

STATE OF KANSAS
BEFORE THE KANSAS DEPARTMENT OF HEALTH & ENVIRONMENT

IN THE MATTER OF
Sunflower Electric Power Corporation

OAH No. 08HE0153 AIR

This matter comes before the Presiding Officer for the issuance of an Initial Order as a result of a conference hearing in accordance with K.S.A. 77-533. The Respondent, Sunflower Electric Power Corporation (Sunflower) and the Agency, Kansas Department of Health and Environment (KDHE), submitted conference hearing briefs and conference hearing reply briefs in support of their positions as directed by the Presiding Officer through a decision issued on September 26, 2008. The Sierra Club of Kansas was permitted to intervene in accordance with K.S.A. 77-521 for the purpose of submitting a conference hearing brief in support of their position. All parties have complied with the direction of the Presiding Officer.

The issue to be addressed by the conference hearing as set forth by the Presiding Officer is whether the statutes, rules and regulations relied upon by the Secretary permit him to deny the permit being sought by the Respondent, Sunflower.

Statement of the Case

1. On October 18, 2007, Roderick L. Bremby, Secretary, Kansas Department of Health and Environment, issued a letter denying Sunflower Electric Power Corporation's Application to construct additional electric generating units. In accordance with K.S.A. 2007 Supp. 65-3008b(e), Secretary Bremby advised Sunflower they had fifteen (15) days to file a request for a hearing.
2. On November 1, 2007, Sunflower filed a Request for Hearing on Denial of Permit Pursuant to K.S.A. 2007 Supp. 65-3008b(e).
3. The Kansas Department of Health and Environment (KDHE) forwarded Sunflower's request to the Office of Administrative Hearings (OAH) on November 15, 2007, pursuant to K.S.A. 2007 Supp. 75-37,121.
4. An acknowledgement of receipt of the case was sent to the parties by OAH on November 21, 2008.
5. A Notice of Prehearing Conference was sent to the parties by the Presiding Officer on November 26, 2007 setting a prehearing conference for December 10, 2007.
6. A petition to intervene was filed by the Sierra Club on December 6, 2007.
7. On December 7, 2007, Sunflower filed a motion requesting the prehearing conference scheduled for December 10, 2007 be continued to a later date. KDHE was advised of the motion and informed the Presiding Officer they had no objection to the motion being granted.

8. An Order of Continuance was issued on December 11, 2007. The matter was continued until a time to be determined following the Supreme Court's ruling on the Respondent's motion to dismiss.

9. On April 24, 2008, the Kansas Supreme Court issued the following order:

The proceedings in the above-captioned appeals are hereby stayed (1) pending the completion of all matters related to these cases that are pending before the Kansas Department of Health and Environment and the Office of Administrative Hearings, and before the District Court of Finney County, Kansas, or (2) until this Court may otherwise later order.

In order for the Court to be aware of when these matters are ready for consideration, the parties are directed to provide a report regarding the status of actions pending before the KDHE, the Office of Administrative Hearings, and the Finney County District Court. The first report shall be filed June 2, 2008, and updates shall be filed every 60 days thereafter.

10. On May 30, 2008, Sunflower filed a Motion to Order to Defer to the District Court's Resolution of the Issue or, in the Alternative to Convene a Conference Hearing. KDHE was given an opportunity to respond which they did on June 27, 2008. Sunflower filed a brief in reply to KDHE's response on July 22, 2008.

11. On July 22, 2008, matters pending in the District Court for the Twenty-fifth Judicial District of Kansas at Finney County were dismissed. The Order of Dismissal reads in part:

The Court, having considered the parties' written submissions and oral statements regarding this issue and being duly advised, hereby finds that it does not have subject matter jurisdiction under K.S.A. 77-609(a) with respect to the petitions for review that are the subject of these actions, in that K.S.A. 65-3008a(b) provides that the Court of Appeals of Kansas has exclusive jurisdiction to undertake judicial review of all issues arising out of the Kansas Department of Health and Environment's denial of Sunflower Electric Power Corporation's permit application that is the subject of said petitions.

12. On July 24, 2008, KDHE requested leave to file a reply brief to Sunflower's filing of July 22, 2008. By letter dated July 25, 2008 leave to file was granted by the Presiding Officer. KDHE, in support of its request, argued there were issues raised by Sunflower which had not been previously raised to which KDHE should be permitted to respond. KDHE was given until August 8, 2008 to reply.

13. On August 12, 2008, Sunflower requested leave to file a reply to KDHE's response. By letter dated August 13, 2008 leave to file was granted. Sunflower, in support of its request, argued there were issues raised by KDHE which had not been previously raised, to which Sunflower should be permitted to respond. Sunflower was given until August 20, 2008 by the Presiding Officer to reply.

14. On September 26, 2008, the Presiding Officer issued a decision calling for a conference hearing to be held in accordance with K.S.A. 2007 Supp. 77-533. A schedule was

established for the parties to submit conference hearing briefs and conference hearing reply briefs. The parties complied with this schedule.

