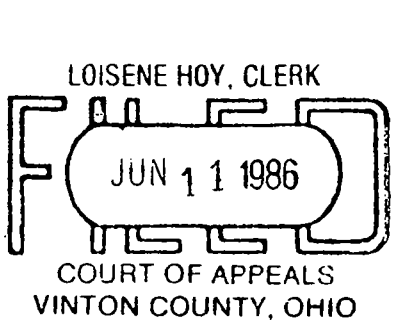
COURT OF APPEALS

VINTON COUNTY, OHIO



RAVEN-HOCKING COAL CORPORATION

Plaintiff-Appellant

v.

CASE NO. 419

LARRY W. MAMONE, CHIEF
DIVISION OF RECLAMATION,
OHIO DEPARTMENT OF NATURAL RESOURCES

OPINION & JUDGMENT ENTRY

Defendant-Appellee

COUNSEL FOR APPELLEE : Mark G. Bonaventura, Assistant Attorney General, Environmental Enforcement Section, Division of Reclamation, Fountain Square, Building B-3, Columbus, Ohio

COUNSEL FOR APPELLANT: John W. Edwards, 41 South High Street, Suite 2250, Columbus, Ohio

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ABELE, J.:

This is a direct appeal filed pursuant to R.C. 1513.14 from an order of the Ohio Reclamation Board of Review. The board adopted a hearing officer's report which concluded the Chief of the Division of Reclamation properly issued civil penalty assessments 268 and 269 for violations on permit sites B-602 and C-62, respectively.

In April, 1974, the Division of Reclamation issued appellant permit B-602, and in December, 1975, issued appellant permit C-62. All mining on the permit sites was completed by September 1976. According to the permit applications, site B-602 was to be reclaimed to pasture land by planting a permanent vegetative cover of Kentucky fescue, orchard grass, perennial rye, yellow sweet clover, and Korean lespedeza. Site C-62 was to be reclaimed to pasture

and hay land by planting Kentucky fescue, orchard grass, perennial rye, alfalfa, and Korean lespedeza. Appellant has not yet properly reclaimed either site B-602 or site C-62.

On April 18, 1977, appellant submitted a request for approval of planting and reclamation on site B-602. On June 29, 1977, an inspection of site B-602 revealed excessive barren areas as a result of exposed acid-producing materials. A November 2, 1977, inspection of the site revealed the vegetative cover has not been established. A May 7, 1979, inspection again revealed excessive barren areas on the B-602 site. On October 25, 1979, appellant filed another request for approval of planting and reclamation on site B-602. On January 18, 1980, the chief of the division of reclamation disapproved appellant's request for approval of planting and all other reclamation on site B-602. The chief disapproval order cited significant erosion and acid water problems on the site.

On June 25 and 30, 1979, an inspection revealed substantial work was needed before the reclamation on site C-62 could be approved. On September 14, 1979, the owner of the site C-62 land filed a complaint concerning inadequate reclamation due to barren areas and erosion. On October 26, 1979, the Chief of the Division of Reclamation issued Chief's Order 2293 for "delinquent reclamation" of site C-62. A June 14, 1982, inspection of site C-62 revealed "much barren and sparse vegetation, (and) many undesirable species encroaching."

On September 1, 1981, the Ohio Legislature passed provisions in R.C. Chapter 1513 which allow for the assessment of civil penalties by the Chief of the Division of Reclamation.

On August 4, 1982, an inspector issued notice of violation 3403 and notice of violation 3404 which notified appellant as follows concerning sites B-602 and C-62:

> "Delinquent Reclamation - year 1. A successful cover of permanent approved species of vegetation has not been established due to excessive barren areas."

The inspector found many undesirable species had encroached upon site B-602 and both sites contained barren areas. The notice of violation gave appellant until November 4, 1982 to abate the violations.

The inspector again found unsuccessful reclamation of both sites during two inspections on November 29, 1982, and December 16, 1982. On December 21, 1982, the Chief of the Division of Reclamation issued civil penalty assessment 269 for delinquent reclamation of site B-602 and civil penalty assessment 268 for delinquent reclamation of site C-62. For each site, the Chief assessed $250 for the initial noncompliance and an additional $750 per day for seven days as required by R.C. 1513.02(F)(4), for a total assessment of $5,500 for each site.

