Birchwood Motel, Inc. v. Virginia Marine Resources Commission, 2 Cir. 07CL241, 74 Va. Cir. 298 (2007)

VIRGINIA: IN THE CIRCUIT COURT OF COUNTY OF ACCOMAC

BIRCHWOOD MOTEL, INC

v.

VIRGINIA MARINE RESOURCES COMMISSION

Case No: 07CL241
Decided: October 30, 2007

COUNSEL

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LETTER OPINION BY JUDGE GLEN A. TYLER:

I. The Commission filed a Motion to Dismiss the Petition for Appeal in this case pursuant to *Va. Sup. Ct. R.* 3:8. The Commission argues four reasons.

1. The Petition does not state facts relied upon with brevity in numbered paragraphs. *Va. Sup. Ct. R.* 1:4(d)(j).

The first pleading filed with a court in an appeal of an administrative case decision is a petition for appeal. *Va. Sup. Ct. R.* 2A:4. That Rule requires a petition to a) designate the regulation or case decision appealed from, b) specify the errors assigned, c) state the reasons why the case decision is unlawful and d) conclude with a specific statement of the relief requested. The Rule does not require the petition to allege facts relied upon, as in a complaint at law or in equity. Petitions for appeal can be prepared and filed and are filed, as in this case, before the filing of a transcript or record on appeal. *Va. Sup. Ct. R.* 3A:3. The Appellant in this case chose to state at great length why the case decision is *unlawful* by referring variously to the factual history and evidence presumably adduced at the agency formal hearing. In other words, the Appellant chose to set out in trial brief form a long narrative of alleged facts, and even argument, also not required in a petition for appeal. Consequently, the Commission feels compelled

to respond to those allegations because, pursuant to *Va. Sup. Ct. R.* 2A:5, further proceedings are to be as in a suit in equity under Part Three of the Rules, meaning that the case is commenced by a petition, and must be answered under *Va. Sup. Ct. R.* 3:8 within 21 days (after a ruling on a motion to dismiss).

If an appellant chooses to allege substantive facts (which *Va. Sup. Ct. R.* 2A:4 does not require) they must be alleged in numbered paragraphs and with brevity so that the Commission can respond in its answer.

2. The Petition fails to aver that the case decision is inconsistent with the public trust doctrine.

The law requires the Commission to make decisions consistent with the public trust doctrine and, if so made, the decision is deemed not to have been made pursuant to the police power. *Va. Code Ann.* § 28.2-1205 (2007 Cum. Supp.). The law requires an appellant to designate and demonstrate an error of law subject to review, including compliance with statutory authority. *Va. Code Ann.* § 2.2-4027 (2007 Cum. Supp.). However, a general averment, without specifying that particular doctrine is sufficient for a petition for appeal. Furthermore, the Commission has the opportunity to move for a bill of particulars if it is so advised. Finally, compliance with the public trust doctrine may be a defense or an affirmative defense as the case may be. There is no requirement for a positive averment by an appellant.

3. The Petition violates *Va. Sup. Ct. R.* 2A:3 by referring to a transcript not at the time of the Petition a part of the record.

This ground for the Commission's Motion is somewhat covered in the discussion of the first ground referred to above. The Rule providing how and when a transcript becomes a part of the record is not itself violated by premature reference to the transcript in a petition for appeal. Furthermore, reference to an unofficial transcript is harmless surplusage at the pleading stage, because such references are unnecessary in a petition for appeal.

4. The Notice of Appeal failed to satisfy all of the requirements of *Va. Sup. Ct. R.* 2A:2.

A. Appellant gave Notice of Appeal of a case decision dated February 28, 2007, yet the Petition for Appeal designates the case decision appealed from as being dated February 27, 2007. The law requires that the terms of any final agency case decision, as signed by it, shall be served upon the named parties by mail. *Va. Code Ann.* § 2.2-4023 (2005 Repl. Vol.). At this point the Court does not know whether it was served, but presumes that it was served by the Commission, neither party having stated in brief or argument to the contrary. The law requires the appellant to *identify* the case decision appealed from in its Notice of Appeal. *Va. Sup. Ct. R.* 2A:2. Using the date of the formal hearing at which a decision was orally announced or the date of a letter dated the next day, stating the decision, does not necessarily misidentify the decision appealed from. The Petition for Appeal shall *designate* the case decision appealed from. *Va. Sup. Ct. R.* 2A:4. Again, the Rule does not require that the precise date be used to designate the decision. It is not misdesignated by the use of either the date of the hearing or the date of the Commission's letter. Incidentally, the Commission's letter to Appellant acknowledges receipt of the

> [Mr. Lewis] shall be employed by [Workflow] . . . on an "at will" basis for a six-month "trial period," after which the parties may continue if that is the mutual desire of [Workflow] and [Mr. Lewis]: if employment continues, [Mr. Lewis] shall execute a new employment agreement continuing . . . restrictive covenants in the form attached as Exhibit A.

