[J-55-2008]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

PENNSYLVANIA BANKERS ASSOCIATION, ADAMS COUNTY NATIONAL BANK, COMMUNITY BANKS, PENNSYLVANIA ASSOCIATION OF COMMUNITY BANKERS, AND STERLING FINANCIAL CORPORATION,	:	No. 44 MAP 2007
	:	Appeal from the Order of the Commonwealth Court at 397 M.D. 2005, dated November 13, 2006, vacating and remanding the decision of the Department of Banking, dated July 8, 2005
v.	:	
	:	910 A.2d 767
PENNSYLVANIA DEPARTMENT OF BANKING, BELCO COMMUNITY CREDIT UNION, PENNSYLVANIA DEPARTMENT OF REVENUE, ATTORNEY GENERAL,	:	
APPEAL OF: PENNSYLVANIA DEPARTMENT OF BANKING	:	ARGUED: April 16, 2008
PENNSYLVANIA BANKERS ASSOCIATION, ADAMS COUNTY NATIONAL BANK, COMMUNITY BANKS, PENNSYLVANIA ASSOCIATION OF COMMUNITY BANKERS, AND STERLING FINANCIAL CORPORATION,	:	No. 45 MAP 2007
	:	Appeal from the Order of the Commonwealth Court at 397 M.D. 2005, dated November 13, 2006, vacating and remanding the decision of the Department of Banking, dated July 8, 2005
v.	:	
	:	910 A.2d 767
PENNSYLVANIA DEPARTMENT OF BANKING, BELCO COMMUNITY CREDIT UNION, PENNSYLVANIA DEPARTMENT OF REVENUE, ATTORNEY GENERAL	:	
APPEAL OF: BELCO COMMUNITY CREDIT UNION AND PENNSYLVANIA CREDIT UNION ASSOCIATION	:	ARGUED: April 16, 2008

CONCURRING AND DISSENTING OPINION

MR. JUSTICE SAYLOR **DECIDED: December 17, 2008**

In light of the limited grant of allocatur, peripheral issues are not directly available for consideration at this juncture. Nevertheless, the following background adds perspective to my evaluation of the issues before the Court:

> The Department of Banking is the administrative agency charged with the implementation of both the Banking and Credit Union Codes.
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> The Department was presented with a colorable challenge to a notice of a credit union seeking to convert from an occupational-based credit union and expand its field of membership to a seven-county area, which notice was grounded on the notion that such large geographic area constituted a single "well-defined local community, neighborhood, or rural district." 12 U.S.C. §1759(b)(3), incorporated into 17 Pa.C.S. §501(e)(2). Cf. American Bankers Ass'n v. NCUA, , No. 1:05-CV-2247, slip op., 2008 WL 2857678, at *10 (M.D. Pa. July 21, 2008) ("To a casual observer familiar with central Pennsylvania, it would likely be a remarkable finding that . . . a geographical area of more than 3,000 square miles with a population of over 1.1 million people and encompassing Harrisburg, Hershey, Carlisle, York, Lebanon, Gettysburg, and Shippensburg -- constituted a 'well-defined local community'").
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> The challenge was asserted by other financial institutions (banks) alleging, among other things, that an unlawful expansion of the field of membership would result in unfair competition, particularly on account of tax advantages enjoyed by credit unions which are not shared by banks.
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> Despite the Department's enforcement obligations and the colorable challenge asserted, the Department refused to provide the challengers with even rudimentary information offered in support of the charter conversion, did not conduct any proceedings, and did not issue a decision of any sort.

> Rather, the agency permitted the conversion approval to occur by default.
>
> Thus, no Commonwealth administrative agency or court has ever passed on whether or not the seven counties involved fairly represent a well-defined local community.

In my view, the interests of justice would be better served if an agency faced with a colorable challenge of the sort presented by the Banks would respond with a reasoned and developed decision, thus providing interested parties and the public with some assurance of actual statutory compliance in areas of the agency's regulatory province.

