RENDERED: FEBRUARY 27, 2015; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001501-MR

ESTILL COUNTY FISCAL COURT — APPELLANT

v.

APPEAL FROM FRANKLIN CIRCUIT COURT
HONORABLE THOMAS D. WINGATE, JUDGE
ACTION NO. 12-CI-00962

COMMONWEALTH OF KENTUCKY,
SECRETARY OF LABOR, AND KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; JONES AND NICKELL, JUDGES.

ACREE, CHIEF JUDGE: The Estill County Fiscal Court ("Estill County") appeals the August 1, 2013 Order from the Franklin Circuit Court. That order affirmed an administrative decision of the Kentucky Occupational Safety and

Health Review Commission (hereinafter referred to as the "Tribunal") issued on May 31, 2012. After reviewing the record and applicable law, we must reverse the circuit court's order and remand for further proceedings consistent with this opinion because the Tribunal acted outside its statutory role as a neutral administrative arbiter.

I. Background

Trouble began when Estill County employee Mary Smith complained about the conditions at her workplace. As a part-time emergency dispatcher, Smith spent most of her shift confined to a small office in a county building that permitted employee smoking. Smith's co-workers smoked in and around the office, which caused Smith to suffer frequent headaches and sinus infections. When doctors traced the source of Smith's illness to a smoke allergy, she wrote a letter to Estill County Judge Executive Wallace Taylor advocating for a change in the smoking policy.

Smith's letter, dated July 19, 2010, contended the second-hand smoke posed a workplace health hazard guaranteed to exacerbate her condition. Smith supported her contention with information from the Center for Disease Control (CDC) describing the dangers of second-hand smoke. In light of those dangers, Smith requested that Taylor forbid smoking in the dispatch office.

But rather than purge the smoke from the office, Estill County chose instead to purge Smith. On August 6, 2010, Taylor ordered Smith's temporary removal from the work schedule, citing his concern for Smith's wellbeing. Suspecting that

Estill County had really removed her as punishment for the letter, Smith lodged a formal complaint with officials at the Kentucky Occupational Safety and Health Office.

Smith's complaint alleged that Estill County took adverse employment action against her for complaining to her supervisor about the second-hand smoke. After a two-month investigation, officials from the Kentucky Labor Cabinet, Occupational Safety and Health Program (hereinafter referred to as the "Commissioner") agreed with Smith and cited Estill County. The Commissioner's citation declared that Estill County violated KRS[1] 338.121(3)(a), which prohibits employers from discriminating against employees who lodge complaints about workplace safety:

> No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or herself or others of any right afforded by this chapter[.]

In the Commissioner's view, Estill County impermissibly discriminated against Smith by removing her from the work schedule after Smith "participated in [a] protected activity [by] complain[ing] to management about breathing second-hand smoke."

Estill County opposed the citation, arguing that Smith's letter to Taylor did not constitute a protected activity under KRS 338.121(3)(a). Estill County pointed

[1] Kentucky Revised Statutes

to the fact that Kentucky's administrative regulations do not define an employee-to-employer complaint as a protected activity under KRS 338.121(3)(a).

But a hearing officer for the Tribunal rejected Estill County's argument, basing his ruling on an unpublished federal district court opinion holding that an employee's "good faith health and safety complaint to an employer [constitutes] a protected activity." *See Chao v. Blue Bird Corp.,* 22 O.S.H. Cas. (BNA) 1665, 2009 WL 485471 (D.C.M.D. Ga., 2009). However, the hearing officer's analysis failed to note *Chao*'s reliance on a federal regulation, 29 C.F.R. § 1977.9, interpreting the Federal Occupational Safety and Health Act of 1970 ("OSHA"), 29 U.S.C.A. § 660[2] to include good faith complaints by an employee to an employer:

> [T]he salutary principles of the Act would be seriously undermined if employees were discouraged from lodging complaints about occupational safety and health matters with their employers. (Section 2(1), (2), and (3)). Such complaints to employers, if made in good faith, therefore would be related to the Act, and an employee would be protected against discharge or discrimination caused by a complaint to the employer.