Exhibit A, attached to and incorporated as part of Plaintiff's complaint, is the employment agreement that contained the restrictive covenants Lewis had signed prior to his resignation on December 2003. it reads in relevant part as follows:

> (9) Non-Solicitation of customers . . . (a) Employee agrees that for a period of one year following the last day of Employee's employment, Employee will not directly or indirectly, compete with Employer by soliciting or accepting competing business from: (i) any person or entity who or which was a customer of Employer at the time of Employee's termination and/or for a one-year period prior thereto, from who or which Employee solicited or accepted business on behalf of Employer; or (ii) any person or entity which was a customer of Employer at the time of Employee's termination and/or for a one-year period prior thereto about whom Employee acquired proprietary and/or confidential information while employed that is material to Employer's business interests.

Lewis worked for Workflow from the date of the aforesaid agreement, March 5, 2004, for over four years, until July 18, 2008, when he resigned again. However, during that time, Workflow had never presented a new employment agreement with the stated restrictive employment covenants to Lewis, and Lewis had not signed any such agreement before he resigned for the second time on July 18, 2008. *Id.*

Arguments of the Parties

Pursuant to Counts I, II and III of its Amended Complaint, Workflow prays that this Court enter an order which would compel Lewis to execute an employment agreement containing the restrictive employment covenants set forth in Exhibit A attached to its complaint, would enjoin and restrain Lewis from competing with Workflow as set forth in paragraph 9 of the said restrictive covenants, and from using any propriety and/or confidential information obtained by Lewis during the course of his employment with Workflow, and, pursuant to Count IV of the Amended complaint would make Workflow whole for any and all assets that were allegedly diverted from Workflow, by Lewis, in violation of his breach of duty of loyalty to Workflow.

Workflow contends that even though it did not present and Lewis did not sign a new restrictive employment covenant, as required by the parties March 5, 2004 settlement agreement, Lewis is still bound by those restrictive covenants as he did work beyond the original six-month trial period, and the settlement agreement states that Lewis "shall execute a new employment agreement" containing the earlier restrictive covenants.

On August 8, 2008, Lewis, by counsel, filed a demurrer requesting that Workflow's complaint against him be dismissed because, even if all of Workflow's claims are taken as true, they fail to state a claim upon which the court may grant the relief sought, inasmuch as restrictive covenants are not favored

Notice of Appeal and "notes your appeal of the February 28, 2007, decision . . .," notwithstanding the argument on brief of the Commission that the decision was on February 27, 2007.

B. Appellant's Notice of Appeal did not "state the names and addresses of the appellant and of all other parties and their counsel, if any . . ." as required by *Va. Sup. Ct. R.* 2A:2, in that the Notice did not state the name and address of the Commission's counsel. This failure to comply with a ministerial requirement is not prejudicial to the Commission, and is not fatally defective or jurisdictional because it may be ambiguous in the sense that one may interpret "other" to not include the Commission's counsel and include only other people who are parties.

The Motion to Dismiss is granted on ground number one and denied on grounds numbered two, three and four. This decision is without prejudice; the Appellant may, within 21 days of the entry of the order to be entered hereon, if it is so advised, file an amended notice of appeal.

II. The appellant filed a Motion for Default/Summary Judgment because the Commission did not prepare and certify the record as "soon as possible."

The law is set out in *Va. Sup. Ct. R.* 2A:3. It is well known that administrative agencies of all kinds make case decisions by the hundreds that are appealed by lawyers and laymen, effectively and defectively. Many such appeals are dismissed summarily for myriad reasons. To require agencies to prepare and certify records, often extremely large and expensive to prepare, before a motion to dismiss is disposed of would be extremely wasteful of government recourses, and that is not what the Rule requires. The delay in the scheduling of the hearing before this Court on the Commission's Motion to Dismiss from the time of its filing on May 18, 2007, until the hearing on October 24, 2007, very well may have been to accommodate the calendar of one attorney or party as to accommodate the other. We notice that the Appellant's Motion for Default/Summary Judgment was not filed until October 4, 2007, along with its brief in opposition to the Commission's Motion to Dismiss. The agency record was filed October 19, 2007. It is not necessary for the Court to review it in order to decide these preliminary motions.

The Appellant's Motion is denied.

Counsel for the Commission will be asked to prepare a decree in keeping with this opinion and circulate it for endorsement and entry.