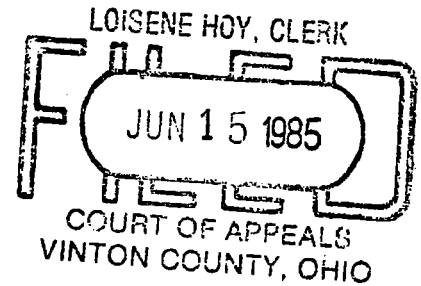


IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
VINTON COUNTY



Personal Service Insurance Co. : No. 412
Appellee :
vs :
Larry W. Mamone, Chief, Division : DECISION AND JUDGMENT ENTRY
of Reclamation, Ohio Department :
of Natural Resources :
Appellant :

APPEARANCES:

Mr. Anthony J. Celebrezze, Ohio Attorney General and Assistant Attorney and Mr. Brian F. Zina, Assistant Attorney General, Columbus, Ohio for Appellant.

Mr. William C. Ailes, Columbus, Ohio, for Appellee.

Stephenson, P.J.,

This is an appeal from an order of the Reclamation Board of Review vacating a proposed civil penalty assessed by Larry W. Mamone, Chief of the Division of Reclamation and appellant herein, against Personal Service Insurance Company, appellee herein. ¹

Appellant assigns the following errors:

"I. The Board erred in vacating civil penalty 1690 on the constitutional grounds that the penalty was an invalid retroactive application of the law because the Board has no jurisdiction to declare a statutory provision unconstitutionally retroactive.

II. The Board erred in holding that civil penalty 1690, issued for a violation occurring after the enactment of an amendment to R.C. 1513.02(F)(1) giving the Chief authority to issue civil penalties, was an invalid retroactive application of the law and basing its decision on the fact that appellee PSI was a surety under a reclamation performance bond executed prior to the amendment of R.C. 1513.02(F)(1)."

On March 27, 1979, appellee entered into an agreement with Allied Coal Sales and Leasing, a holder of a permit to engage in strip-mining on a particular parcel of land. Pursuant to this agreement, appellee acted as a surety by posting a \$70,560.00 performance bond against the satisfactory reclamation of the area after mining. Allied Coal defaulted on its obligations pertaining to reclamation and appellee chose, in lieu of forfeiting any part of its bond, to perform on behalf of the permittee the reclamation of the mined area pursuant to former R.C. 1513.16(F).

On June 27, 1983, appellant issued Notice of Violation 6702 (hereafter referred to as NOV 6702) to appellee for a violation of statutory reclamation provisions. On June 30, 1983, appellant issued Proposed Civil Penalty Assessment 1690 based upon NOV 6702 for \$300.00 to appellee. On July 14, 1983, appellee filed a notice of appeal of this penalty assessment to the Reclamation Board of Review.

On September 29, 1983, this appeal came before a Reclamation Board of Review hearing officer. At this hearing, the parties stipulated that the issuance of NOV6702 to appellee was valid and lawful and that the proposed penalty based thereon was not excessive in amount. The referee decided that, based on a similar case previously decided by the Reclamation Board of Review, the imposition of a civil penalty assessment pursuant to an amendment after a surety had executed its bond was "unlawful" in that it constituted an "invalid retroactive application of the law" and it "charged the terms of the surety's contract." The referee thus recommended vacation of the proposed penalty based on NOV6702.

On October 18, 1983, appellant filed objections to the report and recommendation of the hearing officer. On October 19, 1983

the Reclamation Board of Review returned the report and recommendation to the hearing officer for evidence on when appellee's surety bond was executed. After a copy of the March 27, 1979 surety bond was admitted into evidence, on November 14, 1983, the hearing officer filed a modified report, which repeated the findings and recommendations of the earlier report. On December 9, 1983, the Reclamation Board of Review issued an order adopting the report and recommendations of the hearing officer. Appellant filed a notice of appeal, pursuant to R.C. 1513.14, on the grounds that the Board order was "arbitrary, capricious, or otherwise inconsistent with the law."

