

IN THE COURT OF APPEALS OF LUCAS COUNTY

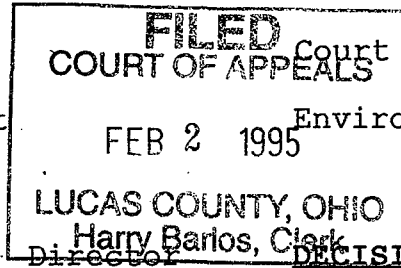
City of Toledo

Appellant

v.

Donald Schregardus,
Environmental Protection
and
Chemical Waste Management

Appellees



Court of Appeals No. L-94-338

Environmental Board No.483055

~~DECISION AND JUDGMENT ENTRY~~

COPY

Decided: FEB 02 1995

* * * * *

This matter is before the court on separate motions to dismiss filed by appellee Director of Environmental Protection ("the director") and appellee Chemical Waste Management, Inc. ("CWM"). Appellant, city of Toledo ("Toledo") has filed motions in opposition thereto.¹ Both motions to dismiss are based on the same argument: that this court lacks jurisdiction because exclusive jurisdiction rests with the Franklin County Court of Appeals for the subject matter of this appeal pursuant to R.C. 3745.06.

The facts relevant to the motions to dismiss are as follows. In 1991, CWM was granted a Permit to Install ("PTI") for an air contaminant source in connection with the construction in Toledo of a facility for the transfer of liquid hazardous waste. Hazardous waste is received at the facility via rail; the hazardous waste is then shipped via tank truck to CWM's hazardous waste management facility in Vickery, Ohio. The hazardous waste

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shipments are stored at the Toledo site for no more than ten days. In 1992, CWM was granted a Permit to Operate ("PTO") an air contaminant source for the same facility. In 1992, the director also dismissed a verified complaint² filed by Toledo alleging that CWM violated Ohio statutes when it failed to obtain a hazardous waste facility installation and operation permit for its hazardous waste transfer facility. On November 1, 1994, the Environmental Board of Review ("EBR") affirmed these three actions taken by the director. On November 28, 1994, Toledo filed its appeal with this court.

In his motion, the director seeks dismissal of the PTO and PTI appeals whereas CWM seeks dismissal of all three. Both motions are based on R.C. 3745.06 which states in pertinent part:

"Any party adversely affected by an order of the environmental board of review may appeal to the court of appeals of Franklin county, or, if the appeal arises from an alleged violation of a law or regulation, to the court of appeals of the district in which the violation was alleged to have occurred."

R.C. 3745.06 also requires that the notice of appeal be filed within thirty days after the date upon which appellant received notice from the EBR.

In Kimble Clay & Limestone v. McAvoy (1979), 59 Ohio St.2d 94, the Ohio Supreme Court held:

"1. A determination by the Director of Environmental Protection in a permit or licensing proceeding that a source of air pollution is not in compliance with regulations or standards of the Ohio Environmental Protection Agency does not involve an 'alleged violation' as that phrase

is used in R.C. 3745.06.

"2. An appeal from the order of the Environmental Board of Review in a permit or licensing proceeding must be filed in a timely and proper manner with the Court of Appeals for Franklin County and as otherwise prescribed by R.C. 3745.06." Syllabus, paragraphs one and two.

In Kimble Clay, the company was denied a permit to operate by the director of environmental protection. The issue before the Supreme Court was in which court the appeal should have been filed: in the court of appeals for Franklin county or in the court of appeals for the county in which the alleged violation occurred. The Court stated that "Such determination depends on whether the [director's] action in denying [company's] initial request to operate a rock crusher constituted a denial of a permit or license, or whether such denial encompassed an appeal arising from an alleged violation of a law or regulation." Id. at 96. As the Supreme Court noted, the first segment of R.C. 3745.06 requires all appeals from an EBR order to be taken in the court of appeals for Franklin county whereas the second segment of that provision creates an exception to the Franklin county appellate court's jurisdiction if an EBR order is based upon an "alleged violation" of a law or regulation. Id. at 97. The Supreme Court examined R.C. Chapter 3745, and R.C. 3745.08 in particular, for the use of "alleged violation" and concluded that:

"The denial of a permit or license, as in these circumstances, does not give rise to a 'violation' as that term is clearly used in

R.C. 3745.08. If the [company] *** would have initiated operations contrary to the permit or license denial, then subsequent action to enforce such denial would have been clearly within the provisions of R.C. 3745.08 and the second segment of the first provision of R.C. 3745.06 which specifically addresses itself to 'an alleged violation of a law or regulation.'" Id. at 97-98.

In regard to the PTO and PTI appeals, both the director and CWM argue that dismissal is required because of the Supreme Court's determination in Kimble Clay that the director's permitting decision is not synonymous with a "violation". Toledo argues that the director's failure to require a hazardous waste facility installation and operation permit for CWM's hazardous waste transfer facility violates several provisions of state law and therefore, that this is an "alleged violation" which authorizes jurisdiction in this court. This court agrees with the director and CWM: the director's interpretation of the law and determination concerning the issuance of the PTO and PTI cannot be considered a "violation" of law or regulation.³

In regard to the dismissal of the verified complaint appeal, CWM argues that the action being appealed is the director's decision to dismiss Toledo's verified complaint and that the director did not violate a statute or regulation in making his decision because his decision was based upon the determination that CWM's transfer station qualified for exemption from hazardous waste permit requirements. CWM argues that this exemption determination is similar to that used by the director in deciding whether or not a facility should be issued or denied

a permit and therefore, under the Kimble Clay reasoning, jurisdiction for the verified complaint appeal also lies exclusively in the Franklin County appellate court.

