

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
March 8, 2007 Session

**TENNESSEE ENVIRONMENTAL COUNCIL, INC. v. WATER QUALITY
CONTROL BOARD, ET AL.**

**Appeal from the Chancery Court for Davidson County
No. 04-3245-III Ellen Hobbs Lyle, Chancellor**

No. M2005-02425-COA-R3-CV - Filed September 27, 2007

The sole issue on appeal is whether a non-attorney's attempt to participate in a contested case hearing before the Water Quality Control Board as the representative of a corporation is permitted pursuant to Tenn. Code Ann. § 4-5-305(a), which expressly provides that a corporation may participate in the hearing by a duly authorized representative, or prohibited as constituting the unauthorized practice of law. Notwithstanding the fact that the statute provides that a duly authorized representative of a corporation may "participate" as the representative of the corporation in a hearing, we have determined that a non-attorney may not participate as the representative of a corporation if doing so requires the non-attorney to exercise the professional judgment of an attorney.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, J., joined. WILLIAM B. CAIN, J., not participating.

Brian Paddock and Mary McCall Mastin, Cookeville, Tennessee, for the appellant, Tennessee Environmental Council, Inc.

Robert E. Cooper, Jr., Attorney General and Reporter; and R. Stephen Jobe, Assistant Attorney General, for the appellee, Water Quality Control Board.

John P. Williams and Thomas V. White, Nashville, Tennessee, for the Intervenor-Respondent-Appellee, Cumberland Yacht Harbor, Inc.

OPINION

On February 11, 2004, the Executive Director of the Tennessee Environmental Council, Inc., a nonprofit corporation, signed and submitted a letter on behalf of the corporation to the Water Quality Control Board ("Board") requesting a declaratory order revoking the permit issued to Cumberland Yacht Harbor, Inc. ("Cumberland") for the construction of a commercial marina with

225 public boat slips along Mill Creek, a tributary of the Cumberland River. The substantive portion of the letter reads as follows:

Dear Sirs and Madame:

The Tennessee Environmental Council submits this letter as an official complaint regarding the Sect. 410 water quality certification issues for the proposed Cumberland Yacht Harbor on Mill Creek in Davidson County, # NRS 03-023, and petitions the board for [a] declaratory order revoking the permit. TEC believes the permit allows illegal activity because the department did not correctly apply the rules of the state. TEC stipulates the following:

1. Mill Creek is a 303(d) listed stream and activity allowed in the permit would further degrade the water quality by increasing pollutants, including siltation, organic enrichment and further decreasing dissolved oxygen levels.
2. In responding to this concern, TDEC stipulated that this portion of the creek is part of the Cheatham Reservoir of the Cumberland River. In either case, existing impairment prevents proposed activities that will impact water quality during and after construction.
3. Existence of the Nashville crayfish has been documented in the area and recognized by TDEC. Providing for incidental take is not acceptable given the extremely limited population and range of this species.
4. The need for “225 public boat slips, 80 condominiums and 30,000 square feet of retail space” cannot be documented other than by anecdotal evidence. Vacancy rates for residential and commercial buildings in the area contradict this justification and the evidence of need for boat slips is a convenient argument for the developer. The only justification for this size development is profit margin.
5. Increased surface area for parking, oil and gas from boats and runoff from the development all contribute to impairment. Again, the pollutant sources listed for impairment are urban runoff and storm sewers. The development will exacerbate water quality problems, and the permit applicant has not overcome the burden of proof in this matter.

In considering this 401 certification the department took a very narrow view of bank disturbance and failed to consider the overall, long-term impacts of the project. This is a trend at Water Pollution Control that leads ultimately to notices of violation and degradation of water quality.

Streams on the 303(d) list need additional pollution controls. Once a stream has been placed on the 303(d) List, it is considered a priority for water quality improvement efforts. These efforts include traditional regulatory approaches such as permit issuance, but also include efforts to control pollution sources that have historically been exempted from regulations, such as certain agricultural and forestry activities.

If a stream is on the 303(d) List, the Division cannot allow additional loadings of the same pollutant(s). In extreme cases, it may mean that dischargers will not be allowed to expand or locate on 303(d) listed streams until the sources of pollution have been controlled. Issuance of the 401 certification for this project simply ignores the department's own guidance.

