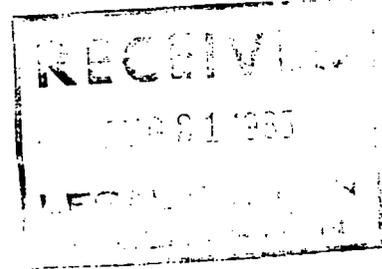


COURT OF APPEALS
VINTON COUNTY, OHIO



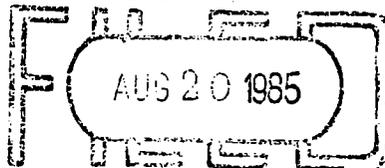
PERSONAL SERVICE INSURANCE CO. LOISENE HOY, CLERK

Plaintiff-Appellant

v.

LARRY W. MAMONE, CHIEF

Defendant-Appellee



COURT OF APPEALS
VINTON COUNTY, OHIO

CASE NO. 418

OPINION & JUDGMENT ENTRY

COUNSEL FOR APPELLANT: William C. Ailes, 100 East Gay St., Columbus, Ohio

COUNSEL FOR APPELLEE: Bryan Zima, Assistant Attorney General, Fountain Square,
Bldg. B-3, Columbus, Ohio

ABELE, J.:

This is an appeal from a Reclamation Board of Review order directly to our court pursuant to R.C. 1513.14. The board's order adopted a hearing officer's report which disapproved appellant's request for approval of its reclamation efforts on a 51.3 acre tract of land. Appellant did not mine the land but served as a surety to secure the miner's R.C. Chapter 1513 obligation to reclaim the land. When the miner failed to reclaim the land, appellant chose its option under former R.C. 1513.16 (F) (now R.C. 1513.16 (H)(4) to reclaim the land rather than forfeit the surety bond.

On June 17, 1983, appellant filed a request for approval of the reclamation. R.C. 1513.16 (H)(3) provides that after such request the chief of the division of reclamation shall make an inspection and evaluation of the land to determine whether the reclamation meets the requirements of R.C. Chapter 1513 and rules adopted pursuant to the chapter.

R.C. 1513.16 (H)(3) provides in pertinent part:

"If the chief does not approve the reclamation performed by the operator, he shall notify the operator by certified mail within the prescribed period after the request for inspection is filed or after he learns of the default. The notice shall be an order stating the reasons for unacceptability, ordering further actions to be taken, and setting a time limit for compliance."

The chief inspected the land in the case at bar and found the reclamation violated Ohio Adm. Code 1501:13-2-15 (F)(1) because more than one percent of the land was barren and the reclamation violated Ohio Adm. Code 1501:13-2-14 because erosion existed on the land. The chief promptly notified appellant he disapproved the reclamation. The notice, however, failed to specifically order appellant to take further actions and failed to set a time limit for compliance.

The hearing officer agreed with the chief's decision to disapprove the reclamation. The hearing officer's report, however, did not discuss the fact the chief's notice failed to specifically order appellant to take further action and failed to set a time limit for compliance.

On appeal to our court appellant assigns no error concerning the chief's notice and makes no request that the chief make a specific order or set a time limit. Appellant instead wishes us to assume the chief's order was a "termination of rights to reclaim" order rather than a "disapproval of reclamation" order. An understanding of the two types of orders is critical to an understanding of this case.

R.C. 1513.16 (H)(3) provides for both types of orders. After a miner (or surety) files a request for approval of reclamation, the chief can make an order either approving or disapproving the request. As discussed above, the chief made an order disapproving the request in this case.

If after a disapproval order the miner (or surety) still fails to reclaim the land, the chief can make another order. R.C. 1513.16 (H)(3) provides in pertinent part:

"If the operator does not comply within the time limit and the chief does not order an extension, or if the chief orders an extension of time and the operator does not comply within the extension of time granted for compliance, the chief shall make another order declaring that the operator has failed to reclaim and, if the operator's permit has not already expired or been revoked, revoking the operator's permit. The chief shall then proceed under division (H)(4) of this section."

* * *

This second order terminates the miner's (or surety's) right to reclaim the land and triggers R.C. 1513.16 (H)(4) which provides in pertinent part:

"(4) Upon issuing an order under division (H)(2) or (3) of this section declaring that the operator has failed to reclaim, the chief shall make a finding as to the number and location of the acres of land which such operator has failed to reclaim in the manner required by Chapter 1513. of the Revised Code, and the amount of the estimated cost to the state to perform reclamation on such acres as determined by the chief at the time of application. The chief shall order the release of that proportion of the bond, cash, or certificates of deposit which are on deposit to assure reclamation of those acres which he finds to have been reclaimed in the manner required by Chapter 1513. of the Revised Code, provided, that all the land contained within a yearly segment as shown in the annual or final map has been so reclaimed."

Under R.C. 1513.16 (H)(4) the chief must make another inspection, this time to determine not whether the miner (or surety) has complied with the reclamation laws, but to determine the exact extent of the miner's (or surety's) lack of compliance. The chief must then release a proportion of the bond, which proportion represents the proportion of acreage correctly reclaimed. The remainder of the bond is forfeited to the state for use by the chief in performing reclamation of the land.