Alternatively, CWM argues that if the director did violate a law or regulation in dismissing Toledo's verified complaint that the violation occurred in Franklin county, not Lucas county, and thus, the appeal should have been filed in Franklin county.

In opposing the motion to dismiss, Toledo argues that in its verified complaint it alleged that CWM's failure to obtain a hazardous waste facility installation and operation permit resulted in the illegal construction of a hazardous waste facility in violation of Ohio code. Toledo argues that the clear intent of the complaint was to redress the failure of CWM to obtain a hazardous waste permit for its transfer facility.

However, this court believes that the words and phrases of Toledo's verified complaint should be "read in context and construed according to the rules of grammar and common usage." R.C. 1.42. Although Toledo argues that CWM failed to obtain a permit, it is not CWM's decision as to what, if any, permits it is required to obtain. The director determines what permits are required. Therefore, in spite of what Toledo argues, the appeal of the dismissal of its verified complaint is really an appeal of the director's determination and, as such, should have been filed in the court of appeals for Franklin county.

In Kimble Clay, the Supreme Court, in responding to an argument regarding the filing requirements of R.C. 3745.06, noted that:

"Where a statute confers the right of appeal, adherence to the conditions thereby imposed is essential to the enjoyment of the rights conferred. The party who seeks to exercise this right must comply with whatever terms the statutes of the state impose upon him as conditions to its enjoyment. (Citation omitted.) *** All statutory requirements must be met which create the right of appeal." Id. at 99.

The court affirmed the Franklin county appellate court's dismissal, after transfer from another appellate court, because of the failure to perfect the appeal in the Franklin county appellate court as required by R.C. 3745.06, citing Todd v. Garnes (1975), 44 Ohio St.2d 56, for the proposition that dismissal of an attempted appeal was correct when a court lacked jurisdiction. Kimble Clay & Limestone v. McAvoy, 59 Ohio St.2d at 99.

Accordingly, this court finds well-taken and grants the motions to dismiss filed by the director and CWM. It is so ordered. Appellant is ordered to pay the court costs of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 7/1/92.

City of Toledo
v.
Donald Schregardus, Director
Environmental Protection, et
al.
L-94-338

Peter M. Handwork, J.

JUDGE

George M. Glasser, J.

Charles D. Abood, P.J.
CONCUR.

JUDGE

JUDGE

1 This court sua sponte consolidated the three related appeals filed simultaneously by Toledo.

2 A verified complaint is a procedure established by R.C. 3745.08 which allows any person aggrieved or adversely affected by an alleged violation of Ohio environmental laws to file a complaint with the director. The statute also requires the director to investigate the complaint and either take enforcement action against the violator if the violation has not been abated or to dismiss the complaint if no violation has occurred or the violation will not occur.

3 This court notes that R.C. 3734.02 (F) states: "No person shall store, treat, or dispose of hazardous waste identified or listed under this chapter and rules adopted under it, *** except at or to any of the following:

(5) A hazardous waste facility *** that is not subject to permit requirements under rules adopted by the director."

Ohio Adm. Code 3745-50-46(C) (6) specifically exempts from the hazardous waste permit requirement "Transporters storing manifested shipments of hazardous waste in containers meeting the requirements of rule 3745-52-30 of the Administrative Code at a transfer facility for a period of ten days or less."

Additionally, Ohio Adm. Code 3745-54-01 (G) states that "The requirements of the hazardous waste facility standards chapter do not apply to: (6) A transporter storing manifested shipments of hazardous waste in containers meeting the requirements of rule 3745-52-30 of the Administrative Code at a transfer facility for a period of ten days or less."

See also, Ohio Adm. Code 3745-53-12 for further exemptions for transfer facilities storing for a period of ten days or less.



**Attorney General
Betty D. Montgomery**

CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION

TO: All EES Attorneys

FROM: Jack McManus, Assistant Attorney General, Environmental Enforcement Section

SUBJECT: Appeal from Administrative Decisions

DATE: February 8, 1995

The attached decision relates to where an administrative appeal may be filed. The court limits the types of cases that that can be appealed to local courts of appeal from the EBR. Some of the language in the case is applicable to other types of administrative cases.

Chem Waste Management has a hazardous waste transfer facility in Toledo. The City of Toledo is arguing that the facility requires a hazardous waste permit. CWM first applied for an Air PTL, which was issued. The City then filed a verified complaint claiming CWM was illegally operating a hazardous waste facility without a permit. The Director dismissed the verified complaint because transfer facilities are exempt from TSD regulations. CWM then applied for and received an Air PTO.

The City, in three separate appeals, appealed the issuance of both permits and the denial of the verified complaint to the EBR. The EBR summarily affirmed all three decisions by the Director. The City appealed all three cases to the Lucas County Court of Appeals.

I moved to dismiss both permit appeals on the ground that 3745.06 requires appeals from the EBR to go to the Franklin County Court of Appeals unless the appeal arise from an alleged violation of law, in which case the appeal can go to the county where the violation occurred. I did not move to dismiss the appeal of the verified complaint because the complaint was based on an allegation by the City of Toledo that CWM was in violation of the hazardous waste permitting requirements.

CWM moved to dismiss all three appeals. CWM argued that even the verified complaint was actually an appeal from a decision of the director, so if any violation of law occurred, it was an error by the director and could only be appealed to Franklin County.

The court accepted CWM's argument and booted all three appeals. It appears that after this decision, that only enforcement orders from the director can be appealed from the EBR to local courts of appeal.

cc: Judi French, OEPA, Deputy Director for Legal Affairs
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Jeanne Mallett, OEPA, Legal