The department should not have issued this permit approval. A project of this size and impact is inappropriate for a stream the size of Mill Creek that is already impaired.

Sincerely,

/s/

Will Callaway

Executive Director

The letter was treated as a formal Petition for Declaratory Order, and a contested case hearing was scheduled.¹ After the hearing was scheduled, the Tennessee Department of Environment and Conservation ("Department") learned that Mr. Callaway, who was not a licensed attorney, intended to represent the Environmental Council and participate on its behalf at the contested case hearing. Being of the belief that Mr. Callaway's representation and intended participation would constitute the unauthorized practice of law by a non-lawyer, the Department filed a Motion to Dismiss and a Motion to Prevent the Unauthorized Practice of Law.² On August 24, 2004, the Administrative Judge issued an Order stating:

In the instant case, the filing of the Petition for Declaratory Order and representation before the Board requires the professional judgment of an attorney. Therefore, the Executive Director of the Tennessee Environmental Counsel must retain legal counsel, before the September 2004 setting of the Water Quality Control Board, to proceed with this matter.

The Administrative Judge subsequently issued a Corrected Order stating that if the Environmental Council failed to notify the State by September 13 of its intent to obtain an attorney

¹The case was first set for hearing in August but was rescheduled to September 2004.

²To protect its interests, Cumberland sought to intervene as a party in the case before the Board, and the Administrative Judge granted Cumberland's request to intervene.

before the September 2004 hearing, the State's motion would be granted, and the matter would be dismissed.³ On September 13, a licensed attorney, Mary M. Mastin, entered a Notice of Special Appearance on behalf of the Environmental Council for the limited purpose of contesting the Administrative Judge's Order. She contended the Environmental Council could participate in a contested case without the assistance of a licensed attorney. Following receipt of Ms. Mastin's letter advising that the Environmental Council intended to participate without engaging an attorney to represent it at the hearing, the Administrative Judge issued an Order dismissing the matter.

The Environmental Council appealed the dismissal by filing a Petition for Judicial Review with the Chancery Court of Davidson County. Following a hearing, the Chancellor found the Petition for Declaratory Order filed by the Environmental Council reveals numerous legal issues and mixed questions of fact and law that required "an understanding and interpretation of statutes and case law on water quality as well as the rules of evidence to obtain admission of documents and testimony on such matters." It was upon these facts that the Chancellor based her conclusion that the Environmental Council's representative would need to exercise the professional judgment of a lawyer, and therefore, the dismissal of the petition for a declaratory order was affirmed. Thereafter, the Environmental Council filed a Motion to Alter or Amend which prompted the Chancellor to issue an additional memorandum opinion and order, in which the Chancellor explained:

In its motion to alter or amend, the petitioner appears to argue that this Court has across the board, in wholesale fashion, ruled that in all cases before the Water Quality Control Board, non-lawyer/duly authorized corporate representatives may not participate as provided by the Tennessee Code Annotated section 4-5-305(a). To clarify that that is not the ruling of this Court, this memorandum and order is issued to address that point.

In the July 6, 2005 memorandum and order the Court concluded, based upon the facts of the record of this case, e.g. the complex legal issues raised by the complaint and the evidentiary and trial skill complexity of prosecuting those claims, that the participation sought by the petitioner in its complaint below limited participation to merely provide a statement, introduce a study, or provide personal observations and testimony of a layperson, the result might have been different. But by filing a complex legal complaint the petitioner put all on notice that legal issues would be contested and, under Tennessee law, that must be prosecuted by a lawyer.⁴

³The Council filed a Motion to Reconsider relying on the Uniform Administrative Procedures Act, Tenn. Code Ann. § 4-5-305, which allows a corporation to practice in a contested case proceeding through an authorized representative. Both TDEC and Cumberland opposed the motion. The judge denied the Council's motion.

⁴We acknowledge the record includes an affidavit by Mr. Callaway containing the information and the documents Mr. Callaway intended to introduce; however we find that moving forward with the issues in the petition required the professional judgment of an attorney as explained in further detail below.

