

State of Vermont
Water Resources Board

Advisory Opinion

By request filed February 13, 1991, Mountain Valley Marketing, Inc. (MVM) which was formerly known as Simco, Inc., seeks an advisory Opinion from the Executive Officer of the Water Resources Board pursuant to Rule 16 A of the Board's Rules of Procedure. MVM is seeking an advisory opinion as to the applicability of the Opinion and Order issued by the Board on October 11, 1990, which dismissed with prejudice a matter before the Board. Specifically, MVM wants to know what was dismissed with prejudice. Did the Board's Order dismiss the Administrative Order as to certain violations or did the Order dismiss MVM's appeal of the Administrative Order?

However, before reaching the subject of MVM's request I need to make a preliminary determination as to whether I have the authority to render an advisory opinion under the Board's Rules of Procedure. The Agency of Natural Resources filed a letter objecting to the issuance of an Advisory Opinion asserting that the October 11, 1991 Order had become "final and unappealable" upon the expiration of the 30 day appeal period. The Agency of Natural Resources argues that Board Rule of Procedure 16 A does not apply to "final" orders resulting from the Board's consideration of a contested case,, de novo proceeding, or appellate proceeding under Board Rules 18 and/or 30. The Agency claims that if an advisory opinion were to be rendered, there would be no finality to any decision or order rendered by the Board. I am not persuaded by the Agency's arguments.

The Water Resources Board Rules of Procedure 16 A provides in pertinent part:

"Any person demonstrating a stake in the outcome may seek an advisory opinion from the Executive Officer as to the, applicability of any rule or order of the Board or any statutory provision under the jurisdiction of the Board... Any decision of the Executive Officer is appealable to the Board by way of a petition for declaratory ruling."

Rule 16 A does not draw a distinction between orders and final orders. The Rule directs the Executive Officer to act on petitions for advisory opinions as to the applicability of "any...order," irrespective of whether the order is a "final order."

Still, the Agency's concerns about finality are noted. The Vermont Supreme Court has stated that declaratory rulings are "not appellate in nature, and cannot be resorted to as a substitute for, or in lieu of, Proper appellate remedies."* Petition of D.A. Associates, 150 Vt. 18, 19 (1988). It is reasonably inferable that advisory opinions under Rule 16 A are limited in the same way.

Under the Board's Rules of Procedures, advisory opinions are restricted in scope to the same extent as declaratory rulings. Board Rule 16 only authorizes decisions, in the form of advisory opinions or declaratory rulings, "as to the applicability of any rule or order . . . or statutory provision." Therefore, limitations in scope which apply to declaratory rulings are equally applicable to advisory opinions. To hold otherwise, to allow a broader reading of the scope of advisory opinions, would thwart the clear expressed intent of Rule 16 A which directs that advisory opinions are appealable to the Board by way of a petition for declaratory ruling.

What then is the scope of an advisory opinion as to the applicability of the Board's Opinion and Order, dated October 11, 1991, which dismissed with prejudice a matter before the Board? MVM wants to know whether the Board dismissed with prejudice the "Administrative Order," as to certain violations asserted in the Administrative Order, or whether the Board dismiss MVM'S appeal of the Administrative Order with prejudice.

The Vermont Supreme Court has stated that the purpose of declaratory rulings authorized by Section 808 of Title 3 was "to test 'the applicability [to a given set of circumstances or facts] of any statutory provision or of any rule or order of an agency.'" Petition of D.A. Associates, 150 Vt. 18, 19 (1988) (quoting In re State Aid Highway No. 1, Peru, Vermont, 133 Vt. 4, 7 (1974) (emphasis in original, brackets in original). The Court has cautioned that the validity of an agency order was not an appropriate subject for a declaratory ruling and issuing guidelines was not a proper purpose. Id. The Court has further pointed out that it was "the purpose of such [declaratory] rulings to declare the rights of the parties in the first instance, not whether rights already acted upon at the agency level have been properly determined." Id. (emphasis in original).

On October 11, 1990, the Water Resources Board dismissed with prejudice a matter before the Board, as to those issues delineated in the Pre-hearing Conference Report. At the time of the Board decision there were two parties: Simco (now known as MVM), and the Agency of Natural Resources Department of Environmental Conservation. By Motion filed October 22, 1990, the Secretary of the Agency of Natural Resources moved the Board to correct and/or alter its Opinion and Order dated October 11, 1990. By Order dated November 14, 1990, the Water Resources Board denied the motion. Neither party appealed the Board's Order(s) within the appeal period. Commenting now on the October 11, 1990 ruling in the form of an advisory opinion would not be a declaration of rights in the first instance, and would therefore be inappropriate. D.A. Associates, supra, at 19. Accordingly, I cannot address the question as to what was specifically dismissed by the October 11, 1990 Order. The Order speaks for itself.

However, I can comment on the applicability of the October

11, 1990 Order as it relates to a future scenario. Although not specifically requested, but relative to concerns about finality, it is clear, based on the facts given to me at this time, that MVM and the Agency of Natural Resources are barred from attempting to relitigate, in this forum, the issues previously delineated in the Pre-hearing Conference Report.

This Advisory Opinion is appealable to the Board by way of a petition for declaratory ruling pursuant to Board Rule 16 B.

Dated this 3rd day of May, 1991.

Maureen T. Holland
Maureen T. Holland
Interim Executive Officer
