IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2002 Term

FILED
June 19, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 30116

RELEASED
June 19, 2002
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

COOKMAN REALTY GROUP, INC.,
Defendant Below, Appellee

v.

BARBARA TAYLOR, CHIEF, OFFICE OF WATER RESOURCES,
DIVISION OF ENVIRONMENTAL PROTECTION,
Plaintiff Below

THE WEST VIRGINIA DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Appellant

Appeal from the Circuit Court of Grant County
Honorable Andrew N. Frye, Jr., Judge
Case No. 99-CAP-1

AFFIRMED

Submitted: March 12, 2002
Filed: June 19, 2002

Leonard B. Knee, Esq.
Bowles Rice McDavid Graff & Love
Charleston, West Virginia
Attorneys for Appellee

Perry D. McDaniel, Esq.
Martha E. Barer, Esq.
Charleston, Charleston, West Virginia
Attorneys for Appellant

The Opinion of the Court was delivered PER CURIAM.
JUSTICES STARCHER and ALBRIGHT concur, and reserve the right to file concurring opinions.

SYLLABUS BY THE COURT

1. "A statute, or administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syl. pt. 1, *Consumer Advocate Div. of Pub. Serv. Comm'n v. Public Serv. Comm'n of West Virginia*, 182 W. Va. 152, 386 S.E.2d 650 (1989).

2. "While long standing interpretation of its own rules by an administrative body is ordinarily afforded much weight, such interpretation is impermissible where the language is clear and unambiguous." Syl. pt. 3, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970).

Per Curiam:

The West Virginia Department of Environmental Protection ("DEP") appeals a lower court judgment that construed the Groundwater Protection Act, W. Va. Code §§ 22-12-1 to -14, and an accompanying regulation, W. Va. C.S.R. § 47-57-4.1 (1994), as precluding DEP from ordering appellee Cookman Realty Group, Inc. ("Cookman Realty") to eliminate motor-oil contamination from its property in Grant County absent evidence that Cookman Realty was the originator of such pollution. DEP argues that the circuit court erred in failing to afford proper deference to its interpretation of its own legislative rule, which DEP argues is ambiguous as to the reach of the agency's power to order remediation. We conclude that the subject regulation clearly and unambiguously limits the agency to requiring remediation only from those who originate contamination that results in a threat to groundwater, and accordingly affirm the circuit court's judgment.

I.

BACKGROUND

Appellee, the Cookman Realty Group, Inc., purchased a parcel of unimproved land in Petersburg, West Virginia, in 1993. Later, in September 1995, a petroleum substance, together with discarded oil filters, was observed on the property in a ditch that had been excavated for the purpose of installing a storm drain. Cookman Realty subsequently entered into negotiations to sell the subject property to the South Branch Valley Bank in July 1996,

which resulted in an environmental site assessment being performed by Triad Engineering, Inc. ("Triad"). Triad's resulting report, a copy of which was furnished to DEP, indicated the presence of motor-oil contamination in both the soil and groundwater underlying the southwestern boundary of property. The report concluded that the pollution most likely emanated from an adjacent parcel owned by Petersburg Motor Company, Inc. ("Petersburg Motor"), which has been in the business of selling and servicing automobiles since 1944.

Apparently as a result of Cookman Realty's self-reporting, DEP requested that additional investigation be undertaken to determine the full extent of contamination. A second report issued by Triad in June 1997 confirmed that the pollution was concentrated in the southwestern corner of Cookman Realty's property, with contamination levels dropping significantly in proportion to the distance from the Petersburg Motor parcel.[1]

Based upon these reports, DEP, through its Office of Water Resources, issued Order No. 4059 on August 21, 1998. This administrative order was issued under the authority of the Groundwater Protection Act (the "Act"), and requires both Cookman Realty and Petersburg Motor to undertake remediation of their respective properties. Under the Act, the Environmental Quality Board (the "Board") is authorized to establish standards regarding the

[1]DEP also requested Petersburg Motor to undertake a similar environmental assessment of its property. Two reports were subsequently prepared by Potesta & Associates in December 1997 and April 1998, both of which found high levels of motor-oil contamination on the Petersburg Motor property.

"purity and quality for groundwater of the state. . . ." W. Va. Code § 22-12-4(a) (1994) (Repl. Vol. 1998). The Act further provides that

> [w]here the concentration of a certain constituent exceeds such [groundwater quality] standard due to human-induced contamination, no further contamination by that constituent is allowed, and every reasonable effort shall be made to identify, remove or mitigate the source of such contamination, and to strive where practical to reduce the level of contamination over time to support drinking water use.

W. Va. Code § 22-12-4(b). DEP is correspondingly charged with the responsibility to

> develop groundwater protection practices to prevent groundwater contamination from facilities and activities within their respective jurisdictions consistent with this article. Such practices shall include, but not be limited to, criteria related to facility design, operational management, closure, remediation and monitoring. Such agencies shall issue such rules, permits, policies, directives or any other appropriate regulatory devices, as necessary, to implement the requirements of this article.

W. Va. Code § 22-12-5(d) (1994) (Repl. Vol. 1998).[2] DEP is expressly authorized to propose legislative rules implementing the provisions of the Act, as governed by the requirements of the West Virginia Administrative Procedures Act.[3] *See* W. Va. Code § 22-12-5(c) (1994) (Repl. Vol. 1998).

DEP has exercised this delegated authority, resulting in the promulgation of, among other regulations, W. Va. C.S.R. § 47-57-4.1 (1994):

> Except for any source or class of sources which has been granted a variance for the particular contaminant at issue, *any person who owns or operates a source subject to the Act which has caused, in whole or in part, the concentration of any constituent to exceed any applicable groundwater quality standard subject to the Act*, must cease further release of that

---

[2]The Act expressly grants the Director of DEP the authority to remedy violations of groundwater quality standards through the issuance of administrative orders:

> If any such official upon inspection, investigation or through other means observes, discovers or learns of a violation of the provisions of this article, or any permit, order or rules issued to implement the provisions of this article, he or she may issue an order stating with reasonable specificity the nature of the violation and requiring compliance immediately or within a specified time. An order under this section includes, but is not limited to, any or all of the following: Orders implementing this article which (1) suspend, revoke or modify permits; (2) require a person to take remedial action; or (3) are cease and desist orders.

W. Va. Code 22-12-10(f) (1994) (Repl. Vol. 1998); *see also* W. Va. C.S.R. § 47-58-8.1 (1994) (stating, in part, that "[t]he Division has the authority to order persons to conduct remedial actions").

[3]The West Virginia Administrative Procedures Act is codified at W. Va. Code §§ 29A-1-1 to 29A-7-4 (Repl. Vol. 1998).

> contaminant and must make every reasonable effort to identify, remove or mitigate the source of such contamination and strive where practical to reduce the level of contamination over time to support drinking water use of such groundwater.

(Emphasis added.) The regulations specify that a "source" is to be understood to mean "any facility or activity which has caused a release or is reasonably likely to cause a release," W. Va. C.S.R. § 47-57-2.13 (1994), with a "release" being defined, in relevant part, as "any act or omission that results in the . . . leaching of materials or contaminants in a manner that has caused . . . entry of a constituent to groundwater." W. Va. C.S.R. § 47-57-2.12 (1994).

Cookman Realty appealed DEP's Order No. 4059 to the Environmental Quality Board on September 22, 1998.[4] Following an evidentiary hearing, where evidence was presented tending to show that the detected contamination was the result of Petersburg Motor's long-standing practice of spilling and disposing of used motor oil along the southwestern corner of the Cookman Realty property, the Board vacated DEP's remediation order by a decision issued on May 20, 1999. The Board found as a matter of fact that the pollution in question was "caused" by Petersburg Motor, rather than Cookman Realty. While expressly recognizing DEP's authority under the Act to order the cleanup of pollution that threatens groundwater, the Board nevertheless determined as a matter of law that under W. Va.

[4]Petersburg Motor's appeal of the administrative order was dismissed after it entered into a settlement agreement with DEP.

C.S.R. § 47-57-4.1, "the source that caused the contamination is responsible for remediating the contamination."

DEP, in turn, sought judicial review of the Board's decision in the Circuit Court of Grant County pursuant to W. Va. Code § 22B-1-9(a) (1994) (Repl. Vol. 1998). The lower court upheld the Board's action in vacating DEP's remediation order, likewise concluding that § 47-57-4.1 "place[s] responsibility for remediation on the owner of the source which has caused the contamination." In reaching this legal conclusion, the circuit court applied a *de novo* standard of judicial review, and expressly chose to afford no deference at all to DEP's interpretation of its own regulation:

> DEP's interpretation of the Groundwater Protection Act in this proceeding is not entitled to deference. First, DEP's interpretation matters only if the regulations are ambiguous, and thus need interpretation. Here the regulations are clear. Second, since DEP's interpretation is a litigation position, no deference is due it. Third, DEP is entitled only to deference when interpreting its own regulations. The regulation cited by DEP in issuing Order No. 4059 [was] not [promulgated] by DEP, but by the Board. The Board owes no deference to DEP's interpretation of the Board's regulation.

It is from this order that DEP now appeals.[5]

---

[5]Although not part of the record of this case, it appears that Cookman Realty eventually brought a civil action against Petersburg Motor alleging trespass, nuisance, and negligence in connection with its conduct in causing the contamination at issue herein, and has obtained a judgment in the amount of $586,400, including $20,900 in punitive damages. Cookman Realty has represented to the Court that it will use any money recovered in connection with this judgment to pay for the removal of the subject contamination. The Court is not faced here with (continued...)

II.

DISCUSSION

In this case, DEP argues that W. Va. C.S.R. § 47-57-4.1 is ambiguous, and therefore the lower court was obligated to defer to what the agency maintains is a permissible construction of the regulation based upon this Court's holding in *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W. Va. 573, 466 S.E.2d 424 (1995). Cookman Realty counters by asserting that the subject regulation unambiguously limits responsibility for remediation to parties who have caused pollution that may result in the contamination of groundwater, and further contends, in accord with the reasoning of the circuit court, that no deference should be extended to DEP's construction of § 47-57-4.1 because the agency's stance on this issue amounts to nothing more than an informal litigation position. *See West Virginia Health Care Cost Review Auth. v. Boone Mem'l Hosp.*, 196 W. Va. 326, 334, 472 S.E.2d 411, 419 (1996) (noting that "Courts customarily withhold [*Appalachian Power*-]*Chevron* deference from agencies' litigating positions") (citation omitted).

We need not go so far in this case as to define what deference, if any, must be afforded an administrative agency's interpretation of its own legislative rule, since the regulations at issue here unambiguously limit administratively-enforced remediation to parties

---

[5](...continued)
the issue of whether such recovery on the part of Cookman Realty would subject it to a duty to remediate under the Act, and we therefore leave such question for another day.

who have actually caused or originated pollution that threatens groundwater. A reviewing court would only be required to afford deference to an agency's interpretation if the regulation contained an ambiguity. As we have frequently admonished, "[a] statute, or administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten." Syl. pt. 1, *Consumer Advocate Div. of Pub. Serv. Comm'n v. Public Serv. Comm'n of West Virginia*, 182 W. Va. 152, 386 S.E.2d 650 (1989); *see also id*. at 156, 386 S.E.2d at 654 ("Interpretation of statutes or rules and regulations is proper only when an ambiguity exists."); syl. pt. 3, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970) ("While long standing interpretation of its own rules by an administrative body is ordinarily afforded much weight, such interpretation is impermissible where the language is clear and unambiguous."); syl. pt. 1, *English Moving & Storage Co. v. Public Serv. Comm'n of West Virginia*, 143 W. Va. 146, 100 S.E.2d 407 (1957) (stating in context of administrative rule that "[w]hen a valid written instrument is clear and unambiguous it will be given full force and effect according to its plain terms and provisions").

The text of W. Va. C.S.R. § 47-57-4.1 requires, among other things, that remediation be undertaken by "any person who owns or operates a source . . . which has caused . . . the concentration of any constituent to exceed any applicable groundwater quality standard . . . ." Since the contamination on the Cookman Realty property is unquestionably causing a violation of groundwater quality standards, the crucial question is whether such pre-existing

contamination produced by a party unrelated to the landowner may be deemed a "source" under the regulations.

The term "source" is elsewhere defined to mean "any facility or activity which has caused a release or is reasonably likely to cause a release." W. Va. C.S.R. § 47-57-2.13. Since neither "facility" nor "activity" are defined in the regulations, such terms must be given their common, ordinary and accepted meanings. *See* syl. pt. 3, in part, *Ohio Cellular RSA Ltd. P'ship v. Board of Pub. Works of West Virginia*, 198 W. Va. 416, 481 S.E.2d 722 (1996) ("In the absence of any specific indication to the contrary, words used in a statute will be given their common, ordinary and accepted meaning.") (internal quotations and citations omitted).[6] The undeveloped parcel of land owned by Cookman Realty, which according to the record in this case has never been used by any of its current or former owners for any activity involving the storage, use, or disposal of hazardous materials, is obviously not a "facility." That term is delimited to mean "something defined, built, installed, etc., to serve a specific function affording a convenience or service." *Random House Webster's Unabridged Dictionary* 690 (2d ed. 1997). We likewise fail to see how Cookman Realty's use of the property, or that of

[6]*Accord* syl. pt. 4, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959) ("Generally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use."); syl. pt. 1, *Miners in Gen. Group v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941) ("In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used."), *overruled on other grounds by Lee-Norse Co. v. Rutledge*, 170 W. Va. 162, 291 S.E.2d 477 (1982).

any of its predecessors in title, could be deemed an "activity" under the regulation, as this otherwise undefined term would ordinarily denote some positive act on the part of the landowner. *See id.* at 20 (defining the word "activity" to mean, *inter alia*, "the state or quality of being active").

A cardinal rule of textual interpretation requires, of course, that statutes and administrative rules "'be construed as a whole, so as to give effect, if possible, to every word, phrase, paragraph and provision thereof.'" *Weirton Med. Ctr., Inc. v. West Virginia Bd. of Med.*, 192 W. Va. 72, 75, 450 S.E.2d 661, 664 (1994) (quoting syl. pt. 8, in part, *Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d 885 (1953)); *see also State ex rel. Johnson v. Robinson*, 162 W. Va. 579, 582, 251 S.E.2d 505, 508 (1979) (recognizing rule of construction that "the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning"). And here the regulation goes on to define the term "release" as "any act *or omission* that results in the spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping or disposing of materials or contaminants in a manner that has caused or is reasonably likely to cause the entry of a constituent to groundwater." W. Va. C.S.R. § 47-57-2.12 (emphasis added). DEP tacitly argues that W. Va. C.S.R. § 47-57-4.1 is ambiguous in that it is at least arguable that a landowner's "omission" in failing to stop contamination from further "leaching" into groundwater may form a basis for liability under the regulations. We disagree.

Although a "release" may indeed arise from an "omission," there still remains the limitation that a landowner, in order to be deemed the owner of a "source," must be in control of a "facility" or otherwise engaged in an "activity" that causes such a release. In other words, contrary to DEP's suggestion, there is nothing in the regulations' use of the term "omission" that serves to modify or render ambiguous the requirement that a landowner must be engaged in an "activity" in order to incur a duty to remediate. Rather, employment of the word "omission" in § 47-57-2.12 merely permits DEP to order remediation where a property owner or its privy has engaged in some positive activity involving hazardous substances and, as a result of an omission or oversight, caused such materials to be released into the environment. The regulations simply could not be more clear that a "source" of groundwater pollution does not include the form of passive land ownership and unauthorized depositing of contaminants involved in this case. We therefore reject DEP's contention that the regulation is ambiguous in this respect.

In sum, we hold that W. Va. C.S.R. § 47-57-4.1 and its accompanying definitions unambiguously provide that a landowner may not be deemed the owner of a "source" of groundwater contamination—and thus subject to a remediation order issuing from DEP—where it is demonstrate that neither the landowner nor its predecessors in title were involved in originating such pollution. The evidence is undisputed that Petersburg Motor, rather than Cookman Realty, was the sole source of the contamination at issue in this case. Consequently, we find no error in the judgment of the lower court.

III.

CONCLUSION

For the reasons stated, the judgment of the Circuit Court of Grant County is affirmed.

Affirmed.