Importantly, while 29 C.F.R. § 1977.9 exists at the federal level, Kentucky authorities have neither adopted it, nor promulgated any similar regulation.

[2] The wording of Federal Occupational Safety and Health Act of 1970, 29 U.S.C.A. § 660(c) is exactly the same as KRS 338.121(3)(a). 29 U.S.C.A. § 660(c)(1) states that "No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this chapter."

Estill County pressed its argument before the Tribunal. Yet the Tribunal ratified the hearing officer's decision via administrative order on May 31, 2012.

The Franklin Circuit Court affirmed the Tribunal's order. Like the hearing officer, the Franklin Circuit Court relied on a federal case in support of the Commissioner's view that Estill County could not discriminate against Smith for writing a letter to Taylor, citing *Marshall v. Springville Poultry Farm, Inc.*, 445 F. Supp. 2, 3 (M.D. Pa. 1977). As with *Chao* – the case cited by the Tribunal and its hearing officer – *Marshall* also relied on 29 C.F.R. § 1977.9 for the proposition that an employee's good faith complaint to an employer constitutes a protected activity under OSHA. *Id.*

After suffering losses before the Tribunal and the Franklin Circuit Court, Estill County appeals to this Court, again arguing that absent any Kentucky analog to 29 C.F.R. § 1977.9, KRS 338.121(3)(a) does not cover employee-to-employer complaints.

I. Standard of Review

The legitimacy of an administrative agency's action stems from the agency's ability to provide reasoned decision-making on matters within the statutorily prescribed bounds of its expertise. Accordingly, judicial review of administrative agency action focuses on the question of arbitrariness. *Curd v. Kentucky State Bd. of Licensure for Prof'l Engineers & Land Surveyors*, 433 S.W.3d 291, 303 (Ky. 2014). On review, we ask whether agency action exceeded the statutory authority granted to it by our General Assembly. *Com. Transp. Cabinet Dep't of Vehicle*

Regulation v. Cornell, 796 S.W.2d 591, 594 (Ky. App. 1990). If agency action exceeds the bounds of its authority, we must overturn that action because it is inherently arbitrary and thus unconstitutional. Ky. Const. § 2 (prohibiting arbitrary exercises of power over the lives, liberty, and property of freemen).

II. Analysis

A. ***Introduction.***

To decide whether the Tribunal's administrative order was arbitrary, and therefore impermissible, we compare the history, purpose, and structure of two closely-related pieces of watershed legislation: the Federal Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. §§ 651 et seq., and its Kentucky counterpart, the Kentucky Occupational Safety and Health Act ("KOSHA"), located in KRS Chapter 338. Our examination reveals that both statutes adopt an unusual administrative structure – described as a split-enforcement regime – that compartmentalizes quasi-legislative, quasi-executive, and quasi-judicial powers among different state actors. Such compartmentalization cabins each agency's respective role in the regulatory process, and in turn, provides the framework for determining which agency is authorized to engage in policy-making.

Patterned after OSHA, KOSHA's statutory scheme evinces our General Assembly's intent to confine all rule-making authority – and thus all policy-

making authority – to a single agency: the Kentucky Occupational Safety and Health Standards Board ("Board"). As KOSHA's exclusive policy-maker, the Board bears sole responsibility in deciding whether an employee-to-employer complaint constitutes a protected activity under KRS 338.121(3)(a).

Because the Board has neither adopted 29 C.F.R. § 1977.9, nor promulgated a similar rule, such complaints remain outside the scope of KRS 338.121(3)(a). When the Tribunal cited federal case law relying on a regulation that the Board never endorsed, the Tribunal effectively expanded the kinds of complaints protected by KRS 338.121(3)(a). This was a usurpation of the Board's policy-making authority; the Tribunal stepped outside its statutorily mandated role as an independent, non-policymaking administrative court. The Tribunal's agency action – its order – is arbitrary because it exceeded its authority. We explain why below.