15. On September 26, 2008, the Sierra Club of Kansas was permitted to intervene in accordance with K.S.A. 2007 Supp. 77-521 and to submit a conference hearing brief. The Sierra Club complied with the schedule established by the Presiding Officer.

Findings of Fact

1. In February 2006, Sunflower submitted an application to KDHE for the purpose of constructing three new electric generating units.
2. After submitting its application Sunflower amended the request to reduce from three to two, the number of new electric generating units it wanted to construct.
3. On September 21, 2006, an initial decision was made by KDHE recommending approval of Sunflower's application.
4. On July 24, 2007, the application was forwarded to the Secretary. KDHE staff concluded the application should be approved and a permit should be issued to Sunflower authorizing the construction of the two electric generating units.
5. On October 18, 2007, the Secretary issued the Denial Order of Sunflower's permit.

Conclusions of Law

1. K.S.A. 2007 Supp. 65-3002 provides in part:
 - (a) "Air contaminant" means dust, fumes, smoke, other particulate matter, vapor, gas, odorous substances, or any combination thereof, but not including water vapor or steam condensate.
 - (e) "Emission" means a release into the outdoor atmosphere of air contaminants.
2. K.S.A. 2007 Supp. 65-3007 is as follows:

Air contaminant sources; classification; monitoring; reporting.(a) The secretary, by rule and regulation, shall classify air contaminant sources which, in the secretary's judgment, may cause or contribute to air pollution, according to levels and types of emissions and other characteristics which relate to air pollution and may require reporting for any such class or classes. The classifications promulgated by the secretary shall be made to apply to the state as a whole or to any designated area of the state, and shall be made with special reference to effects on health, economic and social factors, and physical effects on property.

(b) The secretary shall require air contaminant emission sources to monitor emissions, operating parameters, ambient impact of any source emissions or any other parameters deemed necessary by the secretary. The secretary may require air contaminant emission sources to keep records and make reports consistent with the purposes of this act.

(c) Any person operating or responsible for the operation of air contaminant sources of any class for which the rules and regulations of the secretary require reporting shall make reports containing information as may be required by the secretary concerning location, size and height of contaminant outlets, processes employed, fuels used and the nature and time periods or duration of emissions, and such other information as is relevant to air pollution and available or reasonably capable of being assembled.

3. K.S.A. 2007 Supp. 65-3008b(e) provides:

(e) Within 15 days after the issuance of a notice of intent to take any action authorized by subsection (a), (b), (c) or (d), or within 15 days after the secretary's written decision to affirm, modify or reverse a permit decision pursuant to subsection (b) of K.S.A. 65-3008a, the permittee may file a request for a hearing with the secretary. Each such notice of intent shall specify the provision of this act or rule and regulation allegedly violated, the facts constituting the alleged violation and the secretary's intended action. Each notice of intent or written decision to affirm, modify or reverse a permit decision shall state the permittee's right to request a hearing. Such hearing shall be conducted in accordance with the Kansas administrative procedure act.

4. K.S.A. 2007 Supp. 65-3008a is as follows:

Same; public comment and hearing; review. (a) No permit shall be issued, modified, renewed or reopened without first providing the public an opportunity to comment and request a public hearing on the proposed permit action. The request for a public hearing on the issuance of a permit shall set forth the basis for the request and a public hearing shall be held if, in the judgment of the secretary, there is sufficient reason.

(b) The secretary shall affirm, modify or reverse the decision on such permit after the public comment period or public hearing. Any person who participated in the public comment process or the public hearing who otherwise would have standing under K.S.A. 77-611, and amendments thereto, shall have standing to obtain judicial review of the secretary's final action on the permit pursuant to the act for judicial review and civil enforcement of agency actions in the court of appeals. Any such person other than the applicant for or holder of the permit shall not be required to have exhausted administrative remedies in order to be entitled to review. The court of appeals shall have original jurisdiction to review any such final agency action. The record before the court of appeals shall be confined to the agency record for judicial review and consist of the documentation submitted to or developed by the secretary in making the final permit decision, including the permit application and any addenda or amendments thereto, the permit summary, the draft permit, all written comments properly submitted to the secretary, all testimony presented at any public hearing held on the permit application, all responses by the applicant or permit holder to any written comments or testimony, the secretary's response to the public comments and testimony and the final permit.

(c) When determined appropriate by the secretary, the procedures set out in subsection (a) may be required prior to the issuance, modification, renewal or reopening of an approval.

5. K.S.A. 2007 Supp. 65-3012 states as follows:

Action to protect health or environment.(a) Notwithstanding any other provision of this act, the secretary may take such action as may be necessary to protect the health of persons or the environment: (1) Upon receipt of information that the emission of air pollution presents a substantial endangerment to the health of persons or to the environment; or (2) for an imminent or actual violation of this act, any rules and regulations adopted under this act, any orders issued under this act or any permit conditions required by this act.

