2015 IL App (3d) 130801-U

Order filed July 6, 2015

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IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

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| IRONHUSTLER EXCAVATING, INC., an Illinois corporation, and RON BRIGHT, d/b/a Quarter Construction, | ) | Petition for Review of the Order of the Illinois Pollution Control Board dated July 25, 2013 |
| Petitioners-Appellants, | ) | Appeal No. 3-13-0801 |
| v. | ) | No. PCB 12--21 |
| THE POLLUTION CONTROL BOARD, PEOPLE OF THE STATE OF ILLINOIS, and INTRA-PLANT MAINTENANCE CORPORATION, an Illinois corporation, | ) | Appeal from a Decision of the Illinois Pollution Control Board |
| Respondents-Appellees. | ) | |

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JUSTICE SCHMIDT delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

**ORDER**

¶ 1 *Held*: In granting summary judgment in favor of the State, the Board neither violated its own procedural rules, nor petitioners' right to due process.

¶ 2 The State, at the request of the Illinois Environmental Protection Agency (EPA), filed a complaint before the Illinois Pollution Control Board (the Board) alleging that petitioners, Ironhustler Excavating, Inc., and Ron Bright, had violated section 21(a) of the Environmental

Protection Act (Act) (415 ILCS 5/21(a) (West 2010)) by causing or allowing the open dumping of waste at a site that did not meet the requirements of a sanitary landfill. The Board assigned a hearing officer to the matter and petitioners filed their answer to the State's complaint.

¶ 3 On August 10, 2012, the State filed a motion for summary judgment seeking, *inter alia*, a finding that petitioners had violated sections 21(a) and 21(e) of the Act and the imposition of a $10,000 penalty against each of the four parties.

¶ 4 The hearing officer extended petitioners' deadline for filing a response to the motion for summary judgment a number of times, some by agreement, and two upon petitioners' request. Petitioners filed what amounted to their second formal motion for an extension of time on March 28, 2013. The State filed an objection to the motion that same day.

¶ 5 The hearing officer entered an order denying the motion for an extension of time and advising petitioners that they should file their response and a motion for leave to file *instanter* as soon as possible.

¶ 6 On July 25, 2013, petitioners had yet to file their responses, and the Board entered an opinion and order granting the State's motion for summary judgment. Petitioners filed a motion to reconsider, which the Board denied.

¶ 7 Petitioners appeal, arguing: (1) that the Board's initial and final orders deviate from the Board's own procedural rules and are arbitrary and capricious; and (2) that the Board's order deprived petitioners of both substantive and procedural due process of law.

¶ 8 We affirm.

¶ 9 BACKGROUND

¶ 10 On July 26, 2011, the State, at the behest of the EPA, filed a complaint against Altivity Packaging, LLC, Intra-Plant Maintenance Corporation, Ironhustler Excavating, and Ron Bright with the Board.

¶ 11 The complaint arose from the removal and disposal of materials generated during the construction of a wastewater treatment plant operated by Altivity. Altivity contracted with Intra-Plant to construct the wastewater treatment plant. Intra-Plant subcontracted with Ironhustler to remove and dispose of the relevant materials. Ironhustler transported and disposed of the materials at a sand and gravel pit operated by Bright. The complaint specifically alleged that Altivity, Intra-Plant, Ironhustler, and Bright violated sections 21(a) and 21(e) of the Act by causing or allowing the open dumping of waste and by disposing of waste at a site that did not meet the requirements of a sanitary landfill. 415 ILCS 5/21(a), 21(e) (West 2010). On August 4, 2011, the Board assigned a hearing officer to the matter, and petitioners filed their answer to the State's complaint on October 26, 2011.

¶ 12 On August 10, 2012, the State filed a motion for summary judgment seeking: (1) a finding that Altivity, Intra-Plant, Ironhustler, and Bright violated sections 21(a) and 21(e) of the Act; (2) an order directing the parties to remove the material from the disposal site operated by Bright and dispose of the material in compliance with the Act; (3) an order directing the parties to cease and desist from any further violations of the Act; and (4) the imposition of a $10,000 penalty against each of the four parties. In support of said motion, the State argued that no genuine issues of material fact existed as to whether the relevant materials were "waste," as the Testing Service Corporation had tested the material and discovered the presence of silt, sand, gravel, and fragments of cinders and brick and recommended that the material not be reused due to the presence of the miscellaneous debris. Additionally, the State pointed out that EPA

Inspector Thorp had inspected the material and found slag, brick, and concrete and asserted that Bright's admission that the material was being used to raise the ground level of the disposal site established that the material was not going to be returned to the economic mainstream. Accordingly, the State contended that summary judgment was proper where no questions of fact existed as to whether the parties caused or allowed the open dumping of waste at the disposal site operated by Bright, or whether the disposal site had ever been permitted as or met the requirements of a sanitary landfill.

¶ 13 On August 28, 2012, shortly following the filing of the State's motion, the hearing officer entered an order granting an agreed-upon stay of the deadline for the filing of a response to the motion for summary judgment. On September 24, 2012, the hearing officer entered an order relating that petitioners had requested an opportunity to take depositions before responding to the motion for summary judgment. On November 14, 2012, the hearing officer entered an order stating that petitioners had scheduled depositions for November 28 and 29, and that petitioners planned to file a response to the State's motion for summary judgment and a cross-motion for summary judgment by January 15, 2013. On January 8, 2013, the hearing officer entered an order setting the deadline for petitioners' response to the motion for summary judgment on January 31, 2013.

¶ 14 On January 29, 2013, the State agreed to extend the deadline for petitioners to file a response to the motion for summary judgment and the hearing officer entered an order to that effect. It does not appear that petitioners filed a formal motion for an extension, but that the parties agreed orally and the hearing officer memorialized the agreement in a written order the same day. The order extended the deadline to February 28, 2013.

¶ 15 On February 26, 2013, petitioners filed a motion for an extension of time in which to file a response to the State's motion for summary judgment, asserting that their attorney "has been unable to complete the drafting of Respondents' Answer and Objection to Complainant's motion for summary judgment due to the crush of professional responsibilities and court proceedings." The motion requested 30 days or until March 28, 2013, to file their response and objections. On March 7, 2013, the State filed a response indicating that while the State did not object to this extension, it would object to any further requests for extensions of time. On March 11, 2013, the hearing officer entered an order extending the deadline for petitioners' response to March 28, 2013.

¶ 16 On March 27, 2013, petitioners filed another motion for an extension of time, again requesting that the deadline for filing their response to the motion for summary judgment be extended 30 days or to April 29, 2013. Petitioners asserted that their attorney had been "unable to complete the preparation of Respondents' Answers and Objections and accompanying exhibits to Complainant's motion for summary judgment due to the press of professional responsibilities and court proceedings, as well as a recurrence of personal health issues." The State filed an objection to the motion that same day.

¶ 17 On March 28, 2013, the hearing officer entered an order denying the motion for an extension of time and advising petitioners that they should file their response and a motion for leave to file that response *instanter* as soon as possible. The order noted that the State "agreed to the first two extensions, but now object[s]." The order went on to state, "[t]o further the Board's interest in expediting the resolution of enforcement actions, this hearing officer will grant only one motion for extension of time unless the People agree to additional extensions. Therefore, the third request for extension of time is denied, and respondents should file the response, along with

a motion for leave to file *instanter*, as soon as possible. When the response is filed, the deadline for the People's reply will be reset."

¶ 18 On July 8, 2013, the hearing officer entered an order following a telephonic status conference with the parties earlier that day. That order stated, in relevant part, as follows:

> "The attorney for respondents Ironhustler Excavating, Inc. and Ron Bright reports that a relevant case was decided by the U.S. Supreme Court last month. Respondents now expect to file a response to the People's motion for summary judgment within 30 days, along with a motion for leave to file *instanter*. Due to financial considerations, respondent Intra-Plant Maintenance will let the other respondents take the lead in responding to the summary judgment motion."

¶ 19 On July 25, 2013, the Board entered an opinion and order granting the People's motion for summary judgment, finding that Intra-Plant, Ironhustler, and Bright violated sections 21(a) and 21(e) of the Act, and imposed a civil penalty of $10,000 on each party. It also directed the parties to remove the relevant material from the disposal site at which it was currently located and to cease and desist from further violations of the Act. In doing so, the Board stated that petitioners had waived any objections to the summary judgment motion by failing to file a timely response, but noted that the Board was not required to grant the motion as a result of that waiver. The Board then addressed the summary judgment motion on the merits. On the record before it, the Board found that the relevant material was "waste" because the material was determined to be unfit for reuse and there was no indication that Bright contemplated returning the material to the economic mainstream. It was undisputed that Bright had accepted the material delivered by

Ironhustler. The Board further considered the factors set forth in sections 33(c) and 42(h) of the Act (415 ILCS 5/33(c), 42(h) (West 2010)) and determined that a civil penalty of $10,000 was appropriate in this case.

¶ 20 On August 26, 2013, petitioners filed a motion to reconsider and modify the Board's order granting the State's motion for summary judgment, and also filed a motion for leave to file *instanter* their objections to the summary judgment motion and a cross-motion for summary judgment, attaching a copy of that document to the motion.

¶ 21 In the motion to reconsider, petitioners asserted that the Board should reconsider its decision to grant the State's summary judgment motion in light of their objections to the motion, which were completed "as soon as possible." The State responded, arguing that reconsideration was not warranted because petitioners had not provided the Board with any newly discovered evidence that was not available at the time the Board entered its order, no changes in the relevant law had occurred, the Board did not err in its application of relevant law when it granted the motion for summary judgment, and petitioners had been given ample opportunity to respond to the motion, but failed to do so.

¶ 22 Petitioners then filed a motion for leave to file a reply to the State's response to their motion to reconsider, asserting that the Board should reconsider its order because their attorney believed that based upon the hearing officer's July 8 order, he had until August 8, 2013, to file their objections to the motion for summary judgment.

¶ 23 On September 19, 2013, the Board entered an order granting petitioners leave to file their reply, but ultimately denied their motion to reconsider. The Board noted that petitioners did not attempt to file a response to the motion for summary judgment during the nearly one-year period that transpired between the filing of that motion and the Board's entry of summary judgment. In

addition, the Board stated that petitioners did not provide an explanation in their motion to reconsider for the delay in filing a response beyond the extended deadline of March 28, 2013, nor did the hearing officer's order from July 8 provide petitioners with a reasonable basis upon which to believe that an extension of time to file a response had been granted.

¶ 24 Ironhustler and Bright appeal.

¶ 25 ANALYSIS

¶ 26 I. Pollution Control Board Procedural Rules

¶ 27 Petitioners' contend on appeal that the Board's various orders, including those from March 28 and July 8, deviated from the Board's own procedural rules and are thus arbitrary and capricious. Specifically, petitioners argue that they were entitled to an extension of time for good cause shown, but the Board's hearing officer nevertheless concluded as a matter of policy that the request could not be granted if the State objected. According to petitioners, per this "policy," it becomes the State, not the hearing officer, who determines whether an extension is granted, thereby reducing the Board's procedural rule to a nullity.

¶ 28 The State initially argues that the petitioners cannot now challenge the hearing officer's denial of their motion for extension of time, where those decisions were interlocutory in nature. A party that wishes to challenge a hearing officer's decision may do so by taking an interlocutory appeal from the hearing officer's ruling with the board (35 Ill. Admin. Code § 101.518 (West 2012)), and a party that is dissatisfied with a final board decision may file a motion for reconsideration. 35 Ill. Admin. Code § 101.520 (2012). The State asserts that petitioners failed to move for interlocutory review following the hearing officer's denial of their motion for extension of time, and may not raise this new legal theory for the first time in their motion to reconsider. See *Gonzalez v. Pollution Control Board*, 2011 IL App (1st) 093021, ¶ 38.

However, it is well-settled that an appeal from a final judgment draws into question all previous interlocutory orders that led to a final order. *Pekin Insurance Co. v. Pulte Home Corp.*, 344 Ill. App. 3d 64, 67-68 (2003). While the hearing officer's orders on March 28 and July 8 were both nonfinal, we have jurisdiction to review those interlocutory orders as they constitute a procedural step in the progression leading to the entry of the Board's July 25, 2013, final order granting summary judgment. See *Valdovinos v. Luna-Manalac Medical Center, Ltd.*, 307 Ill. App. 3d 528, 538 (1999).

¶ 29 The Board correctly points out that although petitioners are appealing from the Board's entry of summary judgment and orders entering summary judgment are generally reviewed *de novo* (see *People ex rel. Birkett v. City of Chicago*, 202 Ill. 2d 36, 54 (2002)), petitioners are not contending that the Board erred in determining that summary judgment was warranted on the basis of the record before it. Rather, petitioners make clear that the scope of their appeal with regard to the summary judgment order is limited to procedural matters—they are challenging the Board's interpretation of its own rules and regulations. Our supreme court recently held that even where review is *de novo*, an agency's interpretation of its regulations and enabling statute are " 'entitled to substantial weight and deference,' " given that " 'agencies make informed judgments on the issues based upon their experience and expertise and serve as an informed source for ascertaining the legislature's intent.' " *Hartney Fuel Oil Co. v. Hamer*, 2013 IL 115130, ¶ 16 (quoting *Provena Covenant Medical Center v. Department of Revenue*, 236 Ill. 2d 368, 387 n. 9 (2010)).

¶ 30 With that in mind, we first turn to the section of the Administrative Code petitioners call into question. Section 101.522 provides:

> The Board or hearing officer, for good cause shown on a motion after notice to the opposite party, may extend the time for filing any document or doing any act which is required by these rules to be done within a limited period, either before or after the expiration of time. 35 Ill. Admin. Code § 101.522 (2012).

¶ 31 Section 101.522 clearly vests the hearing officer with the discretion to grant parties an extension of time for filing documents. Conversely, the hearing officer is also vested with the discretion to deny parties an extension. Contrary to petitioners' assertion, the hearing officer was not obligated to grant them what amounted to a third extension of time. In fact, the hearing officer did not have to grant petitioners any extension at all, as evidenced by the legislature's use of "may" instead of "shall." While the use of the word "shall" states the imposition of a mandatory obligation (*Schultz v. Performance Lighting, Inc.*, 2013 IL 115738, ¶ 16), the use of the word "may" indicates that the relevant act is discretionary. *Krautsack v. Anderson*, 223 Ill. 2d 541, 554 (2006). Thus the State's objection to petitioners' motion for an extension of time had no bearing on the hearing officer's determination on whether or not an extension was warranted under the circumstances of the case. Furthermore, we cannot agree with petitioners' contention that they clearly demonstrated "good cause" for an extension. We will address this issue in more detail *infra*, but suffice it to say that even if petitioners had demonstrated "good cause" for an extension, it was still within the hearing officer's discretion to deny the motion. The hearing officer's actions in this instance did not contravene the established rule, and were neither arbitrary nor capricious.

¶ 32 Petitioners also maintain that the hearing officer's orders on March 28 and July 8, 2013, extended the deadline to file a response and that petitioners' counsel was completely taken aback

by the Board's July 25 order granting summary judgment in favor of the State. These arguments are similarly without merit.

¶ 33 The record reflects that petitioners had ample opportunity to file a response of some kind to the State's motion for summary judgment—almost one year—but failed to do so. We acknowledge that petitioners' counsel was dealing with some personal health issues. However, both this court and the Board are left in the dark as to the nature and urgency of those issues. From where we sit, it appears that petitioners took advantage of the time extensions given, particularly when counsel pointed to "the crush of professional responsibilities" and "the press of professional responsibilities and court proceedings in other matters" as reasons for not yet having a response prepared. Indeed, petitioners' counsel did not mention health issues in his first formal motion for an extension of time.

¶ 34 Petitioners specifically take issue with the wording and subsequent effect of the March 28 order, wherein the hearing officer stated that "the third request for extension of time is denied, and respondents should file the response, along with a motion for leave to file *instanter*, as soon as possible." According to petitioners, the hearing officer was clearly acting to protect their rights by allowing petitioners some leeway in which to file their response. We decline to speculate as to the hearing officer's intent. What is apparent is that the hearing officer unequivocally denied petitioners' request for yet another extension. Thus the deadline for filing a response to the motion for summary judgment expired on March 28, 2013—more than seven months after the motion for summary judgment had been filed and after the hearing officer had extended the deadline for petitioners twice.

¶ 35 We acknowledge that the hearing officer's order sent some mixed messages, particularly when she denied the extension, but in the next breath indicated that petitioners should file their

response "as soon as possible." However, fatal to the petitioners' claim is the fact that they still failed to file any kind of response prior to the July 8 telephonic status conference. That is, 103 days passed between the March 28 order and the July 8 status conference. Even giving petitioners the benefit of the doubt based on the somewhat unorthodox wording of the March 28 order, petitioners had requested a 30-day extension, or until April 28, 2013, to file a response. We simply cannot imagine how counsel could have reasonably believed that the "as soon as possible" language granted him over 100 days to file the same.

¶ 36 As for the July 8 order, petitioners' counsel asserted in their motion to reconsider that based on the July 8 order, he believed he had until August 8, 2013, to file a response. While the July 8 order (included verbatim in the facts, *supra*) is inartfully worded, we find that petitioners' reliance on it as an additional extension of time to file a response is unreasonable under the circumstances. Had the hearing officer granted a 30-day extension on July 8, there would be no need to file a motion for leave to file *instanter* along with petitioners' response to the summary judgment motion.

¶ 37 The hearing officer definitively denied the motion for an extension of time on March 28, 2013. We note that generally speaking, the Administrative Code requires that any response to a motion for summary judgment must be filed within 14 days after service of that motion. 35 Ill. Admin Code § 101.516(a) (2012). Assuming that following the denial, the petitioners still had 14 days in which to file a response, as of the July 8 telephonic conference they were well outside that timeframe. Petitioners were also well outside their own requested 30-day extension of April 28, as noted above. And finally, petitioners were outside the 14-day timeline to file a response after the July 8 order, where the Board ultimately ruled on the motion for summary judgment 17 days later on July 25, 2013. Perhaps most compelling, however, is that while counsel argues he

was "in the process of completing the complex task of preparing objections" to the State's motion for summary judgment and believed he had until August 8 to file the same, petitioners did not file any kind of response until August 26, 2013. That is 18 days past the time counsel believed he needed to file a response, and more than a month after the Board granted summary judgment in the State's favor.

¶ 38 Finally, petitioners assert that in denying their motion to reconsider, the Board demonstrably misread its own procedural rule. Section 101.902 provides that in ruling upon such a motion, the Board will consider factors including new evidence, or a change in the law, to conclude that the Board's decision was in error. 35 Ill. Admin. Code § 101.902 (2012). Petitioners argue that the Board ignored any discussion of what had actually transpired between counsel and the hearing officer, and relied exclusively upon the "new evidence, or change in the law" language in denying their motion. This, too, is without merit.

¶ 39 As the State points out, petitioners do not contest the Board's finding that they did not identify any newly discovered evidence or changes in the law in their motion to reconsider. There was none. Our review of the record reveals that, in addition to no newly discovered evidence or changes in the law, the Board also found it was entitled to enter its July 25 order because the deadline for filing a response had expired nearly four months earlier, the hearing officer had not since extended that deadline, and petitioners had not provided any explanation for the reason they had not filed a response during the nearly four-month period which followed. Such a finding by the Board clearly falls within the scope of section 101.902, and is neither arbitrary nor capricious.

¶ 40 At some point, the Board had to make a determination on the State's pending motion. It did so almost a full year after the State initially filed its motion for summary judgment, and after

petitioners were given multiple opportunities to file a response. Petitioners' failure to do so cannot be translated into the Board running roughshod over its own procedural rules. We accordingly find that the Board did not violate its own procedural rules or abuse its discretion in denying petitioners' motion for an extension of time to file a response to the State's motion for summary judgment. Nor did the Board err in denying petitioners' motion to reconsider when it was based on the same set of alleged procedural deficiencies petitioners argued constituted a deviation from the Board's established rules and procedures.

¶ 41 II. Procedural and Substantive Due Process

¶ 42 Finally, petitioners make a sweeping allegation that the Board violated their procedural and substantive due process rights. This argument is a reiteration of the grievances they aired in the previous paragraphs, *i.e.*, that the hearing officer and the Board failed to follow their own procedural rules in denying petitioners' motion for extension of time. The State contends that the petitioners have forfeited any claims alleging that the Board violated their due process rights when it granted summary judgment by having failed to raise a due process claim in their motion to reconsider. We agree.

¶ 43 It is established that if an argument, issue, or defense is not presented in an administrative hearing, it is procedurally defaulted and may not be raised for the first time before the circuit court on administrative review. *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 212 (2008) (citing *Leffler v. Browning*, 14 Ill. 2d 225, 227-29 (1958)); see also *Smith v. Department of Professional Regulation*, 202 Ill. App. 3d 279, 287 (1990) (observing that the rule of procedural default in administrative review "applies equally to issues involving constitutional due process rights").

¶ 44 Here, a review of petitioners' motion demonstrates that it is completely devoid of any reference to specific due process violations, focusing only on the Board's alleged deviation from certain procedural rules in denying the motion for extension and counsel's surprise at the issue of the July 25 order. Even assuming, *arguendo*, that petitioners had properly raised a due process issue on appeal, we find no such violation. As we stated in the outset of our analysis, section 101.522 gives the hearing officer discretion in determining whether to grant a party an extension of time for good cause shown, thus she did not adopt a new rule or promulgate a new "policy". Petitioners cite to *Sleeth v. Department of Public Aid*, 125 Ill. App. 3d 847 (1984), in support of the proposition that it is a denial of due process for an agency to enforce rules or policies, which have not been properly promulgated. *Sleeth*, where the court found that the Department of Public Aid adopted a time limitation for submission of proof of disability without first promulgating the rule, is inapposite. This is simply not the situation confronting us here. Section 101.522 is a procedural rule that was already in place at the time of the hearing, conferred discretion upon the hearing officer, and did not substantively affect the rights of the parties. *Id*. at 853.

¶ 45 Accordingly, we find the Board did not violate petitioners' due process rights when it granted summary judgment in favor of the State and denied petitioners' motion to reconsider.

¶ 46 CONCLUSION

¶ 47 For the foregoing reasons, the judgment of the Illinois Pollution Control Board is confirmed.

¶ 48 Confirmed.