

1986 Ohio App. LEXIS 8208, *

New Boston Coke Corporation, Appellant-Appellee, v. Warren Tyler, Director of
Environmental Protection, Appellee-Appellant

No. **85AP-1067**

Court of Appeals of Ohio, Tenth Appellate District, Franklin County

1986 Ohio App. LEXIS 8208

September 4, 1986, Decided

SUBSEQUENT HISTORY: [*1] Rehearing denied October 7, 1987

PRIOR HISTORY: APPEAL from the Environmental Board of Review.

DISPOSITION: Judgment reversed and cause remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant, Director of the Ohio Environmental Protection Agency, challenged the order of the Environmental Board of Review, which vacated in part an air pollution rule modification adopted by the Director establishing a new limitation on visible emission from coke oven battery doors for appellee corporation. The Board found that the Director's adoption of the amendment to Ohio Admin. Code § 3745-17-07(E)(4) was unreasonable and unlawful.

OVERVIEW: The Director challenged the Board's order vacating his adoption of an amendment to § 3745-17-07(E)(4) as it applied to a local factory. The Board determined that the subject amendment was not necessary to attain and maintain requisite standards under the federal Clean Air Act and that the Director failed to give appropriate consideration to Ohio Rev. Code Ann. § 3704.02. The court on appeal reversed the order of the Board based on its determination that (1) the Board erred in finding the Director's order amending Ohio Admin Code § 3745-17-07(E) to be unreasonable and unlawful; (2) Ohio Rev. Code Ann. § 3704.02 supported the Director's interpretation that the federal regulation program did not require consideration of source-specific data each time a new rule is adopted or modified; (3) there was a valid factual foundation for the Director's action and the Board erred in substituting its judgment for that of the Director; and (4) it was prejudicial error for the Board to deny the company's motion to admit new evidence.

OUTCOME: The court reversed the judgment of the Board and remanded the matter to the Board for further proceedings.

CORE TERMS: assignments of error, environmental, Clean Air Act, non-attainment, air quality, air pollution, vacating, admit, environmental protection agency, well-taken, ambient, air, new evidence, source-specific, pollutant, stringent, emissions, variance, reasonably available, federal statute, control measures, foregoing reasons, substituting, pre-existing, rescinding, attainment, formulated, revisions, approve, attain

LEXISNEXIS(R) HEADNOTES

Environmental Law > Air Quality > General Overview

HN1 Section 7502 of the federal Clean Air Act, 42 U.S.C.S. § 172(b), states in part:
The plan provisions required by subsection (a) shall provide for the implementation of all reasonably available control measures as expeditiously as practicable, and require, in the interim, reasonable further progress (as defined in § 171(1)), including such reduction in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology.

Administrative Law > Agency Rulemaking > Formal Rulemaking

Business & Corporate Law > Agency Relationships > Establishment > Proof of Agency > General Overview

Governments > Legislation > Expirations, Repeals & Suspensions

HN2 Ohio Rev. Code Ann. § 3704.03(E) states that the director of the Environmental Protection Agency may adopt, modify, and repeal rules for the prevention, control, and abatement of air pollution. The statute further provides: In adopting, modifying, or repealing any such rules, the director, to the extent consistent with the Clean Air Act, shall hear and give consideration to evidence relating to: (1) conditions calculated to result from compliance with such rules and their relation to benefits to the people of the state to be derived from such compliance; (2) the quantity and characteristics of air contaminants, the frequency and duration of their presence in the ambient air, and the dispersion and dilution of such contaminants; and (3) topography, prevailing wind directions and velocities, physical conditions, and other factors that may or may combine to affect air pollution.

Environmental Law > Air Quality > General Overview

HN3 Ohio Rev. Code Ann. § 3704.02 reads, in part, as follows: (A) The purposes of Chapter 3704 of the Ohio Revised Code are the following: (1) to protect and enhance the quality of the state's air resources so as to promote the public health, welfare, and economic vitality of the people of the state; and (B) the provisions of Chapter 3704. of the Revised Code, all regulations adopted pursuant to Chapter 3704 of the Ohio Revised Code and all permits, variances, and orders issued pursuant to Chapter 3704 of the Ohio Revised Code shall, to the extent reasonably possible, be construed to be consistent with the federal Clean Air Act and to promote the purposes of Chapter 3704 of the Revised Code.

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > General Overview

Administrative Law > Judicial Review > Standards of Review > Statutory Interpretation

HN4 Courts, when interpreting statutes, are required to give deference to an administrative interpretation formulated by an agency which has accumulated substantial expertise, and to which Congress has delegated the responsibility of implementing a congressional demand.