Appellant's first assignment of error asserts that the Reclamation Board of Review lacked the jurisdiction to pass upon the constitutionality of appellant's "retroactive" application of R.C. 1513.02(F)(1). The penalty assessed in the instant case was under authority of R.C. 1513.02(F)(1), which provides as follows:

"A person who violates a permit condition or any other provision of Chapter 1513 of the Revised Code may be assessed a civil penalty by the chief. . . ."

This provision became effective on September 1, 1981, over a year after appellee executed its March 27, 1979 surety bond. Under the law, before the enactment of this civil penalty provision, a surety choosing to perform in lieu of bond forfeiture upon default of a principal and performing such work improperly under the reclamation statutes, would be subject to an order of the Chief of the Division of Reclamation terminating the surety's right to perform and demanding payment by the surety of the amount due under R.C. Chapter 1513. See former R.C. 1513.16(F). This remedy has been carried over into the newly enacted R.C. Chapter 1513. See R.C. 1513.16(H)(4). Therefore,

the civil penalty provided by the 1981 amendment is an additional remedy that may be utilized by appellant in enforcing the reclamation statutes.

In his first assignment of error the appellant contends that the Reclamation Board of Review lacked the jurisdiction to pass upon the constitutionality of appellant's retroactive application of R.C. 1513.02(F). The applicable standard of review employed upon appeal to the Reclamation Board is found in R.C. 1513.13 (effective July 1, 1983), which states:

"(B) The board shall affirm the notice of violation order, or decision of the chief unless the board determines that it is arbitrary, capricious, or otherwise inconsistent with law, in which case the board may modify the notice of violation, order, or decision or vacate it and remand it to the chief for such further proceedings as the board may direct."

We agree with appellant's argument that administrative tribunals are without jurisdiction to consider questions of constitutionality of statutes. Herrick v Kosydar (1975), 44 Ohio St. 2d 128. However, it is not readily apparent from the record whether either the order considered in the case sub judice or the former order relied upon by the Board was decided upon constitutional grounds. While both orders essentially hold it is unlawful to apply the statute retroactively, in neither is it recited that retroactive application is prohibited constitutionally. It is as reasonable to infer that the Board concluded the penalty statute inapplicable upon contract principles as to infer a conclusion of unconstitutional retroactive application. See Hochevar v Maryland Casualty Co. (6th Cir. 1940), 19 Ohio Op. 51 and our discussion under the second assignment of error. The first assignment of error is overruled.

Appellant's second assignment of error asserts that the Board erred in holding that the R.C. 1513.02(F)(1) civil penalty was an invalid retroactive application of the law merely because a surety was under a reclamation performance bond executed prior to the 1981 amendment creating the civil penalty. We agree.

The Reclamation Board of Review explicitly adopted the modified report and recommendations of its hearing officer. The recommendations of the hearing officer was, in turn, based upon a previous Board case where the "civil penalty was assessed under the authority of a revision to a statute, which revision was made after the surety had executed its bond." Thus, the Board appeared to hold that the imposition of the civil penalty provision under those facts was an "invalid retroactive application of the law" in that it "changes the terms of the surety's contract."

Indeed, even appellee believes that the Board's decision was based on this contractual rationale: ". . . the Reclamation Board of Review found the Order which is the subject of this appeal assessing proposed Civil Penalty Assessment No. 1690 unreasonable and unlawful because it attempted to assess a proposed civil penalty against the surety which under its contract executed in 1979, assumed no obligation under Ohio Revised Code 1513 et seq. to pay any civil penalty. . ."

Under general contract law, a party is presumed to contract in accordance with the provisions of existing law. Maher v Cleveland Union Stockyards Co. (1936), 55 Ohio App. 412; 18 Ohio Juris. 3d (1979) Contracts Section 165. A surety's contract must be construed in connection with the statutes relating to the same subject matter. Secrest v Barbee (1867), 17 Ohio St. 426; Helt v Whittier (1877), 31 Ohio St.

