State of Vermont

Water Resources Board

Re': Appeal of Balagur
Docket No. 86-0'6

ORDER

BACKGROUND

The Water Resources Board (Board) was petitioned by the State of Vermont, Agency of Natural Resources (ANR) to vacate the Water Quality Certificate (WQC), the Discussion, the Findings of Fact and Conclusions of Law and other opinions and orders issued by the Board in the Appeal of Richard Balagur, Docket No. 86-06. The ANR asserts that the Board was without jurisdiction to review and issue a WQC in'the Balagur case and therefore the Board should vacate all decisions, opinions, orders or discussions issued in that matter.

Prior to reaching the merits of the Motion to Vacate, the Board conducted a hearing on the preliminary issue of whether the case should be reopened. Although the Board recognized that it has the inherent authority to reopen a case'to correct errors, the Board decided on August 6, 1991' that the case should not be reopened.

Although the Board decided against reopening the case, it did not specifically.issue an order in reply to ANR's original motion to vacate. Subsequently, ANR filed a Motion For Board to Reach Motion to Vacate or Alternatively For Correction and to Alter Decision on August 20, 1991. ANR points out in its accompanying memorandum that the Board need not reopen the original case in order to decide the motion to vacate. ANR also argues that a reopening is unnecessary when the Board lacked jurisdiction to make the original decision and that the Board erred in holding that the length of time passed since the original determination is the sole indicator of whether a case'should be reopened.

DECISION

Because ANR filed its Motion for Board to Reach Motion to Vacate or Alternatively For Correction and to Alter Decision within 15 days of the Board's August 6, 1991decision not to reopen this matter, the Board accepts the motion as properly and timely filed. Water Resources Board Rule of Procedure 29 B. and 29 'C.

In its decision the Board used V.R.C.P. 60(b) as guidance in refusing to reopen this matter. ANR had argued in a Supplemental Memorandum submitted to the Board prior to the Board decision that the Vermont Rules of Civil Procedure are not applicable to matters before the Board. ANR further argued that, insofar as V.R.C.P. 60(b) may present a useful analogy, relief from judgment on grounds that a judgment is void, for lack of jurisdiction need not be brought within one year.

Although the Vermont Supreme Court has stated that administrative hearings are not included within the purview of the scope of the Rules of Civil Procedure, International Assoc. of Firefiahters v. Citv of Montpelier, 133 Vt. 175 (1975), the Court has held more recently that, in the absence Of other standards, the Vermont Rules of Civil Procedure can be utilized to control administrative proceedings. In re Vermont Public Power Supplv Authority, 140 Vt. 424 (1981). See also, Anaolano v. Citv of South Burlinaton, 142 Vt. 131 (1982) (application of Vermont Rules of Civil Procedure and Rules of Evidence to agency's administrative hearings permissible where agency specifically provided in its own duly adopted rules for such application).

The Board now holds that, where its specific rules of procedure fail to properly address the procedural issues of a post-hearing motion, the Vermont Rules of Civil Procedure shall be a guide in its determinations.

The Board agrees with ANR that a Rule 60(b) motion regarding lack of subject matter jurisdiction may be brought outside a one year time limit. It is not the time frame within which the motion was filed that is the key issue here, however. The heart of the matter is whether the nature of the Board's original decision mandates a vacation of the order and a dismissal of the appeal.

The Board recognizes that absence of subject matter jurisdiction may render a court judgment void if there is some plain usurpation of power, i.e. the court wrongfully extends its jurisdiction beyond its authority. It further recognizes that' this proposition may be applicable to administrative agencies. See, e.g. Sterling Drua. Inc. v. Weinberaer, 509 F.2d. 1236 (2d Cir. 1975; Pepsico, Inc. v. FTC, 472 F.2d 179 (2d Cir. 1972), cert. denied, 414 U.S. 876, 94 S.Ct. 44, 38 L.Ed. 2d 122 (1973).

Normally a board must determine and make findings showing it to have the power to exercise jurisdiction. In re Lake Sadawca Dam, 121Vt. 367 (1960), citing Special Indemnitv Fund v. Prewitt, 210 Okl. 308, 205 P.2d 306. The Prewitt court stated:

"Unlike a court, no disputed, question of fact

relating to the power or authority of an administrative **board, though** quasi-judicial, may be presumed to have been determined in **accordance with** the power exercised." (emphasis added)

Prewitt. **210** Okl. 308, at 309.. The Vermont Supreme Court echoed this when it said, **"The** commission or board must determine and make findings of **the** facts necessary to show, that the power it exercised did **exist."** Sadawoa, supra, at 370 (emphasis added).