B. ***OSHA Adopted a Split-Model Enforcement Structure as Part of a Political Compromise.***

KOSHA's progenitor and federal counterpart, OSHA, was enacted in 1970 as a compromise between two political titans – Big Business and Organized Labor. *See* George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 Admin. L. Rev. 315, 317 (1987). Before compromising, the two sides battled in the United States Senate over the proper allocation of rulemaking, enforcement, and adjudicatory functions within the administrative agencies charged with overseeing OSHA's regime. *Id.* at 318.

Consistent with their respective interests, each side offered their own solutions as to which agency should promulgate, adjudicate, and enforce OSHA regulations.

On one side, Labor advocated for the creation of a traditional, unitary administrative model that housed rulemaking, enforcement, and adjudication all within the Department of Labor ("DOL"). *Id.* In Labor's view, the unitary administrative model would allow its traditional government ally, the DOL, the authority and flexibility necessary to provide robust protection for America's workers. *Id.*

On the other side, Business feared that a traditional unitary administrative structure would foster an overly-aggressive regulatory culture in which DOL employees would serve as "both prosecutor and judge" of all alleged workplace safety violations. *Id.* Such a regulatory structure, Business complained, would produce anti-industry decisions and undermine traditional notions of due process. So, Business suggested dividing "the three administrative functions among three separate agencies – one to promulgate the regulations, a second agency within the DOL to enforce them, and a third independent agency to adjudicate challenges to them." *Id.*

Eventually, the two sides settled the dispute by adopting a relatively novel and experimental administrative structure: the split-enforcement administrative regime. Split-enforcement regimes feature "one agency [that] promulgates rules and exercises prosecutorial responsibilities, while another agency acts as an independent adjudicator." *See* Richard H. Fallon, Jr., *Enforcing Aviation Safety*

Regulations: The Case for A Split-Enforcement Model of Agency Adjudication, 4 Admin. L.J. 389 (1991). OSHA's particular regime charged the Occupational Safety and Health Administration, an agency housed in the DOL (hereinafter referred to as the "Secretary"), with responsibility for rulemaking and enforcement. *See* Gary L. Gill-Austern, *Deference in the Interpretation of OSHA Regulations: Martin v. Occupational Safety and Health Review Commission*, 33 B.C. L. Rev. 359, 360 (1992). As a counterbalance, Congress created an independent administrative court, the Occupational Safety and Health Review Commission (hereinafter referred to as the "OSHA tribunal"), to adjudicate regulatory challenges. *Id.* As with any good compromise, each side got something, but not everything they wanted: Labor got their zealous regulator while Business ensured that an impartial tribunal would temper excessive regulatory zeal.

Finally, in a nod to cooperative federalism, OSHA invited states to enact their own similar legislation, so long as it offered at least the same level of protection as federal standards. *See* 29 U.S.C. § 67(c). Kentucky soon accepted OSHA's invitation.

C. ***KOSHA Features A Split-Enforcement Regime That Is "Substantially Identical" To Its Federal Counterpart.***

Our General Assembly enacted KOSHA in 1972 as a response to the newly-minted federal act. Today, KOSHA exists "to promote the safety, health and general welfare of its people" by protecting them from "harmful conditions and practices at [their workplaces]. . . ." KRS 338.011.

Because it is patterned after OSHA, KOSHA is "substantially identical to the Federal Act." *Dep't of Labor v. Hayes Drilling, Inc.*, 354 S.W.3d 131, 135 (Ky. App. 2011). KOSHA accordingly adopts a similar split-enforcement regime – allocating regulatory authority among three administrative agency actors: (1) the Board, (2) the Commissioner of the Department of Workplace Standards, an enforcement officer who acts under the direction and supervision of the Secretary of the Labor Cabinet ("Commissioner"), and (3) the Tribunal.

