

Circuit Court Reverses MDEQ In Wetlands Contested Case

In an August 23, 2002 opinion, the Circuit Court for the County of Macomb held that the Office of Administrative Hearings (OAH) of the Michigan Department of Environmental Quality (MDEQ) improperly dismissed a petition for a contested case hearing challenging a wetlands determination by MDEQ in a Wetland Assessment Report (WAR) because the petition was not filed within the sixty days after MDEQ issued the WAR. *Jeffrey A. King and Marrocco Enterprises, Inc. v. Michigan Department of Environmental Quality*, No. 2002-1025 (Macomb County Cir. Ct., August 23, 2002).

Background

MDEQ's Land and Water Management Division (LWMD) conducted a "Level 3" Wetland Assessment of property owned by Marrocco Enterprises, Inc. (Marrocco) and issued a WAR identifying the presence of wetlands on the property on October 16, 2001. The WAR indicated that MDEQ would conduct a reassessment if requested to do so within thirty days, provided that the request was "accompanied by evidence supporting different or supplemental findings in relation to vegetation, soil, or hydrology." On December 3, 2001, 48 days later, acting on behalf of Marrocco, Jeffrey King sent a letter to MDEQ requesting an extension of time within which to file the request for a reassessment. King's letter also asked that MDEQ provide its response before December 15, 2001, on the belief that a contested case hearing before the OAH had to be requested within sixty days after issuance of the WAR.

On December 19, 2001, after expiration of the sixty-day period, MDEQ orally notified King and Marrocco that a reassessment would not be conducted and King and Marrocco that day filed by facsimile a petition formally requesting a contested case hearing. MDEQ followed up the oral response with a confirmatory letter on December 21, 2001.

The Administrative Law Judge's Decision

The Administrative Law Judge (ALJ) subsequently issued an opinion and order that denied King and Marrocco's request for a wetlands reassessment and a contested case hearing. In reaching this conclusion, the ALJ relied on Section 104 of the Michigan Administrative Procedures Act (APA), Mich. Comp. Laws § 24.201 *et seq.*, which sets a sixty-day deadline for a party to seek **judicial** review of a "final" decision issued by an administrative agency. The ALJ reasoned that the WAR was a final agency decision and ruled that King and Marrocco were likewise subject to a sixty-day deadline for seeking a contested case hearing, which is an administrative proceeding. Therefore, the ALJ held that, after the sixty-day period expired, the OAH had no jurisdiction to hear the contested case requested by King and Marrocco. The ALJ further ruled that, even if the OAH had jurisdiction to hear the contested case, King and Marrocco still would not prevail because: (i) they addressed their petition for a contested case to the LWMD, not the OAH; (ii) they requested the wetlands reassessment after the thirty-day deadline set in the WAR; and (iii) their December 3, 2001 letter by its own terms was not a request for a contested case hearing.

King and Marrocco petitioned the Circuit Court for judicial review of the ALJ's decision pursuant to the APA and the Michigan Court Rules (MCR).

Request For a Court Declaration

The court first considered King and Marrocco's request for a court declaration under the MCR. MDEQ argued that the court lacked jurisdiction because an adequate means of judicial review was provided under the APA. MDEQ further argued that, even if the court had jurisdiction to issue the requested declaration, King and Marrocco's request for a wetlands reassessment should be denied because MDEQ had the authority to enforce the thirty-day

deadline and King and Marrocco had failed to provide the additional information required by statute. King and Marrocco conversely argued that MCR 2.605(A) conferred jurisdiction on the court and that the thirty-day deadline was not established in accordance with statutory requirements.

The court concluded that the request for a declaration should be denied because an adequate avenue for appellate review was available to King and Marrocco under the APA, which specifically vests the court with jurisdiction over an administrative tribunal's final decision in a contested case. The court concluded that the request for a declaration constituted "an improper attempt to circumvent the appellate procedure set forth under the APA." Therefore, the court did not address the validity of the thirty-day deadline set in the WAR for requesting a wetlands reassessment.

OAH's Jurisdiction To Conduct Contested Case Hearing

The court next considered whether the ALJ properly ruled that the OAH had no jurisdiction to conduct a contested case hearing because King and Marrocco petitioned for a contested case after sixty days. MDEQ argued that the sixty-day deadline for seeking judicial review of a final agency decision applied to the WAR, arguing that the WAR was a final agency decision. MDEQ argued that "[i]nasmuch as a court would lose appellate jurisdiction after the expiration of sixty days, so, too, was the ALJ divested of jurisdiction to entertain a contested case after the passage of the same time."

King and Marrocco "argue[d] that the WAR did not trigger the sixty-day deadline under any statutory provision or administrative rule" and that the ALJ improperly relied upon a provision of the APA that applied only to license applications. King and Marrocco requested

that the ALJ's decision be reversed and/or sent back to the ALJ in order to conduct a contested case hearing.

The court stated that it would apply the following the standard of review under the APA in reaching its decision:

(1) Except when a statute or the constitution provides for a different scope of review, the court shall hold unlawful and set aside a decision or order of an agency if substantial rights of the petitioner have been prejudiced because the decision or order is any of the following:

...

(c) Made upon unlawful procedure resulting in material prejudice to a party

...

(2) The court, as appropriate, may affirm, reverse or modify the decision or order or remand the case for further proceedings.

The court explained that the sole issue was whether the ALJ properly dismissed King and Marrocco's petition for a contested case hearing because they failed to comply with the sixty-day deadline. The court explained that Part 303 (Wetlands Protection) of the Natural Resources and Environmental Protection Act requires "that an agency provide, upon request, contested case hearings to persons aggrieved by the agency's action." The court further explained that Part 303, in turn, looks to the APA to govern the manner in which the agency conducts the contested case hearing and that, under the APA, a party may appeal an agency's "final order" within sixty days after the mailing of notice of the final order. The court noted that although the APA did not expressly define the term "final order," the APA contains a description of the content and format of a final decision. The court stated, for example, that a final decision must include "findings of fact and conclusions of law [that are] separated into sections captioned or entitled 'findings of fact' and 'conclusions of law.'" The court held that the WAR did not constitute "a final agency

decision since it lacked clearly delineated sections, as mandated under [the APA]” and, as an aside, questioned “whether the WAR’s drafter(s) had the authority to make legal conclusions.” The court further held that the ALJ had misplaced his reliance on a section of the APA that pertained only to license applications, which the WAR did not involve.

The court held that, therefore, “the ALJ’s decision was contrary to law because the ALJ followed an unlawful procedure resulting in material prejudice to a party” and it was appropriate to send the matter back to the OAH to conduct a contested case hearing. Therefore, the court held that King and Marrocco’s failure to petition for a contested case within sixty days was not fatal.

Request For Reversal Moot

As a final matter, the court considered and denied King and Marrocco’s request for peremptory reversal. The court explained that “[p]eremptory reversal is appropriate when there is an error ‘so manifest that an immediate reversal of the judgment or order appealed from should be granted without formal argument or submission.’” The court found the request for peremptory reversal to be moot, given that the court had already deemed it appropriate to consider the arguments in the party’s briefs.

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Brian J. Negele