The Board, **in** its original decision on the preliminary matters, issued, substantial findings making it abundantly clear on what factual **basis the** Board took jurisdiction. The Board also made it clear in **the Pre-Hearing** Conference Report **(some three** months before the decision on **preliminary** matters) that the **legal basis of the** appeal was Title **10 V.S.A. §1269.** The fear voiced. **by the** Oklahoma Supreme **Court** and echoed by the Vermont Supreme Court, i.e., a jurisdictional basis could not **be verified at** an appellate level for lack of sufficient facts in the, record, is not a problem in this **case.**

The parties were certainly on notice and **had** the opportunity to litigate the issue of jurisdiction, but, failed **to** do' so. When **the issue** of subject matter jurisdiction has been only implicitly raised and resolved **in a** judgment, and then that judgment is subsequently challenged, the question is "whether to permit, in the interest of securing conformity to the rules of jurisdiction, the revival of a question that attentive counsel should have raised in the first instance." Restatement of Judgments **2d, §12.** at 121-122. The interests at stake are governmental and societal. **Id.** The question then is one of

> "whether the public interest in observance, of the particular jurisdictional rule is sufficiently **strong to permit a** possibly superfluous vindication of the rule by **a litigant** who is undeserving of **the** accompanying **benefit that will redound to** him. **The** public. **interest is of that strength only if** the tribunal's excess of authority was plain or has seriously disturbed the distribution of governmental powers **or has** infringed a fundamental constitutional **protection."**

Id., at **122.***

In the present case **the Board's alleged** excess of authority was not plain.

***Two** of these three exceptions are argued by ANR in its **memorandum** in support of the present motion.

that the Board had authority to hear **the appeal** .(ANR admits this in its most. recent memorandum), there was no clearly **established** jurisdictional basis elsewhere for another body to handle these appeals. Nor was jurisdiction taken by the Board in **contravention** of any law requiring otherwise. See. **Kalb v. Feuerstein,** 308 U.S.. 433 (1940). In fact, Congress **had specifically** given authority to the state to perform a certification in an area of law in which the Board traditionally had appellate jurisdiction. See Clean Water Act, **§401.** See also 10 **V.S.A. §1004.** Moreover, the 'legislature, once aware of the decision in In re Georsia Pacific, No. S-11-90Ec (Vt. **Ess.** Sup. Ct. Aug. 21, **1990),** ratified the authority of the Board to hear these appeals.

Secondly, **the Board's** determination did **not seriously** disturb the distribution of **governmental powers.** The Board did notinfringe-upon **ANR's** ability to issue a permit, nor did it decide **that** ANR had no authority to be the permitting agency.The Board merely acted as an appellate **body on an** issue that was **within** the 'normal purview of the Board's appellate authority, i.e. the Board interpreted the application of the Vermont Water Quality Standards. Nor did the Board infringe upon the powers of the superior court as ANR has suggested. Any decision of the Board was subject to appeal to the superior court. Under the'ruling in Georsia **Pacific,** the ANR **denial** of certification would have been appealable to the same superior court. V.R.C.P. 75.

Finally, the Board's **actions** did not infringe upon a fundamental constitutional protection. ANR does not raise this argument in its memorandum.

Once' the Board decided the preliminary matters, the parties freely entered into a stipulation. Rule 60(b) motions are not ordinarily available **to** parties whose tactical choices turn out to **be** ill advised. Goshv v. **Morey,** 149 Vt. 93 **(1987).** See also, Darken v. Mooney,, 144 Vt. 561 (1984); **Okemo Mountain v. Okemo Trailside Condominiums,** 139 vt. 433 (1981).

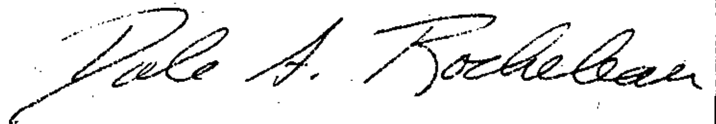
ANR would have the Board consider other "relevant factors" **in** this decision. The need to **be** mindful **of** the integrity of public *r&sources and* public *waterways is* not lost upon **the Board.** In a like manner, **the need** to be mindful'of the **integrity of** an' administrative board's **decisions** is an equal consideration,. This **case was** originally decided nearly **five years** ago by virtue **of** a stipulation freely entered into by the parties. No **appeal** was taken of the Board's construction of **§401** of the Clean Water Act. Hence, no binding precedent was **established.** Moreover, the legislature amended the statute at question, clarifying the law and providing **the** Board **the** jurisdiction **it allegedly** did not have in 1987. The modern rule on conclusiveness of determinations **of subject** matter jurisdiction gives finality substantially

greater weight than validity. Restatement cif Judgments 2d, supra, at 117. The Board agrees that in this case finality outweighs a subsequent question of validity.

The Board hereby denies the Motion to Vacate.

Dated at Burlington, Vermont, this 23d day of December, 1991.

Vermont Water Resources Board
by its Chairperson



Dale A. Rocheleau

Concurring: Elaine Little
William Boyd Davies