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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 23-18

Filed 21 November 2023

Caswell County, No. 22 CVS 116

ANITA FOUST, BYRON SHOFFNER, and THE THOMAS DAY-CASWELL HOLT
BRANCH, NAACP, Petitioners,

v.

NORTH CAROLINA DEPT' OF ENVIRONMENTAL QUALITY, DIV. OF WATER
RESOURCES, Respondent,

and CAROLINA SUNROCK, LLC, Intervenor-Respondent.

Appeal by Petitioners from an order on judicial review entered 16 September
2022 by Judge Lindsay R. Davis, Jr. in Caswell County Superior Court. Heard in the
Court of Appeals 9 August 2023.

New South Law Firm, by Valerie L. Bateman, for Petitioners-Appellants.

*Attorney General Joshua H. Stein, by Assistant Attorney Generals T. Hill Davis,
III and Carolyn McLain, for Respondent-Appellee.*

*Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Joseph A. Ponze,
Robert J. King, III, William P.H. Cary, and Amanda S. Hawkins for
Respondent-Intervenor Appellee.*

WOOD, Judge.

I. Factual and Procedural Background

On 19 March 2021 and 30 March 2021, the North Carolina Department of Environmental Quality, Division of Energy, Mineral, and Land Resources (“NCDEQ”), issued two certificates of coverage to Carolina Sunrock, LLC (“Sunrock”). Sunrock plans to construct a hot-mix asphalt plant and a concrete plant at a site in Caswell County, the “Burlington North Facility.” The certificates permit Sunrock to discharge stormwater from the Burlington North Facility and to operate a wastewater treatment system while discharging stormwater and treated, process wastewater from the same facility. The certificates were issued under the provisions of North Carolina General Statute § 143-215.1.

NCDEQ administers North Carolina’s stormwater runoff programs, including the issuance of permits for the discharge of stormwater. N.C. Gen. Stat. §§ 143-214.7, -215.1 (2021); 15A N.C.A.C. 2H.0101 (2021). According to statute, NCDEQ may issue “general permits” for “categor[ies] of similar discharges to surface waters.” 15A N.C.A.C. 2H.0103(12), .0127. As such, general permits are:

written to regulate one or more categories or subcategories of discharges . . . where the sources within a covered subcategory . . .

(A) Involve the same or substantially similar types of operations;

(B) Discharge the same types of wastes or engage in the same types of sludge use or disposal practices;

(C) Require the same effluent limitations, operating conditions, or standards for sewage sludge use or disposal;

(D) Require the same or similar monitoring; and

(E) In the opinion of the Director, are more appropriately controlled under a general permit than under individual permits.

40 C.F.R. § 122.28(a)(2) (2021). Once general permits are issued by NCDEQ, individual members of the regulated community can then seek coverage through the general permit by filing a Notice of Intent. 15A N.C.A.C. 2H.0127(h). The requirements for a Notice of Intent are set forth at 15A N.C.A.C. 2H.0127(i) and generally require information and supporting documentation establishing that the facility or site and the associated activity fall within the scope of the corresponding general permit. The rules specifically authorize the issuance of general permits for stormwater discharges. 15A N.C.A.C. 2H.0127(d)(11). Accordingly, NCDEQ issued General Permit No. NCG140000 for the discharge of stormwater and process wastewater in 2017 for facilities primarily engaged in ready-mixed concrete and like activities, and General Permit No. NCG160000 for the discharge of stormwater in 2019 for facilities primarily engaged in asphalt paving mixtures and concrete blocks.

Following the issuance of these permits, Sunrock submitted two Notices of Intent on 11 December 2020 seeking certificates of coverage for its facility under NCDEQ's previously issued general permits. After reviewing the submitted Notices of Intent, NCDEQ determined Sunrock's facility fell within the category of facilities for which these general permits were intended. Moreover, NCDEQ determined that there was no material fact or circumstance distinguishing the Sunrock facility from

other similar facilities covered under the general permits.

On 19 March 2021, NCDEQ issued Certificate of Coverage No. NCG160237 authorizing Sunrock to discharge stormwater from Burlington North Distribution Center. On 30 March 2021, NCDEQ issued Certificate of Coverage No. NCG140494 authorizing Sunrock to operate a wastewater treatment system and discharge stormwater as well as treated, process wastewater from the same facility. NCDEQ issued certificates of coverage under the general permits instead of requiring Sunrock to apply for and obtain individual stormwater permits.

