.

Second, the school board argues that the circuit court erred in determining that the Todd County Health Department had the duty to enforce state health regulations "independently of, and regardless of, whether the Cabinet chooses to do so." The school board argues that the Cabinet has "preemption" over local health departments in matters where the Cabinet has taken a direct position involving state regulations. We disagree. While it is true that the school sanitation regulations in 902 KAR 45:150 are regulations promulgated by the Cabinet, the

aforementioned statutes give local health departments the authority to enforce the regulations and to pursue injunctive action in circuit courts. Furthermore, as we will explain later, the Cabinet has no right to ignore or refuse to enforce its own regulations.⁵

The school board's third argument is that the permit to operate the school issued by the Cabinet on April 5, 2004, which stated that the school was in compliance with school sanitation laws, is substantial evidence that the school board was in compliance with the injunction requirement that the school be closed until such time as there was compliance with the applicable regulations. In addressing this issue, the court noted that the Cabinet's regulations have the force of law and that neither the Commissioner nor the Cabinet had the authority to arbitrarily choose not to enforce its regulations. In support of its decision, the court cited the Hagan case wherein the Kentucky Supreme Court held that "[a]n agency must be bound by the regulations it promulgates."

We agree with the court that the Cabinet acted arbitrarily by issuing the permit despite the fact the school

⁵ At this point, we note that the Cabinet did not join with the school board in appealing the orders of the circuit court. The Cabinet has filed a brief, wherein it acknowledges that the circuit court correctly determined that the local health department had concurrent authority to enforce the school sanitation laws. Further, the Cabinet implicitly acknowledges that there was no authority for its issuance of a variance from school sanitation regulations. The Cabinet also states in its brief that its efforts to resolve the controversy in Todd County was "undertaken at the request of elected members of the General Assembly."

was not in compliance with the school sanitation regulations. See Commonwealth, Transportation Cabinet v. Weinberg, 150 S.W.3d 75, 77 (Ky.App. 2004) (“[i]t is axiomatic that failure of an administrative agency to follow its own rule or regulation generally is *per se* arbitrary and capricious”). Furthermore, as the regulations did not provide for the issuance of a waiver, variance, or exemption, we conclude that the permit was improperly issued and that its issuance did not require the court to lift the injunction.

The fourth argument raised by the school board is that 42 U.S.C. § 2000cc (Religious Land Use and Institutionalized Persons Act of 2000, hereinafter referred to as RLUIPA) precludes the Todd County Health Department’s insistence that it has the continuing authority to strictly enforce compliance with the plumbing code provisions of the school sanitation law at the school. The school board asserts that the health department’s failure to accept and apply the Special Religious Use Group exemption granted by the Board of Housing, Buildings and Construction was a substantial burden on the school’s religious exercises because the health department failed to implement an “individualized assessment” land use regulation that “is the least restrictive means of furthering that compelling government interest.”

RLUIPA specifically prohibits any government agency from imposing or implementing a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious institution, unless the government demonstrates that imposition of the burden is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000cc (a)(1); see also Cottonwood Christian Center v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1220 (C.D.Cal 2002). The school board has not persuaded us that requiring it to comply with school sanitation laws is a land use regulation that imposes a substantial burden on the free exercise of religion. First, the statute defines "land use regulation" as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land" 42 U.S.C. § 2000cc-5(5). A school sanitation law is not a land use regulation.

At any rate, as the Kentucky Supreme Court stated in Kentucky State Bd. of Elementary and Secondary Education v. Rudasill, 589 S.W.2d 877, 884 (Ky. 1979), there is nothing that prohibits the state from requiring private and parochial schools to comply with health and safety standards as conditions for approval. The U.S. Supreme Court held in Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531, 113

S.Ct. 2217, 2226, 124 L.Ed.2d 472 (1993), that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." The school sanitation laws are neutral and of general applicability. Therefore, the laws need not be justified by any compelling governmental interest.

The school board's fifth argument is that the Office of Housing, Buildings and Construction waived any requirements that it comply with the Kentucky Building Code or Kentucky Plumbing Code requirements of electric power, hot and cold running water, flushed toilets, or a pressurized water system. The board refers to the recommended order that was signed by the chairman of the Board of Housing, Buildings and Construction on February 12, 2004. The board argues that this order exempts it from complying with school sanitation laws in this regard. We disagree. The health department and the Cabinet are charged by statute with enforcing school sanitation laws, and we know of no authority, nor has the school board cited any, which would allow another state agency to grant such an exemption or waive the regulatory requirements of the agency charged with enforcement.

Finally, the school board argues that the circuit court committed reversible error by not finding it had complied with the injunction issued in October 2002. This matter was

addressed by the court in its order denying the school board's motion to alter, amend, or vacate the order denying the board's motion to dissolve the injunction. As the court noted in its last order, neither the school board nor the Cabinet had claimed that the school was in actual compliance with the applicable regulations. The court noted that the issue before it was whether the Cabinet's decision to issue a permit to operate the school despite the fact that the school was not yet in compliance preempted the ability of the health department to enforce the applicable regulations. We agree with the court's analysis in this regard. Furthermore, the court noted that it stood ready to review the issue of compliance and to lift the injunction if such compliance was shown.

The orders of the Todd Circuit Court are affirmed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
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BRIEF AND ORAL ARGUMENT FOR
APPELLEE, TODD COUNTY HEALTH
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BRIEF AND ORAL ARGUMENT FOR
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