On January 3, 1983, appellant filed applications for review of civil penalties 268 and 269. On March 18, 1983, the two applications were transferred to the Reclamation Board of Review. On September 30, 1983, appellant moved to dismiss the civil penalties, arguing enforcement of the civil penalties is an invalid retroactive application of the 1981 law which allows civil penalty assessments. After the Division of Reclamation responded to appellant's motion to dismiss, hearing officer Linda Osterman issued an interlocutory report overruling appellant's motion. Osterman wrote:

> "The imposition of a civil penalty does not destroy an accured (sic) substantive right, as there is no provision in prior statutory law giving an operator a substantive right to be free from enforcement actions. Moreover, a permit or license by nature "does not confer a vested, permanent or absolute right, but only a personal privilege to be exercised under existing restrictions and such (restrictions) as may thereafter be reasonably imposed. Free latitute is reserved by the governmental authorities to impose new or additional burdens upon the licensee." 34 O.Jur. 2d 373, "License and Permits", Section 14."

Osterman explained that an unconstitutional retroactive application of law would occur if an operator had been issued a notice of violation prior to the 1981 enactment of the civil penalty provisions, and the Chief later issued a civil penalty assessment based on the pre-1981 notice of violation. Imposition of a civil penalty assessment under those facts would result in the unconstitutional imposition of a new duty on past conduct.

Hearing Officer David Zwyer issued the final report and recommendation in the case. He found appellant had failed to properly reclaim sites B-602 and C-62.

Zwyer framed several issues for review in the case. First, he asked whether appellee could charge appellant with the existence of acid water on the sites, or whether appellee could only charge appellant with the inadequacy of vegetation on the sites. After noting the broad term "delinquent reclamation" on Chief's Order 2293 and noting the inspector did not specify the acid water problem on the notices of violation, Zwyer decided the notices of violation "were not reasonably specific as to the nature of the violation or the remedial action as for as the existence of acid water on the two sites."

Next, Zwyer asked whether the failure of the notices of violation to cite the statute or rule violated by appellants renders the notices of violation invalid. He decided that since the notices of violation "were reasonably specific and provided appellant with notice as to the violation without misleading or prejudicing appellant in any way, "the failure of the inspector to cite the specific statutes and rules violated does not invalid the notices of violation.

Zwyer next asked which law governed the vegetation requirements for the two sites, the law in effect in 1976 when the last mining took place, the law

in effect in 1976 and 1977 when the sites were seeded, or the law in effect in 1982 when the notices of violation and civil penalty assessments were issued. Zwyer reviewed many Board of Reclamation Review cases and Dressler Coal Corp. v. Division of Reclamation (1981), 4 Ohio App. 3d 81. Zwyer concluded the statutes, though they have changed in recent years, have all required "operator(s) to reclaim affected land by "establishing" a "permanent" vegetative cover" in accordance with the plan submitted and approved by the chief" in the operator's permit application.

Next, Zwyer asked (1) whether it is a retroactive application of law to apply current standards in the Ohio Administrative Code for determining the success of revegetation, and (2) whether it is a retroactive application of law to apply civil penalty assessment provisions enacted in 1981 to permit areas B-602 and C-62. Zwyer followed hearing officer Osterman's reasoning on these points, and emphasized a license is not a contract between the government and the licensee,but is merely a privilege which can be revoked or changed by the government.

One of the last questions Zwyer framed was the question of how long appellant was required to maintain the approved vegetation on the permit sites. Appellant contends it was required to plant the vegetation listed on the permit applications, but it was not required to "maintain" that vegetation. Zwyer disagreed and pointed out Ohio Adm. Code 1501:13-15-02(F)(1) states a "planting" shall be considered successful "if the species that were planted in accordance with the approved permanent planting plan are established and maintained for two consecutive years" and meet certain standards listed in the regulation. Zwyer found appellant failed to successfully plant the species listed on the permit applications.