KOSHA allocates quasi-legislative authority to the Board. The Board is comprised of twelve members from various backgrounds, each appointed by the Governor, with the Secretary of Labor serving as its chairperson. KRS 338.051(1). The Board is the only agency tasked with "promulgat[ing] occupational safety and health rules, regulations, and standards," KRS 338.051(3), making it analogous to a legislative body with the responsibility of making KOSHA's laws. As such, the Board remains KOSHA's lone policy-making entity and thus acts as the prime mover of KOSHA's regulatory universe.

KOSHA allocates quasi-executive power to the Commissioner. The Commissioner and his or her representatives serve at the direction of the Secretary of Labor, KRS 338.015, and may conduct investigations and issue citations. KRS 338.141(1). In essence, the Commissioner acts as KOSHA's prosecutor, charged with enforcing regulations promulgated by the Board. However, like any prosecutor, the Commissioner may not issue citations based on violations of non-existent rules.

Finally, KOSHA allocates quasi-judicial power to the Tribunal. The Tribunal consists of three members "appointed by the Governor on the basis of their experience and competence in the fields of occupational safety and health." KRS 338.071(1). The Tribunal's task is to "hear and rule on appeals from citations, notifications, and variances issued under the provisions of this chapter." KRS 338.071(4). Unlike the Board, the Tribunal may not promulgate regulations, safety standards, or substantive rules; instead, it may only make "rules and regulations with respect to the *procedural* aspect of its hearings." KRS 338.071(4)(emphasis added). The Tribunal thus functions as a neutral arbiter assigned by the legislature to determine whether the Commissioner's citations are valid in light of the standards set forth by the Board.

KOSHA's resemblance to its federal template justifies Kentucky courts in looking to federal decisions for guidance. *See Ky. Labor Cabinet v. Graham,* 43 S.W.3d 247, 253 (Ky. 2001)(abrogated on other grounds by *Hoskins v. Maricle,* 150 S.W.3d 1 (Ky. 2004)). Although federal cases construing OSHA issues do not bind us, they speak with unusually persuasive force. Thus, when we face a KOSHA question, we often consider federal OSHA precedent.

D. ***Persuasive Federal Precedent Demonstrates that OSHA's Tribunal May Not Make Policy Through Its Orders.***

The United States Supreme Court has determined that Congress refused to grant OSHA's tribunal any policy-making authority within the split-enforcement regime. Instead, Congress "intended to delegate to [OSHA's tribunal] the type of

nonpolicymaking adjudicatory powers typically exercised by a *court* in the agency-review context." *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 152, 154, 111 S. Ct. 1171, 1178, 113 L. Ed. 2d 117 (1991) (emphasis in original). As an adjudicator, OSHA's tribunal may only "review the Secretary's interpretation[s] for consistency with the regulatory language and for reasonableness . . . mak[e] authoritative findings of fact[,] and appl[y] the Secretary's standards to those facts in making a decision." *Id.,* 499 U.S. at 155, 111 S. Ct. at 1178. According to the Supreme Court, the OSHA tribunal functions as a "neutral arbiter," not a policy-maker. *Cuyahoga Valley Ry. Co. v. United Transp. Union,* 474 U.S. 3, 7, 106 S.Ct. 286, 88 L.Ed.2d 2 (1985).

The OSHA tribunal's inability to make policy by adjudication differs foundationally from the power exercised by traditional unitary agencies not based on the split-enforcement regime. Traditional unitary agencies – agencies whose quasi-legislative, quasi-executive, and quasi-judicial functions are *united* within the same agency – may use adjudication for fact-finding as well as "for the exercise of delegated lawmaking powers, including lawmaking by interpretation." *Martin*, 499 U.S. at 152, 111 S. Ct. at 1177-78. Courts have long permitted unitary agencies to make law and effect policy decisions via adjudication because those same actors are also authorized to make law and policy by promulgating regulations. *See NLRB v. Bell Aerospace Co. Division of Textron,* 416 U.S. 267, 292–94, 94 S.Ct. 1757, 1770–72, 40 L.Ed.2d 134 (1974); *SEC v. Chenery Corp.,* 332 U.S. 194, 201–03, 67 S.Ct. 1575, 1579–80, 91 L.Ed. 1995 (1947). However,

