STATE OF MICHIGAN

COURT OF APPEALS

MIDLAND COGENERATION VENTURE LIMITED PARTNERSHIP,

Plaintiff-Appellee,

v

DEPARTMENT OF ENVIRONMENTAL QUALITY, DIRECTOR OF THE MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, and CHIEF-AIR QUALITY DIVISION OF THE MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendants-Appellees,

and

DETROIT EDISON COMPANY and CONSUMERS ENERGY COMPANY,

Intervening Defendants-Appellants.

UNPUBLISHED
July 8, 2008

No. 282716
Midland Circuit Court
LC No. 07-002575-CE

MIDLAND COGENERATION VENTURE LIMITED PARTNERSHIP,

Plaintiff-Appellee,

v

DEPARTMENT OF ENVIRONMENTAL QUALITY, DIRECTOR OF THE MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, and CHIEF-AIR QUALITY DIVISION OF THE MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY,

Defendants-Appellants,

No. 282729
Midland Circuit Court
LC No. 07-002575-CE

and

DETROIT EDISON COMPANY and
CONSUMERS ENERGY COMPANY,

Intervening Defendants-Appellees.

Before: Sawyer, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Defendants appeal the circuit court's order granting plaintiff's request for a writ of mandamus compelling defendant Michigan Department of Environmental Quality (DEQ) to instruct the United States Environmental Protection Agency (EPA) to rely on its July 16, 2007, submission of data to determine the state's permissible level of emissions, rather than on various submissions DEQ submitted to the EPA after that date. We find that the trial court erred in issuing the writ and reverse.

Plaintiff operates twelve natural gas-fired electric generating turbines, in addition to other turbines, at its Midland facility, which are subject to rules promulgated by the DEQ in compliance with the EPA's Clean Air Interstate Rule (CAIR). The EPA determined that nitrogen oxides, or "NOx," from electric generating facilities in 28 states, including Michigan, contribute to other states' inability to meet the EPA's air quality standards for ozone. CAIR was established "to reduce transported emissions of oxides of nitrogen from electric generating units," and the DEQ established rules to enforce CAIR during the spring of 2007, with the rules becoming effective on June 25, 2007.

Under CAIR, the EPA provides NOx emission "allowances" to the 28 states that house electric generating facilities, which limit (or "cap") the amount of nitrogen oxides that can be emitted in a given year, where one allowance permits the emission of one ton of NOx that may be bought, sold, or traded. The states calculate how many allowances are to be allocated to the various electric generating facilities (and to the individual units within those facilities) in their states, and submit their proposed allocations, or "state implementation plan" (SIP) to the EPA for its approval.

Prior to July 2, 2007, plaintiff was operating under a permit that did not contain any specific NOx emissions limits. Plaintiff submitted a permit application to the DEQ for coverage under CAIR on March 21, 2007. The DEQ approved plaintiff's application and issued its modified permit on July 2, 2007. According to intervening defendant Detroit Edison Company, in plaintiff's July 2, 2007, permit, the DEQ increased plaintiff's allocation of allowances by 58%, and correspondingly decreased the allowances of each of the other companies involved in the process. Detroit Edison alleged that because the DEQ estimated that each allowance was worth approximately $4,000, plaintiff stood to gain additional allowances worth $4,000,000,

while intervening defendants stood to lose approximately $2,000,000 worth of allowances per year for the three-year period covered by the permit.

The DEQ submitted its SIP to the EPA on July 16, 2007, utilizing the NOx limits contained in the permit it had issued to plaintiff on July 2, 2007. The DEQ asserted that "[f]ollowing the receipt of comments from" intervening defendants, it "re-examined the rule requirements and determined that it had mistakenly used the NOx limit in the July 2, 2007, permit" in its submission to the EPA, as opposed to the allowance allocations that had been in place as of April 30, 2007, the date stated in the rules as the deadline for the DEQ's submission to the EPA.

After meetings with plaintiff's representatives, however, the DEQ determined that its decision regarding the April 30, 2007, deadline was erroneous, and issued revised allocation spreadsheets to the affected parties. Intervening defendant Consumers Energy Company apparently learned of the DEQ's change of position and on October 11, 2007, sent a letter to the agency again objecting to its use of the data contained in plaintiff's July 2, 2007, permit in its SIP. The DEQ changed its position again, and plaintiff was advised by the EPA on or about November 1, 2007, that the DEQ had sent it a revised spreadsheet reversing its position again and employing the emission limitations contained in permits issued before April 30, 2007.