Zwyer concluded the notices of violation were sufficiently specific to sustain the civil penalty assessments issued against appellant for its failure to successfully complete revegetation on the permit sites. Zwyer recommended the Board of Reclamation Review affirm civil penalty assessments 268 and 269. On December 13, 1984, the Board adopted Zwyer's findings, conclusions, and recommendations.

We affirm.

ASSIGNMENT OF ERROR I

"IT IS AN UNLAWFUL RETROACTIVE APPLICATION OF THE LAW TO APPLY STANDARDS FOR REVEGETATION WHICH DID NOT EXIST UNTIL AFTER THE STRIP MINE LICENSE WAS ISSUED AND MINING AND RECLAMATION WERE COMPLETED."

Appellee argues appellant's failure to file objections to the hearing officer's report pursuant to R.C. 1513.131 constitutes a failure to exhaust administrative remedies and bars appellant from appealing to our court. Appellee cites Dressler Coal Corporation v. Division of Reclamation (Nov. 29, 1984), Muskingham App. No. CA-84-13 & CA-84-21, unreported, wherein the court wrote:

> "The findings and the recommendations of the hearing officer were duly served upon Dressler. By its failure to file objections to the report and recommendation, it waived its right to challenge the dismissal order of the Reclamation Board of Review. R.C. 1513.131 specifically provides a fourteen-day limitation on objections and consideration thereof by the Board of Review prior to ruling."

The court did not elaborate on its blanket statement that a failure to file objections to the recommendations and report of the hearing officer constitutes a waiver of litigant's right to appeal a R.C. Chapter 1513 action. We note the Ohio Supreme Court affirmed the case in Dressler Coal Co. v. Div. of Reclamation (1986), 23 Ohio St. 3d 131, without ruling on the waiver issue.

Until the Ohio Supreme Court rules otherwise, we believe a failure to file objections to the recommendations and report of a Board of Reclamation

Review hearing officer should not preclude an appeal to our court pursuant to R.C. 1513.14. We note the statute which permits objections to the hearing officer's report, R.C. 1513.131, does not require such objections. Nothing in R.C. Chapter 1513 requires objections to the hearing officer's report as a prerequisite to appeal. We find appellant's choice not to file objections to the hearing officer's report has not waived his right to file this appeal.

Appellant's first assignment of error rests upon the false assumption that appellant, at some time prior to the issuance of new R.C. Chapter 1513 reclamation standards, completed mining and reclamation on the permit sites. We note the hearing officer specifically found appellant has not completed reclamation on either site B-602 or C-62. We have reviewed the record below and find sufficient evidence to support the hearing officer's finding.

We must still, however, address the question of whether it is an unconstitutional retroactive application of law to apply standards for revegetation that did not exist until after the permits were issued. The Ohio Supreme Court has recently held:

> "A civil penalty issued to a surety undertaking reclamation on behalf of a defaulting coal mine permit holder for a violation of R.C. Chapter 1513 does not infringe upon Section 28, Article II of the Ohio Constitution, where that civil penalty was enacted as an enhancement of a previously existing law, and where the violation occurred after the effective date of the penalty provision, even though this provision was enacted after the surety bond was executed."

Personal Service Insurance Company v. Mamone (1986), 22 Ohio St. 3d 107. The court reasoned that the civil penalty was not issued against the surety under its surety contract, but was issued because the surety violated the R.C. Chapter 1513 reclamation standards after the enactment of the R.C. Chapter 1513 civil penalty provisions. The court noted the civil penalty "does not add any new conditions to the surety contract, but rather enlarges the conditions for the option of reclamation."