In terms of the limited issues for review, initially, I have no difference with the majority's decision to accept the Department's interpretation of its own regulations, namely, that Chapter 3 of those regulations is not applicable to proceedings on credit union charters. Nevertheless, I differ with the majority's approach to the extent it faults the Banks for invoking Chapter 3. See Majority Opinion, slip op. at 18. At the very least, I believe the terms of Chapter 3 are ambiguous as to their application in proceedings initiated by credit unions. Furthermore, the alternative, default set of procedural regulations, the General Rules of Administrative Practice and Procedure, 1 Pa. Code, Chapter II, are well known to Commonwealth administrative agencies and promote a practice of liberal construction to secure just, speedy, and inexpensive determination of issues presented to agencies. 1 Pa. Code §31.2. Accordingly, I see no reason not to simply sanction the approach of treating the Banks' protest as such under the default regulations. See 1 Pa. Code §35.23 ("A person objecting to the approval of an application, petition, motion or other matter which is, or will be, under consideration by an agency may file a protest."). The majority's approach also seems to me to be in substantial tension with the Department's actual treatment of the Banks' protest as constituting at least a timely-filed comment, as well as with the Department's concession that, "[i]n the event a substantial and direct property interest is supported in comments that would warrant further due process, the constitution would

demand it." Brief for the Department at 34.[1] Finally, as it appears that the Department has referenced the Chapter 3 regulations as the core procedural framework in its treatment of past credit-union submissions, see, e.g., 33 Pa. B. 6233 (Dec. 20, 2003); 34 Pa. B. 1806 (Apr. 3, 2004), it seems inequitable for the Banks to be prejudiced here for relying on such procedure.

The majority also faults the Banks for failing to request a hearing. See Majority Opinion, slip op. at 19-20. In their notice of protest, however, the Banks sought production of Belco's conversion notice and related documents and asked to reserve its entitlement to petition for a hearing upon review of such materials. They explained:

> The Protestors will be unable to effectively prepare and submit comments or testimony to the Department regarding the Application filed by the Belco Community Credit Union until the Protestors are afforded a reasonable opportunity to review, copy and analyze portions of the Application and any related materials available in the hearing file other than material that is confidential and not relevant to the interests of the Protestors.

R.R. at 9a. Pursuant to this Court's decisions, an individual or entity with a due process interest in a charter proceeding is entitled to review application materials in furtherance of a protest. See Conestoga Nat'l Bank v. Patterson, 442 Pa. 289, 299 & n.8, 275 A.2d 6, 11 & n.8 (1971).[2] Thus, I do not regard it as a misstep for the Banks to have reserved the

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[1] The Banks' concern with resort to the General Rules appears to be that intervention is generally required as a prerequisite to a request for a hearing. See Brief for Appellees at 12. Because, however, a party with a direct interest in an agency proceeding has a right to appeal even in the absence of intervention before the agency, see Application of El Rancho Grande, Inc., 496 Pa. 496, 501-02, 437 A.2d 1150, 1152 (1981) (quoting 2 Pa.C.S. §702), in my view the requirement should not be rigidly applied by agencies in the face of allegations of direct interest. Moreover, and again, the ambiguity as to the applicability of the Chapter 3 regulations militates in favor of latitude in the present case.

[2] Indeed, despite the provisions of Section 302(A.2) of the Credit Union Act, 71 P.S. §733-302(A.2), the Department itself recognizes that,
(continued…)

entitlement to a hearing pending review of integrally essential, requested documents. Rather, I believe that the overarching, dispositive question should always have been whether the Banks' protest raised a sufficient interest related to Belco's notice to implicate an entitlement to a review of the documents and a hearing.

On this issue of interest,[3] the Banks argue that their protest

> adequately pleaded the Banks' interest in Belco's notice as their right to be free from direct competition in a manner not authorized by law and which could result in a loss of customers to their direct and substantial detriment; their interest in preserving consumer confidence in the banking system which is vital to their economic stability; and their interest in being free from a discriminatory system of taxation which confers tax exemptions upon Belco in a manner not authorized by law.

Brief for Appellees at 33. The Banks note that, in its Conestoga decision, this Court held that banks located within a community have standing to challenge branch applications filed by other banks located in the same community. See Conestoga, 442 Pa. at 296-97, 275

(…continued)

> in a situation where a constitutionally protected property interest is at issue, a hearing is required. In such a situation, the regulations at 1 Pa. Code, Part II would apply to parity notices and any disclosures required to protect constitutional rights would be made, subject to protective agreements to protect the rights of the party to their information.

Brief for the Department at 12; accord Brief for Appellant Belco at 19 ("Section 302 does not prohibit disclosure in all circumstances, but rather allows information to be disclosed if necessary to protect constitutional rights.").

[3] Although this Court did not grant allocatur specifically to consider the Banks' interest in and of itself, the interest issue is subsidiary to the question of whether the Banks are entitled to review the application materials (the second question on which the appeal was allowed). Moreover, as the majority addresses the matter, I believe that it is appropriate to set forth my own thoughts here.