This Court has not ruled in its July 6, 2005 memorandum and order that all cases before the Water Quality Control Board are so legally complex that as a matter of law a non-lawyer may never participate on behalf of its corporation before that Board. Instead, this Court's order is that when a corporation seeks to participate by a non-lawyer representative, the administrative law judge will have to make a case by case decision whether the participation the petitioner seeks is permissible. Thus, non-lawyer representatives, in preparing their complaint or petition, should not seek participation in the proceeding which requires legal judgment. The participation they seek in their complaint should be tailored and limited to that of a layperson.

Following the issuance of the foregoing Memorandum and Order, the Environmental Council perfected this appeal.

STANDARD OF REVIEW

In the majority of cases, the judicial review of decisions of administrative agencies, when those agencies are acting within their area of specialized knowledge, experience, and expertise, is governed by the narrow standard contained in Tenn. Code Ann. § 4-5-322(h) rather than the broad standard of review used in other civil appeals. *Willamette Indus., Inc. v. Tennessee Assessment Appeals Comm'n*, 11 S.W.3d 142, 147 (Tenn. Ct. App. 1999); *Wayne County v. Tennessee Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 279-80 (Tenn. Ct. App. 1988); *CF Indus. v. Tennessee Pub. Serv. Comm'n*, 599 S.W.2d 536, 540 (Tenn. 1980); *Metropolitan Gov't of Nashville v. Shacklett*, 554 S.W.2d 601, 604 (Tenn. 1977).

The trial court may reverse or modify the decision of the agency if the petitioner's rights have been prejudiced because the administrative findings, inferences, conclusions or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
- (5) Unsupported by evidence which is both substantial and material in the light of the entire record.

Tenn. Code Ann. § 4-5-322(h)(1)-(5). The trial court may not, however, substitute its judgment concerning the weight of the evidence for that of the Board. *Jones v. Bureau of TennCare*, 94 S.W.3d 495, 501 (Tenn. Ct. App. 2002) (citing *Gluck v. Civil Serv. Comm'n*, 15 S.W.3d 486, 490 (Tenn. Ct. App. 1999)). The same limitations apply to the appellate court. See *Humana of Tennessee v. Tennessee Health Facilities Comm'n*, 551 S.W.2d 664, 668 (Tenn. 1977) (holding the trial court, and this court, must review these matters pursuant to the narrower statutory criteria). Thus, the general rule is that when reviewing a trial court's review of an administrative agency's decision, this court is to determine "whether or not the trial court properly applied the . . . standard of review" found at

Tenn. Code Ann. § 4-5-322(h). *Jones*, 94 S.W.3d at 501 (quoting *Papachristou v. Univ. of Tennessee*, 29 S.W.3d 487, 490 (Tenn. Ct. App. 2000)).

Here, however, the controlling issue is whether the participation in a contested case through a representative of a corporation who is not a licensed attorney constitutes the unauthorized practice of law. Such a determination is a question of law and not one within the specialized knowledge of the Water Control Board. Our standard of review of a question of law is de novo without a presumption of correctness. *Northland Ins. Co. v. State*, 33 S.W.3d 727, 729 (Tenn. 2000); *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999).

ANALYSIS

The Tennessee General Assembly has specifically authorized corporations to “participate” in administrative hearings through their representatives without regard to whether the representative is a licensed attorney. The pertinent statute reads: “Any party may participate in the hearing in person or, if the party is a corporation or other artificial person, by a duly authorized representative.” Tenn. Code Ann. § 4-5-305(a). Although the General Assembly is empowered to authorize a corporation to “participate” in certain administrative hearings through a non-lawyer representative, it does not have the authority to authorize a corporation’s representatives to engage in conduct that constitutes the “practice of law.” See *Petition of Burson*, 909 S.W.2d 768, 775-76 (Tenn. 1995). To the contrary, the Supreme Court of Tennessee possesses the sole and exclusive authority to regulate the practice of law and to prevent the unauthorized practice of law. *Burson*, 909 S.W.2d at 773.