On November 21, 2007, plaintiff filed a complaint for writ of mandamus, asking the circuit court to compel the DEQ to resubmit the SIP to the EPA containing the data from the permit it issued to plaintiff in July 2007. Plaintiff argued that the DEQ's interpretation of the April 30, 2007, deadline in the rules was arbitrary and capricious as applied to plaintiff's emissions allowance allocation, and that the deadline was not actually applicable to the substantive portion of the rules promulgated under CAIR. The circuit court agreed that plaintiff did have the right to insist that the DEQ use the emissions limits contained in the July 2, 2007 permit, concluding that although the CAIR rules did specify a date for submission, that date is not identified as a deadline for gathering information in the event that the DEQ does not meet the deadline, as was the case here. Rather, the court found that "on whatever date DEQ *does* submit [its allowance allocations] to the EPA, its duty is to gather the current information from the [electric generating facilities] and process it according to the Rules" (emphasis added). We disagree with portions of the court's analysis and conclusion, and reverse its finding that mandamus was an appropriate remedy for plaintiff.

Defendants claim on appeal that plaintiff failed to satisfy the elements of the test required to show that mandamus is an appropriate remedy. Defendants also claim that plaintiff was required to pursue an alternative legal remedy under the Revised Judicature Act (RJA), MCL 600.631, before seeking a writ of mandamus before the circuit court. Intervening defendants also argue that the DEQ did not have a clear legal duty to use emissions rates contained in permits issued at any point before it submitted its SIP to the EPA, as plaintiff argues. The trial court concluded that plaintiff had a right to compel the DEQ to use the July 2, 2007, permit data in its SIP, and that the DEQ had a duty to follow its own rules, which were not ambiguous and did not allow for the agency's exercise of discretion.

"To obtain a writ of mandamus, a plaintiff must have a clear legal right to the performance of the specific duty sought to be compelled, the defendant must have a clear legal duty to perform it, and the plaintiff must be without any other legal remedy." *Riley v Parole Bd*,

216 Mich App 242, 243; 548 NW2d 686 (1996). In addition, a plaintiff must show that the duty sought to be ordered is ministerial and does not involve the exercise of judgment or discretion. *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 438; 722 NW2d 243 (2006).

The trial court found that plaintiff did have a clear legal right to use the data contained in the permit it received from the DEQ on July 2, 2007, because the relevant rules at issue, 2007 AC, R 336.1822 and 2007 AC, R 336.1830, do not require that the electric generating facilities submit their emissions data for use in the DEQ's SIP by the DEQ's own deadline for the submission of its SIP to the EPA. Specifically, Rule 336.1822(3)(a) provides as follows:

> A 3-year allocation that is 3 years in advance of the 2010 ozone season and 4 years in advance of each subsequent ozone season control period. The 3-year allocation shall be as follows:
>
> *(i)* By 60 days after the effective date of this rule or April 30, 2007, whichever is earlier, the department shall submit to the U.S. environmental protection agency the CAIR NOx ozone season allowance allocations, under this subrule, for the ozone season control periods in 2010 and 2011.

Similarly, Rule 336.1830(2) provides that:

> The department shall allocate CAIR NOx annual budget allowances to existing EGUs [electric generating units]. A 3-year allocation is 2 and 3 years in advance of the 2009 and 2010 annual control period, respectively, and 4 years in advance of each subsequent annual control period. The 3-year allocation shall be as follows:
>
> (a) By 60 days after the effective date of this rule or April 30, 2007, whichever is earlier, the department shall submit to the U.S. environmental protection agency the CAIR NOx annual allowance allocations, under subrule (3) of this rule, for the annual control periods in 2009, 2010, and 2011.

The trial court disagreed with defendants' "assert[ion] that because April 30, 2007, was the 'deadline' for SIP submission that April 30, 2007, must therefore define the date on which 'allowable emission rate' is to be determined." Essentially, the trial court's conclusion centered on its finding that there was no connection in the rule between the April 30, 2007, deadline for the DEQ's SIP submission and the submission of permit applications and accompanying data by the electric generating facilities. The court also determined that because the DEQ missed its deadline for SIP submission, it could not argue that it was bound by the rule to reject use of data from permits it had issued after the deadline. While the court's argument is logical, it does not necessarily follow that plaintiff was entitled to a writ of mandamus based on the agency's actions.

