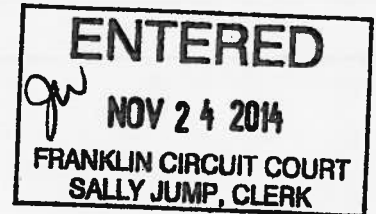


COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION I
CIVIL ACTION NO. 13-CI-584



APPALACHIAN VOICES, INC., et al.

PETITIONERS

V.

OPINION & ORDER

ENERGY AND ENVIRONMENT CABINET

RESPONDENT

AND

FRASURE CREEK MINING, LLC

INTERVENING RESPONDENT

This matter is before the Court on the Petitioner's Motion for Summary Judgment and Declaratory Relief, the Cabinet's Motion for Summary Judgment, the Cabinet's Motion to Dismiss Petition for Declaratory Judgment, Frasure Creek's Support of the Cabinet's Motion for Summary Judgment, and Frasure Creek's Motion to Dismiss the Petition in its entirety. Oral Arguments were heard on February 18, 2014. The parties fully briefed the issues, and the Court then took the case under submission. Upon review of the record and parties' pleadings, and after being sufficiently advised, the Court hereby **REVERSES** the Final Agreed Order of the Cabinet and **GRANTS** Summary Judgment in favor of the Petitioners, **REMANDING** the matter for an evidentiary hearing at the administrative level for reasons more fully detailed below.

BACKGROUND

The Court recognizes the context of this case includes Franklin Circuit Court Civil Action No. 10-CI-1868, enforcement proceedings initiated by the Energy and Environment Cabinet (hereinafter "Cabinet") regarding Frasure Creek Mining, LLC's (hereinafter "Frasure Creek") compliance with its KPDES permits for its mining operations. The Cabinet conducted an investigation of the alleged violations at Frasure Creek which revealed problems with

laboratories conducting wastewater analyses and preparing DMRs (discharge monitoring reports). The Cabinet filed a complaint in this Court in 2010 alleging the above violations by Frasure Creek. In April 2010, Petitioners began investigating water-monitoring data for Frasure Creek by submitting open record requests with the state's agencies and discovered DMR inaccuracies and inconsistencies. On December 3, 2010, the Cabinet and Frasure Creek filed a Joint Motion for the entry of a Consent Judgment that allegedly resolved the violations and is still pending before this Court. Appalachian Voices, Inc., Waterkeeper Alliance, Inc., Kentuckians For The Commonwealth, Inc., Kentucky Riverkeeper, Inc., Lanny Evans, Winston Merrill Combs, Thomas H. Bonny, and Pat Banks (hereinafter "Petitioners") objected to the proposed Consent Judgment. Throughout the course of 2011, the Cabinet continued its investigation of Frasure Creek's DMRs and detected additional violations. Petitioners then filed their Notice of Intent to file a citizen's suit under the federal Clean Water act against Frasure Creek for its violations. On August 26, 2011, the Cabinet filed a complaint initiating the administrative action to prosecute the violations by Frasure Creek. On November 7, 2011, Petitioners moved to intervene and were granted "full intervention" in the administrative proceeding. From June 2011 to September 2012, all parties were trying to reach a global settlement as to the administrative action, the Franklin Circuit Court action, the federal district court case, and the Petitioners' Notices of Intent to Sue. A mediation was attempted on four different occasions. On May 12, 2012, Frasure Creek notified the hearing officer and the parties of its dire financial situation and its potential bankruptcy. Settlement talks continued. On January 2, 2013, Frasure Creek and the Cabinet tendered to the Administrative Hearing Officer an Agreed Order purporting to be a global settlement of all claims against Frasure Creek. On January 31, 2013, Petitioners objected to the Agreed Order. On February 14, 2013, an

involuntary bankruptcy petition was filed against Frasure Creek by its creditors. On April 16, 2013, the proposed Agreed Order was entered as a final order of the Cabinet, without holding a full hearing before an administrative hearing officer so that Petitioners could hear, present, and test evidence, and consequently, the hearing officer made no findings of fact or conclusions of law before presenting the Agreed Order to the Secretary.

Petitioners seek declaratory relief stating that the Cabinet violated Section 2 of the Kentucky Constitution by (1) arbitrarily entering an agreed order that was not agreed to by all parties to the associated administrative proceeding; (2) violating Petitioners' due process rights by entering an agreed order without allowing Petitioners the opportunity to present and test evidence and participate in the administrative hearing; (3) violating Petitioners' due process rights by entering an agreed order without setting forth specific findings of fact or conclusions of law by the Secretary to support the entry of the agreed order; (4) acting outside of its statutory authority by following an improvised process for settling this matter without the consent of all the necessary parties; and (5) entering an agreed order that is unsupported by substantial evidence in the record. Petitioners also seek summary judgment on their claims, and review by this Court pursuant to KRS 13B.150 and Section 2 of the Kentucky Constitution. They argue that without a declaration from this Court, citizen participation in administrative enforcement actions will be eliminated and that no representation will be made as to their interests, and there will be no effective recourse to challenge the Cabinet's actions.

The Cabinet then filed its own Motion for Summary Judgment. The Cabinet argues that the Agreed Order is supported by substantial evidence and that entry of the Agreed Order is within the Cabinet's authority. The Cabinet also argues that Appalachian Voices has no protectable property interest in an evidentiary hearing before the Cabinet may settle an

enforcement action. They argue that Petitioners were provided with due process and a notice of the proposed settlement agreement and an opportunity to make their objections heard during the negotiation process with Frasure Creek, that the Agreed Order is not arbitrary or unreasonable, and that the entry of the Agreed Order should be affirmed because it is supported by substantial evidence.

The Cabinet also filed a Motion to Dismiss the Petition for Declaratory Judgment arguing that Petitioners are seeking to have this court declare their rights *after* adjudication by the Secretary. They argue there is no justiciable controversy between the parties. The Cabinet does not believe a Declaratory Judgment Action is a proper vehicle for resolving this appeal and that it should be dismissed.

Following its Bankruptcy Proceedings, Frasure Creek then intervened in the current action on February 21, 2014. Frasure Creek filed its Motion to Dismiss and its Statement in Support of Energy and Environment Cabinet's Motion for Summary Judgment on February 21, 2014. Frasure Creek argues, in its Motion to Dismiss, that the case is moot because Petitioners' claimed injury cannot be redressed by a favorable decision in this action. They also argue that Petitioners lack standing to bring this Petition. Their arguments differ from the Cabinet's in that Frasure Creek argues the Chapter 11 bankruptcy case bars Petitioners' claims because any potential claims against Frasure Creek by Petitioners were discharged on January 31, 2014 (the effective date of Frasure Creek's Plan of Reorganization). Frasure Creek argues that Appalachian Voices had notice of the bankruptcy proceedings and did not file their claims, so their claims are forever barred, rendering this case moot. Since completion of oral arguments and briefing of these issues, counsel for Frasure Creek have filed with the Court a notice of withdrawal as counsel of record.

STANDARD OF REVIEW

In reviewing an administrative decision, the Court's role "is not to reinterpret or reconsider the merits of the claim." *Kentucky Unemployment Insurance Commission v. King*, 657 S.W.2d 250, 251 (Ky. App. 1983). In reviewing an agency decision, this Court may only overturn that decision if the agency acted arbitrarily or outside the scope of its authority, if the agency applied an incorrect rule of law, or if the decision itself is not supported by substantial evidence of record. As such, as long as there is substantial evidence in the record to support the Cabinet's determinations with regard to the Permit, we must defer to the Cabinet, even if there is conflicting evidence. *Kentucky State Racing Comm'n v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972). Substantial evidence "means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Kentucky Retirement Systems v. Bowens*, 281 S.W.3d 776, 780 (Ky. 2009) (internal citations omitted). If it finds that the agency's decision is supported by substantial evidence, an appellate court must then determine whether the agency applied the correct rule of law. This Court reviews an agency's conclusions of law *de novo*, mindful of the fact that "agencies are entitled to great deference in interpreting their own statutes and regulations, at least where those interpretations do not contravene the law." *Morgan v. Natural Resource and Environmental Protection Cabinet*, 6 S.W.3d 833, 842 (Ky. App. 1999).

Summary Judgment is appropriate when the court concludes there is no genuine issue of material fact for which the law provides relief. CR 56.03. Summary judgment should only be granted when the facts indicate that the nonmoving party cannot produce evidence at trial that would render a favorable judgment. *Steelevest, Inc. v. Scansteel Serv. Ctr., Inc.*, 807 S.W.2d 476, 480 (1991). The record must be viewed in light most favorable to the party opposing the

motion for summary judgment and all doubts are to be resolved in that party's favor. *Id.*

“Summary judgment is proper when it is manifest that the party against whom the judgment is sought cannot strengthen his own case at a trial and the moving party would be entitled ultimately and inevitably to a directed verdict.” *American Inc., Co. v. Horton*, 401 S.W.2d 758, 760-61 (Ky. 1966) (internal citation omitted). In this analysis, “the focus should be on what is of record rather than what might be presented at trial.” *Welch v. Am. Publ’g Co. of Ky.*, 3 S.W.3d 724, 730 (Ky. 1999).

DISCUSSION

a. Declaratory Judgment

The Court cannot render advisory opinions. “In any action... [where] an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked.” KRS 418.040. Declaratory judgment statutes are “remedial; their purpose is to make courts more serviceable to the people by way of settling controversies, and affording relief from uncertainty, and insecurity with respect to rights, duties and relations, and are to be liberally interpreted and administered.” KRS 418.080. *See Hammond v. Smith*, 930 S.W.2d 408 (Ky. App. 1996). Kentucky courts have long held that “there can be a ‘justiciable controversy’ when an advance determination would eliminate or minimize the risk of wrong action or mistakes by any of the parties.” *Combs v. Matthews*, 364 S.W.2d 647 (Ky. 1963).

Here, an actual controversy exists between the parties in interest. Petitioners argue they were not given an opportunity to be heard on the merits at the administrative level and that the final agreed order was entered into without their consent. Petitioners are entitled to a declaratory judgment as a matter of law, as the Cabinet denied Petitioners due process rights when they

entered an agreed order with Frasure Creek, without the Petitioners' consent. The Cabinet acted arbitrarily and also violated Petitioners' due process rights by failing to conduct a full administrative hearing and failed to set forth findings of fact and conclusions of law by the Secretary supporting the Final Order. Petitioners were denied an avenue to redress their grievances because they were not able to fully participate in the administrative process and have suffered injury to their procedural and substantive interests because of the Cabinet's actions.

b. Summary Judgment

Furthermore, Petitioners are entitled to summary judgment as a matter of law because no genuine issues of material fact are in dispute. Petitioners were granted full intervention rights at the administrative level on November 7, 2011, but then were denied the right to a full administrative hearing where they could hear, present, and test evidence on the inadequacy of the consent decree. Petitioners were effectively bypassed in entering the Agreed Order. To tender a Final Agreed Order, the consent of all three parties to the administrative proceeding was required. Petitioners did not consent and a hearing was not held.

The Cabinet had every right to enter into an enforceable agreement with Frasure Creek, in the form of an Agreed Order or stipulation, during the pendency of the administrative hearing. But it had no right to short-circuit or by-pass the right of intervening parties to engage in discovery, present evidence, and test the adequacy of the Cabinet's agreement, at a full due process hearing on the merits, as required under KRS Chapter 13B and the Cabinet's own obligations under its regulations governing administrative hearings.

c. KRS 13B.150

In reviewing the Cabinet's Final Order, the Court finds that the Cabinet acted arbitrarily and outside the scope of its authority when the Secretary entered the Agreed Order, without

Petitioners' consent and before conducting a full hearing before an administrative hearing officer. Kentucky courts are authorized to review final agency actions to ensure they are not arbitrary. Moreover, the Secretary's decision must be subject to meaningful review, which requires the Secretary "to set forth sufficient facts to support conclusions that are reached, so the parties understand the decision," and those facts must be supported by substantial evidence. *See 500 Assocs., Inc. v. Natural Res. & Envtl. Prot. Cabinet*, 204 S.W.3d 121, 132 (Ky. App. 2006). The Secretary's decision to sign the Agreed Order, without giving the intervening parties the opportunity to question the Agreed Order, test the adequacy of its provisions, or question its contents, is not based on substantial evidence in the record. All of the parties were not at the table, as required by basic principles of due process. While the Cabinet may enter into an agreement with Frasure Creek, it cannot circumvent the rights of intervening parties to question that agreement, to gather evidence concerning its adequacy, and to put on proof before a hearing officer raising objections to the agreement. A lawsuit in which 2 of 3 parties enter into a settlement agreement is not fully settled. The same is true for an administrative proceeding. The plaintiffs here were granted a right to intervene, as provided for in KRS 13B.060¹ and the Cabinet's own hearing procedures. Moreover the statute governing administrative hearings at the Cabinet provides "unless **all** parties to the case agree in writing otherwise, the hearing officer **shall conduct the hearing**, complete the report and recommended order, and transmit the report and recommended order to the Secretary within 180 days ..." KRS 224.10-440(5) (emphasis supplied). The intervening parties have a right to engage in discovery, to take testimony under oath, and compel production of relevant documents. 401 KAR 1:040. The Cabinet itself properly granted the petitioners' motion to intervene, as required under 401 KAR 100:010

¹ While administrative proceedings for the Cabinet are exempt from KRS Chapter 13B under KRS 13B.020, that statute requires the Cabinet's own procedures must meet or exceed the procedural safeguards of KRS Chapter 13B, and the Court must so construe the Cabinet's own hearing statute and administrative regulations.

§11(2)(a). It is unquestionable that the petitioners have standing. *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs., Inc.*, 528 U.S. 693, 181 (2000). It cannot now unilaterally divest the petitioners of the right to an administrative hearing by entering into a settlement with the permittee. While the hearing may now focus on the adequacy of the settlement rather than the underlying violations, the petitioners are still entitled to a hearing. The Cabinet's own statute and administrative regulations dictate that the right of intervening parties to a due process hearing cannot be circumvented by a partial settlement between the Cabinet and the permittee.

The Secretary has an obligation to hear and consider all objections and concerns raised by the petitioners at the administrative hearing. Petitioners have a right to make a record and to compel testimony and the production of evidence that relate to those concerns. While the Secretary remains free to accept or reject the arguments of the petitioners, he cannot deprive the petitioners of the right to make a record to present for judicial review, and to short-circuit the administrative hearing process by entering into a partial settlement which does not resolve the claims of the petitioners.

CONCLUSION

Accordingly, this Court is compelled to **REVERSE** the Cabinet's Final Order. **WHEREFORE**, the Final Order of Respondent Energy and Environment Cabinet is hereby **REVERSED** and **REMANDED** to the Cabinet for further proceedings consistent with this Opinion and Order.

This order is final and appealable and there is no just cause for delay.

So **ORDERED** this 24th day of November, 2014.



PHILLIP J. SHEPHERD, JUDGE
Franklin Circuit Court, Division I

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