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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin County.
The VILLAGE OF REMINDERVILLE, Appellant-Appellant,
v.
Donald SCHREGARDUS, Director of Environmental Protection et al., Appellees-Appellees.
No. 98AP-246.

Dec. 8, 1998.

APPEAL from the Environmental Review Appeals Commission.

Grendell & Targrove LLP, Timothy J. Grendell and Steven A. Targrove, for appellant The Village of Reminderville.

Betty D. Montgomery, Attorney General, and **Ann M. Wood**, for appellee Ohio Environmental Protection Agency.

Lewis Adkins, David L. Nott and Cindy Peters, for appellee Summit County Department of Environmental Services.

Climaco, Climaco, Lefkowitz & Garofoli LPA, Robert B. Casarona and Robert E. Ashton; Benesch, Friedlander, Coplan & Aronoff LLP, Paul D. Jesse and Marc S. Blubaugh, for appellee Liberty Glenwood, Inc.

OPINION

LAZARUS, J.

***1** Appellant, Village of Reminderville, appeals the February 3, 1998 decision of the Environmental Review Appeals Commission (the "Commission") dismissing the appellant's challenge to a proposed expansion at a waste water treatment plant in Summit County. The Commission dismissed appellant's challenge on the grounds that appellant obstructed discovery efforts and failed to demonstrate a good-faith effort to prosecute its appeal. For the following reasons, we affirm.

On June 27, 1996, appellee Ohio Environmental Protection Agency ("OEPA") issued a permit to appellee Summit County Department of Environmental Services allowing an expansion to the Aurora Shores Waste Water Treatment Plant. On July 25, 1996, appellant appealed OEPA's decision to the Commission pursuant to R.C. 3745.04, claiming that its residents would be adversely impacted by the expansion of the plant and that OEPA failed to consider available alternatives. On August 7, 1996, appellee Liberty Glenwood, Inc. ("Liberty Glenwood"), the developer of real property to be served by the expanded plant, moved to intervene in the action, which motion was granted by the Commission on August 15, 1996.

In the following year and a half, Liberty Glenwood sought to obtain discovery from appellant, and in particular, sought to conduct discovery depositions of expert witnesses identified by appellant. However, when such depositions were scheduled, they were cancelled by appellant, often at the last minute. Finally, on January 22, 1998, after numerous depositions of experts were again cancelled at the last minute by appellant with only days remaining before the scheduled discovery cut-off, Liberty Glenwood filed a motion to dismiss appellant's appeal pursuant to Ohio Adm.Code 3746-3-08(B) (standards of conduct and suspension). On February 3, 1998, the Commission issued its decision on the motion. In its decision, the Commission outlined the relevant procedural facts of the case as follows:

"3. From the outset of this appeal, Appellee Liberty Glenwood has documented difficulty in conducting discovery with the Village. A number of status conferences have been scheduled in an effort to achieve some progress in processing this appeal. The status conferences have all been at the request of the Appellee or the Commission, not at the request of the Village.

"4. As a result of one such attempt, on May 2, 1997,

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the parties agreed that all discovery would be completed by October 17, 1997. They also agreed that a *de novo* adjudication hearing should commence on November 4, 1997.

“5. In late June of 1997, Appellee Liberty Glenwood moved the Commission to order the deposition of 10 individuals whose names appeared on the Village's witness list. Noting no objections, the Commission granted the motion for depositions and ordered that documents be made available before the depositions. The Commission also issued subpoenas for the witnesses to the county sheriff, as well as checks to cover witness fees and mileage. (Case File R, III, KKK.)

***2** “6. Despite a number of conversations confirming the deposition dates, the Village cancelled the depositions the day before they were scheduled to occur.

“7. Appellee Liberty Glenwood attempted to reschedule the cancelled depositions; nevertheless, the depositions did not occur, and disputes ensued. In an attempt to resolve these disputes and to accommodate the appeal, the Commission held another status conference on August 5, 1997, at which time all parties agreed to work together and cooperate in moving discovery in this case forward. The parties were reminded of the agreed-to discovery date cutoff of October 17, 1997. (Case file LLL.)

“8. Subsequent to this status conference, the parties filed a revised agreed-to discovery schedule. This schedule contained dates on which the Village and ASHA [a non-party to this appeal] stated that their witnesses would be available for discovery depositions. (Case File NNN.)