Administrative Law > Agency Adjudication > Review of Initial Decisions

Governments > Local Governments > Administrative Boards

HN5 Ohio Rev. Code Ann. § 3745.05 provides the standard applied to the Environmental Review Board in reviewing an order of a Director. That statute, in part, states: If, upon completion of the hearing, the Board finds that the action appealed from was lawful and reasonable, it shall make a written order affirming the action. If the Board finds that the action was unreasonable or unlawful, it shall make a written order vacating or modifying the action appealed from.

Administrative Law > Agency Adjudication > Hearings > Evidence > Admissibility >

General Overview

Administrative Law > Agency Adjudication > Review of Initial Decisions

Environmental Law > Air Quality > Nonattainment Areas

HN6 Ohio Adm. Code § 3746-9-02 provides, in part: The Environmental Board of Review may grant a motion for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the proceeding before the Director or local board of health.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Environmental Law > Air Quality > National Ambient Air Quality Standards

Evidence > Procedural Considerations > Rulings on Evidence

HN7 A trial court's decision to admit or exclude evidence will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to a complaining party.

COUNSEL: MESSRS. PORTER, WRIGHT, MORRIS & ARTHUR, MR. J. JEFFREY McNEALEY and MR. ROBERT A. MEYER, JR., for appellee.

MR. ANTHONY J. CELEBREZZE, JR., Attorney General, MS. MARTHA E. HORVITZ and MS. SHARON SIGLER, for appellant.

JUDGES: REILLY, McCORMAC and VICTOR, JJ., concur.

OPINION BY: REILLY

OPINION

OPINION

REILLY, J.

This is an appeal from an order of the Environmental Board of Review, which vacated in part an air pollution rule of the Director of the Environmental Protection Agency.

Appellant, Director of the Environmental Protection Agency (Director), adopted amendments to Ohio Adm. Code 3745-17-01, 3745-17-04, and 3745-17-07 to 3745-17-10, relating to air pollution. Specifically at issue in this appeal is Ohio Adm. Code 3745-17-07(E)(4), which establishes a new limitation on visible emissions from coke oven battery doors. Appellee, New Boston Coke Corporation (New Boston) appealed the Director's amendment to the Environmental Board of Review (EBR).

The EBR found that the Director's adoption of the amendment was unreasonable and unlawful. The EBR vacated **[*2]** the order but only as it applied to New Boston. The Director has timely appealed and asserts the following assignments of error:

"I. The Environmental Board of Review erred in holding that the Director 's adoption of the amendment to O.A.C. Rule 3745-17-07(E)(4) was unlawful and unreasonable insofar as it applied to New Boston Coke Corporation on the ground that the amendment was not necessary to attain and maintain National Ambient Air Quality Standards.

"II. The Environmental Board of Review erred in holding that the Director 's adoption of the amendment to O.A.C. Rule 3745-17-07(E)(4) was unreasonable and unlawful insofar as it

applied to New Boston Coke Corporation on the ground that Revised Code Section 3704.03 (E)(1) through (3) and air quality modeling analyses were not considered in amending the rule.

"III. The Environmental Board of Review erred in holding that the Director's adoption of amendments to O.A.C. Rule 3745-17-07(E)(4) was unreasonable and unlawful as applied to New Boston Coke Corporation on the ground that the Director did not give appropriate consideration to Section 3704.02(A)(1) and (B) of the Revised Code.

"IV. The Environmental Board of Review erred by **[*3]** substituting its judgment for that of the Director.

"V. The Environmental Board of Review erred to the prejudice of the Director by denying the Director's motion to admit newly discovered evidence.

"VI. The Environmental Board of Review erred in vacating the Director's order of August 17, 1983, insofar as it applied amended O.A.C. Rule 3745-17-07(E)(4) to New Boston Coke Corporation without also vacating the portion of the Director's order rescinding pre-existing O.A.C. Rule 3745-17-07-(E)(4) insofar as it applied to New Boston Coke Corporation."

The first three assignments of error are interrelated and are considered together.

