State of Vermont

Water Resources Board

Re': Appeal of Balagur
Docket No. 86-06

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, 1991 decision 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 Firefighters v. City 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 Supply Authority, 140 Vt. 424 (1981). See also, Ansolano v. City of South Burlington, 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 Drug, Inc. v. Weinberger, 509 F.2d 1236 (2d Cir. 1975); Pepsico, Inc. v. FTC, 472 F.2d 179 (2d Cir. 1973), 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, 121 Vt. 367 (1960), citing Special Indemnity 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 alleged excess of authority was not plain.

*Two of these 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 Georgia 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 not infringe 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 Georgia 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 resources 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 of 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 23rd day of December, 1991.

Vermont Water Resources Board
by its Chairperson

Dale A. Rocheleau

Concurring: Elaine Little
William Boyd Davies