under OSHA's split-enforcement structure, "Congress did not invest [OSHA's review tribunal] with the power to make law or policy by other means"; therefore, courts must not "infer that Congress expected the [tribunal] to use its adjudicatory power to play a policymaking role." *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 161 (D.C. Cir. 2006)(internal citations omitted). The Supreme Court's analysis of OSHA's structure persuades us that the KOSHA Tribunal serves an identically restrictive role.

E. ***Because KOSHA's Tribunal May Not Make Policy, Its Order In This Case Exceeded Its Statutory Role As A Neutral Arbiter.***

Turning to the case at bar, we find the Tribunal impermissibly engaged in policy-making by relying upon a federal regulation, 29 C.F.R. § 1977.9, that has not been adopted by the Board. By relying on that regulation, the Tribunal undoubtedly expanded the scope of complaints covered under KRS 338.121(3)(a),[3] and thus engaged in the type of policy-making reserved solely for the Board.

The Tribunal, an appellee in this case, even concedes that "Kentucky has no regulation which is the specific equivalent of 29 C.F.R. § 1977.9." This admission alone decides this case; when the Tribunal upheld Estill County's citation by relying on 29 C.F.R. § 1977.9, it used the adjudicatory process to bypass the Board's rulemaking authority and, without authority to do so, embraced a new

[3] We are convinced that OSHA authorities intended 29 C.F.R. § 1977.9 to cover a kind of complaint not otherwise covered in the regulations – employee-to-employer complaints. If such complaints were already covered, 29 C.F.R. § 1977.9 would be redundant and OSHA authorities would have wasted their time constructing a needless, repetitive interpretation. We find OSHA authorities promulgated this exclusive, necessary rule on policy grounds, particularly in light of 29 C.F.R. § 1977.9's language that the regulation was created in order to further OSHA's "salutary principles."

regulation into Kentucky law. *Ad hoc* rulemaking of this nature upends KOSHA's finely calibrated, split-enforcement regime and betrays the careful political compromises reached by our General Assembly. Moreover, it conflicts with the well-settled administrative law principle that "before transactions otherwise legal can be outlawed or denied their usual business consequences, they must fall under the ban of some standards of conduct prescribed *by an agency of government authorized to prescribe such standards*. . . ." *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 92-93, 63 S. Ct. 454, 461, 87 L. Ed. 626 (1943)(emphasis added).

In short, the Tribunal created a rule based on its reading of federal precedent without considering whether it had any authority to do so. As tempting as that may be, especially in situations featuring sympathetic claimants such as Smith, this still constitutes arbitrary, and thus impermissible, agency action. As it stands, the Tribunal should have dismissed the citation because KOSHA's administrative scheme requires the Board, not the Tribunal, to decide whether regulations like 29 C.F.R. § 1977.9 are necessary.

III. Conclusion

We reverse the August 1, 2013 Order from the Franklin Circuit Court, and remand the case for further proceedings consistent with this opinion.

ALL CONCUR.

ORAL ARGUMENT AND BRIEFS FOR APPELLANT:

Adrian Mendiondo
Lexington, Kentucky

BRIEFS FOR APPELLANT:

D. Barry Stilz
Lexington, Kentucky

Rodney G. Davis
Irvine, Kentucky

ORAL ARGUMENT AND BRIEF FOR APPELLEE, SECRETARY OF LABOR:

S. Kelly Gilliam
Office of General Counsel
Frankfort, Kentucky

ORAL ARGUMENT AND BRIEF FOR APPELLEE, KENTUCKY OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION:

Frederick G. Huggins
Frankfort, Kentucky