“9. Despite continued attempts on the part of Appellee Liberty Glenwood to depose proposed witnesses, as late as October 21, 1997, no depositions had been taken in this case, and no discovery documents had been exchanged. This was obviously past the first discovery date cut-off and mere weeks from the scheduled hearing.

“10. In another attempt to move the appeal forward, the Commission convened yet another status conference. At the conference, counsel for the Village assured the Commission that it would work diligently to accommodate discovery requests in this matter. In acknowledgement of the lack of discovery and the quickly approaching November hearing date, the Commission *sua sponte* rescheduled the hearing for February, 1998. At this time the Commission dismissed ARID [a non-party to this appeal] from the case, noting this appellant's failure to prosecute the appeal, despite numerous orders from the Commission. (Case file CCCC, DDDD.)

“11. Unfortunately, discovery did not progress, and disputes continued. Cognizant of the upcoming February hearing, and apparent lack of discovery for that hearing, the Commission ordered yet another status conference to be held at the Commission offices on January 7, 1998.

“12. Once again, discovery, or the lack thereof, was discussed. Once again, parties agreed to exchange witness lists and agreed to a discovery date cutoff of February 9, 1998. (Case File VVVV.)

“13. Appellee Liberty Glenwood, once again, attempted to schedule depositions based on Appellant's witness list, and filed the appropriate notices with the Commission. Once again, the Commission issued the requisite subpoenas and checks for the scheduled depositions.

“14. This final set of depositions was also cancelled at the last minute by the Village.

“15. The record demonstrates that Appellee Liberty Glenwood has attempted to depose at least eighteen individuals from the Village's various, and apparently ever-changing witness lists. Further, a number of these individual have been scheduled and rescheduled for deposition three or four times each.

***3** “16. The latest agreed-to discovery date cut-off of February is less than two weeks away, and the thrice scheduled hearing is set for March 10, 1998.”

Based upon the foregoing recitation, the Commission granted Liberty Glenwood's motion to dismiss finding that the record reflected no effort on the part of the appellant to initiate discovery, that appellant had been “obstructive to discovery efforts on the part of the other parties,” and that appellant had “failed to demonstrate a good faith effort to prosecute its appeal.”

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On March 3, 1998, appellant filed a timely appeal raising the following two assignments of error:

1. "The Environmental Review Appeals Commission erred in dismissing Appellant The Village of Reminderville from the proceedings when Appellant was in the process of responding to Appellee's discovery request *still* within the discovery period established by the Commission."

2. "The Environmental Review Appeals Commission erred in denying Appellant The Village of Reminderville's Motion for Protective Order."

In its first assignment of error, appellant challenges the Commission's decision to dismiss appellant's appeal. In particular, appellant contends that the Commission failed to provide adequate notice to appellant that it would be dismissed and that dismissal was not appropriate because appellant was in compliance with all orders and discovery procedures. We find neither contention persuasive.

First, we find that appellant was given adequate notice that its appeal could be dismissed. In so doing, we reject appellant's reliance upon case law applying the strict notice requirements of Civ.R. 41(B)(1). See, *e.g., Ohio Furniture Co. v. Mindala* (1986), 22 Ohio St.3d 99, 488 N.E.2d 881. As this court has noted before, Civ.R. 1(A) states that the civil rules only apply to *courts* of the state, and therefore, the rules "are not binding in adjudicatory proceedings before administrative agencies."*In the Matter of Vaughn v. State Medical Bd.* (Aug. 6, 1991), Franklin App. No. 90AP-1160, unreported (1991 Opinions 3735, 3740) (citing *Yoder v. Ohio State Bd. Of Edn.*[1988], 40 Ohio App.3d 111, 531 N.E.2d 769). Thus, appellant was not entitled to notice comporting with all of the strictures of Civ.R. 41(B)(1), as long as appellant was provided notice sufficient to satisfy basic principles of fair play and due process. See *Columbia Township Trustees v. Williams* (Aug. 5, 1976), Franklin App. No. 76AP-107, unreported (1976 Opinions 2524, 2530) (proceedings before Environmental Board of Review, the predecessor of the Commission, need not be strictly in accord with the civil rules but must be conducted consistent with basic concepts of fair play).