In the case at bar the chief did not make an order terminating appellant's right to reclaim, but merely made an order disapproving appellant's request for approval of the reclamation. Appellant, however, argues the fact the chief's

notice failed to specifically order appellant to take further action and failed to set a time limit for compliance turns the chief's disapproval order into a termination order. We disagree. The order below was clearly a disapproval order. The statute makes no provision for disapproval orders to miraculously turn into termination orders.

Appellant also argues the chief's disapproval order should be considered a termination order because the chief cited R.C. 1513.16 (H)(4), the statute which discusses the procedures to be followed after termination orders. We find no merit to appellant's argument. The statute not only discusses procedures to be followed after termination orders, but also gives sureties the right to perform reclamation after a miner's right to perform reclamation has been terminated by a previous R.C. 1513.16 (H)(3) termination order. The chief most likely cited R.C. 1513.16 (H)(4) in an effort to explain why appellant, a surety, is performing reclamation on the land.

Appellant's three assignments of error all rest on the erroneous assumption the disapproval order should be considered to be a termination order:

ASSIGNMENT OF ERROR I

"THE RECLAMATION BOARD OF REVIEW, DEPARTMENT OF NATURAL RESOURCES, STATE OF OHIO WAS IN ERROR IN RULING THAT THE APPELLANT WAS NOT ENTITLED TO A RELEASE OF THAT PORTION OF THE AREA FULLY RECLAIMED WITHIN PERMIT C-904 WHICH IT HAD RECLAIMED ON BEHALF OF THE PERMIT HOLDER, LYDIA COAL CO., THAT HAD DEFAULTED ON ITS OBLIGATION TO RECLAIM SAID PERMIT AREA."

ASSIGNMENT OF ERROR II

"THE RECLAMATION BOARD OF REVIEW, DEPARTMENT OF NATURAL RESOURCES, STATE OF OHIO WAS IN ERROR IN REFUSING TO ALLOW THE APPELLANT A RELEASE OF THAT PORTION OF THE SURETY BOND ISSUED ON BEHALF OF THE DEFAULTING PERMIT HOLDER, LYDIA COAL CO., EQUAL TO THAT PORTION OF THE PERMIT AREA OF PERMIT C-904 IT HAD FULLY RECLAIMED ON BEHALF OF SAID DEFAULTING PERMIT HOLDER TIMES THE COST PER ACRE TO RECLAIM AS DETERMINED BY THE CHIEF OF THE DIVISION OF RECLAMATION AT THE TIME THE PERMIT WAS ISSUED."

ASSIGNMENT OF ERROR III

"THE APPLICATION OF THE OHIO REVISED CODE 1513.16 (H)(4) TO THE SURETY, PERSONAL SERVICE INSURANCE CO., THAT HAD UNDERTAKEN RECLAMATION OF PERMIT C-904 AREA THAT HAD BEEN AFFECTED BY THE DEFAULT OF THE PERMIT HOLDER, LYDIA COAL CO., WAS UNCONSTITUTIONAL."

We find no merit to any of appellant's assignments of error. As discussed above, the chief's order was clearly a disapproval order and not a termination order. While miners and sureties have rights to a full inspection and a proportional release of the bond after termination orders, no such rights exist after disapproval orders. Appellant will have to wait until the chief makes a termination order before appellant can be partially released from the bond.

Appellant's third assignment of error concerns the portion of R.C. 1513.16 (H)(4) which discusses the procedures to be followed after a termination order. Appellant argues Ohio legislature recently moved that portion of the statute from R.C. 1513.16 (F) and into R.C. 1513.16 (H)(4) and added a proviso. Appellant contends the new proviso should not apply to this case. Again, we find the chief's order was a disapproval order and not a termination order. The portion of R.C. 1513.16 (H)(4) which disucsses procedures to be followed after termination orders does not apply to this case.

Appellant's three assignments of error are overruled.

JUDGMENT AFFIRMED.

Grey, J.: Concur with Attached Concurring Opinion
Stephenson, P.J.: Concur in Judgment & Opinion & also in Judge Grey's concurring
Opinion.

It is ordered that ~~appellant-appellee~~ ^{XXXXXX} recover of ~~(appellant-appellee)~~ ^{XXXXXX} the costs herein
taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Reclamation Board
of Review ~~Court~~ to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Pro-
cedure. Exceptions.

Earl E. Stephenson

JUDGE, COURT OF APPEALS

Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 8, this document constitutes a final judgment entry and the time period for further appeal commences
from the date of filing with the clerk.

Personal Service Insurance Co. v. Mamone, No. 418, Vinton Co.

GREY, J. CONCURRING:

I concur in the judgment and opinion, but would comment on the claim of unconstitutionality in assignment of error three.

Appellant is correct that a modification of the statutes or regulations cannot modify the obligation of a surety so as to increase his duties as surety. Personal Service's obligation was to pay a certain and definite sum of money under its bond. That obligation is fixed and may not be changed.

R.C. 1513 gives the surety the option of paying the money on the bond or doing the reclamation work according to the current standards for reclamation. Having exercised its option to reclaim, Personal Service cannot object to the current standards, because the State has not added any new conditions to the bond itself, only to the option to reclaim.

There has been no retroactive application of statutes to Personal Service's original obligation, but only a prospective application of the reclamation standards for those who voluntarily elect to undertake such work.