As noted above, a plaintiff must prove four elements in order to obtain a writ of mandamus. First, plaintiff was required to show that it had "a clear legal right to the performance of the specific duty sought to be compelled." *Riley*, *supra* at 243. Our Supreme Court has stated that "[t]he primary purpose of the writ of mandamus is to enforce duties created by law where the law has established no specific remedy and where, in justice and good

government, there should be one." *State Bd of Ed v Houghton Lake Community Schools*, 430 Mich 658, 666; 425 NW2d 80 (1988) (citations omitted).

Presumably, if a legal duty is one created by law, a clear legal right is also created by law. Neither the court nor plaintiff identify the legal origin of plaintiff's claimed clear legal right to compel the DEQ to issue its permit at the emissions levels plaintiff has requested. The court reasoned that plaintiff's legal right to compel the DEQ to "submit the proper information in accordance with its own rules" arises out of plaintiff's status as one of the entities affected by the DEQ's rules and policies. However, no legal rights necessarily are inherent to plaintiff's status as an electric generating facility subject to the DEQ's rules, and neither the court nor plaintiff cite a rule or statute that indicates otherwise. It is not clear that plaintiff had a legal right to compel the DEQ to take any sort of action. Therefore, we cannot agree with the trial court's conclusion that plaintiff had a clear legal right to compel the DEQ's performance in the manner ultimately proscribed.

Next, plaintiff was required to show that the DEQ had "a clear legal duty to perform." *Riley, supra* at 243. Although plaintiff may not have had a clear legal right to compel the DEQ to perform in a specific manner, the DEQ was clearly bound to set emissions allowances under the rules. However, it is not apparent that the DEQ has a clear legal duty to use emissions rates contained in permits issued on a date certain before it submits its SIP to the EPA. The trial court found that the DEQ has a "clear and positive . . . duty [under the Rules] to submit information to the EPA." The court noted that while the Rules specify a deadline for the submission of that information to the EPA, "all parties knew beforehand [that] the date in the Rules [would] not be adhered to." Therefore, the court found that "on whatever date DEQ *does* submit [its SIP] to the EPA, its duty is to gather the current information from the [electric generating units] and process it according to the Rules" (emphasis added) and explicitly dismissed the idea that the electric generating units were required to have submitted their data to the DEQ by April 30, 2007.

Intervening defendants argue that the DEQ did not have a clear legal duty to use data from July 2007, and a writ of mandamus compelling the agency to use data from this time period was inappropriate. Rather, intervening defendants contend that the DEQ merely had the option of using data from this date, and as such, no clear legal duty existed. Furthermore, defendants argue that the trial court's invention of a " 'floating deadline' under which MDEQ is obligated to use the emissions data available on the day of its SIP submission to EPA has no support whatsoever in the rules." Plaintiff argues that because the rules at issue do not specify a date by which electric generating facilities must submit their permit information to the DEQ, the DEQ must therefore use the most current data it has available when calculating its emissions allowances before it has submitted its SIP to the EPA. Conversely, the DEQ argues that because it was bound under the rules to submit its SIP to the EPA by April 30, 2007, any information it received relevant to a permit not issued by that date to electric generating facilities would not be considered in making its emissions allowance allocations.

The trial court justifiably found that the deadline in the rules does not explicitly apply to electric generating facilities, and appears to bind only the agency. While the rules do not contain a deadline for electric generating facilities, they also do not explicitly allow them to submit their proposals at any point before the DEQ's submission of the SIP. It is certainly reasonable that for practical reasons, the DEQ might be unable to utilize in its calculations data that arrives too close to the date on which it is scheduled to submit its SIP to the EPA. Because the rules do not

specify this point, however, it is apparent that this matter has been left to the DEQ's discretion. We therefore treat it with deference to the agency's interpretation. See *Romulus v Mich Dep't of Environmental Quality*, 260 Mich App 54, 65; 678 NW2d 444 (2003) (noting that this Court "will generally defer to the construction of the statute or administrative rule given by the agency charged with administering it.").