In the first assignment of error the Director contends that EBR erred in holding that the amendment was not necessary to attain and maintain National Ambient Air Quality Standards. As part of the Federal Clean Air Act, Congress required the United States Environmental Protection Agency (EPA) to develop National Ambient Air Quality Standards (NAAQS) for several pollutants including particulate matter, the pollutant involved herein. Section 7409, Title 42, U.S. Code, §109. The purpose of the regulatory program in the Clean Air Act is to achieve and maintain **[*4]** NAAQS for each pollutant. Thus, each state is required to identify the areas which meet, exceed, or do not meet the primary and secondary NAAQS. Such attainment and non-attainment areas are subsequently sent to the United States EPA which promulgates a list with any necessary modifications. The United States EPA must approve any revisions to the list. Section 7407, Title 42, U.S. Code, §107(d)(5).

Section 7410, Title 42, U.S. Code, §110, requires each state to develop a State Implementation Plan (SIP) to provide for achievement and maintenance of NAAQS. Part D of the act requires SIP to include stringent control measures (for non-attainment areas) to assure air quality improvement. Section 7502, Title 42, U.S. Code, §172(b). The United States EPA is required to approve all SIP's.

The area where New Boston is located is a non-attainment area. The Director maintains that New Boston must meet the ten percent limit for coke oven door emissions because this is the limit which can be reached by reasonably available control technology (RACT). The Director contends that the Clean Air Act requires implementation of RACT for non-attainment areas.

The federal statute at issue, [HN1](#) Section 7502, **[*5]** Title 42, U.S. Code, §172(b), states:

"(b) The plan provisions required by subsection (a) shall -

"(2) provide for the implementation of all reasonably available control measures as expeditiously as practicable,

"(3) require, in the interim, reasonable further progress (as defined in Section 171(1)) including such reduction in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology;

Appellee New Boston agrees that the federal statutes require RACT but nonetheless contends that source-specific data must be considered in developing RACT requirements. New Boston further contends in response to the Director's second assignment of error that the factors in R.C. 3704.03(E) must also be considered before developing RACT. ^{HN2} R.C. 3704.03(E) states that the director of the environmental protection agency may adopt, modify, and repeal rules for the prevention, control and abatement of air pollution.

The statute further provides:

"*** In adopting, modifying, or repealing any such rules, the director, to the extent consistent with the federal Clean Air Act, shall hear and give consideration [***6**] to evidence relating to:

"(1) Conditions calculated to result from compliance with such rules and their relation to benefits to the people of the state to be derived from such compliance;

"(2) The quantity and characteristics of air contaminants, the frequency and duration of their presence in the ambient air, and the dispersion and dilution of such contaminants;

"(3) Topography, prevailing wind directions and velocities, physical conditions, and other factors that may or may combine to affect air pollution."

Appellant Director alleges that the EBR erred in finding the amendment unreasonable and unlawful on the ground that the Director did not give appropriate consideration to ^{HN3} R.C. 3704.02, which reads, in pertinent part, as follows:

"(A) The purposes of Chapter 3704. of the Revised Code are the following:

"(1) To protect and enhance the quality of the state's air resources so as to promote the public health, welfare, and economic vitality of the people of the state,

"(B) The provisions of Chapter 3704. of the Revised Code, all regulations adopted pursuant to Chapter 3704. of the Revised Code, and all permits, variances, and orders issued pursuant to [***7**] Chapter 3704. of the Revised Code shall, to the extent reasonably possible, be construed to be consistent with the federal Clean Air Act and to promote the purposes of Chapter 3704. of the Revised Code."

The Director maintains that this section is a statement of purpose which does not impose substantial rights, duties or obligations.

Thus, the basic question presented by this case is one of statutory construction, that is, do R.C. 3704.03(E), 3704.02(A)(1) and (B) require mandatory consideration of the criteria and source-specific data each time the Director of the EPA adopts, modifies, or repeals a rule.

There was testimony from James Orlemann, the manager of the engineering section within the division of the Air Pollution Control of the Ohio EPA, that the specific criteria in R.C. 3704.03(E)(1)-(3) were not considered when the amendment at issue was adopted. However, Mr. Orlemann testified that these criteria were considered by the Ohio EPA when the initial set of revisions for the Part D SIP were formulated in 1979.

The Director interprets R.C. 3704.03 to require the rules he adopts to be consistent with the federal Clean Air Act. The federal regulation program does not [***8**] require consideration of source-specific data each time a new rule is adopted or modified. Both R.C. 3704.02(A) and (B) support the Director's interpretation.