475. Parties to a surety contract are presumed to have known and contracted with reference to the provisions of the statute and to have agreed to all the consequences resulting from their operation. Walsh v Miller (1894), 51 Ohio St. 462; Richardson v Peoples's Nat'l. Bank (1897), 57 Ohio St. 299. Thus, the scope of a surety's obligation is measured by the bond and statutes applicable when it is executed, and there can be no expansion by subsequent statutory changes. Hochevar v Maryland Casualty Co. (6th Cir. 1940), 114 F. 2d 948.

However, all contracts are subject to the paramount rights of the public, and all contracts the subject matter of which involves the public welfare will have read into them, all public regulations then existing or thereafter to be enacted which tend to the promotion of the health, order, convenience, and comfort of the people and the prevention and punishment of injuries and offenses to the public. Franklin County v Public Utilities Comm. (1923), 107 Ohio St. 442; Akron v Public Utilities Comm. (1948), 149 Ohio St. 347; Steele, H. S.M. Co. v Miller (1915), 92 Ohio St. 115; Stange v Cleveland (1916), 94 Ohio St. 377.

The removal of coal by strip mining is subject to regulations as a proper exercise of police power. East Fairfield Coal Co. v Miller (CP 1955), 71 Ohio Law Abs. 490; Coal & Mineral Co. v Clay (1894), 51 Ohio St. 542. R.C. Chapter 1513 provides for the conservation and improvement of land used in strip mining and such regulations necessarily tend to promote public health and welfare pursuant to the police power.

In the case at bar, the availability to appellant of an additional penalty to be used against a surety's improper performance

under the reclamation statutes would promote public health and welfare ends. Hochevar, supra, relied upon by appellee for the contention that a surety contract with regard to only then existing statutes, did not involve a change in the law which tended to promote the public welfare and so, does not derogate from the Franklin County, supra, line of cases. Therefore, we hold that appellee's and the Reclamation Board of Review's reliance upon an argument that the civil penalty of R.C. 1513.02(F)(1) "changes the terms of the surety's contract" where the bond was executed prior to the new statute's enactment is inconsistent with the law.

Appellee stipulated at the hearing, the issuance of NOV6702 was valid. R.C. 1513.02(F)(1) provides that the civil penalty may be assessed against any "person" who does not comply with the provisions of R.C. Chapter 1513. Appellee did not argue that it had complied with the statutory provisions. R.C. 1513.01(L) provides that "person" includes a "person, partnership, corporation association, or other legal entity. . ." Appellee certainly fits within the ambit of this broad definition. Additionally, all statutes are presumed to be prospective unless expressly made retrospective. R.C. 1.48. The violation, which occurred over a year after the enactment of the R.C. 1513.02(F)(1) civil penalty provision, was within the statute's prospective application. To conclude otherwise is to allow sureties engaged in reclamation projects to violate subsequently enacted regulations with impunity, subject only to revocation of their right to reclaim and forfeiture of the bond.

Therefore, pursuant to the standard of review specified in R.C. 1513.14(A)(3), we hold that the order of the Board was

"inconsistent with law" and we sustain appellant's second assignment of error. The decision appealed from is, therefore, vacated and remanded to the Board for further proceedings consistent with this decision.

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R.C. 1513.14(A)(3) provides that upon court review from the Board, the following: "The court shall affirm the decision of the board unless the court determines that it is arbitrary, capricious, or otherwise inconsistent with law, in which case the court shall vacate the decision and remand to the board for such further proceedings as it may direct."

It is ordered that (appellant-appellee) recover of (appellant-appellee) their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Reclamation Board of Review ~~do~~ to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

DECISION VACATED AND REMANDED

Abele, J., Concurs:
Grey, J., Concurs:

Earl E. Stephenson
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 9, this document constitutes a final judgment entry and the time period for further appeal commences