(b) The action the secretary may take under subsection (a) includes but is not limited to:

(1) Issuing an order directing the owner or operator, or both, to take such steps as necessary to prevent the act or eliminate the practice. Such order may include, with respect to a facility or site, temporary cessation of operation.

(2) Commencing an action to enjoin acts or practices specified in subsection (a) or requesting the attorney general or appropriate county or district attorney to commence an action to enjoin those acts or practices. Upon a showing by the secretary that a person has engaged in those acts or practices, a permanent or temporary injunction, restraining order or other order may be granted by any court of competent jurisdiction. An action for injunction under this subsection shall have precedence over other cases in respect to order of trial.

(3) Applying to the district court in the county in which an order of the secretary under subsection (b)(1) will take effect, in whole or in part, for an order of that court directing compliance with the order of the secretary. Failure to obey the court order shall be punishable as contempt of the court issuing the order. The application under this subsection for a court order shall have precedence over other cases in respect to order of trial.

(c) In any civil action brought pursuant to this section in which a temporary restraining order or preliminary injunction is sought, it shall not be necessary to allege or prove at any stage of the proceeding that irreparable damage will occur should the temporary restraining order or preliminary injunction not be issued or that the remedy at law is inadequate, and the temporary restraining order or preliminary injunction shall issue without such allegations and without such proof.

(d) Any order of the secretary pursuant to subsection (b)(1) is subject to hearing and review in accordance with the Kansas administrative procedure act.

6. K.S.A. 2007 Supp. 77-533 provides for the use of a conference hearing when circumstances exist in which there is no disputed issue of material fact or the parties agree.

Conclusion

The Kansas Administrative Procedures Act sets up a framework for administrative review of agency actions. The role of the Presiding Officer within this process is to look at the laws and rules and regulations through which an agency implements its decision making, in order to make sure the agency has acted in an appropriate manner. There are instances where agencies institute internal policies which are not found within their rules and regulations. The Kansas Supreme Court in Bruns v. Kansas State Board of Technical Professions, 255 Kan. 728, 877 P. 2d 391 (1994), determined that internal policies of the agency used to make licensing decisions which regulated the industry had to be filed and approved as rules and regulations in order to have any force or effect.

In addition, the Kansas Appellate Courts have put forth the doctrine of operative construction. The doctrine provides that the interpretation of a statute by an administrative agency which is responsible for enforcing a specific statute or statutes is entitled to judicial deference. It will be the appellate courts who will then interpret the statute in question utilizing a standard of *de novo* review. Auten v. Kansas Corporation Commission, 27 Kan.App.2d, 3 P.3d 86 (2000), Fisher v. Kansas Crime Victims Compensation Board, 280 Kan. 601, 124 P.3d 74 (2005), Reifschneider v. State, 270 Kan. 560, 17 P.3d 907 (2001). Deference is particularly appropriate when the agency is one of special competence and experience. Reifschneider at 568.

KDHE is an agency of special competence and experience. A review of the administrative regulations put forth by KDHE shows that in the present case, KDHE has in place numerous rules and regulations designed to assist it in implementing the Air Quality Act, under which Sunflower sought its permit. Sunflower questions whether the interpretation and implementation undertaken by the Secretary is permitted under the regulatory scheme set forth. An administrative agency's interpretation of its own regulations will not be disturbed, unless the interpretation is clearly erroneous or inconsistent with the regulation. Reifschneider at 569. KDHE argues that their interpretations, which have been implemented, are consistent with the statutes and rules and regulations under which they operate.

The Presiding Officer in an administrative action is not in a position to substitute their opinion for that of the agency. That is the realm of the appellate courts.

Based upon the above and foregoing, the Presiding Officer determines that the actions of the Secretary were permitted. The denial of the permit being sought by Sunflower as set forth in the Secretary's letter of October 18, 2007 is affirmed.

Appeal Rights and Other Administrative Relief

Pursuant to K.S.A. 77-527, either party may request a review of this initial order by filing a petition for review with the Secretary of Health and Environment. A petition for review must be filed within 15 days from the date this initial order was served. Failure to timely request a review by the Secretary of Health and Environment may preclude further judicial review. The petition for review shall be mailed or personally delivered to: Roderick L. Bremby, Office of the Secretary, Kansas Department of Health and Environment, 1000 SW Jackson, Suite 540, Topeka, KS 66612.

If neither party requests a review by the Secretary of Health and Environment, then pursuant to K.S.A. 77-530, this initial order becomes final and binding on both parties on the 30th day following its service.

Pursuant to K.S.A. 77-528, if a stay of the initial order is desired after a petition for review

has been filed, a petition to stay the effectiveness of the initial order must be filed with the presiding officer prior to the expiration of the time to file a petition for judicial review.

Pursuant to K.S.A. 77-531, if the initial order is served by mail, three days are added to the time limits set out above.

OFFICE OF ADMINISTRATIVE HEARINGS



Tracy T. Die, Presiding Officer
Office of Administrative Hearings

CERTIFICATE OF SERVICE

On Dec, 10, 2008, I mailed a copy of this document to:

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