The Supreme Court expressly prohibits any person from engaging in the “practice of law” or the “law business” in Tennessee.⁵ Therefore, a non-lawyer representative of a corporation may “participate” in administrative hearings provided the non-lawyer’s “participation” does not constitute the practice of law. Accordingly, the issue is whether the Executive Director’s planned participation as the representative of the Environmental Council would constitute the unauthorized practice of law by a non-attorney.

In *Petition of Burson*, a similar legislative-judicial conflict arose after the General Assembly authorized appraisers and other non-attorney agents to appear before the various boards of equalization on behalf of taxpayers.⁶ See *id.* at 769; see also Tenn. Code Ann. § 67-5-1514 (1994).

⁵“No person shall engage in the ‘practice of law’ or the ‘law business’ in Tennessee, except pursuant to the authority of this Court, as evidenced by a license issued in accordance with this Rule, or in accordance with the provisions of this Rule governing special or limited practice.” Tenn. S. Ct. R. 7, § 1.01.

⁶Pursuant to Tenn. Code Ann. § 67-5-1514 (1994), taxpayers, including corporations, were expressly authorized to be represented by the following non-attorney agents: (1) immediate family members, (2) officers, directors, or employees of a corporation or other artificial entity, or (3) a registered property appraiser who has satisfied certain statutory criteria. The new statute also authorized taxpayers to be represented by certified public accountants if the only issue on appeal is the proper completion of a schedule listing or establishing the value of tangible personal property. Tenn. Code Ann. § 67-5-1514.

When the State Board of Equalization promulgated rules consistent with the new statute, the Attorney General objected and filed a petition requesting a determination of the constitutionality of the statute. In pertinent part the petition stated:

By enacting a statute authorizing non-attorneys to participate in a representative capacity before the state and local boards of equalization, the General Assembly has implicitly determined that such representation does not constitute the practice of law. Therefore, the question instantly presented, according to the petition, is whether the General Assembly is the branch of government empowered by the Constitution and state statutes to make that determination.

Burson, 909 S.W.2d at 770 (citations omitted).

After establishing its supremacy in the regulation of the practice of law and the unauthorized practice of law, the Supreme Court adopted Tennessee Supreme Court Rule 8, EC 3-5 as “the standard by which to determine whether the services performed by the non-attorney agents constitute the practice of law.” *Burson*, 909 S.W.2d at 775. That standard reads as follows:

It is neither necessary nor desirable to attempt the formulation of a single specific definition of what constitutes the practice of law. Functionally the practice of law relates to the rendition of services for others that call for the professional judgment of a lawyer. The essence of the professional judgment of the lawyer is his educated ability to relate the general body and philosophy of law to a specific legal problem of a client; and thus, the public interest will be better served if only lawyers are permitted to act in matters involving professional judgment. Where this professional judgment is not involved, non-lawyers, such as court clerks, police officers, abstracters, and many governmental employees, may engage in occupations that require a special knowledge of law in certain areas. But the services of a lawyer are essential in the public interest whenever the exercise of professional legal judgment is required.

Burson, 909 S.W.2d at 775 (quoting Tenn. S. Ct. R. 8, EC 3-5).⁷

Once the Court adopted the standard, it focused on the facts of that case to determine whether the acts of the non-attorneys who appeared on behalf of taxpayers before the boards of equalization constituted the unauthorized practice of law. The more relevant facts in *Burson*, which were set forth in the Special Master’s report, read as follows:

⁷The Code of Professional Responsibility was replaced by the Rules of Professional Conduct, and there is no comment equivalent to Ethical Consideration 3-5 in the new Rules; nevertheless, the changes does not affect the standard to be applied. See *Green v. Carthage Gen. Hosp., Inc.*, 2007 WL 2096176 at *3 (Tenn. Ct. App. July 20, 2007).

Appraisal appeals are initiated by filing a fill-in-the-blank form with the local board of equalization The only information placed on the form is the identity of the property. No legal training, skill or judgment is required for identifying the property on the form.

The next step is often a conference with the local taxing authority. The taxing authority is represented by the appraiser or a deputy. Appeals often end at this stage because the taxing authority may agree that the information presented on behalf of the taxpayer supports the taxpayer's valuation or because the taxing authority and the taxpayer may agree on a compromise assessment. No legal training, skill or judgment is required to participate in these conferences.