Third, plaintiff was required to show under *Riley* that mandamus was appropriate because it did not have any other legal remedy available. *Riley*, *supra* at 243. Defendants contend that plaintiff should not have been permitted to sue for a writ of mandamus in the circuit court because it had not exhausted the remedies available to it under the RJA, MCL 600.631.

The trial court found that mandamus was appropriate because it agreed with plaintiff's assertion that it would be left without further remedy after the DEQ submitted its SIP to the EPA, because "that agency will in turn then automatically populate the trading accounts." This portion of the court's opinion references the provision of the CAIR rules that if a state has not submitted a SIP by a certain date, "CAIR provides for a default implementation plan for the allocation of the credits among the facilities." The court further determined that because "the decision to use the pre-April 30 data was made at the highest level of DEQ," plaintiff had ostensibly exhausted its remedies for appeal. Plaintiff does not specify why it would have been left without further remedy in the event that the EPA had applied default allocations to electric generating facilities governed by the DEQ. The DEQ submitted SIPs to the EPA on at least two occasions with different NOx emissions allowance allocations. At least in theory, based on past practices, if the DEQ had agreed to change its (most-recent) final position to one favorable to plaintiff, it could have submitted an SIP to the EPA with the new information and applied the allocations contained therein to the affected electric generating facilities. Even if the EPA had not permitted the DEQ to re-submit its SIP with new data, other remedies were apparently available.

The trial court noted that it had issued an ex parte temporary restraining order in November 2007 ordering the "DEQ to contact EPA and inform them not to use the currently submitted information to populate the NOx trading accounts." Plaintiff does not address whether a similar remedy would have been available pending an appeal to this Court under the RJA. Neither does plaintiff claim that no other remedy was available, but only that defendants should be considered to have abandoned their argument on this issue because they previously argued before this Court that no urgency existed in obtaining an appellate court determination concerning the propriety of the DEQ's allowance allocations. Because plaintiff did not show before the circuit court and does not demonstrate on appeal that it exhausted all available legal remedies before seeking a writ of mandamus, plaintiff does not satisfy this element.

Finally, plaintiff was required to show that the duty sought to be ordered was ministerial and did not involve discretion or judgment. *Carter*, *supra* at 438. In *Carter*, the plaintiff sued the defendant after his application for a position as assistant city attorney was rejected. *Id.* at 426. This Court rejected the plaintiff's argument that because "the act of hiring an assistant city attorney is a ministerial task," a writ of mandamus was appropriate. *Id.* at 440. The Court noted that

> neither the Ann Arbor charter nor the [statute at issue] required defendant to hire any assistant city attorneys at all. Instead, defendant had the discretion to hire the assistant city attorneys [and] the writ sought by plaintiff was for appointment of

himself, a specific individual, as assistant city attorney. The choice of an assistant, however was discretionary. [*Id.* at 440-441.]

In the instant case, the trial court found that plaintiff's requested action was "clearly of a ministerial nature as the procedure set forth in the Rules is not subject to interpretation. DEQ is mandated under the Rules to take each [electric generating unit's allowable emission rate] and apply the appropriate formulaic calculation . . . . Nothing about this duty requires discretion." While the court's focus on this part of the mandamus test was clearly on the formula that the DEQ was required to use in order to calculate emissions allowances, it is not clear that this is the only duty that could be considered for purposes of this element.

According to this Court's analysis, the proper focus for this part of the test is the dates by which the DEQ was required to gather all the necessary data and submit its SIP. Plaintiff sought a writ of mandamus in order to compel the DEQ to submit to the EPA the data it argued it had submitted before the DEQ's deadline for submitting its SIP to the EPA. The issue is not whether the DEQ had discretion in terms of calculating plaintiff's allowable emission rate, but rather which data should be employed in doing so. Plaintiff argued before the lower court that the most recent data should be used, and the DEQ contended that it was required to use the data it had available by the April 30, 2007, EPA deadline for submission of its SIP. Therefore, because of the lack of an explicit term in the Rules requiring electric generating facilities to submit their data for emissions allowance calculations by a certain date, the DEQ did apparently have discretion to decide when that deadline would be for its purposes. Because the DEQ had discretion under the rules to determine a deadline for data submission by electric generating facilities, plaintiff cannot establish that the DEQ's duty was purely ministerial, and thus, mandamus was not appropriate.

Reversed and remanded for entry of an order dismissing this case. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra