2018 IL App (4th) 170243-U

NO. 4-17-0243

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
September 17, 2018
Carla Bender
4th District Appellate
Court, IL

PETCO PETROLEUM CORPORATION, an Indiana Corporation, Plaintiff-Appellee, v. THE DEPARTMENT OF NATURAL RESOURCES; MARC MILLER, in His Official Capacity as Director of The Department of Natural Resources; and ROBERT L. WELCH, in His Official Capacity as Hearing Officer for The Department of Natural Resources. Defendants-Appellants.	)	Appeal from the Circuit Court of Sangamon County No. 14MR1407 Honorable John M. Madonia, Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Steigmann and DeArmond concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court erred in finding section 240.160 of Title 62 of the Illinois Administrative Code (62 Ill. Adm. Code 240.160, amended at 35 Ill. Reg. 13281 (eff. July 26, 2011)) was invalid, vacating the Department of Natural Resources' final administrative orders, and awarding Petco its attorney fees.

¶ 2 On February 11, 2016, in ruling on Petco Petroleum Corporation's (Petco's) complaint for administrative review of the Department of Natural Resources' (Department's) final administrative orders in case Nos. 46523 and 46722, the circuit court held section 240.160 of Title 62 of the Illinois Administrative Code (62 Ill. Adm. Code 240.160, amended at 35 Ill. Reg. 13281 (eff. July 26, 2011)) was invalid and void *ab initio* and declared the final administrative orders in both cases void and ordered them vacated. On January 27, 2017, the Department filed a new final administrative order on remand pursuant to the trial court's

direction, ordering Petco to pay a civil penalty of $1000 in both case No. 46523 and case No. 46722. On February 24, 2017, the circuit court entered an agreed order and final judgment after remand. The Department, its director, and its hearing officer, who we will refer to as the Department unless more specificity is needed, filed this appeal. According to the Department's brief to this court, Petco forfeited its challenge to the regulation and the penalties imposed by the Department because Petco did not raise this issue during the administrative proceedings. Regardless of forfeiture, the Department argued section 240.160 is consistent with the Illinois Oil and Gas Act (Act) (225 ILCS 725/1 to 28.1 (West 2012)) and it did not err in assessing the $3500 penalties against Petco in each administrative case. The Department also argued Petco is not entitled to its attorney fees in this case. We reverse the circuit court rulings (1) section 240.160 was void *ab initio,* (2) the final administrative orders in case Nos. 46722 and 46523 were void, and (3) Petco was entitled to its attorney fees and costs. We remand this matter to the Department for it to reinstate its original final administrative orders in the two administrative cases at issue in this appeal.

¶ 3 I. BACKGROUND

¶ 4 A. Case No. 46722

¶ 5 On February 4, 2013, Petco informed the Department of an oil and salt-water leak from a hopper header in Fayette County consisting of approximately 30 barrels of salt water and 5 barrels of oil. Representatives of the Department and Petco believed the oil and salt water leaked from a hole in the bottom of the header. The Department issued a notice of violation to Petco for failing to maintain its equipment in a leak-free condition. Petco completed its remedial action with regard to the spill prior to June 25, 2013. On July 2, 2013, the Department's enforcement unit completed a civil penalty assessment worksheet with regard to the leak.

According to the worksheet, Petco could be fined $250 for its failure to exercise reasonable care, $1000 for environmental damage, and $2500 because of Petco's history of violating the same rule (five or more prior violations of the same rule). That same day, the director issued his decision, assessing a civil penalty of $3750 against Petco. Petco requested an administrative hearing.

¶ 6 B. Case No. 46523

¶ 7 This case also involved Petco's alleged failure to maintain its equipment in leak-free condition. On October 22, 2012, Petco reported to the Department one of its riser pipes in Fayette County was leaking. The Department issued an inspector's spill report, indicating one barrel of oil and six barrels of salt water had leaked from the pipe. The Department issued a notice of violation to Petco for failing to keep its equipment in leak-free condition. On June 20, 2013, the Department completed a civil penalties assessment worksheet, showing possible penalties of $250 for Petco's lack of reasonable care, $1000 for environmental damage, and $2500 based on Petco's history of violating the same rule (five or more prior violations of the same rule). The same day, the director issued his decision assessing a civil penalty of $3750 against Petco. Petco filed a request for an administrative hearing.

¶ 8 C. Administrative Hearings

¶ 9 On September 17, 2014, the administrative hearing in each case was held before Hearing Officer Welch. Petco was represented by the same attorneys in both hearings. At the beginning of the hearing in case No. 46722, one of Petco's attorneys stated during his opening statement:

> "I would only say that we're not here to dispute the violations. We are here seeking reduction of the civil penalties as assessed under the elements of lack

> of reasonable care and seriousness. We believe that after the evidence is out that those assessments should be reduced."

The hearing officer then asked Petco's counsel, "What about the issue of I think five or more violations?" Petco's counsel responded, "I don't believe we can dispute that, Judge."

¶ 10 Petco's counsel did not make the same statement during the hearing on case No. 46523. However, this hearing was held on the same day before the same hearing officer after the hearing in case No. 46722. Based on Petco's opening statement, it treated this case the same as case No. 46722. Counsel stated:

> "Your Honor, I think we'll be brief and just say as we did in the previous proceeding that we believe the evidence and testimony that we will elicit today will show that Petco acted as any other reasonably prudent operator would with respect to the maintenance and repair of its wells and well equipment, and that accordingly its actions were not unreasonable and should not be subject to a penalty for such from the Department and that the seriousness of the spill is not consistent with the civil penalty levy by the Department."

¶ 11 In case No. 46722, the hearing officer found Petco failed to maintain its equipment in leak-free condition. However, the hearing officer concluded the State failed to establish by a preponderance of the evidence the leak resulted from a lack of reasonable care by Petco. As a result, the hearing officer recommended the civil penalty against Petco be reduced from $3750 to $3500. In case No. 46523, the hearing officer also found Petco failed to maintain its equipment in leak-free condition but again found the State failed to prove Petco did not exercise reasonable care. Again, the hearing officer recommended the civil penalties assessed against Petco be reduced from $3750 to $3500.

¶ 12 D. Administrative Review

¶ 13 On December 15, 2014, Petco filed a complaint for administrative review regarding both administrative cases in the circuit court. Petco alleged, in pertinent part, the final administrative orders were based on a Department regulation which is inconsistent with the Act and exceeds the Department's authority under the Act. In its brief on administrative review, Petco argued the violations in each case lasted only one day. As a result, any penalty over $1000 in either case constitutes an *ultra vires* act by the Department. Petco also argued the Department's regulatory penalty structure set forth in section 240.160 constitutes an *ultra vires* act and should be found invalid as it is outside the scope of the Department's authority as provided by the Act.

¶ 14 On June 17, 2015, the Department filed its memorandum of law in support of its final administrative decisions. The Department argued Petco forfeited its argument section 240.160 was invalid by not raising it during the administrative proceedings. Assuming the circuit court did not find Petco forfeited the issue, the Department argued the penalties imposed did not violate the Act.

¶ 15 On August 6, 2015, Petco filed its reply brief on administrative review. Petco argued Illinois law is clear—regulations which exceed statutory bounds are invalid. As a result, Petco stated section 240.160 is invalid.

¶ 16 Petco acknowledged the Department had discretion to assess penalties, but its discretion was limited to $1000 per day, per violation. According to Petco, section 240.160 exceeded the Department's authority because it provided for penalties in excess of the $1000 per day, per violation limit.

¶ 17 On February 11, 2016, the circuit court issued its memorandum of opinion.

Although Petco did not challenge the validity of section 240.160 during the administrative proceedings, the court found the argument was not forfeited. The court ruled the administrative orders entered in case Nos. 46722 and 46523 were void "as the rulings contained in the Orders, and the penalties correspondingly assessed, are based upon provisions of administrative regulations that, as enacted, exceed the scope of the authority granted to the agency by the [Act], 225 ILCS 725/8a and 225 ILCS 725/26 [(2012)]***." The court found the Act expressly and unconditionally limited the Department's power to impose civil penalties to $1000 per day, per violation. However, the court interpreted section 240.160 as giving the Department the power to assess penalties in excess of this limit.

¶ 18 The circuit court also rejected the Department's argument the penalties in this case were not excessive because the violations in both administrative cases lasted for multiple days. The court vacated the final administrative orders and remanded both cases for the civil penalties to be redetermined based on the authority granted to the Department by the Act. The court reserved the issue of attorney fees pending further argument by counsel.

¶ 19 On January 21, 2017, the Department issued a final administrative order on remand covering case Nos. 46523 and 46722. The Department noted:

> "The Department respectfully disagrees with, and intends to appeal from, certain aspects of the February 11, 2016, Memorandum Opinion and Remand Order, including the Court's ruling that the regulation at 62 Ill. Adm. Code 240.160 exceeded statutory authority and the Court's finding that the duration of Petco's violations in each case under review lasted for no longer than one day."

Subject to those qualifications, the Department modified its earlier decisions to comply with the circuit court's order and assessed a civil penalty of $1000 against Petco in both administrative

cases.

¶ 20 On February 24, 2017, the circuit court entered an agreed order and final judgment after remand. The court noted the Department had retained the $7000 paid by Petco for the civil penalties originally assessed. Petco agreed to allow the Department to retain this money pending the outcome of the appeal. The Department agreed Petco had incurred reasonable attorney fees and litigation expenses in the amount of $26,700 in connection with the pending litigation. The Department reserved all rights to appeal the circuit court's ruling, which provided the basis for the plaintiff's claim for fees and expenses under 5 ILCS 100/10-55(c) (2016). The court awarded Petco $26,700 for its attorney fees and litigation expenses.

¶ 21 This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 On appeal to this court, the Department argues the circuit court erred (1) by declaring section 240.160 of Title 62 of the Illinois Administrative Code (62 Ill. Adm. Code 240.160, amended at 35 Ill. Reg. 13281 (eff. July 26, 2011)) void and (2) by ordering the Department to pay Petco's attorney fees and costs. According to the Department, Petco forfeited its arguments regarding the validity of section 240.160 and the Department's authority to impose a $3500 civil penalty against Petco in the administrative cases at issue. On the merits, the Department argued section 240.160 is facially valid.

¶ 24 We note the civil penalty the Department deemed appropriate in both administrative cases was not a surprise to Petco at the administrative hearing in either case. In case No. 46722, the director's decision was issued on July 2, 2013, assessing a civil penalty of $3750. In case No. 46523, the director's decision was issued on June 20, 2013, assessing a civil penalty of $3750. On July 22, 2013, Petco filed a request for a hearing in both cases. The

hearings were held on September 17, 2014. Petco had over a year to question whether the penalties imposed in the director's decisions violated the penalty limitations found in the Act. However, Petco neither challenged the Department's ability to impose a penalty of more than $1000 in either case nor the Department's process in determining the amount of the civil penalty.

¶ 25 Our supreme court has stated, "[i]t is quite 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, 886 N.E.2d 1011, 1019 (2008). A party's right to challenge the validity of a statute also falls under the procedural default rule even if the administrative body lacks the power to declare a statute unconstitutional or challenge the statute's validity. *Cinkus*, 228 Ill. 2d at 214, 886 N.E.2d at 1020. The purpose behind the practice of requiring these challenges to be raised during the administrative hearing is to avoid "piecemeal litigation and, more importantly, allow[] opposing parties a full opportunity to refute" the arguments made. *Cinkus*, 228 Ill. 2d at 214, 886 N.E.2d at 1020.

¶ 26 Petco argues *Cinkus* is not applicable here because its challenge goes to the heart of the Department's authority and its jurisdiction. However, we note Petco is not challenging the Department's authority to make regulations regarding the enforcement of the Act. Petco is also not arguing the Department lacks authority to impose penalties on individuals who violate the Act. Instead, Petco is challenging whether section 240.160 exceeds the Department's authority under the Act to impose fines above a certain amount. As a result, we do not agree with Petco's characterization with regard to the Department's jurisdiction.

¶ 27 That being said, exceptions to the administrative forfeiture rule do exist. This court has stated:

> "Courts have made an exception to the general procedural-default rule for challenges to the facial validity of a statute. [Citation.] Such a case 'presents an entirely legal question that does not require fact-finding by the agency or application of the agency's particular expertise.' [Citation.] In contrast, a challenge to a statute as applied to a litigant relies upon certain factual bases. Thus, when a litigant presents an as-applied challenge, 'an evidentiary record is indispensable because administrative review is confined to the record created before the agency.' [Citation.] In such a case, the rule of procedural default 'allows opposing parties a full opportunity to present evidence to refute the constitutional challenge.' [Citation.]" *Gruwell v. Department of Financial and Professional Regulation*, 406 Ill. App. 3d 283, 297–98, 943 N.E.2d 658, 671–72 (2010), quoting *Arvia v. Madigan*, 209 Ill.2d 520, 527–28, 809 N.E.2d 88, 94 (2004).

Based on our decision in *Gruwell*, we will excuse Petco's forfeiture with regard to its argument section 240.160 is facially invalid. However, we will not excuse Petco's forfeiture with regard to how the Department or hearing officer applied the administrative regulation to Petco in either of these two cases. As we noted in *Gruwell*, an evidentiary record is indispensable when reviewing a challenge to the way a regulation is applied to a certain individual. Because Petco did not argue the Department's application of section 240.160 to assess a penalty over $1000 in either case was not allowed under the Act, the Department had no reason to offer evidence explaining why the penalty over $1000 in each case was justified and did not violate the Act's limitation on civil penalties.

