Franklin County Ohio Clerk of Courts of the Common Pleas- 2016 Oct 20 1:01 PM-16CV005337

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

KJAMS, LLC,	:	
	:	
Appellant,	:	
	:	
vs.	:	Case No. 16CV-5337
	:	
FORD MOTOR COMPANY, *et al.*,	:	(JUDGE FRYE)
	:	
Appellees.	:	

OPINION AND FINAL JUDGMENT
REMANDING CASE FOR LACK OF FINAL ORDER
(Motion #1 Filed July 15, 2016)

I. Introduction.

This is an administrative appeal. On July 15, 2016, appellant KJAMS, LLC dba Steve Rogers Ford filed a motion to dismiss its own appeal, and to have the case remanded to the Ohio Motor Vehicle Dealers Board for lack of "final order." Appellees Ford Motor Co. and the Motor Vehicle Dealers Board have briefed the issue.

It is axiomatic that statutes creating and governing administrative agencies must be closely followed. Being creatures of statute, administrative agencies like the Motor Vehicle Dealers Board have no ability to exceed the bounds set by the legislature. That principle is especially important when state government acts to regulate or ration purely private commerce, such as here the contractual relationships between auto manufacturers and their franchised dealers.

By statute the Motor Vehicle Dealers Board is supposed to consist of eleven members. Three members are specifically designated to "represent the public and shall not have engaged in the business of selling motor vehicles at retail in this state." R.C. 4517.30(A). Rogers Ford points out that, despite the statute, only one public member was a member of the Board at the time it addressed a Hearing Examiner's

recommended decision in this case.[1] That fact has dispositive importance here because "[o]nly the public members of the board" may "consider or decide" a matter filed pursuant to several specific provisions of Ohio law. R.C. 4517.57(D). This is one such case. Furthermore, Ohio law says that "[t]he public members shall act by majority vote." *Id*.

Thus, KJAMS contends that because the Board was not able to "act" by a majority vote of three public members, it could not issue a legally binding final order. For the reasons explained below this court agrees.

II. Factual Background.

While not overly detailed, the findings of fact by the Board Hearing Examiner appear to be undisputed and to frame this case sufficiently for present purposes. The Examiner found that KJAMS, LLC is a Ford franchisee with its place of business in Waterville, Ohio. Brondes Ford is also a franchisee of Ford, located in Maumee, Ohio. Both dealerships sell motor vehicles that are of the same line-make, the term of art in the relevant statute.

Brondes Ford proposes to open a new facility west of its existing location, and within approximately 1 mile of KJAMS' existing dealership. Ford Motor seeks to avoid a proceeding before the Board over this action. Ford's decision approving Brondes' new location is claimed not to trigger the possibility of any Board review, or even require notice to KJAMS because of an exception to the Board's general authority. That exception may be invoked when a proposed new dealership location is within one mile of an existing, related dealership location. Under R.C. 4517.50(A), relocations within a one mile radius appear not to trigger administrative rights before the Board.

III. Legal Analysis.

The Hearing Examiner concluded that Ford was correct, and that no "subject matter jurisdiction" existed for the Board to consider KJAMS protest of the new location sought by Brondes Ford. By letter to counsel dated May 31, 2016, the Secretary of the

[1] By statute, a hearing examiner's proposed decision may become the final order of the Board if the Board *fails* to act within 30 days. R.C. 4517.58. However, as explained herein that presupposes that there are sufficient Board members to constitute a quorum.

Board gave notice that "[t]he Board has declined to further deliberate on this matter" such that the Hearing Examiner's recommendation of dismissal "*is approved* and the protest is dismissed for lack of jurisdiction under R.C. 4517.50(A)." (emphasis in original) Contending that was contrary to law and could not constitute a final, appealable order of the Board, KJAMS filed a notice of appeal to this court on June 3, 2016.