A.2d at 10 (explaining that "a decision on an application for a branch bank is judicial in nature and involves substantial property rights."); cf. Delaware County Nat'l Bank v. Campbell, 378 Pa. 311, 326, 106 A.2d 416, 423 (1954) (holding that a national bank had standing to protest the application of a state bank for a new branch). The Banks observe that a predominate concern arising out of both the Conestoga and Delaware County National Bank cases was for the health of the overall financial system, in which many types of financial institutions are participants. See, e.g., Delaware County Nat'l Bank, 378 Pa. at 324-25, 106 A.2d at 422 (discussing, with reference to the country's experience with bank "runs" during the Great Depression, the impact of the failure of one or more financial institutions upon the financial community at large). Indeed, the Banks emphasize that Conestoga, in particular, couched the salient interests broadly, confirming the entitlement of banks to remain competitive with all other types of financial institutions regulated by the Department, as follows:

> [W]e believe that it is clear beyond question that substantial property rights are involved in the Banking Department's adjudication here. Those rights include not only the rights of the applicant and the protesting bank but also the rights of the surrounding financial community. As has been noted before, the banking system is unique in that the failure of one of several competing financial institutions frequently leads not to the enhancement of the relative position of the surviving competitors but to the possible adverse effect to all.

Conestoga, 442 Pa. at 298, 275 A.2d at 11 (emphasis added).

To the degree that this Court would depart from the broader concerns expressed in Conestoga and accept the counter-position of Belco and the Department that standing requires participation in a common regulatory scheme, the Banks contend that the various statutory codes governing financial institutions, in tandem with the Administrative Code, create such a common scheme for regulation, which obligates the Department to ensure the safety and soundness of all financial institutions and protect their competitiveness. For

example, the Banks develop that, under both Section 103(a)(v) of the Banking Code and Section 103(a)(5) of the Savings Association Code of 1967, it is the duty of the Department to provide for "[t]he opportunity" for institutions subject to the Banking Code and associations subject to the Savings Association Code "to remain competitive with each other" and "with financial organizations existing under other laws of this Commonwealth." 7 P.S. §§103(a)(v), 6020-3(a)(5).[4] Finally, the Banks note that the United States Supreme Court highlighted the role played by restrictions upon the membership of credit unions in holding that commercial banks had standing, under federal jurisprudence, to challenge field-of-membership expansion. See NCUA v. First Nat'l Bank & Trust Co., 522 U.S. 479, 493-94, 118 S. Ct. 927, 935-36 (1998) ("As competitors of federal credit unions, respondents certainly have an interest in limiting the markets that federal credit unions can serve, and the NCUA's interpretation [of a statutory field-of-membership restriction] has affected that interest by allowing federal credit unions to increase their customer base.").

The Department and Belco, on the other hand, distinguish Conestoga as pertaining only to adverse financial organizations (there, competing banks) governed under the same regulatory scheme. Accord Pennsylvania Bankers Ass'n v. Pennsylvania Dep't of Banking, 893 A.2d 864, 871 (Pa. Cmwlth. 2006), rev'd on other grounds, ___ Pa. ___, 956 A.2d 956 (Pa. 2008); see also Pennsylvania Petroleum Ass'n v. PP&L Co., 32 Pa. Cmwlth. 19, 26, 377 A.2d 1270, 1273 (1977) (reasoning that, where a party alleges competitive injury, "such parties have standing only where the alleged competition is prohibited by a regulatory scheme in which both parties participate"), aff'd on different grounds, 488 Pa. 308, 412

[4] Likewise, the Bank observes, Section 202.A of the Department of Banking Code expressly requires the Department to enforce and administer "all laws of this Commonwealth which relate to any institution" in a manner that "will afford the greatest possible safety to depositors, other creditors, and shareholders thereof, ensure the safe and sound conduct of the business of such institutions, conserve their assets, maintain the public confidence in such institutions and protect the public interest." 71 P.S. §733-202.A.

A.2d 522 (1980). According to the Department, in the regulatory context, the concept of unfair competition can have meaning only within a unique regulatory environment. Both the Department and Belco express the concern, also advanced by the Commonwealth Court in Pennsylvania Bankers Association, that if Conestoga is read broadly, "banks would have automatic standing in proceedings involving all financial organizations, including credit unions, insurance companies, securities firms, check cashing businesses, any concern offering financing." Pennsylvania Bankers Ass'n, 893 A.2d at 871. Like the Commonwealth Court, the Department and Belco perceive this as an unreasonable result. See id.