HN4 Courts, when interpreting statutes, are required to give deference to an administrative interpretation formulated by an agency which has accumulated substantial expertise, and to which Congress has delegated the responsibility of implementing the congressional demand. *North Sanitary Landfill v. Nichols* (1984), 14 Ohio App. 3d 331 citing *Jones Metal Products Co. v. Walker* (1972), 29 Ohio St. 2d 173. It is apparent that the Ohio EPA construes this statute to allow R.C. 3704.03 rule-making without specific consideration of the criteria every time a rule is made. When considering the purpose and history of the Clean Air Act, along with the more stringent 1972 amendments applicable to non-attainment areas, this is a reasonable interpretation of R.C. 3704.03(E). It is reiterated that the criteria were considered when the Ohio EPA developed its modeled analysis and Part D of SIP.

Moreover, R.C. 3704.03(H) outlines the procedure for obtaining a variance from the rules promulgated by the Director of the EPA. The variance **[*9]** procedure allows the Director to consider the individual source and the effects of that source of a stringent requirement. Therefore, the EBR erred in finding the Director's order amending Ohio Adm. Code 3745-17-07(E) to be unreasonable and unlawful. For the foregoing reasons, the first, second and third assignments of error are well-taken.

In the fourth assignment of error the Director contends that the EBR erred by substituting its judgment for that of the Director. **HN5** R.C. 3745.05 provides the standard applied to the EBR in reviewing an order of the Director. That statute, in part, states:

"*** If, upon completion of the hearing, the board finds that the action appealed from was lawful and reasonable, it shall make a written order affirming the action, [,] if the board finds that the action was unreasonable or unlawful! it shall make a written order vacating or modifying the action appealed from. ***"

The issue to be determined by the EBR was whether the action of the Director in adopting the amended rule was unreasonable or unlawful. Although the EBR stated several times in its order that the action was unreasonable and unlawful, this conclusion was based on a different interpretation **[*10]** of R.C. 3704.03(E)(1)-(3) and the role of RACT as previously discussed. While the EBR's interpretation is valid, the Director's action was neither unlawful nor unreasonable. There was a valid factual foundation for the Director's action. *Citizens Committee v. Williams* (1977), 56 Ohio App. 2d 61. It is thus apparent that the EBR substituted its judgment and, accordingly, the fourth assignment is well-taken.

The Director also contends that the EBR erred by denying the Director's motion to admit new evidence. The Director attempted to admit a letter from Steven Rothblatt, Chief of the Air and Radiation Branch of the United States EPA denying Ohio EPA's request to redesignate the area around New Boston from a non-attainment area to an attainment area. The letter was dated August 28, 1985 which is well after the date of the hearing before the EBR and thus complies with **HN6** Ohio Adm. Code 3746-9-02 which provides:

"(A) The Board may grant a motion for the admission of additional evidence when satisfied that such additional evidence is newly discovered and could not with reasonable diligence have been ascertained prior to the proceeding before the Director or local board of health."

[*11] Appellee New Boston maintains, however, that this was not new evidence as it involved the monitoring equipment in the area and the unreliability of the monitoring data submitted by the Ohio EPA to the United States EPA with its request for redesignation. There was evidence presented at the hearing concerning the location of the monitors and the reliability of the data obtained from Scioto County.

It is basic that **HN7** a trial court's decision to admit or exclude evidence will not be disturbed on appeal absent an abuse of discretion resulting in prejudice to the complaining party. *State*

v. Hymore (1967), 9 Ohio St. 2d 122. In this case, it is apparent that the Rothblatt letter was relevant evidence. It appears from the record that a material factor in the EBR's determination was the assumption that the area surrounding New Boston was within the NAAQS as required by the Clean Air Act. The Rothblatt letter puts that conclusion into question as it indicates the United States EPA did not determine this area was in compliance with NAAQS. This evidence supports the Director's rationale for the amendment and directly affects the stated basis for the EBR's reversal of the Director's order. **[*12]** Consequently, it was prejudicial for the EBR to deny the motion to admit new evidence. The Director's fifth assignment of error is well-taken.

In the sixth assignment of error, the Director maintains that the EBR erred in vacating its order as it applied amended Ohio Adm. Code 3745-17-07(E)(4) to New Boston without vacating the portion of the Director's order rescinding the pre-existing rule as it applied to New Boston. Appellee concedes that this was error based on *City of Middletown v. Nichols* (1983), 9 Ohio App. 3d 135. Hence, the final assignment of error is well-taken.

For the foregoing reasons, the assignments of error are sustained. The judgment is reversed and cause remanded to the Environmental Board of Review for further proceedings consistent with this opinion.

McCORMAC and VICTOR, JJ., concur.

VICTOR, J., retired, of the Ninth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Constitution, in the Tenth Appellate District.

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