On 20 April 2021, Petitioners, composed of the NAACP and residents with land interests in Burlington, North Carolina, challenged NCDEQ's issuance of the certificates of coverage by filing a petition for a contested case hearing in the Office of Administrative Hearings. On 21 April 2021, Petitioners filed an amended petition clarifying Petitioners were made up of residents of Caswell County and Alamance County. The petition asserted NCDEQ's granting of the general permits will allow "harmful discharges to the Jordan Lake Watershed" so that NCDEQ has "acted erroneously; substantially prejudiced Petitioners' rights; failed to use proper procedure; acted arbitrarily or capriciously; and/or failed to act as required by law or rule in violations of Petitioner[s'] rights under Ch. 150B of the N.C. Gen. Statutes." Petitioners alleged NCDEQ's actions were in violation of federal and state statutes, including Title VI of the Civil Rights Act of 1964.

During the discovery process, various extensions were given by the court. Both

NCDEQ and Sunrock sought the identities and topics of potential expert witness testimonies from Petitioners. NCDEQ sent discovery requests to Petitioners on 23 August 2021, and Petitioners responded on 11 October 2021 with the following response regarding expert witnesses: “Petitioners have not yet identified an expert witness but will supplement this answer as necessary to comply with the Rules of Civil Procedure.” No such supplementation occurred.

Petitioners filed a prehearing statement on 4 June 2021 alleging that NCDEQ did not follow its regulations and, in its discretion, NCDEQ could have required Sunrock to obtain an individual permit. NCDEQ and Sunrock each moved for summary judgment on 19 November 2021.

On 3 December 2021, Petitioners filed an amended prehearing statement without leave of the Administrative Law Judge (“ALJ”) and offered the affidavit of Barrett Kays (“Kays”), an expert who previously had not been disclosed to NCDEQ or Sunrock, as well as a response to the summary judgment motions. Both NCDEQ and Sunrock moved to strike the amended prehearing statement and the affidavit. Petitioners failed to respond as requested by the ALJ, and the motions to strike the Kays affidavit and the amended prehearing statement were subsequently granted on 7 March 2022.

On 18 March 2022, the ALJ issued a final decision which granted summary judgment in favor of NCDEQ and Sunrock on all of Petitioners’ claims. The ALJ found NCDEQ acted in accordance with the applicable law when issuing the

certificates of coverage. The ALJ's final decision contained twenty-five "undisputed findings of fact" as Petitioners' response to the motions for summary judgment did not contest the facts in NCDEQ's and Sunrock's motions for summary judgment. The final decision also provided forty-two specific conclusions of law.

Additionally, the ALJ analyzed the Petitioners' individual permit claim and rejected it because: (1) Petitioners conceded they had no evidence to support it; (2) Sunrock was entitled to the certificates of coverage; (3) an individual permit is an option for NCDEQ to consider and is only considered after certificates of coverage are issued; and (4) there was no evidence justifying, much less requiring, NCDEQ to exercise its discretion to require an individual permit. The ALJ determined the correct procedures for granting the certificates of coverage were followed, and therefore, Sunrock was entitled to its certificates. The ALJ's final decision held there was no genuine issue of material fact and granted NCDEQ's and Sunrock's motions for summary judgment. An amended final decision correcting the case caption and title of the decision was issued on 23 March 2022.

On 22 April 2022, Petitioners filed a petition for judicial review in Caswell County Superior Court. Judge Lindsay R. Davis held a hearing on the merits of the appeal on 2 September 2022. On 16 September 2022, the trial court entered an order on judicial review granting NCDEQ's and Sunrock's summary judgment motions as to all claims, thereby dismissing the case with prejudice. Petitioners filed a notice of appeal to this Court on 23 September 2022.

II. Analysis

On appeal, Petitioners contend the trial court erred in affirming the ALJ's decision to grant summary judgment to NCDEQ and Sunrock. Petitioners allege NCDEQ did "not follow its own rules when issuing certificates of coverage" to Sunrock "to discharge stormwater and wastewater" into the relevant body of water. Before we can reach the merits of Petitioners' appeal, we must address Sunrock's motion to dismiss the appeal.