If the case does not end with a conference, a hearing is held before the local board of equalization. The hearings are informal. No rules of procedure or evidence are followed. The hearings are essentially non-adversarial, information gathering sessions.

Very few of the members of the local boards are attorneys. There are no opening statements or closing arguments. There is no direct or cross-examination of witnesses. Information is simply given in narrative form. No legal training, skill or judgment is required to participate in the hearings.

Id. at 771. Based upon the foregoing facts, the Court found there was no proof to show that the services performed by the non-attorneys before the boards of equalization required the professional judgment of a lawyer, and therefore, their acts did not constitute the unauthorized practice of law. *Id.* at 777.

Burson and its progeny, including *Old Hickory Eng'g and Mach. Co., Inc. v. Henry*, 937 S.W.2d 782 (Tenn. 1996), *Fifteenth Judicial Dist. Unified Bar Ass'n v. Glasgow*, No. M1996-00020-COA-R3-CV, 1999 WL 1128847, at *3 (Tenn. Ct. App. Dec. 10, 1999), and *Green v. Carthage General Hosp., Inc.*, 2007 WL 2096176 (Tenn. Ct. App. July 20, 2007), instruct that the issue often hinges on a fact intensive inquiry of whether the service rendered or to be rendered by the non-lawyer requires the professional judgment of an attorney. This point was emphasized in the most recent of these opinions, *Green v. Carthage General Hosp., Inc.*, wherein a non-attorney employee of the hospital prepared, signed and filed with the Probate Court Clerk's Office a simple form to assert a claim for a debt owed by the decedent. Based upon the facts of that case, the court found the proof insufficient to establish that preparing and filing a claim for a debt required the professional judgment of a lawyer. As the court explained:

[F]iling a claim for debts due from a decedent does not require the exercise of the professional judgment of a lawyer. Such claims are in essence demands for payment. Many employees or owners of businesses make similar demands daily and are quite competent to make an informal statement of the amount due with necessary backup

documentation. Although the claims statutes require some specific inclusions, they are straightforward and do not require legal training to understand.

Green, 2007 WL 2096176, at *4.

Cases involving the unauthorized practice of law are heavily fact-dependent. *Fifteenth Judicial Dist. Unified Bar Ass'n*, 1999 WL 1128847, at *3. We therefore focus our attention on the facts of this case to determine whether Mr. Callaway's planned participation at the contested case hearing would require the exercise of the professional judgment of an attorney.

The Administrative Judge noted that "contested case hearings" before the Water Quality Control Board are "formal, adversarial proceedings where rules of evidence and civil procedure are enforced, the parties file pleadings, often file briefs and motions, present argument[s], examine and cross-examine witnesses, and make opening and closing statements." The complexity of the procedures and content of a contested case hearing under the Uniform Administrative Procedures Act is further evident from the fact the parties are given a full opportunity to file pleadings, motions, objections, make offers of settlement, engage in discovery, and compel the attendance of witnesses by subpoena pursuant to the Tennessee Rules of Civil Procedure. *See* Tenn. Code Ann. §§ 4-5-308-311. During the hearing of a contested case, the parties are also afforded an opportunity to present evidence, conduct cross-examination, and present rebuttal evidence. Tenn. Code Ann. § 4-5-312. At the conclusion of the contested case hearing, an order with findings of fact and conclusions of law is entered. Tenn. Code Ann. § 4-5-314. The significance of the proceedings in a contested case hearing and the need for able representation therein becomes even greater when a party seeks judicial review of the administrative proceedings and the rulings therein. This is because, in most situations, the review by the Chancery Court and then this court is limited to the record of the administrative proceedings. Tenn. Code Ann. § 4-5-322(g).