¶ 28 Turning to Petco's facial challenge to the validity of section 240.160, Petco

argues the regulation permits the Department to impose fines in excess of $1000 per day, per violation. An administrative rule which conflicts with the statute under which it was adopted is invalid. *Estate of Slightom v. Pollution Control Board*, 2015 IL App (4th) 140593, ¶ 25, 44 N.E.3d 1096, 1102. Sections 8a and 26(a) of the Act (225 ILCS 725/8a, 26(a) (West 2012)) specifically restricts the Department's authority to impose a civil penalty greater than $1000 per day, per violation. Petco argues section 240.160 is facially invalid because provisions within subsection (c) call for penalties in excess of $1000 even if the violation lasted only one day. This is not correct. The provisions Petco points to within subsection (c) are subordinate to the following language found at the beginning of the subsection:

> "The Director shall determine whether or not to assess civil penalties based on the factors set forth in subsection (a). *If a penalty is assessed by the Department, the penalty shall be computed as follows, but shall not exceed $1,000 per day for each and every act of violation*[.]" (Emphasis added.) 62 Ill. Adm. Code 240.160(c), amended at 35 Ill. Reg. 13281 (eff. July 26, 2011).

Regulations must be read as a whole and not in a manner that renders included language meaningless or superfluous. *Perez v. Department of Children and Family Services*, 384 Ill. App. 3d 770, 774-75, 894 N.E.2d 447, 451 (2008). On its face, this regulation clearly does not allow for penalties in excess of $1000 per day, per violation to be assessed. The trial court erred in finding section 240.160 to be invalid on its face.

¶ 29 As noted earlier, we will not excuse Petco's forfeiture with regard to how the Department applied section 240.160. If, in fact, the violation in each case lasted only one day, the Department would have erred in imposing a civil penalty greater than $1000 in each case. However, had Petco challenged the propriety of the civil penalties imposed in the director's

decision at the administrative hearing, the Department may have introduced evidence the violations lasted more than one day, the Department may have realized it was attempting to impose civil penalties beyond the scope of its authority under the Act and reduced the civil penalty, or the hearing officer may have found the Department's penalty exceed the Act's limitations. However, because Petco did not raise this issue during the administrative proceedings, we are left to speculate whether (1) the Department had any evidence these violations may have lasted more than one day as Petco argues, (2) the Department and the hearing officer simply misapplied the administrative regulation, or (3) the Department had a policy or procedure in place to ignore the $1000 per day, per violation limit on civil penalties. We are not going to speculate on the Department's decision to impose a civil penalty over $1000.

¶ 30 Before moving on, we note Petco's reliance on *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 901 N.E.2d 373 (2008), *Miller v. Illinois Department of Public Aid*, 69 Ill. App. 3d 477, 387 N.E.2d 810 (1979), and *Bio-Medical Laboratories, Inc. v. Trainor*, 68 Ill. 2d 540, 370 N.E.2d 223 (1977), to excuse its forfeiture is misplaced. These cases dealt with situations where parties were not required to exhaust the administrative process before bringing a claim in the circuit court. The situation here is easily distinguishable. Petco went through the administrative process and failed to raise the issues it raised for the first time in the circuit court.

¶ 31 We next turn to the circuit court's decision requiring the Department to pay Petco's reasonable attorney fees. The court awarded Petco its attorney fees pursuant to section 10-55 of the Illinois Administrative Procedure Act (5 ILCS 100/10-55(c) (West 2016)) because Petco successfully invalidated an administrative rule. We reverse the attorney fee award because the court erred in ruling section 240.160 was invalid.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated above, we find the circuit court erred in determining (1) section 240.160 of Title 62 of the Illinois Administrative Code (62 Ill. Adm. Code 240.160, amended at 35 Ill. Reg. 13281 (eff. July 26, 2011)) was void *ab initio,* (2) the final administrative orders in case Nos. 46722 and 46523 were void, and (3) Petco was entitled to its attorney fees. We reverse the trial court's orders issued on February 11, 2016, August 26, 2016, and February 24, 2017. We remand this case to the Department for it to vacate its January 21, 2017, final administrative orders issued pursuant to the circuit court's remand order and reinstate its original final administrative orders in case Nos. 46722 and 46523.

¶ 34 Reversed and remanded with directions.