The Department asserts that, particularly measured against the interests involved in the present case, a requirement of participation in a common regulatory scheme is sensible. In this regard, the Department develops competitive disadvantages of the credit union model, including the fact that such organizations cannot raise capital from investment markets or experience market appreciation since they do not have capital stock, and thus, credit-union capital grows very slowly out of many years of accumulating retained earnings. According to the Department, given the above, the limited size of credit unions, and the different system for insurance, it is highly unlikely that credit union failures would have significant impact on banks. Moreover, the Department concludes, there is no historical or other basis for determining that there is a unique relationship between credit unions and banks to support a finding of a substantial property interest. See Brief for the Department at 26 (arguing that "a claim based on competition is disingenuous given highly competitive financial marketplace and the numerous banks in the same market territory. The unrestricted ability of banks to operate in any geographic area without limitation under the law, unlike credit unions, renders their claims hollow."). In response to the Banks' arguments relying on the tax status of credit unions, the Department asserts that "the tax status of an entity is a legally insufficient reason to find unfair competition." Brief for the

Department at 28 (citing Commonwealth v. Lukens, 312 Pa. 220, 167 A. 167 (1933); City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369, 94 S. Ct. 2291 (1974)).

Additionally, it is the Department's position that, under the Credit Union Code, it lacks the authority to restrain field-of-membership expansion, except when the safety and soundness of the credit union involved is at issue. Brief for the Department at 30 (citing 17 Pa.C.S. §501(f)(3)). The Department further expresses the position that protracted proceedings at the behest of competitor banks would harm the interests of credit unions by injecting unnecessary delay into charter conversion proceedings. In this regard, the Department also relates its concern that the process would be subject to abuse, particularly since credit unions have no reciprocal ability to lodge field-of-membership challenges relative to other financial organizations. The Department also points to the General Assembly's intent to allow state credit unions to engage in activities on par with their federal counterparts upon notice, just as banks may operate on par with federal banks under notice-based parity provisions in the Banking Code. See 7 P.S. §201(c)(i). In this regard, the Department indicated that it does not wish to "circumvent the General Assembly by acting within the thirty-day period simply to deny the credit union its rights to exercise the statutory provision for a deemed approval" of parity-related charter conversions. Brief for the Department at 30. Finally, the Department contends that all the process which was due was provided via public notice and opportunity for comment.

Preliminarily, I differ substantially with the Department's approach to the deemed approval of the charter conversion. Given the public interest in reasoned governmental decision making, where governmental approval is a prerequisite to some action, I believe agencies should expressly accord substantive review when faced with a colorable

challenge to the action asserted by an individual or entity having a direct interest.[5] In my view, approval by default despite a challenge such as that asserted by the Banks undermines the appearance of fundamental fairness. While I am sympathetic to the Department's concern with avoiding potential abuses of the review process, I do not agree that the solution to such difficulties is the affordance of no substantive review. Cf. Pennsylvania Coal Mining Ass'n v. Dep't of Insurance, 471 Pa. 437, 451, 370 A.2d 685, 692 (1977) (explaining that an agency's deemed approval of a private entity's proposal does not negate the due process rights of persons with direct interests in the proceedings).

Additionally, contrary to the Department's position, I believe that the agency possesses clear statutory authority to regulate parity-driven, field-of-membership expansion beyond the mere assurance of safety and soundness to the affected credit union. Indeed, the Credit Union Code's express authorization of the imposition of "conditions, limitations, and restrictions" on credit union activities includes a specific cross-reference to the parity-related provisions of the Credit Union Code. 17 Pa.C.S. §501(f)(2) (cross-referencing 17 Pa.C.S. §501(e)). Thus, it seems clear that the Department should enforce parity-related restrictions, including the maintenance of boundaries for community-based credit unions established by a well-defined local community. See 17 Pa.C.S. §501(e). It is far from clear, however, particularly without adversarial testing, that expansion to a seven-county area in South Central Pennsylvania meets that requirement. Cf. American Bankers Ass'n, No. 1:05-CV-2247, slip op., 2008 WL 2857678, at *10. Indeed, in American Bankers Association, the district court expressed substantial concern with the underpinnings of a

[5] Neither Belco nor the Department denies that credit unions compete with banks for patronage. Cf. First Nat'l Bank, 522 U.S. at 488 n.4, 118 S. Ct. at 933 n.4 ("In this action, it is not disputed that [banks] have suffered an injury in fact because the NCUA's interpretation allows persons who might otherwise be their customers to be members, and therefore customers, of [the credit union].").

federal administrative agency's decision that a six-county area in South Central Pennsylvania comprised a single well-defined local community.[6]