The Chancellor concluded that this contested case revealed "numerous legal issues and mixed questions of fact and law, requiring an understanding and interpretation of statutes and case law on water quality as well as the rules of evidence to obtain admission of documents and testimony on such matters." We agree with this conclusion. The obvious complexities of this matter arise from the petition submitted to the Board on February 11, 2004. This is because the petition puts at issue several complex issues, including: (1) whether Mill Creek, as a "303(d) listed stream" and the "activity allowed in the permit" would further degrade the water quality by increasing pollutants, including siltation, organic enrichment and further decreasing dissolved oxygen levels; (2) whether the existence of the Nashville crayfish has been documented and recognized by the Department; (3) whether the increased surface area for parking, oil and gas from boats and runoff from the development will contribute to impairment and exacerbate water quality problems; (4) whether the Department failed to consider the overall, long-term impacts of the project and the possible degradation of water quality; (5) whether as a 303(d) list stream, Mill Creek is considered a priority for water quality improvement efforts and thus needs additional pollution controls; (6) whether the Department's issuance of a 401 certification for this project ignored the Department's own guidance on 303(d) listed streams until the sources of pollution have been controlled; and (7) whether a project

of this size and impact is inappropriate for a stream the size of Mill Creek that is already impaired.⁸ All of the foregoing issues were viable when the non-lawyer's participation was put at issue.⁹

When a non-lawyer's participation is put at issue, it becomes the duty of the Administrative Judge to determine whether the non-lawyer's participation may require the exercise of professional legal judgment.¹⁰ In such circumstance, a determination must be made regarding the complexity and nature of the proceedings. The determination is often dependent upon the issues presented, and whether the petition likely triggers formal adversarial proceedings or informal information gathering sessions. If the hearing is expected to be a non-adversarial session, wherein information is shared in an informal fashion, rules of procedure or evidence are not followed, and there is no direct or cross-examination of witnesses, then legal training or judgment is not required, and thus, the corporation's representative need not be a licensed attorney. *See Burson*, 909 S.W.2d at 771. If, however, it appears the parties may engage in direct or cross-examination of witnesses, and rules of procedure or evidence are expected to be followed, then the matter is more adversarial and formal, as distinguished from the more informal information gathering sessions. In the more formal, adversarial proceedings, legal training or judgment becomes essential, and thus, the corporation's representative must be a licensed attorney to participate; otherwise, the non-lawyer representative would be engaged in the unauthorized practice of law. *Id.* at 776.

The record before us reveals, as the Administrative Judge and Chancellor concluded, that the complexities of the issues presented in the contested case would require the Environmental Council's representative to exercise the professional judgment of a lawyer. Therefore, the representative of the Environmental Council must be a licensed attorney to participate in the contested case.

IN CONCLUSION

⁸Whether all of the issues presented require the professional judgment of an attorney for competent presentation in an APA contested case proceeding may be debatable. Nevertheless, several of the issues raised by the Environmental Council would require the professional judgment of an attorney.

⁹In this matter, the non-lawyer's participation was not put at issue until shortly prior to the hearing of the contested case. In a similar but unrelated case of the same name that pertained to a permit issued to Tosh Farms, the Department contested the non-lawyer's participation immediately upon the filing of the petition for a declaratory order. *See Tenn. Environ. Council, Inc. v. Tenn. Water Quality Control Board*, No. M2006-00914-COA-R3-CV, 2007 WL _____, (Tenn. Ct. App. Sep. __, 2007).

¹⁰It is not contended that only a lawyer may participate on behalf of a corporation in an administrative hearing. To the contrary, it is acknowledged that such occurs in many informal administrative proceedings. This practice was confirmed in a 1994 study conducted by Dean Hill Rivkin and Fred T. Bell, in which they examined "to what extent non-lawyers regularly represent individuals and firms involved in grievances before governmental bodies in Tennessee." In a telephone interview by the authors with Alan Leiserson, General Counsel for the Tennessee Department of Environment and Conservation, Mr. Leiserson is quoted as stating, "In all but the contested cases before the administrative law judges, nonlawyer representation is permitted." Dean Hill Rivkin & Fred T. Bell, *Nonlawyer Representation in Administrative Proceedings in Tennessee: A Field Study*, pg. A-10 (Commissioned by Nat'l Council of Prop. Tax Consultants (Mar. 8, 1994).

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against the Appellants, Tennessee Environmental Council, Inc.

FRANK G. CLEMENT, JR., JUDGE