A. Appellate Jurisdiction

In its motion to dismiss, Sunrock contends Petitioners have failed to satisfy the jurisdictional requirements of North Carolina Administrative Procedure Act ("APA") because this case originated in the Office of Administrative Hearings and is governed by N.C. Gen. Stat. § 150B. According to Sunrock, because Petitioners' case challenges a decision made by NCDEQ, a State agency, this appeal constitutes an action against the State. Consequently, Sunrock argues this Court lacks subject matter jurisdiction to hear the appeal due to Petitioners' failure to comply with the APA, thus requiring dismissal of the appeal. Sunrock further contends Petitioners' appeal is frivolous and they are subject to sanctions pursuant to Rule 34 of the North Carolina Rules of Appellate Procedure. N.C. R. App. P. 34. For Petitioners to bring this appeal, Sunrock reasons a separate motion under Rule 37 was required to raise the contested issues. N.C. R. App. P. 37.

The State has waived its immunity under limited circumstances as set forth in

the APA, codified at Chapter 150B of our general statutes. See *Empire Power Co. v. N.C. Dep't of Env't, Health & Nat. Res., Div. of Env't Mgmt.*, 337 N.C. 569, 586, 447 S.E.2d 768, 778 (1994). Strict compliance with the APA is a jurisdictional prerequisite of the waiver of the State's sovereign immunity which the APA confers. The APA "governs trial and appellate court review of administrative agency decisions." *EnvironmentalLEE v. N.C. Dep't of Env't & Nat. Res.*, 258 N.C. App. 590, 595, 813 S.E.2d 673, 677 (2018) (citation omitted). The APA provides a party aggrieved by a "final decision in a contested case, and who has exhausted all administrative remedies made available to the party or person aggrieved by statute or agency rule, is entitled to judicial review" by the superior court. N.C. Gen. Stat. § 150B-43. A party to the review proceeding in superior court may then appeal from the superior court's final judgment to the appellate division. N.C. Gen. Stat. § 150B-52. "The APA sets forth the scope and standard of review for each court." *EnvironmentalLEE*, 258 N.C. App. at 595, 813 S.E.2d at 677. On petition for judicial review from a final administrative agency decision, it is the superior court that sits as an appellate court reviewing the administrative agency. *Rector v. N.C. Sheriffs' Educ. & Training Standards Comm'n.*, 103 N.C. App. 527, 532, 406 S.E.2d 613, 617 (1991) (citation omitted).

N.C. Gen. Stat. § 150B-51 governs the scope of the superior court's judicial review of an agency decision. It provides in pertinent part:

(b) The court reviewing a final decision may affirm the

decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b). As the right for this judicial review is statutory,

[w]hen statutory provision has been made for an action against the State, the procedure prescribed by statute must be followed, and the remedies thus afforded are exclusive. The right to sue the State is a conditional right, and the terms prescribed by the Legislature are conditions precedent to the institution of the action.

Great Am. Ins. Co. v. Gold, 254 N.C. 168, 173, 118 S.E.2d 792, 795 (1961) (citations omitted), *overruled on other grounds by Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976). Thus, a waiver of the State’s immunity, “must be strictly construed.” *Irving v. Charlotte-Mecklenburg Bd. of Educ.*, 368 N.C. 609, 611, 781 S.E.2d 282, 284 (2016) (citation omitted). Sunrock contends that “[a]ny failure to strictly comply with the requirements of N.C. Gen. Stat. Chapter 150B deprives this Court of subject matter jurisdiction and the Appeal should be dismissed.”

Section 150B-46 of the APA governs the contents of a petition for judicial review from an administrative agency’s final decision. N.C. Gen. Stat. § 150B-46. It

requires that “[t]he petition shall explicitly state what exceptions are taken to the decision or procedure and what relief the petitioner seeks.” *Id.* The term “explicit” is defined in this context as “characterized by full clear expression: being without vagueness or ambiguity: leaving nothing implied.” *Gray v. Orange Cnty. Health Dep’t.*, 119 N.C. App. 62, 70, 457 S.E.2d 892, 898 (quoting *Vann v. N.C. State Bar*, 79 N.C. App. 173, 173-74, 339 S.E.2d 97, 98 (1986)), *disc. review denied*, 341 N.C. 649, 462 S.E.2d 511 (1995).