While Personal concerned a surety contract, we find that most of the reasoning used by the court to be equally applicable to the case at bar. The supreme court permitted application of the new R.C. 1513.02(F)(1) civil penalty assessment provisions to violations which occurred after the effective date of the statute regardless of whether the permit to mine the site was issued before or after the effective date of the statute. The supreme court quoted from Lankengren v. Kosydar (1975), 44 Ohio St. 2d 199, where the court wrote:

> "*** The prohibition against retroactive laws is not a form of words; it is a bar against the state's imposing new duties and obligations upon a person's past conduct and transactions, and it is a protection for the individual who is assured that he may rely upon the law as it is written and not later be subject to new obligations thereby."
> (Emphasis Added)

In Personal the supreme court noted the prohibition against retroactive laws does not apply to a sanction levied for a present violation of an existing law.

We note the plaintiff in Personal was assessed a civil penalty for a violation which occurred nearly one year and nine months after the effective date of R.C. 1513.02(F)(1). Appellee is not imposing new duties and obligations upon appellant's past conduct, but upon appellant's present conduct. We note if appellant had completed the reclamation shortly after all the mining was complete on the sites in 1976, appellant would never have faced the civil penalty provisions of R.C. 1513.02(F)(1).

Appellant's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

"THE NOTICES OF VIOLATION FAILED TO MEET THE SPECIFICITY REQUIREMENT OF ORC 1513.02(D)(4), AND THEREFORE THE RECLAMATION BOARD OF REVIEW ERRED IN AFFIRMING THE CIVIL PENALTY ASSESSMENTS."

Appellant claims the notices of violation, in order to meet the specificity requirement of R.C. 1513.05(D)(4), should have cited the exact statutes or rules

violated. We disagree. R.C. 1513.02(D)(4) provides:

> "Notices of violation and orders issued pursuant to this section shall set forth with reasonable specificity the nature of the violation and the remedial action required ***."

We note the statute does not require the notices of violation to state the exact statutes or rules violated. The statute only requires the notices of violation to state with "reasonable specificity" the nature of the violation and the remedial action required.

The notices of violation gave the following description of the violations:

> "Delinquent Reclamation - year 1. A successful cover of permanent approved species of vegetation has not been established due to excessive barren areas."

The notices of violation set forth the following remedial measures to be taken:

> "Establish a successful cover of permanent vegetation in accordance with the approved reclamation plan and comply with all other requirements of Chapter 1513 of the Ohio Revised Code."

We believe the notices of violation in the case at bar successfully notified appellant of the revegetation problem on the permit sites. We do, however, agree with the hearing officer that the notices of violation did not successfully notify appellant of the acid water seepage problems on the permit sites.

Appellant complains the hearing officer erred by failing to reduce the civil penalty assessment which the Chief of the Division of Reclamation levied on each site for <u>both</u> the revegetation problem and the acid water seepage problem. Appellee points out that whether the notices of violation alerted appellant to both the acid water and the revegetation problems, or just to the revegetation problems, the penalty is the same. We agree the minimum civil penalty assessment required by R.C. 1513.02(F)(1) is $750 per day. The Chief issued the minimum civil penalty assessment allowed by law. Accordingly, we find no error with the hearing officer's failure to reduce the civil penalty assessment.

We note the Board of Reclamation Review has power pursuant to R.C. 1513.02(F)(3) to modify a civil penalty assessment issued by the Chief of the Division of Reclamation. With full knowledge of the fact the notices of violation only notified appellant of the revegetation problems, the Board chose not to modify the civil penalty assessments in this case.

Appellant's second assignment of error is overruled.

JUDGMENT AFFIRMED.

Stephenson, P.J.: Concur in Judgment & Opinion
Grey, J.: Concur in Judgment & Opinion

CLERK'S CERTIFICATE
The State of Ohio, Vinton County, ss:
I, the undersigned Clerk of Courts of said County, hereby certify that the foregoing is a true and correct copy of the original Opinion & Entry filed with me June 11 19 86
WITNESS my hand and official seal, this 11 day of June 19 86
Lorraine Hay
Clerk of Courts
By L.H.
Deputy

It is ordered that (~~appellant~~ appellee) recover of (~~appellant~~ appellee) the 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 Ohio Reclamation Board of Review ~~Court~~ to carry this judgment into execution.

Any Stay previously granted by this Court is hereby terminated as of the date of filing of this Entry.

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

Homer E. Abele.
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 from the date of filing with the clerk.