"The MVDB consists of eleven members, three of which 'represent the public and shall not have engaged in the business of selling motor vehicles at retail in this state.'" *Bob Daniels Buick Co. v. GMC*, 10th Dist. No. 97APE12-1701, 1998 Ohio App. LEXIS 4862, *5–*6 (quoting R.C. 4517.30(A)). "Pursuant to R.C. 4517.57(D), only the public members of the MVDB may decide any matter filed under R.C. 4517.50, and the 'public members shall act by majority vote.'" *Bob Daniels Buick Co.* at *6.

The original proceeding begun by KJAMS sought to invoke Board authority under R.C. 4517.50(A). (Certified Record Doc. #20) The dismissal order from the Board likewise explicitly referenced R.C. 4517.50(A). That is important, because R.C. 4517.57(D) provides that "[o]nly the public members of the board *** shall participate in, deliberate on, hear, consider, or decide any matter filed pursuant to sections 4517.50 ***." Furthermore, R.C. 4517.57(D) also says that "[t]he public members shall act by majority vote."

While the reason for vacancies on the Board is not suggested in the record, it is undisputed that at the time this case was dismissed the Board had only one public member. The statute calls for three. Inferentially, when the statute also says the "public members shall act by majority vote" that too signals that there must be more than one member of a multi-person group before action can occur. No provision Chapter 4517 or in any court decision addresses the present situation in which only one public member is available to act on a case arising under R.C. 4517.50(A).

The closest decision to these facts is *Bob Daniels Buick Co., supra*. It addressed a situation in which there were two public members participating in a case, because the third had recused. In that circumstance, where two public members - a majority - were available to act and review a hearing examiner's recommendation, the Court of Appeals found that the Board decision was valid. (There too, the decision in question was issued

by operation of law under the automatic adoption provision in R.C. 4517.58.)[2] However, KJAMS' case presents materially different facts.

Appellees argue that the automatic adoption rule cures the absence of a quorum of public members. That view is mistaken. Automatic adoption, as contemplated by R.C. 4517.58, can only be valid when at least two public members are actually members of the Board, and available to take action on a particular case. When a "majority" of public members is available to act within thirty days after a hearing examiner's recommendation, there is a basis to think that those public members gave attention to a particular case before automatic adoption kicked-in. In KJAMS' case only one public member was available. Under those circumstances, a majority of three public members does not even implicitly consider the case. Thus, the automatic adoption provision for Board decisions cannot cure the absence of a minimum quorum of public members. Automatic adoption is not valid unless the statutory minimum number of public Board members is in place to look at a case, if they choose to do so.

This is not a novel holding. In *New Process Steel, L.P. v. NLRB,* 560 U.S. 674 (2010), the United States Supreme Court held that the National Labor Relations Board could not exercise its power in the absence of the statutorily required quorum of at least three members. *New Process Steel* was subsequently reaffirmed in *NLRB v. Canning*, 573 U.S. ___, 134 S.Ct. 2550, 189 L.Ed2d 538 (2014). There, the court addressed whether appointments of NLRB members during Senatorial recesses were valid. After concluding three appointments to the NLRB by President Obama were not proper under the recess appointments clause, the Supreme Court ruled all Board decisions issued between January 2012 and August 2013 were invalid under *New Process Steel.* ("[B]ecause the Board lacked a quorum of validly appointed members when it issued its order, the order was invalid." 134 S.Ct., at2558.) This reading of the precedents is well-accepted. *E.g., Pacific Maritime Ass'n v. NLRB,* 827 F.3d 1203, 1212 (9th Cir. 2016).

Just this month the United States Court of Appeals for the District of Columbia Circuit addressed the reasons Congress has historically required multi-member bodies

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[2] "Automatic adoption provisions satisfy due process requirements if the party with the claim of entitlement had the opportunity for a meaningful hearing and consideration of its claim, and the decision adopted by operation of law is consistent with the factual determinations made during the administrative proceeding." *Bob Daniels Buick Co.* at *13.

at the head of administrative agencies that are not directly managed by Presidential appointees. The case arose from a challenge to a provision of the Dodd-Frank Act of 2010 that purported to insulate the head of the Consumer Financial Protection Bureau (currently Richard Cordray, of Ohio) from Presidential removal or oversight. The D.C. Circuit held the portion of Dodd-Frank insulating the Director unconstitutional. In doing so that Court observed:

> In addition, unlike single-Director independent agencies, multi-member independent agencies 'can foster more deliberative decision making' [citation omitted]. Relatedly, multi-member independent agencies benefit from diverse perspectives and different points of view among the commissioners and board members. The multiple voices and perspectives make it more likely that the costs and downsides of proposed decisions will be more fully ventilated.
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> ***
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> As compared to a single-Director structure, a multi-member independent agency also helps to avoid arbitrary decisionmaking and to protect individual liberty because the multi-member structure - and its inherent requirement for compromise and consensus - will tend to lead to decisions that are not as extreme, idiosyncratic, or otherwise off the rails. [citation omitted] A multi-member independent agency can only go as far as the middle vote is willing to go.
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> ***
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> [A] multi-member independent agency provides the added benefit of "a built-in monitoring system for interests on both sides because that type of body is more likely to produce a dissent if the agency goes too far in one direction." [citation omitted] A dissent, in turn, can serve "as a 'fire alarm' that alerts Congress and the public at large that the agency's decision might merit closer scrutiny." [citations omitted] ***
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> Moreover, multi-member independent agencies are better structured than single-Director independent agencies to guard against "capture" of - that is, undue influence over - the independent agencies by regulated entities or interest groups. *** Capture can infringe individual liberty because capture can prevent a neutral, impartial agency assessment of what rules to issue and what enforcement actions to undertake. In a multi-member agency, however, the capturing parties "must capture a majority of the membership rather than just one individual.

PHH Corporation v. Consumer Financial Protection Bureau, ___ F.3d ___, 2016 U.S. App. LEXIS 18332, *61 - *65 (D.C. Cir. October 11, 2016.) As written by the General Assembly, the provisions in R.C. 4517.50 requiring three public members to rule on certain types of cases avoids these difficulties with single-member decisions.

Finally, a different line of case law also furnishes strong justification to enforce these Ohio statutes exactly as written. Having a state closely regulate a part of the free-market economy can be problematic. While *Parker v. Brown*, 317 U.S. 341 (1943) and the line of cases that followed *Parker* recognize state governments have immunity under antitrust laws when acting in their sovereign capacity, there must be a clearly articulated and affirmatively expressed state policy behind anticompetitive conduct. Furthermore, "[l]imits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust account-ability." *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. ___, 135 S.Ct. 1101, 1115, 191 L.Ed.2d 35 (2015).

The Legislature plainly required both that this Board include three public members, and that only public members "deliberate on, hear, consider, or decide" certain types of cases. Such restrictions were no doubt intended to avoid concern over market participants regulating other car dealers, jeopardizing *Parker* immunity for Ohio under federal antitrust law. Applying Chapter 4517 to assure that a quorum of public members is in place before Board decisions are deemed legally valid avoids concern that car dealers - active market participants - might misuse governmental authority to selfishly help themselves. This reading of Chapter 4517 best assures *Parker* immunity for the Board.

IV. Conclusion.

Because the action of the Motor Vehicle Dealers Board was not in accordance with Ohio law, this appeal is **DISMISSED** and this case is **REMANDED** to the Ohio

Motor Vehicle Dealers Board for further action in compliance with R.C. 4517.57 (D) and (E).

Court costs are taxed against the Board.

IT IS SO ORDERED.

Franklin County Court of Common Pleas

Date: 10-20-2016

Case Title: KJAMS LLC -VS- FORD MOTOR COMPANY ET AL

Case Number: 16CV005337

Type: JUDGMENT ENTRY

It Is So Ordered.

/s/ Judge Richard A. Frye

Court Disposition

Case Number: 16CV005337

Case Style: KJAMS LLC -VS- FORD MOTOR COMPANY ET AL

Case Terminated: 18 - Other Terminations

Final Appealable Order: Yes

Motion Tie Off Information:

1. Motion CMS Document Id: 16CV0053372016-07-1599980000
   Document Title: 07-15-2016-MOTION TO DISMISS - PLAINTIFF: KJAMS LLC
   Disposition: MOTION GRANTED