In applying the definition of “explicit” in cases such as *Gray* and *Vann*, we have previously determined the trial courts erred “in denying the respondents’ motions to dismiss because the petitions at issue were not ‘sufficiently explicit’ to allow effective judicial review where the petitioners did not except to particular findings of fact, conclusions of law, or procedures.” *Kindsgrab v. N.C. Bd. of Barber Exam’rs*, 236 N.C. App. 564, 570, 763 S.E.2d 913, 917 (2014) (quoting *Gray*, 119 N.C. App. at 71, 457 S.E.2d at 899; and *Vann*, 79 N.C. App. at 174, 339 S.E.2d at 98). Thus, when an appeal petition fails to satisfy this specificity requirement, we have previously reversed a trial court’s failure to dismiss the appeal. *Gray*, 119 N.C. App. at 76, 457 S.E.2d at 902.

In its motion to dismiss, Sunrock brings to our attention this court’s decision in *Gray v. Orange County Health Department*. In *Gray*, the Orange County Health Director, the appointing administrative authority for the local health department, made eighty-one findings of fact and twelve conclusions of law in his final agency

decision. *Id.* at 72, 457 S.E.2d at 899. Despite the appointing authority's numerous findings of fact and conclusions of law, this Court held the petition for judicial review

lacked even a single exception to particular findings of fact or conclusions of law. Instead, it baldly asserted only that the Department's decision was "contrary to the Recommended Decision of the [ALJ] and the State Personnel Commission." . . . Particularly in light of the extremely detailed and thorough nature of [the appointing authority's] decision, it is difficult to imagine how Gray's petition could be less specific or explicit.

Gray, 119 N.C. App. at 72, 457 S.E.2d at 899.

In the present case, the ALJ's final decision provided twenty-five undisputed findings of fact and forty-two conclusions of law. However, Petitioners' judicial review petition did not identify any findings of fact or conclusions of law from the ALJ's decision which they contest and argue is erroneous. Instead, Petitioners' judicial review appeal petition consisted of three pages and provided the following generalized "exceptions":

The Amended Final Decision should be overturned because it erroneously granted summary judgment in favor of [NCDEQ] and [Sunrock] and failed to find that the decision of [NCDEQ] in granting [Sunrock] certificates of coverage . . . which would allow harmful discharges to Hughes Mill Creek and other surface waters of the State . . . was erroneous[;] substantially prejudiced Petitioners' rights[;] affected by failure to use proper procedure; evaluated and granted arbitrarily or capriciously; and in noncompliance with law and rule in violation of Petitioner[s'] rights under Chapter 150B of the N.C. General Statutes. In addition, Respondent[s'] actions were in violation of [F]ederal and State statute, rules, policy, and guidance

Petitioners specially except to the ALJ's decision to strike Petitioner[s'] expert affidavit, and failure to extend the discovery period, and the ALJ's grant [of] Summary Judgment were error of law based on the record before the [ALJ], including the Offers of Proof made by Petitioners, and the existence of a genuine issue of material fact as to whether [NCDEQ] had violated Petitioners' rights by granting the certificate of coverage.

Petitioners' petition for judicial review sought reversal of the ALJ's order granting summary judgment and requested "remand to the Office of Administrative Hearings to conduct further discovery and to take testimony at a hearing from witnesses on the issue of whether [NCDEQ] violated Petitioners' rights by granting the certificate of coverage."

Although Petitioners' petition attempts to utilize language such as "specifically except," their petition lacked specificity as no exceptions were made to any findings of fact or conclusions of law. Petitioners' petition consisting of "only generalized complaints as to certain procedural aspects of the hearing" does not constitute as sufficiently explicit to permit effective judicial review. *Vann*, 79 N.C. App. at 174, 339 S.E.2d at 98. Accordingly, because Petitioners' petition "was not sufficiently explicit to allow effective judicial review" of the proceedings, *Id.*, Petitioners have failed to meet the statutory requirement for specificity pursuant to N.C. Gen. Stat. § 150B-46. And, because Petitioners did not comply with the statutory provisions of the APA, this Court is deprived of subject matter jurisdiction over this appeal. We grant Sunrock's motion to dismiss this appeal. Petitioners' appeal is dismissed.

III. Conclusion

For the foregoing reasons, we dismiss Petitioners' appeal.

DISMISSED.

Judges HAMPSON and MURPHY concur.

Report per Rule 30(e).