Here, appellant was provided with sufficient notice in accordance with such principles. As this court has previously stated, the purpose of notice is to afford a party with an opportunity to either comply or explain why it should not be dismissed. See *Carr v. Green* (1992), 78 Ohio App.3d 487, 490, 605 N.E.2d 431. Here, appellant was served with a copy of Liberty Glenwood's motion to dismiss on January 22, 1998, and appellant filed its opposition to this motion on January 26, 1998. Thus, appellant was aware that it was at risk of being dismissed and was provided an opportunity to comply or explain its position. As such, appellant was provided adequate notice.

***4** Similarly, we reject appellant's contention that the Commission abused its discretion in dismissing appellant's appeal. A decision of the Commission must be upheld if it "is supported by reliable, probative, and substantial evidence and is in accordance with law."R.C. 3745.06; see, also, *Red Hill Farm Trust v. Schregardus* (1995), 102 Ohio App.3d 90, 95, 656 N.E.2d 1010. Here, the Commission is authorized, for good cause stated in the record, to dismiss a party who refuses to comply with its directions or engages in dilatory tactics. Ohio Adm.Code 3746-3-08(B). Moreover, as when a trial court dismisses a party for lack of prosecution under Civ.R. 41(B), the decision of the Commission to dismiss under Ohio Adm.Code 3746-3-08 is within the sound discretion of the Commission and will be reversed only for an abuse of that discretion. Cf. *Pembaur v. Leis* (1982), 1 Ohio St.3d 89, 91, 437 N.E.2d 1199 (applying Civ.R. 41). An abuse of discretion implies an unreasonable, arbitrary or unconscionable attitude on the part of the Commission. *Id.* Thus, while a disposition of a matter on its merits is favored, the Commission is in the best position to determine whether delays in the prosecution of the appeal are for legitimate or illegitimate reasons. Cf. *Indus. Risk Insurers v. Lorenz Equip.* (1994), 69 Ohio St.3d 576, 581, 635 N.E.2d 14 (applying Civ.R. 41). Applying these standards to this case, we find that the decision to dismiss the appellant was not an abuse of discretion.

The record shows, as reflected in the Commission's decision, that appellant engaged in a pattern of obstructionistic and dilatory conduct throughout the litigation below. For example, appellant failed to produce witness lists or documents in accordance with the scheduling orders entered by the Commission and only produced such material after several status conferences and motions by the appellees. Moreover, even after appellant produced its witness

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lists, appellant continued to change the list throughout the litigation. Finally and most importantly, appellant repeatedly and consistently cancelled previously scheduled and properly noticed discovery depositions, often at the last minute, including depositions scheduled only days before the discovery deadline. Moreover, while appellant contends that it was in compliance with all scheduling orders because it eventually reduced its witness list to only one expert and offered to make that witness available before the discovery cut-off, appellant did so only after the Commission had already ruled on Liberty Glenwood's motion dismissing appellant's appeal. As such, we do not find that the Commission abused its discretion in dismissing appellant in this case. Cf. *Indus. Risk Insurers, supra* (no abuse of discretion when trial court dismissed a party for failure to prosecute based upon party's repeated delays in identifying expert, producing expert materials, and in making expert available for deposition). Appellant's first assignment of error is not well-taken.

***5** In its second assignment of error, appellant contends that the Commission abused its discretion in denying the appellant's December 8, 1997 motion for a protective order seeking reimbursement from appellees of copying costs incurred by appellant in the production of documents. Again, we are not persuaded.

First, while appellant contends that the denial of the motion was "unreasonable and arbitrary," appellant cites no authority in support of its claimed right to such a reimbursement, let alone any provision authorizing the Commission to grant it. Second, nothing in the record suggests that appellant ever requested that the appellees pay for the cost of copying the documents prior to their production, that appellant ever made the document production contingent on such reimbursements, or that the appellees otherwise agreed to reimburse the appellant for such costs. Given this record, we do not find that the Commission abused its discretion in denying appellant's motion for a protective order. Appellant's second assignment of error is not well-taken.

For the foregoing reasons, both of appellant's assignments of error are overruled, and the judgment of the Environmental Review Appeals Commission is affirmed.

Judgment affirmed.

BOWMAN and TYACK, JJ., concur.
Ohio App. 10 Dist.,1998.
Village of Reminderville v. Schregardus
Not Reported in N.E.2d, 1998 WL 869619 (Ohio App. 10 Dist.)

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