I also disagree with the Department's and Belco's approach to the Conestoga decision. The broader language of the decision, see Conestoga, 442 Pa. at 298, 275 A.2d at 11 (indicating that substantial property rights at issue with regard to bank branch expansion "include not only the rights of the applicant and the protesting bank but also the rights of the surrounding financial community"), seems well justified, when considering that, in today's complex financial marketplace, competition occurs across the boundaries of multiple regulatory schemes. As the United States Supreme Court recognized in First National Bank, financial organizations may suffer direct harm, in the form of a loss of customers, due to the actions of credit unions and other competing financial organizations,

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[6] For example, the district court stated as follows:

> The organic statute assigns to the NCUA the task of weighing the evidence before it and, after an "appropriate investigation," deciding whether a proposed area is a well-defined local community. As illustrated above, the record contains evidence that supports the agency's findings; however, it also contains a substantial body of evidence contravening the agency's finding that the [six-county area] constitutes a well-defined local community. The NCUA's lopsided decision reflects a certain deafness to the unfavorable evidence of record. Moreover, the record is clear that the agency in this case changed its formal position with respect to the relative weight of the factors, and the agency provided no explanation for the shift. That so much of the evidence contrary to the agency's decision went completely unmentioned hardly inspires confidence that the NCUA's decision was the product of reasoned, deliberative decision-making -- particularly where such decision-making occurs entirely ex parte. That the agency made an unexplained shift in its approach strongly suggests that determinism, not documentation, drove the NCUA's decision.

Id. at *14.

and thus, maintain an acute interest in ensuring that competitors abide by statutory provisions limiting the markets that they can serve. See First Nat'l Bank., 522 U.S. at 488 n.4, 492-93, 118 S. Ct. at 933 n.4, 935. While the specific holding in all cases should be read against their facts, I agree with the Banks that the broader concerns expressed in Conestoga to be valid and pertinent here.[7]

Notably, the arguments of both the Department and Belco generally address separately the field-of-membership restrictions and the tax advantages enjoyed by credit unions. A fair response to the Banks' argument, however, entails consideration of these factors in tandem. The Banks are not challenging the tax advantages enjoyed by credit unions as such; rather, they are asserting that the competitive advantage of credit unions, due to their tax-exempt status, is unfairly enhanced by an unlawfully expansive approach to credit union field of membership.[8] The interest of the Banks seems even more apparent if the statutory field-of-membership restrictions are viewed, as they are by some, as, at least in part, a quid-pro-quo for the tax advantages enjoyed by credit unions.

In view of the above, I differ with the majority's holding that the Banks waived any entitlement to due process protections. The majority reasons that the Banks did not establish a direct interest in the controversy, since they did nothing more than request the

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[7] Both the Department and Belco suggest that the Banks challenge might be better suited to the context of branch office approval as opposed to charter conversion. See Brief for Appellant Belco at 21-22; Reply Brief for the Department at 9. I find merit in the Banks' position, however, that their interest pertains in both settings. See Brief for Appellees at 48 n.21 ("If, however, the required procedural due process recognized by Conestoga applies to a proposal to build a new branch, it is absurd to suggest that it should not, likewise, apply to a proposal to establish an entirely new system of branches.").

[8] Certainly, the Department is correct that credit unions also suffer from some competitive disadvantages, and that they enjoy no reciprocal opportunity to challenge other types of licensed or chartered entities in terms of their fields of membership. Again, however, I believe that other measures are available, short of the outright denial of substantive review, to counteract potential abuses.

Department's hearing file and offer a reservation of a right to request a hearing. See Majority Opinion, slip op. at 21. As developed above, I believe that the Banks' protest and associated arguments, in fact, did substantially more.[9]

As to the production of documents, as previously noted, the Department concedes that at least some reasonable disclosure is required if the Banks are deemed to have a sufficient interest to implicate due process norms. Having concluded that such interest is present, I would remand to the Department to determine, in the first instance, the scope of the materials to be provided and the conditions for their disclosure. At this juncture, I would merely note that the Department has acknowledged that much of the information supplied by Belco was not proprietary in nature. See Brief for the Department at 32 ("In field of membership cases, the documents at issue consist of rather benign compilation of geographic, demographic, social, commercial and governmental information from public sources and a discussion by the credit union as to why those facts support a finding of a community exists for purposes of a credit union field of membership.").

Mr. Chief Justice Castille joins this concurring and dissenting opinion.

[9] I also find the Banks' protest to be materially distinguishable from the challenge to an agency's statement of policy in Bedford Downs Management Corporation v. State Harness Racing Commission, 592 Pa. 475, 926 A.2d 908 (2007) (per curiam), referenced by the majority, particularly since the challenge in that case was not asserted in the proceedings under review until the filing of a petition for reconsideration. See id. at 499, 926 A.2d at 923.